Filing # 43539044 E-Filed 07/05/2016 12:44:52 PM

**IN THE SUPREME COURT OF FLORIDA**

**ZACHARY TAYLOR WOOD,**

Appellant,

v. **CASE NO. SC15-954**

**STATE OF FLORIDA,**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR WASHINGTON COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-1000

ATTORNEY FOR APPELLANT
FLA. BAR NO. 0648825

RECEIVED, 07/05/2016 12:48:35 PM, Clerk, Supreme Court

**TABLE OF CONTENTS**

**PAGE(S)**

## TABLE OF AUTHORITIES

**PAGE(S)**

**CASES**

**IN THE SUPREME COURT OF FLORIDA**

**ZACHARY TAYLOR WOOD,**

Appellant,

v. **CASE NO. SC15-954**

**STATE OF FLORIDA,**

Appellee.
_____/

**REPLY BRIEF OF APPELLANT**

**PRELIMINARY STATEMENT**

Appellant files this reply brief in response to the arguments presented by the state as to Issues I-III. Appellant will rely on the arguments presented in his Initial Brief as to the remaining issues.

## ARGUMENT

### ISSUE I

**THE EVIDENCE IS INSUFFICIENT TO SUPPORT WOOD'S CONVICTION AS A PRINCIPAL TO PREMEDITATED MURDER WHERE THERE IS NO EVIDENCE WOOD INTENDED SHORES' DEATH OR ASSISTED RAFSKY IN SHOOTING HIM.**

Appellant argued in his Initial Brief that the evidence was legally insufficient to support his guilt as a principal to premeditated murder because the evidence failed to establish that Wood intended Shores' death or aided Rafsky in killing him.

In response, the state first asserts on page 24-29 that Rafsky's act of shooting Shores was not an independent act, citing Jackson v. State, 18 So. 2d 3d (Fla. 2009). Wood is not challenging his conviction under the "independent act" doctrine,[1] however, but his conviction as a principal to premeditated murder.

The state also asserts on page 29 that "Wood was a principal to the murder ... as he participated in the events that led to the victim's death," Answer Brief at 29, i.e., binding the victim, attempting to light matches, taking license plates off the Jeep. None of these acts directly contributed to Shores' death, however, and none establish that Wood was a principal to

[1]The "independent act" doctrine arises when one co-felon, who previously participated in a common plan, does not participate in acts committed by his co-felon that "fall outside of, and are foreign to, the common design of the original collaboration." Ray v. State, 755 So. 2d 604 (Fla. 2000). The independent act doctrine is a defense to felony murder.

premeditated murder. To establish that Wood was a principal to premeditated murder, the evidence must show that Wood both intended Shores' death and aided Rafsky in killing him. Tying the feet of the already knocked out and bound Shores, pretending to light matches while tossing them aside, and removing the Jeep's license plates, are acts that do not logically or legally suggest, much less establish beyond a reasonable doubt, intent to kill. And, if there was a plan to kill, why bother tying Shores' feet? Nor did any of these acts aid Rafsky in shooting the victim, a decision made later by Rafsky and Rafsky alone.

The state also asserts that premeditation was proved because "Wood attempted to light [Shores] on fire" and "Wood admitted that he attempted to light matches to set him on fire." Answer Brief at 31-32. These statements are belied by the evidence, even according to the state's own Statement of Facts. When asked about the matches by police, Wood said Rafsky told him to catch Shores on fire, but Wood instead struck each match and then threw each match away as if they would not light. Wood did this because Shores was still alive. Wood testified to the same at trial. There is nothing to refute Wood's statement, and without Wood's statement, there would be no evidence with regard to the matches. Accordingly, Wood never "admitted" that he tried to set Shores on fire, and there is no evidence he tried to do so.

Last, contrary to the state's argument, Jackson is not

controlling on the issue of premeditation. In Jackson, unlike in the present case, there was direct evidence that Jackson planned the murder, i.e., one of the co-defendants testified that Jackson was in charge and planned to kill the victims by injecting them with medicine. Here, there was no evidence Wood wanted Shores dead, intended to kill Shores, or did any act to assist Rafsky in killing him.

**ISSUE II**

**THE DEATH PENALTY IS DISPROPORTIONATE BECAUSE (A) THE EVIDENCE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT WOOD'S MENTAL STATE AMOUNTED TO RECKLESS INDIFFERENCE, AND (B) MORE CULPABLE DEFENDANTS HAVE RECEIVED LIFE SENTENCES.**

***A. Enmund/Tison proportionality***

Appellant argued that under the Enmund/Tison[2] standard, the death penalty is disproportionate for this felony murder because the evidence does not establish that Wood intended or attempted to kill Shores or that he acted with reckless indifference to human life. In support of this argument, appellant pointed out that he did not plan the felonies; did not carry a weapon himself or procure a weapon for use in a felony; did not beat or otherwise incapacitate Shores; had no reason to suspect Rafsky's violent assault or shooting of Shores; and had no time to stop either event, since both happened quickly and without warning. Wood did take action to prevent further harm to Shores, in refusing to burn him and placing a phone nearby so he could call for help after they left. Although Wood tied Shores' feet--at which time he had no reason to expect further violence, as neither he nor Rafsky had firearms--that conduct does not establish reckless indifference.

The state asserts on page 34 that the evidence showed "Wood's active participation in the plan to kill the victim."

[2]Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987)

What evidence?

On page 38, the state asserts that Wood's statement to police "reflected his active participation in the killing of the victim" and that "based on his individual actions, Wood was aware of the plan, actively participated in an attempt to kill the victim, and had a reckless disregard for human life." The state again points to no action by Wood that evinced an attempt to kill or reckless disregard for human life, and as discussed above, Wood actively thwarted Rafsky's initial effort to kill Shores by lighting him on fire.

On page 38-39, the state cites Bush v. State, 461 So. 2d 936 (Fla. 1984), as similar. Bush and several accomplices robbed a convenience store, kidnapped the store clerk, and took her to the woods, where she was stabbed and then shot. This Court determined that Bush was an active participant in the murder, and that his actions, including stabbing the victim, directly contributed to the woman's death. Here, in contrast, Wood did not participate in a plan to kill Shores and took no action that contributed to Shores' death.

On page 39-40, the state attempts to distinguish Jackson v. State, 575 So. 2d 181 (Fla. 1991), asserting that here "they [Rafsky and Wood] stayed and attempted to kill the victim by burning him alive and when they failed, the victim was shot in the head." But "they" did not attempt to kill Shores by burning

him; Rafsky sought to do so, and Wood thwarted the attempt. And it was Rafsky who, without warning, grabbed the rifle from Shores' car and shot him. Wood thwarted Rafsky's initial attempt to kill Shores and did nothing to aid Rafsky in the second attempt. The state also attempts to distinguish Benedith v. State, 717 So. 2d 472 (Fla. 1998), asserting that unlike Benedith, Wood was aware of his co-felon's intent to kill and did nothing to prevent the killing. Mere awareness that a co-felon may kill, without more, does not meet the Tison standard, however. There must be evidence that Wood himself engaged in actions "known to carry a grave risk of death." The Tison brothers brought an arsenal of lethal weapons into the prison to arm murderers in an escape attempt; clearly, lethal force was foreseeable. Here, in contrast, Wood was mud-riding with a friend he had no reason to suspect was capable of murder, and neither had any kind of weapon. Further, Wood did not stand by and watch the killing, as did the Tyson brothers. Wood had no opportunity to stop the killing, as it happened quickly and without warning.

***B. Dixon Proportionality.***

On page 45, the state cites Lawrence v. State, 846 So. 2d 440 (Fla. 2003), as a basis for upholding the death sentence as proportionate. Lawrence and his co-defendant kidnapped, raped, and then killed the female victim, removed her calf muscle, took pictures of the body, and then buried her in the woods. This

Court determined that Lawrence participated in all phases of the murder--the planning, the preparation, the implementation, and the concealment of the crime. Lawrence's handwritten notes established that he planned the murder in a cold, calculated, and premeditated manner. There are no similarities between Lawrence and the present case for proportionality purposes.

The other two cases cited by the state are equally dissimilar. Further, all three cases relied on by the state involved either CCP or HAC, neither of which exists in the present case.

**ISSUE III**

**THE TRIAL COURT ERRED IN APPLYING (A) THE COLD, CALCULATED, AND PREMEDITATED AND (B) AVOID ARREST AGGRAVATING CIRCUMSTANCES VICARIOUSLY TO WOOD WHERE THE RECORD IS LACKING IN EVIDENCE THAT WOOD EITHER INTENDED SHORES' DEATH OR ASSISTED RAFSKY IN THE SHOOTING.**

Appellant argued in his Initial Brief that CCP cannot be applied vicariously to Wood for the same reason premeditated murder cannot be sustained: intent to kill cannot be inferred from any of Wood's conduct. Appellant further argued that the same logic applies to the avoid arrest aggravator: whatever Rafsky's motive in assaulting and then shooting Shores, that motive cannot be applied vicariously to Wood, who neither intended nor assisted in the shooting. The trial court applied the wrong rule of law, and there was not competent, substantial evidence to support the trial court's findings that CCP and avoid

arrest were established as to Wood.

On page 52, the state asserts that "the actions of Wood show a cold, calculated, and premeditated nature and participation in the murder of the victim." What actions? The state again asserts that Wood "help[ed] further the murder of the victim," but points to no action by Wood that aided Rafsky in killing Shores. The state concedes that Wood refused to light the victim on fire when ordered by Rafsky to do so, but asserts that "despite knowing that the co-defendant's intention was to kill the victim, Wood did nothing to prevent the killing." Answer Brief at 53. In short, the state argues that Wood's failure to prevent Rafsky from shooting Shores is sufficient to establish the CCP aggravating circumstance to Wood. However, to properly find this aggravator, the evidence must show beyond a reasonable doubt that Wood cooly and calmly determined that he and Rafsky would kill Shores; that Wood carefully planned and calculated the manner in which the killing would be accomplished; and that Wood's premeditation to kill was greater than that required for ordinary first-degree premeditation. There is no evidence that Wood planned the murder at all, however. Wood testified that he refused to go along with Rafsky's idea to burn Shores, and shortly thereafter, Rafsky retrieved a gun from Shores' car and shot him. The record does not otherwise establish Wood's knowledge of a plan to kill, thus precluding a finding of CCP

beyond a reasonable doubt. See Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

The state cites Carr v. State, 156 So. 3d 1052 (Fla. 2015), as similar, but Carr was part of the plan to kill the victim, had even talked earlier about finding someone to kill the victim, and actively participated in the murder by suffocating and then attempting to break the victim's neck.

The state also cites Cave v. State, 727 So. 2d 227 (Fla. 1998). Cave was Bush's co-defendant in the robbery, kidnapping, and murder of a convenience store clerk, discussed above. See Bush. The Court upheld CCP and avoid arrest because there was competent substantial evidence that the kidnapping and murder were planned to eliminate the only witness to the robbery. Further, Cave was a ringleader in the entire criminal episode: Cave had the gun during the robbery, led the victim out of the store at gunpoint, kept her in the backseat for the long ride out to the scene of the murder, and took her out of the car before handing her over to Bush and Parker, who knifed and shot her.

With respect to the avoid arrest aggravator, the state argues that Wood's removal of the Jeep's license plates and knowledge that Rafsky had outstanding warrants prove Wood's "intent to dispose of the victim in order to avoid arrest." Answer Brief at 58. Removal of the license plates does not logically prove that Wood knew Rafsky was going to shoot Shores,

much less that Wood himself intended Shores' death. Furthermore, Rafsky's motive cannot be imputed to Wood when Wood refused to participate in the killing and did nothing to further it. The state must prove that Wood himself was guilty of the aggravating circumstance beyond a reasonable doubt. See Omelus v. State, 584 So. 2d 563 (Fla. 1991)(HAC aggravator cannot be applied vicariously). The state also argues that "not once did Wood try to stop Rafsky or to save the victim's life." Answer Brief at 60. As discussed above, Wood had no opportunity to stop Rafsky, as the shooting happened quickly and without any warning. Furthermore, Wood's inability to stop Rafsky does not make him responsible for Rafsky's actions or transfer Rafsky's motive to Wood.

## CONCLUSION

Appellant respectfully asks this Honorable Court to reverse and remand this case for the following relief: Issues II and V, vacate the death sentence and remand for imposition of a life sentence; Issues III & IV, vacate the death sentence and remand for resentencing.

## CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Berdene Beckles, Assistant Attorney General, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapptlh@myfloridalegal.com, and by U.S. mail to appellant, Zachary Wood, #Q30086, F.S.P., P. O. Box 800, Raiford, FL 32083, on this 5th day of July, 2016.

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Nada M. Carey
NADA M. CAREY TFB #0648825
Assistant Public Defender
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
Nada.Carey@flpd2.com
(850) 606-1000
ATTORNEY FOR APPELLANT