Filing # 24471394 E-Filed 03/04/2015 01:51:00 PM

RECEIVED, 03/04/2015 01:53:40 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

DONALD OTIS WILLIAMS,

Appellant,

vs.

CASE NO. SC14-814

STATE OF FLORIDA,

Appellee.

_______________________________/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

In November, 2011, the State disclosed to the defense a four-page laboratory report from the Florida Department of Law Enforcement. (I 78) In February, 2013, counsel was discharged on Appellant's motion. (III 418-19) On April 1, 2013, the State disclosed a five-page laboratory report from FDLE. (V 828) In July, 2013, the defendant filed a *pro se* motion to re-depose the State's DNA analyst, Mohamed Amer. (VIII 1544) The motion acknowledges that the witness was deposed in 2012, but notes that the witness filed a supplemental report on April 1, 2013. (VIII 1544) At trial, while cross-examining Mr. Amer, the defendant referred to a deposition he conducted with that witness on July 30, 2013 regarding the DNA results from the men's briefs, men's jeans, and bloodstains that were found in the victim's car. (XXI 765-69) On redirect, the State established that FDLE received those items later than other evidence in this case, and established that the items were submitted separately so as not to overwhelm the lab with too many specimens at once. (XXI 774-75)

Mr. Amer's trial testimony about the two pair of men's briefs found in the car, specifically, was as follows: he designated those respective items as 86A and 86B. (XXI 761-63) From 86A he recovered a mix of skin cells that almost certainly included both Appellant and Janet Patrick as contributors; as to 86A he

concluded that the odds were one in 2.8 million that someone other than Miss Patrick had been one of the contributors of the cells. (XXI 764-65) As to 86B, he swabbed a semen stain of Appellant's from the crotch area, a result he testified was not unusual in an unwashed pair of men's underwear. (XXI 763, 765) He also recovered a mix of skin cells from 86B, with one of the contributions resulting in only a partial profile; the likelihood that someone other than Miss Patrick had been the donor reflected by that partial profile was one in forty. (XXI 763-64)

SUMMARY OF ARGUMENTS

Point one. The State argues that the right to represent oneself does not carry with it the right to disrupt orderly proceedings. Here the defendant sought and received a ruling before trial permitting him to represent himself, then listed his counsel as witnesses in an effort to show his mental-health difficulties were of long standing, then concluded - when the judge asked - that he in fact needed the help of counsel. On being reappointed, counsel sought a reasonable opportunity to learn everything that had gone on in the jury's presence before taking over this capital trial. This series of events does not reflect a scheme to manipulate the court.

Point two. Where no cause of death can be determined, and where the medical examiner's expertise as a forensic pathologist was not needed or used in reaching a conclusion as to the manner of death, her opinion testimony invades the province of the jury. The State does not argue that any error on this point was harmless; Appellant agrees with the apparent concession, in light of the emphasis the State put on Dr. Wolf's testimony in opening statement and closing argument.

Point three. The State argues that any reference it made to Appellant's criminal past was innocuous, inadvertent, and fleeting. The references were repeated, and thus were hardly "fleeting." While the prosecutor assured the court

that the revelations were inadvertent, the line of questioning that elicited two references to Appellant's eight-year prison stay clearly presented the risk that inadmissible matter would emerge. Taken together, the references were not "innocuous." The State does not address Appellant's argument that prejudice continued into the penalty phase, and has not persuasively shown that Appellant is entitled to no relief.

Point four. The State denies that any argument the prosecutor made below was inappropriate. It does not argue that any error on this point was harmless. As on Point Two above, Appellant agrees that such an argument would have been inapposite, in light of the likely prejudicial effect of the prosecutor's conduct in both the guilt and penalty phases.

Point five. The State argues that since Darla Blackwell's testimony fills just a few transcript pages, it can therefore hardly be deemed a central feature of the penalty phase. It is not the quantity of that testimony that concerns Appellant. As the defense conceded at trial, proof of the details of prior violent felonies is generally admissible; it is the combination of Darla's proof with the State's unwarranted insistence that another sexual battery must have occurred in this case that warrants a new penalty phase here.

Point six. A non-standard interrogatory about mitigation was used on the verdict form in this case; the jury's question how to respond to it indicated confusion. That confusion would have been ameliorated had the court instructed on each proposed mitigating factor as requested, and had the court's interrogatory mirrored that requested instruction.

Point seven. The poem in evidence falls outside the range of victim impact evidence permitted by the governing law.

Points eight and nine. Appellant relies on his initial brief as to these points.

ARGUMENT

POINT ONE

IN REPLY: DENYING AN ADEQUATE CONTINUANCE WHEN COUNSEL WAS REAPPOINTED MIDWAY THROUGH THE GUILT PHASE DEPRIVED THE APPELLANT OF THE RIGHTS TO COUNSEL AND DUE PROCESS.

The State argues that after Appellant re-invoked his right to counsel on the second Wednesday of trial, and the court continued the case only until the following Monday, no prejudice resulted. It further argues that if any prejudice did result, the defendant bears full responsibility for it. (Answer brief at 25-26) The State's position fails on factual, logical, and legal grounds.

Factually, the State asserts that since the Public Defender's Office investigated the case from February, 2011 until February, 2013, it was "well versed as to the State's case in chief which included DNA results." (Answer brief at 25, citing page 78 of the record) The State's record citation is to the original DNA report disclosed by the State in 2011; a second DNA report was disclosed in April of 2013, after counsel was discharged. It was the second report that contained the results the State relied on at trial to suggest sexual misconduct.

The State also asserts that "in evidence was the fact that Williams's semen was mixed with the victim's DNA on the front inside crotch area of his briefs

found in the victim's car." What the DNA analyst testified was that testing done on one pair of briefs indicated the presence of the defendant's semen, and also disclosed a mix of skin cells which included a contribution that had a 1/40 chance of coming from someone other than the victim. The other pair of briefs yielded no positive result for semen, and had a mix of skin cells adhering to it which included a contribution that had a 1/2.8 million chance of coming from someone other than the victim. No testimony supports the claim that the defendant's semen was "mixed with" anything.

The State argues that the DNA-related proof "yields the logical inference that Williams had engaged in some type of sexual conduct with the deceased victim." (Answer brief at 26) The DNA analyst's admission that skin cells transfer easily from car seats to clothing raises the more likely inference that a transfer of that kind took place. The logical principle known as Occam's Razor applies here; it teaches that given a choice, the explanation which requires the fewest assumptions is the explanation likeliest to be true. See generally In re Bimini Island Air, Inc., 66 Fed. R. Serv. 3rd 1154 n.1 (Bankr. S. D. Fla. 2006).

Further, as noted, the garment that tested positive for semen also contained skin cells which had a relatively low (1/40) chance of having been donated by someone other than the victim. This court has held that a similarly weak result

(1/29) "does not constitute competent substantial evidence of identity." Dausch v. State, 141 So. 3rd 513, 518-19 (Fla. 2014). For that reason as well, the DNA analyst's proof is not competent, substantial evidence that there was personal contact between the two likely DNA donors.

The State further reasons that defense counsel, who were barred from attending the first week and a half of trial because Appellant listed them as witnesses, had ample opportunity to catch up on what had occurred. Although the record shows the recordings of that portion of trial were not all audible, the State argues they had Appellant to fill them in. When a lay participant in a trial tries to recount the legal significance of what has gone on in court over the last seven business days, he is bound to miss the mark as to at least some particulars. The State notes that counsel said at one point he was waiting for transcripts to supplement the audio recordings he was having trouble hearing, but the record does not suggest that he received those transcripts, and had the opportunity to review them, before the Monday when trial reconvened.

The State also argues that even assuming counsel did not know just what the DNA analyst said in the State's case in chief, no harm ensued since any objection they made to the State's closing would have been correctly overruled. Its rationale is that in closing, attorneys may advance all legitimate inferences from the

evidence. As argued in the initial brief at pages 76-78, the State in its final closing in the guilt phase went well beyond advancing *legitimate* inferences once it accused Appellant of an uncharged sexual battery.

The State cites Jones v. State, 449 So. 2d 253 (Fla.), *cert. den.,* 469 U.S. 893 (1984), for a rule that even if prejudice resulted from the limited chance to prepare, "[t]he fault lies squarely on defendant." (Answer brief at 30, 26-29) In Jones, the defendant was allowed to dismiss appointed counsel "Z" six weeks before trial, in reliance on his promise to be ready with the help of his chosen standby counsel, "K." On the day before trial "K" moved to be relieved of his responsibilities because Jones refused to meet with him and refused to make the case file available to him. The court granted the motion, and appointed standby counsel "W" for the trial that began the next day. On the second day of trial the defense unsuccessfully sought a continuance to better prepare. On appeal, displaying considerable *chutzpah*, Jones argued that the court had erred in denying the continuance; this court affirmed, noting that the right of self-representation may not be used to frustrate orderly proceedings. 449 So. 2d at 257. No similar series of manipulative moves is on display in this case. Here the defendant sought and received a ruling permitting him to represent himself well prior to trial, then listed his counsel as witnesses in an effort to show his mental-health difficulties

were of long standing, then concluded - when the court inquired of him - that he in fact needed the help of counsel. On being reappointed, counsel sought a reasonable opportunity to learn what had gone on in the jury's presence. The trial court abused its discretion, and denied Appellant due process, by denying that opportunity. See Valle v. State, 394 So. 2d 1004 (Fla. 1981) (rushing counsel to trial in capital case amounted to abuse of discretion and denied right to effective counsel); Jones v. State, 58 So. 3rd 922 (Fla. 5th DCA 2011) (rushing substitute appointed counsel to trial in case carrying potential life sentence was "palpable" abuse of discretion); Sessions v. State, 965 So. 2d 194 (Fla. 4th DCA 2007) (court abused its discretion when it denied a continuance to a defendant newly permitted to represent himself).

POINT TWO

IN REPLY: THE STATE'S RELIANCE ON OPINION TESTIMONY OUTSIDE THE SCOPE OF THE MEDICAL EXAMINER'S EXPERTISE AMOUNTED TO FUNDAMENTAL ERROR AND TO DENIAL OF DUE PROCESS OF LAW.

The State asserts that Appellant's argument on this point "is completely devoid of merit and must be patently rejected." (Answer brief at 30) It further argues that the doctrine of invited error precludes relief. The precedent cited in the answer brief does not support either position.

The State relies on Brennan v. State, 754 So. 2d 1 (Fla. 1999), Geralds v. State, 674 So. 2d 96 (Fla.), *cert. den.,* 519 U.S. 891 (1996), and Capehart v. State, 583 So. 2d 1009 (Fla. 1991), *cert. den.,* 502 U.S. 1065 (1992), for the general principle that expert witnesses may rely on facts provided to them out of court. It correctly notes that in each of those cases this court held that a substitute medical examiner appropriately relied on reports prepared by others. (Answer brief at 32-33) In Brennan and Geralds the testimony established that the victims were beaten and stabbed to death; in Capehart the medical examiner testified that the victim, who was found with her nightclothes in disarray and with a pillow on her face, died of asphyxiation after being injured during sexual intercourse. Those cases are inapposite here, where the cause of death could not be determined.

It is universally recognized that medical examiners may testify to the *cause and manner* of death, even if that testimony tends to suggest the defendant's guilt. Huck v. State, 881 So. 2d 1137 (Fla. 5th DCA 2004), *rev. den.*, 898 So. 2d 80 (Fla. 2005); Fridovich v. State, 489 So. 2d 143 (Fla. 4th DCA 1986), *rev. den.*, 496 So. 2d 142 (Fla. 1986); Baraka v. Commonwealth, 194 S.W. 3rd 313 (Ky. 2006). This is so because such testimony is generally scientific in origin and outside the common knowledge of laypersons on juries. Baraka, 194 S.W. 3rd at 315.

A pathologist's conclusions as to the cause and manner of death are admissible even if they are arrived at by process of elimination. In Vaillancourt v. State, 288 So. 2d 216 (Fla. 1974), this court held that the corpus delicti of murder can be established by a medical examiner's conclusion that the victim was suffocated, even where that conclusion could only be reached by eliminating other possibilities. 288 So. 2d at 218. In Huck v. State, *supra*, the 22-year-old victim was bound with tape, weighted down, and thrown in the Indian River. 881 So. 2d at 1140, 1143. The pathologist testified that he was not 100% certain of the cause of death, but also testified that his autopsy excluded any possibility that the victim died of disease, poisoning, or a drug overdose, and showed neither organ injury nor any other sign of violence. Id. He concluded "within a reasonable degree of probability" that the cause of death had been either drowning or asphyxiation, and

the manner of death had been homicide. Id. The Fifth DCA held that the doctor's testimony had been appropriately helpful to the jury, in that by applying his experience to his own observations of the remains he was able to reach conclusions on matters outside the scope of the jury's experience. Id. at 1148-50. Similarly, in Eierle v. State, 358 So. 2d 1160 (Fla. 3rd DCA), *cert. den.*, 364 So. 2d 884 (1978), the victim's body was found in the septic tank of the home she shared with the defendant. The pathologist was able to eliminate "disease, trauma to the body, obstruction to the throat, drugs, insect or snake bites" as causes of death, and he testified to a reasonable degree of medical certainty, based on the process of elimination, that death had been caused by suffocation or strangulation. 358 So. 2d at 1160-61. The Third DCA affirmed Eierle's conviction, holding that the view that Mrs. Eierle had met her end at the hands of another was supported by "more than sufficient evidence." Id. at 1161.

However, in a case where no cause of death could be determined, the Georgia Supreme Court arrived at a different result. In Maxwell v. State, 414 S.E. 2d 470 (Ga. 1992), *overruled on other grounds by* Wall v. State, 500 S.E. 2d 904 (Ga. 1998), the victim's remains, which showed no sign of trauma, were found in the woods six days after she was last seen by her family; her car and purse had been found nearby. A pathologist testified that the manner of the victim's death

was homicide "based entirely upon the circumstances surrounding [her] demise as related to him by a detective working on the case." 414 S.E. 2d at 473-74. The Georgia Supreme Court reversed Maxwell's murder conviction because all of the factors the pathologist relied on had been "well within the knowledge and understanding of the jury." Id. at 474. The court noted that the witness's "expertise as a forensic pathologist was not needed or used in reaching [his] conclusion [as to the manner of death]." Id. In this case, Dr. Wolf's "homicide" conclusion was based on the circumstances of Janet Patrick's demise, combined with the fact that her medical records mentioned no life-threatening conditions. (XXI 695-99) Here, as in Maxwell, that proof requires no interpretation by a forensic pathologist, and Dr. Wolf's opinion was accordingly inadmissible.

The State asserts that in Lambrix v. State, 494 So. 2d 1143 (Fla. 1986), this court rejected an argument similar to the one now made. (Answer brief at 35-36) Lambrix admitted out of court that he had choked one victim and hit another, and the pathologist at his trial testified that the victims had died, respectively, of strangulation and multiple crushing blows to the head. The pathologist referred to the deaths as homicides before a predicate was laid to support that opinion, and the defense raised that testimony as an issue in the appeal. This court held it would not find an abuse of discretion merely because an expert "jumped the gun," in light of

the fact that a sufficient predicate for the "homicide" conclusion was eventually brought out in the jury's presence. 494 So. 2d at 1148. Here, no such predicate was ever established.

The State argues that the defense invited any error, in that "it was Williams himself that elicited the basis of Dr. Wolf's opinion before the jury." (Answer brief at 31-32, citing pages 701-04 of the trial transcript) On the cited record pages, the defendant, in cross-examining the witness, established that she had relied in part on his statement to the press. (XXI 702-03) The State, on direct, had elicited the same fact. (XXI 698) The quoted cross-examination cannot reasonably be said to have "invited" the "homicide" opinion the State had already elicited, and this is not a case where the defendant later exploited introduction of inadmissible evidence to his own benefit. Cf. Pierre v. State, 730 So. 2d 841 (Fla. 3rd DCA), *rev. dism.*, 733 So. 2d 516 (1999).

The State's reliance on Sheffield v. Superior Ins. Co., 800 So. 2d 197 (Fla. 2001) and Goodwin v. State, 751 So. 2d 537 (Fla. 1999) is misplaced: Sheffield holds that the invited error doctrine does not preclude anticipatory rehabilitation after a clear ruling admitting evidence, and in Goodwin this court noted in passing that invited errors do not support reversal. 800 So. 2d at 202; 751 So. 2d at 544. The "invited error" doctrine exists to ensure that "a party cannot successfully

complain about an error for which he or she is responsible." Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475, 478 (Fla. 1995). The record of this case does not support the view that Appellant is responsible for bringing Dr. Wolf's opinion to the jury's attention.

The State does not argue that any error in eliciting Dr. Wolf's opinion testimony should be deemed harmless. In light of the prominence counsel for the State gave to that testimony in opening statement and closing argument in the guilt phase, the tacit concession is entirely appropriate. Since the error cannot reasonably be deemed harmless, and since Dr. Wolf's testimony was unfairly prejudicial and directly affected the guilt-or-innocence determination, Appellant has shown fundamental error occurred on this point.

POINT THREE

IN REPLY: THE DEFENSE MOTIONS FOR MISTRIAL SHOULD HAVE BEEN GRANTED AFTER A STATE WITNESS TESTIFIED THE DEFENDANT HAS "A LENGTHY CRIMINAL HISTORY." THE EVIDENCE AMOUNTEDTO A NON-STATUTORY AGGRAVATING FACTOR, AND RESULTED IN A DENIAL OF DUE PROCESS AT BOTH STAGES OF TRIAL.

The State argues that its revelations at trial about Appellant's criminal past amounted only to "innocuous, inadvertent, fleeting references which the jury was instructed to disregard." (Answer brief at 41) Since the references were repeated, they can hardly be deemed "fleeting." While the prosecutor assured the court on each occasion that the revelations were inadvertent, the entire line of questioning that elicited two references to Appellant's eight-year prison stay clearly presented the risk that inadmissible matter would emerge. As shown in the initial brief, the references were neither "innocuous" nor likely cured by court's repeated directions for the jury to disregard them.

The State now asserts that in the guilt phase, any possible error was cured when a defense witness, and the defendant, disclosed that the defendant had once gone to prison and had been arrested for misdemeanors. Neither disclosure established that he had spent eight of the nine years preceding the charged offenses in prison, or that he had a "lengthy criminal history." The State does not address

Appellant's argument that prejudice from that latter, unsupported comment continued into the penalty phase, and has not persuasively shown that Appellant is entitled to no relief on this point.

POINT FOUR

IN REPLY: PROSECUTORIAL OVERREACH IN BOTH PHASES AMOUNTED TO FUNDAMENTAL ERROR, AND AMOUNTED TO A DENIAL OF THE RIGHT TO DUE PROCESS OF LAW.

The State argues that when it pointed out in jury selection that justice for a little old lady was at stake, it did not impermissibly *ask* for justice for the victim, but instead - permissibly - *reminded* the venire[1] to *consider* justice for the victim as well as for the defendant. (Answer brief at 45) It cites no case which draws such a distinction, and does not acknowledge or attempt to distinguish the cases relied on in the initial brief as to this point. (See initial brief at 78)

The State further argues that it was "completely appropriate" for the prosecutor to tell the venire that proof it would newly hear in the penalty phase would cover "factors in the crime" as well as details of the defendant's life. (Answer brief at 45-47) It seeks to distinguish Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993), on the basis that in this case, "the State did not suggest that the State had additional evidence and proof of the defendant's guilt." (Answer brief at 46-47) Again, the State cites no authority for the distinction it draws, and again, the suggested distinction is one that was almost certainly lost on the venire.

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[1] The jury that heard this case was chosen from a single panel.

As to the suggestion made in the guilt-phase closing that Appellant likely committed an uncharged sexual battery, the State does not acknowledge Huff v. State, 437 So. 2d 1087 (Fla. 1983). In that case, this court reversed after the State accused the defendant of an uncharged offense in its final closing. (See initial brief at 76-78) What the State does argue is that its inference was well supported, in that the record of this case "is replete with evidence that sexual misconduct ensued." (Answer brief at 47-48) The "replete" argument is based in part on the DNA evidence discussed above at Point One; as to that proof the State asserts "[t]he fact that Williams can advance ulterior explanations to how his DNA arrived on these articles does not negate the logical inference." (Answer brief at 48) This makes no sense; the articles tested were his own briefs. The remaining basis for the "replete with evidence" argument is the fact the victim's body was found without clothing. (Answer brief at 48) No jewelry or purse was found with the body either. (See initial brief at 10) As the trial court eventually noted on the record, if the prosecutor believed a sexual battery could be proved, he would have charged it. (XXX 2422; see initial brief at 50)

As to the prosecutor's dramatic rendering of the victim's final moments, the State submits that since a defendant may be confronted with images showing the injuries and death he is charged with perpetrating, then he may also be confronted

with a description of his "work." (Answer brief at 49) Photographs are only admissible where they are shown to fairly and accurately represent what they purport to depict. Whittaker v. State, 46 So. 3rd 650 (Fla. 2d DCA 2010); Bryant v. State, 810 So. 2d 532, 536 (Fla. 1st DCA 2002). A speculative evocation of a victim's dying moments cannot be authenticated in that manner, and this court accordingly discourages such flights of imagination. (See initial brief at 79)

Finally, the State argues that when it appealed to the jurors to "have the courage of their convictions" and to "do the right thing, even when it's not the easy thing," it was "merely reinforc[ing] how important the jury was in the penalty phase," rather than urging a death recommendation. (Answer brief at 50) Placed in context, the quoted language directly followed the State's argument that the victim's vulnerability supplied "a reason in and of itself" for a death sentence. (XXX 2427-28)

The State does not argue that any error in how it addressed the jury was harmless. (Answer brief at 50) As on Point Two above, Appellant agrees that such an argument would have been inapposite, in light of the likely prejudicial effect of the prosecutor's conduct in the guilt and penalty phases. This court should hold that the combined errors argued on this point amount to fundamental, reversible error.

POINT FIVE

IN REPLY: SEXUAL BATTERY, A CRIME UNCHARGED AND UNPROVED IN THIS CASE, BECAME A CENTRAL FEATURE OF THE PENALTY PHASE OVER OBJECTION.

The State argues that the sexual battery on Darla Blackwell can hardly be deemed a central feature of the penalty phase, since her testimony takes up just a few transcript pages. (Answer brief at 54) It is not the quantity but the essence of that testimony which counts here. As the defense conceded at trial, proof of the details of prior violent felonies is generally admissible; it is the combination of Darla's proof with the State's unwarranted insistence that another sexual battery must have occurred in this case that amounts to error.

The State argues that L.E.W. v. State, 616 So. 2d 613 (Fla. 5th DCA 1993), is inapposite here, in that it involved a recanted statement made by a crime victim, rather than by a criminal defendant. (Answer brief at 57-58) The undersigned concedes that the State is correct to draw that distinction, and that *fair* comment on Appellant's own statement is not precluded by the governing caselaw. Appellant maintains that on this record, the repeated suggestion of sexual impropriety with the 81-year-old victim was unfairly prejudicial, in that its only factual basis was the inference that the prior violent felony repeated itself, and an out-of-court statement

which the State itself proved that Appellant had repudiated.

The State argues that any error on this point was harmless since the proof of mitigation was "relatively minor." (Answer brief at 59) However, that judgment is solely for the jury to make. Since the error argued on this point was calculated to affect the jury's deliberations, this court should order a new penalty phase.

POINT SIX

IN REPLY: THE JURY INSTRUCTIONS AND VERDICT FORM SET OUT NON-STATUTORY MITIGATION AS A SINGLE "CATCHALL" FACTOR.

The State asserts that the interrogatory used in this case regarding mitigation appears in the standard jury instructions; the standard instructions in fact include no interrogatory on mitigation. Appellant's position is that the jury's question about the non-standard interrogatory used below indicated confusion, and that the confusion would have been ameliorated had the court instructed on each proposed mitigating factor as requested, and had the court's interrogatory mirrored that requested instruction, as was the case in <u>Huggins v. State</u>, 889 So. 2d 743 (Fla. 2004), *cert. den.*, 545 U.S. 1107 (2005). The heightened reliability required by the Eighth Amendment in capital sentencing proceedings is absent in this case, because the verdict form gave the court no guidance as to how the jury perceived the proof of mitigation.

POINT SEVEN

IN REPLY: THE COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE WHICH SHOWED NEITHER THE VICTIM'S UNIQUENESS NOR LOSS TO THE COMMUNITY.

The State argues that the poem in evidence "was a clear reflection of what the victim was like in life," and notes that other testimony also showed the victim favored uplifting literature. (Answer brief at 61) The admissibility standard the State recites is not the standard set out in Section 921.141(7), Florida Statutes. The statute requires that victim impact evidence must show uniqueness *and* a loss to the community; the alternative standard the State proposes would exclude little evidence.

The other testimony the State refers to was unexceptionable. An unemotional description of the victim's passions is admissible, but allowing a demonstration of them that packs emotional impact may violate due process. Had Miss Patrick's passion been animal rescue, that fact, and her accomplishments, could go before the jury, but a heart-tugging video devoted to that cause would certainly fall outside the range of admissible victim impact proof. The poem in evidence is analogous to such a video, and its prejudice lies in the contrast it invites between the selfless victim and the heartless perpetrator of her demise. The due process

clause of the United States Constitution allows admission of victim impact testimony only where that testimony does not “so infec[t] the sentencing proceeding as to render it fundamentally unfair.” See Payne v. Tennessee, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring). The limit the due process clause places on evidentiary showings in capital cases is expressed in Gardner v. Florida, 430 U.S. 349 (1977): “any decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice or emotion.” 430 U.S. at 358.

On this point the State again argues that any error was harmless since the proof of mitigation was “relatively minor.” (Answer brief at 62) That judgment, again, is solely for the jury to make. The error argued on this point was calculated to affect the jury’s deliberations, and this court should order a new penalty phase.

POINT EIGHT

THE AGGRAVATING FACTORS IN THIS CASE FAIL TO NARROW THE FIELD OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Appellant will rely on his initial brief as to this point.

POINT NINE

THE TRIAL COURT ERRED IN DENYING RELIEF BASED ON RING v. ARIZONA.

Appellant will rely on his initial brief as to this point.

CONCLUSION

Appellant has shown that this court should reverse the orders of judgment and sentence appealed from, and remand for a new guilt-phase trial on all counts, on the bases argued as Points One, Three, and Four.

If that relief is denied, this court should reverse the murder conviction and remand for a new guilt-phase trial on that count, on the basis argued on Point Two.

If that relief is denied, this court should vacate the sentence imposed below and remand for a new penalty phase, on the grounds argued on Points Three through Seven and Nine.

If that relief is denied, this court should vacate the sentence and remand for reweighing of the aggravating and mitigating factors on the basis urged on Point Eight.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply brief has been electronically delivered to Assistant Attorney General Katherine Y. McIntire, at capappdab@myfloridalegal.com on this 4th day of March, 2015.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan
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