IN THE SUPREME COURT OF FLORIDA

JOHN SEXTON , :

Appellant, :

vs. : Case No. SC14-0062

STATE OF FLORIDA, :

Appellee. :

:

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

REPLY BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG,II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ISSUE I

THE TRIAL COURT ERRED BY PREVENTING DEFENSE COUNSEL FROM CROSS-EXAMINING THE DNA LAB ANALYSTS REGARDING PRIOR INCIDENTS OF CONTAMINATION.

The DNA lab analyst, Lisa Thomas, testified that she had processed 5,000 samples for DNA. Appellee contends Thomas was just testifying as to her credentials demonstrating her experience to qualify her as an expert witness. By not allowing the defense to cross examine Thomas regarding past incidences of contamination, the jury was misled to believe that her previous 5,000 DNA tests were without error and there was no possibility that error could have occurred in this case. Appellant's proffered cross-examination would have clarified to the jury that DNA results could be inaccurate due to contamination. This was not an attack upon Thomas's credibility, which is not allowed. Hitchcock v. State, 413 So. 2d 741, 744 (Fla. 1982). Appellant sought to show that the DNA testing process that Thomas had done 5,000 times is not without the potential for error due to contamination.

Sexton's proffered questions show that Thomas had on several occasions erred in the past, which could have presented to the jury that the DNA results in this particular case could be inaccurate, even though Thomas claimed there was no contamination in this particular case. This case is similar to Special v. West Boca Medical Center, 39 Fla. L. Weekly S676 (Fla. 2014), where the

trial court erred, in a medical malpractice action, when it excluded testimony on cross-examination of the hospital's expert regarding the hospital's over-diagnosis of amniotic fluid embolus (AFE). The doctor in Special was adamant that in this case the mother died because of amniotic fluid embolus. Special was suing the medical center alleging their negligence caused Susan Special's death. The trial court would not let Special cross examine the doctor regarding the rate at which West Boca Medical Center made a diagnosis of AFE in other instances. This Court found it was reversible error to exclude the proffered testimony of the defense expert regarding the number of times West Boca Medical Center made a diagnosis of AFE. In Special the rate was higher than the national average, but that in itself is not proof that the medical center misdiagnosed AFE. However, the jury should have been provided that information to make an informed decision.

Here the trial court indicated that unless Thomas made some statement that her work was perfect, or without contamination issues, then cross-examination regarding prior instances of contamination would be improper. The jury should have not been left with the false impression that Thomas made a DNA analysis in 5,000 cases and there was no indication of any errors in any of those cases. That is the whole purpose of cross-examination, to correct false impressions. In Williams v. State, 386 So. 2d 25, (Fla. 2d DCA 1980), it was reversible error not to allow cross-examination of a witness regarding false statements made to the police on a prior occasion. The right of cross-examination is

particularly important in a capital case, and limiting cross-examination on any matter plausibly relevant to the defense may constitute reversible error. Id. at 27. In the present case, it was error to limit cross-examination, which was trying to correct the misleading impression that Thomas made 5,000 DNA analyses without any errors. Appellant should have been given the opportunity to show that Thomas had between six and ten incidents of errors or contamination.

Appellee contends that this issue was not preserved as to the testimony of the other DNA lab analyst, Sean Michaels. This was the identical issue presented with Lisa Thomas. The trial court made its ruling denying the cross-examination of prior incidents of contamination regarding Thomas. There is no reason to believe the same ruling did not apply to Michaels. The trial court was fully apprised that the defense was also contesting the ruling as applied to Michaels when Michaels' deposition testimony was proffered. Clearly, Sexton was denied the opportunity to present evidence that over the course of six years Michaels had three or four incidents of contamination. This was not harmless error. There were no eyewitnesses to the murder, the trial court's ruling denied Appellant an opportunity to prove the DNA analysis is subject to error, and there was potential error in linking Sexton to the crime scene.

ISSUE II

THE TRIAL COURT ERRED BY PROHIBITING THE TESTIMONY OF STEPHEN TARNOWSKI ABOUT TWO MEN IN THE AREA, WHICH WAS RELEVANT TO THE DEFENSE'S THEORY OF THE CASE THAT SOMEONE OTHER THAN SEXTON COMMITTED THE MURDER.

The two individuals seen by Tarnowski were involved in suspicious behavior in the vicinity of and near the time of the murder. Tarnowski reported the two men that he saw trying to break into cars, because he thought it could be related to the nearby murder. They could not be excluded as potential suspects in this crime and consequently, it was error for the trial court to exclude the testimony of Stephen Tarnowski. By so ruling, the trial court denied Sexton his right to present evidence of a reasonable hypothesis of innocence.

Even if Sexton was at the crime scene, which he admitted he was, albeit at an earlier time, that is still not proof that he is the person that committed the murder. Since there was DNA evidence and fingerprint evidence of another person at the location of the crime scene, Sexton should have been able to present evidence of any other possible suspects in the area at the time of the crime.

Appellee misplaced reliance on Olsen v. State, 751 So. 2d 108 (Fla. 2d DCA 2000) and State v. Savino, 567 So. 2d 892 (Fla. 1990) confusing the proffered evidence as reverse Williams rule evidence regarding other bad acts that must be similar to the charged crime. Sexton did not want to present evidence of other similar crimes in this case. There is no contention that these suspects

committed other crimes similar to the murder in this case. The proffered evidence showed that the suspects were acting suspiciously near the time and location of the murder. The proffered testimony was relevant, because it presented other suspects behaving suspiciously at a time and location that made them potential suspects in the murder case. In some cases, judges have a duty to admit evidence that does not fit neatly within the confines of the evidence code, in order to protect the defendant's right to a fair trial. Curtis v. State, 876 So. 2d 13, 19 (Fla. 1st DCA 2004)

The evidence that the defense sought to introduce was not reverse Williams rule, but rather relevant evidence to support the defense's reasonable hypothesis that someone other than Sexton committed the murder. The State only presented circumstantial evidence. There were no eyewitness to the actual murder, and no confession. There were unexplained fingerprints on a tub of coins on the coffee table and unexplained DNA from a male on the handle of the knife found on the living room floor. Therefore, to obtain a conviction, the State must exclude every reasonable hypothesis of innocence. Defendant's reasonable hypothesis of innocence is that someone else committed the murder. All relevant evidence is admissible unless excluded by law. Relevant evidence is any evidence that tends to prove or disprove a material fact. McDuffie v. State, 970 So. 2d 312 (Fla. 2007). Where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission.

Chandler v. State, 366 So. 2d 64, 70 (Fla. 3d DCA 1978).

Sexton should have been allowed to present evidence which tends to prove someone else committed the murder. Because the State presented only circumstantial evidence, the State must disprove the reasonable hypothesis of innocence that the suspects Tarnowski saw committed the murder. The trial court should not make a determination to exclude evidence if it tends to prove an issue in dispute. The trial court erroneously made a ruling to exclude the evidence, because it thought the weight of the evidence was insufficient to prove these suspects committed the murder. These suspects were not eliminated as the source of the unexplained fingerprints or DNA. By excluding the evidence, the trial judge invaded the province of the jury to make the factual determination of how much weight to give the evidence.

Sexton's theory of defense was that he was at the victim's house earlier in the evening, but he did not commit the murder. He should have been allowed to present his theory of defense. Tarnowski's testimony was relevant to Sexton's theory of defense that someone else committed the murder, because it presented evidence provided to the police of potential suspects of the murder. Sexton was denied a fair trial because he was not allowed to develop his theory of the case. Tarnowski's testimony should have been presented so the jury could determine whether or not the State excluded every reasonable hypothesis of innocence.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING, AS A SPONTANEOUS STATEMENT, CATHERINE SEXTON'S STATEMENT TO THE DETECTIVE, "HE'S NOT TELLING THE TRUTH. HE GOT HOME AT 2 A.M."

A spontaneous statement must be made at the time of, or immediately following, the declarant's observation of the event or condition described. J.M. v. State, 665 So. 2d 1135, 1137 (Fla. 5th DCA 1996). The statements admitted under section 90.803(1) are limited to statements which "describe or explain" an event. Deparvine v. State, 995 So. 2d 351, 369 (Fla. 2008). The event Catherine Sexton was describing was Sexton coming home, not Sexton's conversation with Grady. A narrative of past events cannot qualify as spontaneous statements or excited utterances. Id. at 370. Thus Appellee's alternative argument that the hearsay statements could come in as an excited utterance must also fail.

Catherine Sexton's statement to Grady, "He's not telling the truth. He got home at 2:00 A.M.", was not describing current conditions as she perceived them. Sexton asked a question to his wife regarding his arrival home, which occurred a half a day earlier. Absent her reliance on historical information, Catherine Sexton would not have been able to make her statement to Grady. Catherine Sexton's statement contained historical information that she learned in the early morning and was recounting to Grady. As in Deparvine, because Catherine Sexton's statement to Grady was not describing a contemporaneous event or observation, it was

erroneously admitted. Id. at 371.

The statement admitted through Grady was not harmless error because it directly stated that Sexton was not telling the truth. It puts into question any of the statements Sexton made to the police. Sexton's credibility is crucial because during his statement to the police he puts forth his theory of defense that someone else committed the murder. The statement, "He's not telling the truth. He got home at 2 A.M." is much different and much more damaging than Catherine Sexton's direct examination testimony that she only knew he knocked on the door at 1:55 a.m., but often he would sit outside, listen to music and drink beers before knocking on the door to be let inside. The admission of the hearsay statement denied Appellant a fair trial.

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT EVIDENCE AND PHOTOGRAPHS OF POST MORTEM INJURIES THAT WERE NOT RELEVANT TO ANY ISSUE IN DISPUTE.

The photographs of post mortem injuries were irrelevant to any issue in dispute, and should have been excluded. Appellee contends Susan Miller, Forensic Investigator, used photographs to aid her testimony about the crime scene and victim's condition when she was found. The medical examiner, Dr. Thogmartin used a crime scene photograph to explain the victim's condition and injuries. Jerry Findley used another photograph to show a pattern of blood stains. None of the contested photographs were a

necessary part of any of these witnesses' testimony involving an issue in dispute. To be relevant, a photo of a deceased victim must be probative of an issue that is in dispute. Almeida v. State, 748 So. 2d 929 (Fla. 1999).

The only issue in dispute was the identity of the perpetrator. The disputed post mortem photographs, the picture of the naked burned vaginal area, the cut-off breast, and the vase in the rectum were not probative of any issue in dispute, and if there was any minimal probative value, it was substantially outweighed by the unfair prejudice that distracted the jury from a fair and unimpassioned consideration of the evidence. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). Postmortem injuries have little relevance to premeditation or consciousness of guilt. Premeditation was not contested and was not an issue in dispute. The minimal value that postmortem photographs may have had toward premeditation or consciousness of guilt was substantially outweighed by unfair prejudice.

Appellee points to Seibert v. State 64 So. 2d 67, 88 (Fla. 2010) for the proposition that there was no abuse of discretion by the trial court in admitting photographs of the dismemberment of the victim, because it was relevant to show premeditation, consciousness of guilt, the sequence of events based on blood spatter patterns, and details of the crime scene. However, the gruesome photos were relevant in Seibert, because Seibert raised the defense that he had consensual sex with the victim. The court noted that by presenting this defense, Seibert made evidence of

the dismemberment and its effects on the remaining evidence relevant to an issue in dispute. Id. at 88. Seibert even conceded that consciousness of guilt was a proper basis for admission of the photographs. There was no such concession in this case, as defense counsel maintained his objection throughout the trial.

The present case is similar to Hertz v. State, 803 So. 2d 629 (Fla. 2001) where this Court found that it was error to admit gruesome photographs showing the effects of fire which occurred after the victim's death, because the photographs were not relevant to any issue in dispute. Id. at 643. Likewise, in the present case, the objected to photographs were not relevant to any issue in dispute. In Hertz, the improperly admitted photographs were found harmless because they played a minor role in the State's case, where there was direct evidence implicating Hertz, corroborated by physical and testimonial evidence. The improper admission of the objected to photographs in Sexton's case was not harmless, because there was only circumstantial evidence and no direct evidence presented to prove who murdered the victim.

ISSUE V

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSELS'S MOTION TO CONTINUE PENALTY PHASE, LEAVING SUBSTITUTE COUNSEL WITH INADEQUATE TIME TO PROPERLY PREPARE FOR AND PRESENT AN ADEQUATE PENALTY PHASE DEFENSE.

This was not a case of defense counsel simply seeking more time to prepare without having a valid reason for the request.

Assigned defense attorney, Stephen Fisher, who was responsible for presenting the penalty phase, witnessed his wife as she was hit by a car and suffered debilitating injuries. As a result of the numerous operations and recuperation period of his wife, Mr. Fisher was not able to fulfill his duties as lead counsel for the penalty phase. The duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up. Reasonably diligent counsel may draw the line when they have good reason to believe further investigation would be a waste. Rompilla v. Beard, 545 U.S. 374, 383 (2005). Byron Hileman stepped in to do the penalty phase but the trial court drew the line long before Hileman thought further investigation would be a waste, and he was denied the time necessary to be fully prepared.

Hileman made it clear to the trial court that once he became lead counsel for penalty phase, he had to make his own tactical decisions and could not simply rely on notes from previous counsel. Hileman was at a distinct disadvantage because he was not present during the guilt phase, and he did not get to see the witnesses and how the jurors reacted to them during trial. Hileman should have been provided the time necessary to prepare his penalty phase, to determine what evidence would resonate with the jury to make a life recommendation. The trial court mentioned that going through every scrap of paper in the file should not be the basis for granting a continuance. When Mr. Hileman is fighting for his client's life, he should be given the time to go through every piece of paper in his file, speak to all potential witnesses and

make reasoned decisions on how to present the penalty phase.

Hileman was not working on the case during the entire two week continuance time period, because he initially thought Fisher would be able to return and present the penalty phase. The trial court intimated that every penalty phase presentation is similar, and Hileman should easily be able to get up to speed to present his expert witnesses. That certainly was not Hileman's view, as he was fighting to save the life of his client and he considered every penalty phase unique. Hileman was limited in his preparation time with Dr. Maher, and although Maher investigated toxic substances, he was not an expert in the field. Maher did not explain how Sexton could have survived all those years without committing other violent felonies. Because of the limited explanation Maher could provide, the trial court only gave little weight to the statutory mitigator that Sexton's ability to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was substantially impaired. Had Hileman been provided time to properly prepare and obtain an expert in toxic substances, such as a neuropharmacologist, he could have made a presentation that would have persuaded the jury to provide a life recommendation, and the trial court to give great weight to this statutory mitigating circumstance.

Appellee contends that Hileman did not provide a specific purpose for asking for a continuance. Hileman was put into an impossible situation, to explain what he did not know and what he still needed to do, because he did not sit through the trial and

had no interaction with the jurors at voir dire. Nonetheless, Hileman did indicate the need to speak with family members, to determine if he would call them as witnesses. That mitigation was ultimately presented through a mitigation specialist. Sexton was prejudiced, because testimony through a mitigation specialist is much different than live testimony of family members. The jury was left with the impression that if his children did not care enough to come and testify, should we care enough to vote for life? Sexton was clearly prejudiced by the denial of a continuance, as Hileman did not have the necessary time to fully prepare and present a penalty phase that would have humanized Sexton, and fully explain how toxic substances affected his behavior over the years. Sexton should be given a new penalty phase for which his counsel has time to fully prepare for the penalty phase.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING SEXTON'S REQUEST TO HAVE COUNSEL DISMISSED.

Sexton presented adequate reasons to have his trial counsel dismissed. A defendant facing the death penalty should not be forced to proceed to a penalty phase trial with an attorney who is saying he cannot provide an adequate defense. If there is reasonable cause to believe appointed counsel is not rendering effective assistance to the defendant, the trial court should appoint substitute counsel and allow adequate time for preparation of a defense. Nelson v. State, 274 So. 2d 256, 259 (Fla. 4th DCA

1973).

Sexton clearly articulated his attorney had not acquired the presence of his witnesses from Oregon. Sexton's attorney who was going to do the penalty phase, Stephen Fisher, had brought the witnesses from Oregon and had them ready to testify at the originally scheduled penalty phase. Hileman provided no reason, other than time limitations, for not presenting live testimony of the witnesses from Oregon. Because the court did not allow adequate time for Hileman to consult with the Oregon witnesses, he rendered ineffective assistance of counsel by not having the witnesses present to testify. Consequently, the trial court should have granted Sexton's request to have counsel dismissed, or allowed Hileman more time to complete his preparation for penalty phase.

The present case is distinguishable from Morrison v. State, 818 So. 2d 432, 442 (Fla. 2002) where no further inquiry into ineffective assistance of counsel was required where Morrison was merely noting his dissatisfaction with his attorney's frequency of communication, trial strategy, and trial preparation. Morrison questioned why his uncle was not testifying, but the court found no error because it was explained to Morrison why his uncle was not testifying. Id. at 441. In the present case, the only explanation provided to Sexton for not having his witnesses from Oregon testify was the time limitation placed on Hileman. Sexton's complaints went beyond disagreement with trial strategy. Fisher's original penalty phase plan was to have the witnesses from Oregon

testify at the penalty phase, and Sexton's complaint was that neither his witnesses, nor Fisher, were present at the start of the penalty phase.

The trial court did engage in the proper procedure by inquiring into the reasons for Sexton's dissatisfaction with counsel. However, the trial court erred in ruling that counsel was not ineffective. The trial court caused counsel's ineffectiveness by not providing him adequate time to prepare for penalty phase, and then exacerbated the error by finding trial counsel was not ineffective. Fisher was able to obtain and have the Oregon witnesses present for the penalty phase, and it was clearly ineffective assistance of counsel for Hileman not to have obtained the presence of the Oregon witnesses.

Contrary to what Appellee suggests, Appellant is not faulting Hileman for not proceeding with the initial penalty phase when the witnesses from Oregon were present. Appellant is faulting trial counsel for not maintaining contact with the Oregon witnesses, to ensure their presence when the penalty phase was ultimately conducted. New counsel or Hileman should have been provided time to consult with the Oregon witnesses. If Fisher was able to obtain the presence of the witnesses from Oregon, then substitute counsel should also have been able to obtain their presence. This is not harmless error, because now instead of having live witness who could humanize Sexton to the jury, they were left wondering why his family members were unwilling to come from Oregon to fight for his life. Sexton should be given a new penalty phase where defense

counsel has time to properly prepare for trial.

ISSUE VII

THE TRIAL COURT ERRED BY EXCLUDING PHOTOGRAPHS OF APPELLANT AND HIS BROTHER DURING PENALTY PHASE.

There are three photographs in question that the trial court erred in excluding from the penalty phase, because they were relevant to Sexton's character. The first two photographs were Sexton's brother Duey and Sexton near the time of Duey's death. The relevance of the photographs was to show the age and appearance of the two at the time of Duey's death. The untimely death of his brother was a traumatic incident which affected the development and character of Sexton, and the two photographs helped to show the untimeliness of Duey's death and how it affected Sexton's character and development.

Sexton did not waive the issue regarding his photo near the time of Duey's death. It was to be introduced in juxtaposition with Duey's photograph so the jury could see the relative ages and appearance of the two brothers. Once the trial court denied the admission of Duey's photograph, the single photograph of Sexton at that age was not relevant. The photograph of Duey was not cumulative. No photos were admitted showing what Duey looked like at the time of his death. The importance and relevance of Sexton's photograph hinged on its juxtaposition with the photograph of Duey. Once the trial court denied the admission of Duey's

photograph, defense counsel chose not to introduce the single photograph of Sexton, but that did not waive the argument that the two photographs should have been admitted in juxtaposition to each other.

The picture of Sexton in a St. Louis Cardinals jacket and cap was certainly relevant to his character, showing him to be a loyal Cardinals fan. Sexton grew up in Arkansas, the neighboring state to where the St. Louis Cardinals played. The trial court did not know how Sexton dressed when he coached his little league team. The trial court made assumptions about which it had no knowledge in determining that Sexton did not wear the St. Louis Cardinal jacket and cap when he coached little league. Appellee suggests that the picture showing Sexton as a St. Louis Cardinals fan is not mitigation evidence. It is not for the State or the trial court to determine if the photograph is mitigation evidence. As long as the photograph is relevant to the defendant's character, it is up to the jury to decide if it is mitigation evidence, and how much weight to give such evidence.

By excluding the photographs, the trial court violated the long standing requirement in Lockett v. Ohio, 438 U.S. 586, 604 (1978), to liberally permit any conceivable mitigation. "We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the

defendant proffers as a basis for a sentence less than death." Id. at 604. It is improper for the trial judge not to allow for consideration of non-statutory mitigating circumstances. Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987).

The exclusion of the proffered photographs was not harmless error. Appellant was denied the opportunity to present mitigating evidence of the pictures that showed him and his brother during the time of this traumatic loss, which formed Appellant's character, and the picture of Sexton in his St. Louis Cardinals jacket and cap portraying his character as a loyal fan. With little humanizing evidence put forth, the trial judge's exclusion of these photographs deprived Sexton the opportunity to present all of his mitigation evidence to persuade the jury to return a life recommendation. Sexton is entitled to a new penalty phase where he is allowed to present his mitigation evidence that is relevant to his character.

ISSUE VIII

IT WAS FUNDAMENTAL ERROR FOR THE TRIAL COURT TO INCORRECTLY READ THE PENALTY PHASE JURY INSTRUCTION, RESULTING IN A CONFUSING INSTRUCTION.

The jury instructions as read to the jury would have permitted the jurors to return a death recommendation in the absence of aggravating factors. The incorrect reading of the jury instruction was not a minor error, but reaches down into the validity of the penalty phase jury verdict.

It strains logical reasoning to suggest providing the jurors with accurate written instructions could have cured the erroneous oral instructions, because there is no way to know if any or how many of the jurors actually read the written instructions. In order for the written instruction to correct the misstated oral instruction, it would actually have to be read by the jurors. Appellant respectfully asks this court to reconsider its holding in Wike v. State, 698 So. 2d 817, 822 (Fla. 1997) where this court held: That the judge erroneously used an "or" where an "and" was required does not constitute fundamental error in a case such as this, where the jury was provided with a written copy of the instructions.

Absent some record support for the jury actually having read the written instruction, how could it possibly correct the erroneous oral instruction? It simply could not, as was recognized in Valentine v. State, 774 So. 2d 934 (Fla. 5th DCA 2001). The jury was erroneously instructed that the defendant had to have a "fully formed conscious intent to commit the offense of burglary with an assault or battery in that conveyance." It was error to instruct the jury that the intent must have been to commit a burglary, rather than the intent to commit some distinct underlying offense. The error was caught at trial and the jury was provided a correct written instruction, however the correction was never brought to the jury's attention. The Fifth District stated: It cannot be assumed that the jury noticed the change in the instructions and disregarded the erroneous instruction." Id. at

937.

Appellee stated: "To suggest that the jury actually noticed the alleged misreading and was somehow confused by the written instructions involves a stretch of the imagination that goes far beyond the analysis required for fundamental error." Prior to reading the oral jury instructions the jury is advised to pay close attention to the instructions; so it is their job to listen to the instructions as read, and logical to assume that they heard the instruction as it was misread. Appellant does not suggest the jury was confused by the written instructions, because it is not known whether any of the jurors even read the written instructions. As in Valentine, where erroneous instructions were read to the jury, this Court must reverse and remand this case for a new penalty phase where the jury is read accurate instructions.

ISSUE IX

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

There was insufficient evidence to prove beyond a reasonable doubt that the victim experienced prolonged physical pain or mental anguish. Appellee contends the record does not support that the victim was unconscious after the first or second blow. This ignores Dr. Thogmartin's testimony that she definitely became unconscious at some point and that could have been from the first or second hit. (28/4677, 78) The present case is similar to Williams v. State, 37 So. 3d 187, 200 (Fla. 2010) where the

medical examiner's testimony, that the first blow could have resulted in death or unconsciousness and the entire attack could have taken place in seconds, did not support a finding of HAC. Here Dr. Thogmartin's testimony that the victim could have been rendered unconscious after the first or second blow does not support a finding of HAC.

There is no question that the victim suffered horrible injuries, but there is not proof beyond a reasonable doubt that she was conscious or aware of most of the injuries being inflicted. Nothing done to the victim after the victim is dead or unconscious can support the HAC aggravator. Zarkzewski v. State, 717 So. 2d 488, 493 (Fla. 1998). In order to support a finding of HAC, the evidence must prove that the victim was conscious and aware of impending death. Douglas v. State, 878 So. 2d 1246, 1261 (Fla. 2004).

It is the State's burden to prove the aggravating circumstances beyond a reasonable doubt. Tai A. Pham v. State, 70 So. 3d 485, 498 (Fla. 2011). The trial court improperly shifted that burden to the defense, when it found there was no indication the victim was moved by the defendant from the front door to the living room. Because the defense failed to prove that the defendant moved the victim to the living room, the court assumed that Parlato moved herself to the living room. That is not proof beyond a reasonable doubt but rather a mere assumption. The State did not present evidence to preclude the possibility that the defendant did move the victim. The victim's low-cut socks were

half way off her foot. They could have easily come off if she was dragged to the living room, and the blood could have gotten on her foot at the foyer as her feet dragged the ground.

There was only one defensive-like wound on the victim. That could have occurred during the first blow and she could have been rendered unconscious immediately. Such a scenario would not support a finding of HAC. The trial court finding the existence of the HAC aggravating circumstance was not harmless error, because HAC is one the most serious aggravating circumstances in the statutory sentencing scheme. Id. at 500. Absent a finding of HAC, it cannot be said beyond a reasonable doubt that the remaining aggravating circumstances outweigh the mitigating circumstances. This case should be remanded for a new penalty phase where the jury does not consider the HAC aggravating circumstance, or at the very least, a new sentencing hearing without the consideration of the HAC aggravating circumstance.

ISSUE X

THE TRIAL COURT FAILED TO ADEQUATELY ADDRESS WHETHER THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES, AS EVIDENCED BY A DEFECTIVE ORDER THAT FAILED TO CLEARLY INDICATE WHICH MITIGATING CIRCUMSTANCES WERE FOUND, AND HOW MUCH WEIGHT THEY WERE GIVEN.

The trial court failed to consider significant non-statutory mitigating circumstances. Appellee seems to suggest that Sexton abandoned the mitigation presented in the penalty phase because it

was not restated in the sentencing memorandum. There is no requirement that mitigation must be presented in a sentencing memorandum. The only requirement is that the defendant identify, for the court, the specific non-statutory mitigating circumstances it is attempting to establish. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). The trial court was well aware of what non-statutory mitigation Sexton was attempting to establish, because it was laid out point by point in the requested jury instruction that the trial court read during penalty phase. It is the trial court's obligation to consider all mitigation presented. Mitigating evidence must be considered and weighed when contained anywhere in the record, if it is believable and uncontroverted. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993).

Appellee's reliance on Allred v. State, 55 So. 3d 1267 (Fla. 2010) is misplaced, as Allred does not specifically state that non-statutory mitigating factors are waived if they are not mentioned in a sentencing memorandum. It simply states a concern that Allred did not specifically propose prior domestic violence in his home and his father's drinking problems as separate non-statutory mitigating factors in his sentencing memorandum. Nonetheless, the trial court did address those factors in its sentencing order. Gonzalez v. State, 136 So. 3d 1125 (Fla. 2014) is also distinguishable from the present case. In Gonzalez the non-statutory mitigating factors argued for on appeal were not presented to the court at trial or in the sentencing memorandum, so they were never before the trial court for consideration. Here,

the trial court was fully aware of the non-statutory mitigating circumstances because they were clearly listed in the jury instructions.

The trial court erred in the present case because it "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant." Roger v. State, 783 So. 2d 980, 995 (Fla. 2001). Non-statutory mitigating factors were proposed by the defendant and were acknowledged by the court during the penalty phase instructions read to the jury. However, the trial court failed to address the following non-statutory mitigating factors in its sentencing order:

> Number three. The defendant has Bipolar Disorder.
>
> Number four. The defendant's mother and father were alcoholics.
>
> Five. The defendant suffered emotional and physical abuse from his parents during his childhood.
>
> Number Six. The defendant was exposed to instances of domestic violence during his childhood.
>
> Number seven. The defendant had chronic asthma during his childhood.
>
> Number eight. The defendant graduated from high school after the 11th grade.
>
> Number nine. The defendant received an honorable discharge from the United States Marine Corps.
>
> Number ten. The defendant's younger brother died when the defendant was 20 years old.
>
> Number 11. The defendant has chronic severe alcoholism.

> Number 12. The defendant has had prolonged exposure through his work to industrial chemical toxins which has caused brain damage.
>
> Number 13. The defendant has worked as a journalist and a television producer.
>
> Number 14. The defendant attempted suicide on multiple occasions.
>
> Number 15. The defendant was Baker Acted.
>
> Number 16. The defendant sought treatment for his mental-health issues.
>
> Number 17. The defendant was intoxicated at the time of the offense.

The trial court's deficient sentencing order makes it extremely difficult, if not impossible, to review the trial court's sentence.

> The standards of review of a trial court's finding of mitigating circumstances are as follows: (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and the weight assigned to a mitigating circumstance is within the trial courts discretion and subject to the abuse of discretion standard.

Id. at 995. This court cannot apply the appropriate standards of review because the trial court failed to address the proposed mitigation. In Crump v. State, 622 So. 2d 963, 973 (Fla. 1993) this Court stated: "The sentencing order in the instant case is sparse because it fails to specify what statutory and non-statutory mitigating circumstances the trial judge found and what

weight he gave these circumstances in determining whether to impose the death sentence." Florida's capital sentencing statute was found to be constitutional because it can assure consistency, fairness, and rationality in the operation of the state law. Proffit v. Florida, 428 U.S. 242 (1976). If the capital sentencing statute is not strictly followed and the trial court does not write a clear sentencing order addressing all of the proposed mitigating circumstances, the imposition of the death penalty does not pass constitutional muster. This case must be remanded for the trial judge to reweigh the aggravating and mitigating circumstances and resentence Sexton.

ISSUE XI

THE TRIAL COURT ERRED BY FAILING TO READ THE SPECIAL REQUESTED JURY INSTRUCTION THAT WHEN CONSIDERING HAC THE JURY IS NOT TO CONSIDER ANY EVENTS THAT OCCURRED AFTER THE VICTIM BECAME UNCONSCIOUS.

The special requested jury instruction provides a clear and concise statement of the law to the jury that is not covered by the standard jury instruction. The trial court was concerned that the special jury instruction could mislead and confuse the jury. Appellee suggests that the instruction was confusing because defendant's actions could have been relevant in determining if the capital felony was committed while engaged in the commission of a sexual battery. The instruction was straightforward and clear, that any events occurring after the victim became unconscious were

not relevant in determining whether the murder was heinous, atrocious, or cruel (HAC). The jury instruction was dealing specifically with the HAC aggravator and no other circumstances of the crime.

Appellant is not arguing that the standard instruction is not constitutional, but rather the standard jury instruction provides no guidance to the jurors regarding actions taken after the victim became unconscious. The special jury instruction was necessary in the present case, because of the prejudicial nature and amount of trial evidence presented regarding actions that occurred after the victim lost consciousness.

In Penry v. Lynaugh, 492 U.S. 302, 323 (1989) the Court found that without a special jury instruction, a juror who believed Penry's intellectual disability and background diminished his moral culpability and made the death penalty unwarranted would not be able to give effect to that conclusion if the juror also believed Penry committed the crime deliberately. In Brickley v. State 12 So. 3d 311, 314 (Fla. 4th DCA 2009) the trial court erred in failing to give a special instruction on constructive possession where there was evidence supporting the instruction. Moreover, the Fourth District found no merit in the State's contention that adding the special instruction would be misleading. In the present case, a special jury instruction was needed in ensure the jurors did not use actions of the defendant after the victim was unconscious to make a finding of heinous, atrocious, or cruel.

Allowing defense counsel to argue that acts after the victim became unconscious could not be considered for a finding of HAC did not cure the error of not providing the special jury instruction. A juror is sworn to follow the law and is specifically instructed: "You must follow the law as it is set out in these instructions." Jury inst. 3.10, 1. Further, the jury is advised that what the lawyers say is not evidence or the law: "The attorneys now will present their final arguments. Please remember that what the attorneys say is not evidence or your instruction on the law." Jury inst. 2.7. This case should be remanded for a new penalty phase where the requested special jury instruction is read to the jury.

ISSUE XII

THE TRIAL COURT ERRED IN SENTENCING SEXTON TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL PURSUANT TO RING V. ARIZONA.

The aggravating circumstance of prior violent felony does not exist in the present case. Since the opinions denying certiorari in Bottoson v. Moore, 833 So. 2d 693 (Fla.); cert. denied, 123 S.CT 662 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 123 S.Ct. 657 (2002), did not explain their reasoning, it is not known why certiorari was denied. Those cases are distinguishable from the present case because, in both Bottoson and King there existed the statutory aggravating circumstance of

prior conviction for a felony involving the use or threat of violence to a person.

Under the Florida sentencing scheme, in order for a maximum sentence of life to be increased to death, a trial court must make findings of fact in considering whether a statutory aggravating circumstance is proven. Ring v. Arizona, 536 U.S. 584 (2002) requires that "if a state makes an increase in a defendant's punishment contingent on a finding of fact, that fact--no matter how the state labels it--must be found by a jury beyond a reasonable doubt." Id. at 602 (quoting Apprendi v. New Jersey, 530 U.S. 466 at 482 (2000). The only exception to this is that it is not necessary for a jury to find the existence of a prior crime. "Other than the fact of a prior conviction, any fact that increases the penalty of the crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." Id. at 490.

The maximum penalty Ring could have received based solely on the jury's verdict finding Ring guilty of first degree felony murder was life imprisonment. That is because the death sentence may not be imposed in Arizona unless at least one aggravating factor is found to exist beyond a reasonable doubt. Ring v. Arizona, 536 U.S. at 597. Florida's sentencing scheme, like Arizona's, requires that at least one aggravating factor be found to exist beyond a reasonable doubt before a sentence of death may be imposed.

Sexton's case is ripe for consideration because the death

recommendation was 10 to 2 and the jury did not unanimously find any of the statutory aggravators. The prior violent felony aggravator was not present in Sexton's case, nor did the jury make a finding that the murder occurred in the course of an enumerated felony. Justice Pariente's dissent in Peterson v. State, 94 So. 3d 514, 538, is applicable to the present case because similar circumstances are present:

> I concur in affirming Peterson's convictions, but dissent as to his sentence because, based on this record, there is no unanimous finding by a jury that any of the applicable aggravators apply to this case. Peterson was sentenced to death following a seven-to-five jury recommendation absent any fact-finding as to which of the aggravators the jury found. None of the aggravators were aggravators that automatically demonstrate the jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony or that the murder occurred while in the course of an enumerated felony that also was found by the jury. For the reasons explained more fully in my dissent in Butler v. State, 842 So. 2d 817, 835-40 (Fla. 2003) Pariente, J., concurring in part and dissenting in part), I continue to believe that Florida's death penalty statute, as applied in circumstances like those presented in this case, is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Whether our statute meets the requirements of the Federal Constitution will be an issue for the United States Supreme Court to decide. However, the fact that we do not require unanimity in fact-finding as to the aggravators necessary to impose the death penalty is, in my view, an independent violation of Florida's constitutional right to trial by jury.

Since the jury does not make the findings of fact necessary

for imposition of the death penalty, Fla. Stat. section 921.141 (2013) stands in clear violation of Ring and Apprendi. This Court should declare the statute unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, or under Article One sections 16, 17, or 22 of the Florida Constitution.

If this Court does not declare Florida's capital sentencing scheme unconstitutional, Appellant alternatively requests this Court to await the decision of the United States Supreme Court in Hurst v. Florida, No. 14-7505, 2015 WL 998606, Mar. 09, 2015, in which the Court granted certiorari on the question of whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of the Court's decision in Ring.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 23rd day of March, 2015.

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,

/S/Julius J. Aulisio

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