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IN THE SUPREME COURT OF FLORIDA

DELMER SMITH, :

Appellant, :

vs. : Case No. SC13-1550

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENTS

Issue one. The evidence the State relies on does not amount to substantial proof of guilt. The evidence did not place Appellant inside the residence where the killing occurred. The State did not eliminate the reasonable hypothesis of innocence that someone other than Appellant killed the victim. The judgment of acquittal should have been granted.

Issue two. Detective Deniro's testimony was highly prejudicial because it gave the jury every reason to believe that Smith was being investigated for another crime that occurred in the City of Sarasota. The trial court erred in denying the motion for mistrial. The detective's testimony was inadmissible collateral crime evidence warranting a reversal for a new trial.

Issue three. The trial court abused its discretion by failing to exclude Hull's testimony. The vagueness of the statements have so little probative value that the statements are clearly outweighed by unfair prejudice. The minimal probative value of Hull's testimony was outweighed by the unfair prejudice of his statements going only to show his bad character. Because the threat was not tied to the murder or getting Cellecz not to testify, the minimal relevance was easily outweighed by the danger of unfair prejudice. Smith should be granted a new trial.

Issue four. The trial court abused its discretion by denying the motion for continuance. It was only the week before trial that defense counsel learned the State's fingerprint expert was not

able to match Ramos' prints to the unknown prints in the encyclopedia. The denial of the continuance was tantamount to a denial of a request for a fingerprint expert, causing material prejudice because Appellant did not have the opportunity to prove that the clean encyclopedia did not come from the bloody crime scene.

Issue five. The trial court erred by finding HAC because there was not competent substantial evidence to support its finding. The trial court made assumptions based on facts not in evidence. There were no defensive wounds to suggest Briles was conscious during the attack. A new penalty phase is required because it cannot be said beyond a reasonable doubt that the jury's improper consideration of the HAC aggravator did not contribute to the recommended sentence of death.

Issue six. The trial court erred in rejecting Dr. Eisenstein's testimony that two statutory mental mitigators existed at the time of the offense. The State failed to present competent substantial evidence to prove that Dr. Eisenstein was incorrect. The facts of the case were consistent with an episode of explosive personality disorder. Mr. Smith's death sentence should be reversed because the mitigating evidence outweighs the remaining valid statutory aggravating circumstances.

Issue seven. Florida's sentencing scheme is unconstitutional because these findings of facts which make a defendant eligible for the death penalty are made by a judge rather than a jury. A unanimous death recommendation does not save Florida's statute

from being unconstitutional because there is no way of knowing which aggravating and mitigating factors the jury found beyond a reasonable doubt. There is no way to know if all jurors would have recommended death if a unanimous jury did not find all of the aggravators presented to the jury for their consideration. Even though the jury unanimously recommended a death sentence, that still does not comply with the constitutional requirement that findings of fact be made by a jury. Smith's death sentence should be reversed and remanded for imposition of a life sentence.

ARGUMENT

ISSUE I

IN REPLY: APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED. THE ORDER DENYING ACQUITTAL RESULTED IN A VIOLATION OF THE RIGHT OF DUE PROCESS OF LAW, PROTECTED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

Smith was incriminated by evidence that put him near the scene of the crime at the time of the murder, but no physical evidence placed Smith inside the house where the murder occurred. Being near a crime scene is insufficient proof that one was actually inside a residence where a crime was committed. Owen v. State, 432 So. 2d 579 (Fla. 4th DCA 1970). Owen was charged with burglary of a dwelling with intent to commit sexual battery and sexual battery. No one saw Owen enter, remain in, or leave the victim's home. No physical evidence placed Owen inside the residence. Evidence establishing Owen was in the yard was

insufficient to sustain a conviction. Id. at 581. In the present case, there was a bloody crime scene, yet no blood from the crime scene was ever linked to Smith. There was no evidence to prove Smith possessed his cell phone at the time of the crime. If Smith did possess his cell phone, there was no proof he or the phone were ever inside the Briles residence.

Cellecz, a convicted felon, presented suspect testimony while admitting he pawned items that he did not own. Cellecz testified he received the necklace from Smith. Even so, Cellecz presented no testimony that Smith obtained the necklace from the Briles residence. To the contrary, Cellecz testified that Smith indicated he received the necklace from a mutual friend. Likewise, Cellecz's observation of the medical book in Smith's vehicle is not competent substantial evidence to place Smith inside the residence where Briles was murdered. There was no testimony and no physical evidence placing Smith inside the residence. Thus, Cellecz's testimony does not provide the missing link for the jury to conclude that Smith was inside the house and obtained the necklace or medical book from inside the house at the time of the murder.

Again, there was no testimony that Smith took the Minnie Mouse keychain from the Briles house, and there was no competent substantial evidence proving the keychain was not in the lockbox that Smith obtained from Cellecz. The keychain being in the lockbox when Smith obtained the box from Cellecz is not "inconsistent with Quinones' testimony that Smith gave her a set of keys on the same keychain prior to it being found in the lockbox." (Appelle's brief p. 31, 32) Quinones did not state she

received the keychain prior to it being found in the lockbox. She simply stated Smith gave her the keychain in the fall of 2009. (V14/2331) The police did find the keychain in the lockbox after that time. Smith could have taken the keychain from the lockbox and given it to Quinones, and at a later date the keychain could have been placed back in the lockbox. Quinones was not sure when Smith gave her the keychain. She only knew it was after Smith purchased the Chevy Blazer. (V14/2336)

Appellee stated: "Michele Quinones testified that Smith had given her the Minnie Mouse keychain after the murder but before they were discovered in the lockbox, so clearly Smith had this item in his possession shortly after the murder." (Appellee's Answer Brief P. 37) Quinones did not state she received the keychain after the murder. Quinones did not recall the date she first saw the keychain. She only knew it was after Smith purchased the Blazer. (V14/2336) Nothing in Quinones testimony established that she received the keychain prior to the time Smith obtained the lockbox, and her testimony did not exclude the possibility that Smith obtained the keychain from the lockbox acquired from Cellecz.

Although Cellecz testified he did not break into Briles house and kill her, Cellecz was not questioned if he knew the carpenter who was working in the Briles' house or if he knew if the carpenter killed Briles. Thus the State did not present evidence to exclude the carpenter from being the killer. Nor did the State exclude the possibility that Smith got the necklace and other property from the killer.

Appellee relies on Gosciminski v. State, 132 So. 3d 678 (Fla. 2013), as a similar case where this Court found sufficient evidence to establish Gosciminski as the perpetrator. In Gosciminski although there was no confession, Gosciminski told his girlfriend to the ring he had given her was "hot." Gosciminski then took the ring to the beach and it was never seen again. Shortly after the time of the murder, the girlfriend saw Gosciminski washing blood from his arm and she saw a pile of bloody clothes. There was more than general cell phone evidence tying Gosciminski to the murder. In contrast, Smith never indicated the jewelry he gave to Cellecz was "hot." Unlike Gosciminski, there was no blood or bloody clothes linking Smith to the murder of victim.

Finney v. State, 660 So. 2d 674 (Fla. 1995), can also be distinguished from the present case. Finney himself pawned the victim's VCR on the day of the murder. Finney's fingerprints were found on the lid of a jar on the nightstand and on a paper with German writing. In the present case, Smith was not the person who pawned the necklace. The necklace was not pawned until the day after the murder. If Cellecz lied to the pawnbroker about being the owner of the necklace, he certainly could have lied about receiving the necklace from Smith. Smith did not take the necklace from the Briles residence and go directly to pawn it. If Smith did actually ever possess the necklace, there was time for him to obtain the necklace from someone else.

Another possible perpetrator was the carpenter who did not show up to work at the Briles house on the morning of the murder.

Although Smith is linked to the possession of property from the Briles house, this merely creates a strong suspicion that Smith committed the murder. There is not competent substantial evidence establishing Smith as the actual killer. Evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not sufficient to support a conviction. Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997).

Appellee states the evidence suggested Smith used a mask and gloves, which would limit the opportunity to discover forensic evidence at the scene. This does not explain the absence of blood on Smith's belongings, on the encyclopedia, or in his car. The delay in searching Smith's car would not eliminate the chance of police detecting blood in the car if Smith had been the perpetrator. As testified to by a medical examiner, if blood is preserved on cloth, it will stay there for years. House v. Bell, 547 U.S. 518, 542 (2006). If Smith was the perpetrator of the bloody murder, there should have at least been traces of Briles' blood linked back to Smith's clothes, mask, vehicle, or the encyclopedia. Yet no blood was found on any of Smith's belongings or on the encyclopedia.

The unidentified fingerprint on the duct tape was highly relevant. The State's evidence that a factory worker placed the print on the duct tape during the manufacturing process was highly speculative since the print was not linked to a worker. Nor was there testimony to eliminate Cellecz or the carpenter from having placed the fingerprint on the duct tape. All we know is that it was an unknown fingerprint on the duct tape. It is pure

speculation that a factory worker placed the print on the duct tape and it is just as likely or more likely that the killer, someone other than Smith, placed the fingerprint on the duct tape. Appellant maintains his position that there was only circumstantial evidence of guilt which was not inconsistent with the hypothesis that someone else committed the murder. This Court should hold that judgment of acquittal should have been granted.

ISSUE II

IN REPLY: THE CITY OF SARASOTA DETECTIVE'S TESTIMONY WAS HIGHLY PREJUDICIAL. THE MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED. DENYING THE MOTION RESULTED IN A DEPRIVATION OF THE RIGHT TO DUE PROCESS OF LAW, PROTECTED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

Appellee attempts to downplay Detective Deniro's statement because Deniro did not actually state that Smith was being investigated by the City of Sarasota. Contrary to Appellee's assertion, the jury had every reason to believe Smith was being investigated for another crime by the Sarasota authorities. Deniro's statement: "Regarding my investigation that I was doing for the City of Sarasota" (V14, 2339) cannot be viewed in a vacuum. Every juror knows that they live in Manatee County and they are to appear at the Manatee County Judicial Center for jury duty. The indictment charging murder indicated it occurred in Manatee County.

During Deniro's introduction to the jury, she testified that she is a police officer for the City of Sarasota and had been for 23 years. She was working for the Sarasota Police Department

during the fall of 2009. Deniro was a detective at the time. She was then asked by the prosecutor: "Were you involved in an investigation involving Delmer Smith?" Deniro responded: "Yes, I was." (V14, 2338) Deniro was not asked if she was involved in this murder investigation but rather "an investigation" involving Delmer Smith. From that question alone the jury could have surmised that Smith was being investigated for a crime other than the murder, since Deniro was not asked about the murder investigation, and she was an officer from an entirely different jurisdiction located in a different county from where the murder occurred.

That inference in the jurors' minds was confirmed when Deniro was asked how she received some of Smith's property and she said: "Regarding my investigation that I was doing for the City of Sarasota." This was an unequivocal statement that it was her investigation for the City of Sarasota. The City of Sarasota is in Sarasota County, not in Manatee County where the murder occurred. The logical conclusion the jury likely reached regarding this testimony was that Deniro was doing her own investigation for a crime that Smith was being accused of in the City of Sarasota.

Appellee contends because Pinellas and Sarasota County Sheriff's Offices were involved in the investigation of the murder, Deniro's reference to her investigation "for the City of Sarasota" did not suggest a separate unrelated crime. Smith lived in Northport in Sarasota County but, according to the map, Bobko Circle, where Smith lived, is over thirty miles from the City of Sarasota. There was reason for Sarasota Sheriff's Office to be

involved because Smith's residence was in their jurisdiction. When the deputies from Sarasota Sheriff's Office testified they were very careful not to mention any investigation they were involved in other than the murder. Since the City of Sarasota was not near where Smith lived, it is all the more reason for the jury to think Deniro was engaged in a separate investigation involving a crime Smith was suspected of having committed in the city of Sarasota.

A deputy from Manatee County Sheriff's Office took the duct tape to a Pinellas County Sheriff's Office laboratory. The jury had not reason to suspect this had anything to do with another crime, because it was explained that the Pinellas County lab had special equipment that was not available at the Manatee County lab.

Appellee attempts to distinguish Jackson v. State, 627 So. 2d 70 (Fla. 5th DCA 1993), because the detective stated the defendant had been taken into custody on another charge. (Appellee's brief p. 41) The detective in Jackson said: "Detective Bauman notified me that an individual had been taken in on another charge and he fit the description that had been issued to all the officers of the suspect of the case." The trial judge in Jackson denied the motion for mistrial because the detective did not say he committed another offense but only that he had been picked up on another charge. Deniro's testimony regarding her investigation for the City of Sarasota is a distinction without a difference of what occurred in Jackson. In both Jackson and the present case, the jury was made aware that the defendant was under investigation for a crime other than the one being tried. The court in Jackson found

the detective's testimony to be inadmissible collateral crime evidence warranting a reversal for a new trial.

In Jackson the detective's testimony was inadmissible because it lacked relevance to any material fact in issue. The Fifth District found the erroneously admitted collateral crimes evidence was not harmless where identification of the defendant as the perpetrator of the crime charged rests upon the testimony of a single eyewitness. Id. at 71. In the present case, there were no eyewitnesses to the murders.

Deniro's careless testimony regarding her investigation for the City of Sarasota exposed Smith's other crimes in the City of Sarasota to the jury. During jury selection, the attorneys danced around the Sarasota charges and asked jurors what they knew of Smith's background. Some jurors only mentioned as an afterthought Smith's Sarasota charges. Of course they were excused. However, Deniro's testimony could have jogged the memory of jurors regarding Smith's burglary charges in Sarasota. Exposing the jury to information that Deniro was involved in an investigation for the City of Sarasota was highly prejudicial and denied Smith his constitutional right to a fair trial. The trial court abused its discretion by refusing to grant the motion for mistrial. In order to protect Smith's right to a fair trial, the lower court's judgment and sentence must be reversed for a new trial.

ISSUE III

IN REPLY: THE TRIAL COURT ERRED IN PERMITTING THE TESTIMONY OF JOSHUA HULL BECAUSE THE PROBATIVE VALUE OF SMITH'S ALLEGED STATEMENTS WAS OUTWEIGHED BY UNFAIR PREJUDICE, CONFUSION OF ISSUES OR MISLEADING THE JURY.

The trial court abused its discretion by failing to exclude Hull's testimony from trial. Appellee contends that the argument that Smith's statements to Hull were too vague to constitute a threat was not preserved for appellate review. Defense counsel preserved this issue by arguing that Hull's testimony presented a distinct offense of witness tampering and any probative value was outweighed by unfair prejudice. The vagueness of the statements goes to prove the statements have so little probative value that the statements are clearly outweighed by unfair prejudice. The statements that Smith made to Hull had limited probative value because there was no reference to the murder.

The nexus between the murder and Smith's statements to Hull is not nearly as clear as appellee claims. There was testimony by Cellecz that Smith obtained the jewelry from David Watmaugh. There was no testimony from Watmaugh to refute that statement. Nothing from Smith's statements indicated any connection to Brile's murder.

Smith's statements were more like the statements in Penalver v. State, 926 So. 2d 1118, 1134 (Fla. 2006), that this Court found the trial court erred in admitting into evidence. Penalver turned himself into the police and while they were removing his shoes

pursuant to a warrant, he made statements to the effect of "I might as well be dead" or "I want to kill myself." It was not clear that these statements were threats of suicide to avoid prosecution and thus were erroneously admitted into evidence. Id. at 1132-34. In the present case, Smith's statements made no connection to the murder and thus the statements had no relevance based on consciousness of guilt as required for admissibility. Heath v. State, 648 So. 2d 660, 664 (Fla. 1994).

Appellee states: "The same vagueness that decreases the probative value also minimizes the prejudicial impact." (Appellee's brief p. 47) The vagueness clearly decreases the probative value because Smith's statements in themselves show no consciousness of guilt of a murder. However, the statements: "I have something for his ass" and "I still know where Stephanie and Gavin are and I have something for them" are highly prejudicial. The jury could infer from the statement "I have something for his ass", there would be a future attempt at a prison rape or other violence. Improperly encouraging the jury to speculate Smith had a proclivity for prison rape or other violence. The statement regarding Stephanie and Gavin could be construed that Smith intended to inflict violence on them. Since neither of these statements were combined with a statement that Cellecz should not testify, the jury likely concluded Smith was going to engage in these acts solely in retaliation for Cellecz snitching on him. This would be totally irrelevant as to whether Smith committed the murder. The jury could have found Smith guilty to eliminate the

possibility of future dangerousness.

The statements Smith made to Hull were similar to statements the trial court erred in admitting in Fasenmyer v. State, 383 So. 2d 706 (Fla. 1st DCA 1980). Fasenmyer's accomplice was allowed to testify that after the burglary Fasenmyer had threatened to kill him if he went to the police. This testimony should have been excluded because it was irrelevant to the fact at issue and tended only to put Fasenmyer's character in issue. Id. at 708.

In St. Louis v. State, 584 So. 2d 180 (4th DCA 1991), the Fourth District held that testimony by a juvenile detention center employee was not admissible as admissions to charged crimes. St. Louis was convicted of second degree murder, armed robbery, and armed burglary. While incarcerated and awaiting trial, St. Louis threatened an employee and his family stating he could kill them just as easily as he killed someone else, referring to a newspaper article posted in the detention center about his pending case. Statements came in about how St. Louis would blow the employee's head off and blow away his family. This testimony was not inextricably intertwined to the crime and was very prejudicial showing only his bad character. Id. at 182.

Smith's statements to Hull should have been excluded from trial. As in St. Louis, the minimal probative value of Smith's statements was outweighed by the unfair prejudice of his statements going only to show his bad character. Appellee acknowledges the probative value of Smith's statements may have been greater if Smith had been more direct in his threat.

(Appellee's brief p. 47). Because the threat was not tied to the murder or getting Cellecz not to testify, the minimal relevance was easily outweighed by the danger of unfair prejudice.

The presentation of Smith's statements was excessive and unfairly prejudicial because the jury could have interpreted the language, "I have something for his ass" to be much worse than intended by envisioning scenarios of prison rape. The trial court must exclude evidence in which unfair prejudice outweighs the probative value, to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing guilt. McDuffie v. State, 970 So 2d 312, 327 (Fla. 2007). Here the admission of Hull's testimony regarding Smith's statements was not harmless, because it created the danger that the jury convicted Smith based on his intent to retaliate against Cellecz and his family. Although there was evidence Smith possessed items from the Briles home the day after the murder, there was no evidence he possessed those items on the day of the murder. There was no direct evidence placing Smith inside the residence or committing the murder. In order to protect Smith's right to a fair trial this case must be reversed and remanded for a new trial.

ISSUE IV

IN REPLY: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO CONTINUE AND ANY ATTEMPT TO HAVE A FINGERPRINT EXPERT APPOINTED AT THAT TIME WOULD HAVE BEEN FUTILE.

The First District, in McKay v. State, 504 So. 2d 1280 (1st

DCA 1986), and the Fourth District in D.N. v. State, 855 So. 2d 258, 260 (Fla. 4th DCA 2003), established the following factors to be considered in determining whether the denial of a continuance requested due to lack of preparation time is error: 1) the time available for preparation, 2) the likelihood of prejudice from the denial, 3) the defendant's role in shortening the preparation time, 4) the complexity of the case, 5) the availability of discovery, 6) the adequacy of counsel actually provided, and 7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime.

These seven factors should be utilized in assessing a motion for continuance anytime there is a lack of time to properly prepare the case for trial. Neither opinion indicates that these seven factors are only to be applied in cases where there is newly obtained counsel.

Appellee suggests the present case is more like Mosely v. State, 46 So. 3d 510 (Fla. 2009), and Geralds v. State, 674 So. 2d 96 (Fla. 1996). In both of these cases defense counsel sought a continuance to obtain a witness. These cases might be applicable to the portion of continuance to obtain Alex Ramos as a witness, but they are not applicable to the portion of the motion to obtain a fingerprint expert to analyze the unknown prints in the medical encyclopedia. To prevail on a motion for continuance based on the absence of a witness, the defendant must show: prior due diligence; substantially favorable testimony would be forthcoming; the witness was available and willing to testify; and the denial

of continuance caused material prejudice. The trial court did not determine what efforts defense counsel made to obtain Ramos as a witness.

It is inappropriate to apply these four criteria to this situation where defense counsel sought a continuance to obtain a fingerprint expert. Once Appellant's motion for continuance was denied, it was futile for defense counsel to ask the court to appoint a fingerprint expert. Smith was declared indigent and was being represented by court appointed counsel. Smith could not go out and hire a fingerprint expert. The only way to have a fingerprint expert examine the prints in the medical encyclopedia was to have the court appoint that expert. All parties were made aware a continuance would be necessary to have a fingerprint expert do this work. The denial of the continuance was tantamount to a denial of a request for a fingerprint expert. Once the continuance was denied, defense counsel was not required to engage in the futile request to have a fingerprint expert appointed. No purpose is served by requiring a futile motion. Simpson v. State, 418 So. 2d 984, 986 (Fla. 1982). The law does not require futile or useless acts. Howard v. State, 616 So. 2d 484, 485 (Fla. 1993)

It was only the week before trial defense counsel learned that the State's fingerprint expert was not able to match Ramos' prints to the unknown prints in the encyclopedia. It would have been a waste of limited court appointed resources for defense to commence with his own fingerprint expert before learning the results from the State's fingerprint expert. It was not possible

for defense counsel to show substantially favorable testimony would be forthcoming when the continuance was denied and he would not have time to have a fingerprint expert do the required work. The denial of continuance caused material prejudice because Appellant did have the opportunity to prove that the encyclopedia, with no blood on it, did not come from the bloody crime scene. Because Appellant did not have time to develop evidence to refute a crucial piece of evidence linking him to the crime scene, the trial court abused its discretion by denying the motion for continuance.

ISSUE V

IN REPLY: THE TRIAL COURT ERRED IN FINDING THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The trial court's written sentencing order indicated: "Displacement of furniture about the house evidenced at least some futile resistance put up by Ms. Briles." This is purely speculative as there was not any testimony regarding this assumption. This Court's review regarding a finding of HAC is whether the trial court applied the correct rule of law, and whether competent substantial evidence supports its finding. McWatters v. State, 36 So. 3d 613, 641 (Fla. 2010). There certainly was not competent substantial evidence to support the finding that Ms. Briles resistance is what caused the furniture displacement. The furniture displacement was just as likely caused

in a fit of rage during an episode of the perpetrator's explosive personality disorder. Although there was testimony that Briles received the liver injury while still alive, there was no proof that she was conscious and was aware of receiving the blow that caused the liver injury.

The trial court stated: "it takes little effort to imagine the fear, terror, anxiety, and hopelessness that the victim experienced in the minutes before she died." Imagining something is not proof beyond a reasonable doubt. A reasonable hypothesis that precludes proof beyond a reasonable doubt of HAC is that Briles was duct taped and lying face down, and she never saw the first blow which rendered her unconscious. The blows with the sewing machine were so severe her body could have rolled to the side. The kick to the liver could have come shortly after Briles was rendered unconscious in the midst of a manic rage. The facts presented do not establish what terror, anxiety, or pain Briles suffered because they do not establish at what point Briles became unconscious. This case is different from Gosciminski v. State, 132 So. 3d 678 (Fla. 2013), where the finding of HAC was upheld, because Briles did not sustain the same type of defensive wounds as the victim in Gosciminski.

From the time Briles was tied up she could have been face down on the floor. Injuries to her face suggest she was face down when she received the blows from the sewing machine. If she was tied up and unaware of the pending blows which rendered her unconscious then HAC would not apply here. See Rimer v. State,

825 So. 2d 304 (Fla. 2002). (The fact the victims were forced to lie on the floor with hands bound while Rimmer robbed the store is insufficient to assume they knew they would be killed or that they lay there in fear of their impending deaths, thus HAC was not applicable.)

The beating-death cases cited by Appellee where the finding of HAC was upheld are different from the present case because the victims in those cases had defensive wounds and/or consciousness, and awareness of impending death. King v. State, 130 So. 2d 676, 685 (Fla. 2013) (The defensive wounds to the victim's hand and arm clearly demonstrate that the victim was conscious and aware of her impending death and attempting to fend off the attack); Douglas v. State, 878 So. 2d 1246, 1262 (Fla. 2004) (The medical examiner opined the victim was turning her head trying to roll away during the beating, and she had defensive wounds on her hands and forearms); Dennis v. State, 817 So. 2d 741, 766 (Fla. 2002) (The evidence supports the trial court's finding that the victims were conscious for at least part of the attack as they had defensive wounds to their hands and forearms); Owen v. State, 596 So. 2d 985, 990 (Fla. 1992) (Sleeping victim awoke screaming and struggling after the first blow and lived for a period of from several minutes to an hour).

It is this Court's task on appeal "to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Aguirre-Jarquin v.

State, 9 So.3d 593, 608 (Fla.2009). In this case there was not competent substantial evidence to support a finding that this murder was especially heinous, atrocious, or cruel. In Perez v. State, 919 So. 2d 347, 381 (Fla. 2005), where this Court found the HAC aggravator was improperly found to apply to Perez, the case was remanded for a new penalty phase, not merely a new sentencing. In Perez, given the significant weight that has historically been accorded to the HAC aggravator, a new penalty phase was required because it could not be said beyond a reasonable doubt that the penalty phase jury's improper consideration of the HAC aggravator did not contribute to the recommended sentence of death. Id. at 382. In the present case, where only one remaining aggravator was given great weight and two were given moderate weight compared against significant mitigation, there was a reasonable possibility that the finding of HAC contributed to the finding that the mitigation did not outweigh the three remaining aggravating circumstances. State v. Diguilio, 491 So. 2d 1129, 1135 (Fla. 1986). The death penalty should be stricken, or Smith's case should be remanded for a new penalty phase.

ISSUE VI

IN REPLY: THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES.

Appellant presented competent substantial evidence that the

statutory mental mitigating circumstances applied in this case. The testimony of Dr. Eisenstein, a licensed psychologist, was not refuted by a doctor trained in the same discipline. There was no testimony as to why the tests Dr. Eisenstein gave and his conclusions were inaccurate. In several cases cited by Appellee where the statutory mental mitigating circumstances were rejected, the defense expert witnesses did not testify that the statutory mental mitigators existed. Allen v. State, 137 So. 3d 946, 965 (Fla. 2013); Hoskins v. State, 965 So. 2d 1, 17 (Fla. 2007); Philmore v. State, 820 So. 2d 919 (Fla. 2002). In Philmore the State presented expert testimony directly rebutting the defense expert's use of an outdated and inaccurate MMPI and the improper use of the WAIS to determine brain damage. Id. at 936, 937. In the present case there was no testimony refuting the accuracy of the testing performed by Dr. Eisenstein. The State's experts disagreed with the findings of Dr. Eisenstein but did not present competent substantial evidence as to why his findings were inaccurate.

The State's doctors simply came up with a different conclusion but neither one directly testified that the statutory mental mitigating circumstances did not apply to Smith. Dr. Eisenstein was the only doctor to engage in sensitive testing to determine if the statutory mental mitigators existed. The State's rebuttal would be akin to a doctor looking at an X-ray and determining a patient did not have a fractured bone. Dr. Eisenstein's more sophisticated testing would be like doing a more sensitive bone scan and determining a bone fracture did exist. Because the less

sensitive X-ray could not pick up the bone fracture does not mean the bone fracture did not exist. Likewise, in this case even though the State's mental health experts did not find the statutory mitigating circumstances, that is not competent substantial evidence to refute Dr. Eisenstein's findings that the statutory mental mitigating circumstances existed in this case. There was no testimony that the State's doctors did adequate testing to determine if the statutory mental mitigators existed. Their testimony did not present competent substantial evidence that Dr. Eisenstein's testing was not reliable. Certainly, one would not continue to walk on a broken leg found by a bone scan simply because an X-ray did not reveal the fracture.

In this case, the State did not present competent substantial evidence to refute Dr. Eisentein's findings that both statutory mental mitigators existed. Dr. Eisentstein opined that Smith committed the crime while under the influence of extreme mental or emotional disturbance, and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. A manic rage, rather than rational thought, more accurately explains the beating of the victim. The facts of the case were consistent with Eisenstein's view that Appellant was engaged in an explosive personality episode.

The State did not present competent substantial evidence to refute Eisenstein's findings simply because a less sensitive process did not find the existence of the statutory mental

mitigators. The defense presented competent substantial evidence that these two mental mitigators did exist at the time of the murder and the State's evidence did not outweigh the findings of Dr. Eisenstein.

The failure of the trial court to find the statutory mental mitigators was not harmless error because it cannot be said beyond a reasonable doubt it did not contribute to the imposition of the death sentence. State v. Diguilio, 491 So. 2d at 1135. When considered in combination with Issue V, Mr. Smith's death sentence should be reversed because the existence of the statutory mitigating evidence combined with the non-statutory mitigating evidence outweighs the remaining valid statutory aggravating circumstances. Alternatively, as was done in Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006), where the trial court erred in failing to find the statutory mitigator of ability to conform conduct, the death penalty should be vacated and this case should be remanded for resentencing.

ISSUE VII

IN REPLY: FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA.

Under section 921.141(3) Fla. Stat. (2012), in order to be eligible for the death penalty the trial court must make written findings of facts: "(a) That sufficient aggravating circumstances

exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." If the trial court fails to make these written findings of fact within 30 days after rendition of the judgment and sentence, the court shall impose a life sentence. Section 921.141(3) Fla. Stat. (2012). Florida's sentencing scheme is unconstitutional because these findings of facts which make a defendant eligible for the death penalty are made by a judge rather than a jury. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U. S. 584, 602 (2002); See Apprendi v. New Jersey, 530 U.S. 466, 482-483 (2000). It is unconstitutional for the trial court to make findings of fact, that increase the penalty from life to death, rather than a jury. Ring, 536 U.S. at 609.

Even if a Florida jury makes a unanimous death recommendation that, in and of itself, does not save Florida's statute from being unconstitutional because there is no way of knowing which aggravating and mitigating factors the jury found beyond a reasonable doubt. The only two circumstances in which it can be known that the jury properly carried out their function is 1) if there is only one aggravating circumstance of prior violent felony 2) there are only two aggravating circumstances: prior violent felony and during the commission of an enumerated felony and the jury returned a guilty verdict on that enumerated felony.

Absent these two exclusive situations it is impossible to tell if the jury unanimously found any other aggravating circumstances and if they properly weighed the mitigating circumstances against the same aggravating circumstances in determining that the mitigating circumstances did not outweigh the aggravating circumstances. For instance, in the present case where all jurors made a death recommendation, prior violent felony is the only aggravating circumstance that does not require a jury finding. The burglary was never charged and the jury did not make a finding of whether the murder occurred during the course of a burglary. Some jurors could have found that none of the other aggravating circumstances existed yet still made a death recommendation. Other jurors that found four aggravating circumstances may not have made a death recommendation if prior violent felony was the only aggravator that was unanimously found by a juror. Thus, even though the jury unanimously recommended a death sentence, that still would not comply with the constitutional requirement that findings of fact be made by a jury. Id. at 609. Smith's death sentence should be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant has shown that this court should reverse his conviction and order his discharge, because insufficient competent, substantial evidence established he was the perpetrator of the charged offense.

If that relief is denied, Appellant has shown he is entitled to a new guilt phase trial, because his motion for mistrial should have been granted, Hull's testimony should have been excluded, and Appellant was denied sufficient time to properly prepare his case.

If that relief is denied, Appellant has shown that this Court should reduce his death sentence to life, as a result of striking the HAC factor and finding the existence of the two statutory mental mitigators. Alternatively, Appellant's sentence should be reduced to life, because Florida's sentencing scheme is unconstitutional.

If that relief is denied, the sentencing order should be reversed and remanded for a new penalty phase, or alternatively a new sentencing where there is a reweighing of valid aggravating and mitigating circumstances.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at Capapp@myfloridalegal.com, on this 13th day of August, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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