IN THE SUPREME COURT OF FLORIDA

TERRY SMITH,

Appellant,

v. **CASE NO. SC11-1076**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTH** JUDICIAL CIRCUIT,
IN AND FOR **DUVAL** COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. **0648825**
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
nada.carey@flpd2.com
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

CONSTITUTIONS AND STATUTES

IN THE SUPREME COURT OF FLORIDA

TERRY SMITH,

Appellant,

v. **CASE NO. SC11-1076**
L.T. CASE NO. 09-CF-4417

STATE OF FLORIDA,

Appellee,
_____/

STATEMENT OF THE CASE[1]

On June 5, 2007, Desmond Robinson, Berthum Gibson, and Keenethia Keenan were shot to death in an attempted robbery during a drug deal at 5533 Ahmad Drive, Jacksonville, Florida.

Two years later, on May 21, 2009, the Duval County Grand Jury indicted appellant, Terry Smith, on three counts of first-degree murder and one count of attempted armed robbery. R1:18-20.

Smith was tried by jury before Duval County Circuit Judge Adrian G. Soud on February 28-March 4, 2010. Smith's defense at trial was that he was not at 5533 Ahmad Drive that night, and that the witnesses who testified against him did so to obtain leniency in their own cases. The jury found Smith guilty of premeditated and felony murder in the deaths of Gibson and Keenan, guilty of felony murder in the death of Robinson, and

[1] References to the sixteen-volume record on appeal are designated by "R," the volume number and the page number.

that Smith possessed and discharged a firearm causing death or great bodily harm on all counts. R4:735-742.

The penalty phase was held March 11, 2011. The jury recommended the death sentence for the deaths of Gibson (by a vote of 8 to 4) and Keenan (by a vote of 10 to 2) and life imprisonment for the death of Robinson. R5:878-880.

A Spencer hearing was held on April 15, 2011. R9.

On May 12, 2011, the trial court followed the jury's recommendations and sentenced Smith to death for the murders of Gibson and Keenan and to life without the possibility of parole for the murder of Robinson. As to the murders of Gibson and Keenan, the trial court found two aggravating circumstances: prior violent felony, based on the contemporaneous murders (great weight), and robbery/pecuniary gain (great weight). In mitigation, the trial judge found (1) Smith's age, 19 (moderate weight), (2) mental mitigation (moderate weight); (3) that Smith loves his children and their mothers and they love him (some weight); (4) that Smith is a good brother to his siblings (little weight); (5) that Smith took care of his sister's seven children when she worked at night (moderate weight); (6) that Smith is dependable (some weight); (7) that Smith was a good employee and would do well in a structured environment where he would be required to show deference to authority (slight weight); (8) that Smith could be rehabilitated and make positive

contributions to society (little weight); (9) That Smith grew up in a ”terrible” neighborhood with a high crime rate and low graduation rate (some weight). The sentencing order is attached herein as Appendix A. R6:1037-1063.

Notice of appeal was timely filed June 9, 2011. R6:1067.

STATEMENT OF FACTS

Guilt Phase

On June 5, 2007, Allegra Muller, Keenethia Keenan, Desmond Robinson, and Berthum Gibson returned to Robinson's residence at 5533 Ahmad Drive after a trip to Atlanta. Muller, 25, testified that she and Keenethia had met Gibson and Robinson several months earlier, and Keenan and Gibson had struck up a romantic relationship. That night when they got back to Robinson's house, Muller was tired and went to sleep in the back bedroom. Sometime later, Muller was awakened by "a lot of shooting." Muller couldn't tell how many guns were being fired but it sounded like "chaos." Muller hid in the closet for about 10 minutes. When the gunfire stopped, Muller looked into the hallway and saw Robinson lying on the floor. She didn't see Keenan or Gibson. She locked the bedroom door, climbed out the window, and knocked on some neighbors' doors, but no one responded. While outside, Muller saw a motor scooter in the driveway. Muller jumped the back fence and called the police. R12:593-615.

Detective Hamilton arrived just before midnight and entered the house through the open back door. Robinson was dead on the kitchen floor, and drugs were sitting out on the kitchen table. Hamilton found Gibson and Keenan in the southeast bedroom. Keenan was dead, but Gibson was still alive, kneeling against

the bed, with a rifle in one hand. Rescue came and took Gibson to the hospital, where he later died. R12:585-592.

Detective Kicklighter, the evidence technician, arrived after Gibson had been transported from the scene. Kicklighter testified the back burglary bar door open, with the keys in the inside lock. R13:775-778. Robinson lay face down between the kitchen and living room, with his upper body in the living room. A 9 mm Glock automatic handgun was in the palm of his right hand. R13:780, 786. The magazine held 31 of a possible 32 rounds. The other round had been ejected out of the port, ready to be fired. No shell casings from the Glock were found on the premises. R13:786. Sitting out on the dining room table was powder and crack cocaine, along with drug paraphernalia. On the counter to the right of the sink were stacks of money. R13:777-783; State's Exhibit 1, attached herein as Appendix B.[2]

Keenan's body was in the left corner of the southeast bedroom, facedown. R13:777. The rifle, which had been removed from Gibson's hand before he was taken to the hospital, was on the bed, with rounds in the clip. Some blood spatter was on the back wall. On the dresser in open view were currency, car keys, and a wallet. R13:788-790.

[2] State's Exhibit 1 is housed at the Florida Supreme Court. Appendix B is an iphone photograph of that exhibit.

Kicklighter testified the ballistics evidence, comprised of bullet strikes and shell casings, indicated that gunfire was going to and from the hallway. R13:786. There were bullet strikes in the kitchen (to the refrigerator and wall behind it), dining room (to the wall behind the dining room table), living room (walls), and hallway (both sides of wall). R13:777, 785.

Thirteen 7.62 shell casings from the rifle were recovered from the southeast bedroom and the hallway leading from the living room into that bedroom. Several were on the bed in the bedroom, three were on the floor by Keenan's body, and the rest were in the hallway. R13:788, 797.

Eleven 10 mm shell casings were found in the kitchen/dining and living room areas. Kicklighter testified a 10 mm is a "fairly large caliber" weapon. R13:792. None of the 10 mm shell casings were recovered anywhere down the hallway that led into the back bedroom. R13:796-797. Eight of the 10 mm shell casings were in the kitchen/dining area and three were in the living room: Two on the kitchen floor)(State's Exhibit 29); two under the dining room table (State's Exhibits 34-36); one by the chair that was against the wall in the dining area (State's Exhibit 32-33); one behind the kitchen sink (State's Exhibit 41); one on the dining room window behind the table (State's Exhibit 42); one on the dining room table, in an open book (State's Exhibit 38); one on the living room carpet to the right

of Robinson's wrist, near the threshold between the dining and living rooms (State's Exhibit 37); one on the living room sofa (State's Exhibit 40); and one on the carpet in the living room (State's Exhibit 39). R13:791-796.

David Warniment, the firearms analyst, said the thirteen 7.62 cartridge casings were all fired from the same weapon and are typically fired out of rifles, an AK-47 or an SKS, a semiautomatic version of a Russian carbine. R14:974-975. The eleven 10 mm shell casings also were fired from the same gun, a Glock semiautomatic, such as the Glock Model 20. R14:977.

The two bullets found at the scene and one recovered from Robinson's head at autopsy were consistent with 10 mm 40-caliber bullets, but Warniment could not determine if they were fired from the same firearm. Two other bullets were consistent with 7.62, or 30-caliber bullets, and one fragment was of no value. R14:979-981. A 10 mm round is at the lower edge of the large calibers. R14:986.

Terry Smith's left palm print was found on the bottom corner of the right side of the Plexiglas portion of the back burglar bar door. R15:1058, 1062, 1065. Richard Kocik, the latent print examiner, testified the print could have been there days, weeks, or even years. R15:1067-68, 1072. Robinson's prints were on the beakers located on the table. R15:1055.

Dr. Giles, the medical examiner, explained the autopsy results. Desmond Robinson had scrapes on his face, consistent with falling to the floor, R14:824, and seven gunshot wounds, to the left elbow, the right arm, a superficial wound to the back, the lower right back, the right buttock, the left abdomen, and the left lower back of the head. The wounds to the lower right back and head were fatal. The wounds were not all back to front. The one entering the abdomen was slightly at the front. Dr. Giles could not tell if the arm shots were to the front, as that would depend on where the arm was, but he thought it unlikely the arm shots were to the front because if the arm was in front of the body, the bullet likely would have damaged the body, too. R14:823-835.

Berthum Gibson died of a single gunshot wound to the top of the abdomen, resulting in slow internal bleeding. R14:840-842. Keenethia Keenan died of a single gunshot wound to the left breast and through the heart. She could have functioned for a few minutes, at most. R14:837-839.

All the wounds were caused by medium to large caliber bullets. The weapon used likely was a medium to large caliber handgun, and definitely was not a small caliber, high velocity assault weapon. R14:834, 838, 841.

On June 8, 2007, three days after the shooting, Sergeant Michael Paul received a phone call from Ray Dukes. Dukes told

Paul that his son, Breon Williams, might have some information about the murder on Ahmad Drive. Paul was unable to locate Williams at that time. R13:763-765.

In January 2008, Detective Robert Nelson[3] took over the investigation. At that time, Terry Smith was a person of interest based on the palm print identification from the crime scene. In April 2008, Edward Bud Haney told Nelson that Terry Smith had made admissions regarding the Ahmad Drive murders. 15:1084-1086. On January 11, 2009, Nelson located Breon Williams in the Leon County Jail, gave him his rights, and questioned him about the murders. Breon eventually told Nelson he and Smith went over there to buy drugs, Smith pulled a gun and shot Desmond, and Breon ran. Nelson spoke to Ulysses Johnson a couple of days later. Ulysses told Nelson that he, his brother, Raylon (Ray-Ray), and Jonathon Peterson picked Terry up after he called asking for a ride, and Smith told them he had shot some people. Nelson spoke to Ray-Ray the next day and to Peterson a few days later. R15:1087-1100-1101.

At trial, Breon Williams, 23, said he knew Terry Smith from the neighborhood. Desmond Robinson was a good friend, and he and Breon were both drug dealers. Breon had bought drugs from Robinson many times but had never taken Terry with him. Terry

[3] Nelson was a detective at the time but was now a bailiff. R15:1083.

called that night, looking for drugs, and Breon said Terry could go with him to Desmond's house. Breon picked Terry up at his mother's house on his scooter, parked the scooter in Desmond's driveway, and knocked on the back door. Desmond unlocked the door and let them in. This was around 11 or 12. R12:623-633. Breon walked into the kitchen over by the sink. Berthum Gibson was sitting at the table with a girl Breon didn't know on his lap. Cocaine was sitting out on the table. Terry was standing in the kitchen in front of the refrigerator. As Breon was counting his money, he heard Terry say, "Give it up," and then heard gunshots. Breon ran out the door and kept running. As he ran out the door, Terry was shooting Desmond, who was standing directly in front of Terry. Breon saw Desmond fall as he ran out. The gun was a black handgun. The door was locked but the key was still in it, so Breon had to unlock it to get out. R12:634-641. As Breon ran, he continued to hear gunfire, about ten shots. He did not see what happened to Gibson or the girl before he ran out. He left his money there. He fled on foot to Breve Drive, where he ran into Kirk, from the neighborhood. He told Kirk that Desmond had been shot and asked Kirk to get his scooter, which Kirk did. Breon then left the area. He saw Terry the next day, and Terry told him not to say anything about it. R12:642-645. A few days later, Breon told his father, Ray Dukes, and another person from the neighborhood, Justin Harper,

about the shooting. R12:670. In January 2009, Breon was arrested for possession of marijuana in Tallahassee. Detective Nelson visited him in jail and asked him about the murders. For two hours, Breon told Nelson he didn't know anything and repeatedly asked to be taken back to his cell. They kept talking to him and told him they knew about the scooter and other things. Eventually, he told them what he knew and gave a written statement: "I picked up Terry to go to Desmond's house to buy some drugs. When we got in the house, I was then counting my money to get something. That's when I heard Terry tell Desmond to give it up and began shooting and I ran out the back door and I ran around the neighborhood and told Kirk to get the scooter." 12:646-650. Breon said he knew Ray-Ray from the neighborhood but didn't know Ulysses Johnson, Jonathan Peterson, or Edward Bud Haney and had never talked to any of them about what happened. 12:672-674.

Kirk Brewer lives in the neighborhood and had known Breon for ten years. Kirk was standing on the corner of Mahalia and Breve when Breon walked up and asked him to get the scooter from Desmond's house. Kirk rode his bicycle to Desmond's and parked across the street by a hedge. He got the scooter but couldn't start it, so he walked it to Breon. He only learned later about the murders. When police first came to talk to him, he said he wasn't there. In January 2009, he told the truth. During the

questioning, the police told him he wasn't in the house and that Breon told him to get the scooter. He didn't recall being told he would be charged with tampering or being yelled at, but he remembered telling the police seven times that he didn't want to talk to them anymore. He finally asked them what they wanted him to say in order to let him go home. They said if he told the truth, they would let him go. He had Nelson write down that he could go if he said what they wanted to hear. R13:730-744.

Anthony Nixon lived across the street a few doors down from 5533 Ahmad Drive. Nixon was in his carport that night and could see the house. He heard multiple gunshots from two different types of guns coming from the house. He heard a small caliber multiple times and then heard a larger caliber pistol multiple times. He had heard gunshots in the neighborhood before. Ten minutes of silence followed the gunshots. Nixon then saw a screen pushed out of the window, followed by a woman, who ran up and down the sidewalk, knocked on some doors, and then went north. Nixon then saw Kirk come down the street on his bicycle, park the bike across the street from where the gunshots had come, go to the back, and come out with a scooter. Unable to crank it up, he pushed it away. Police arrived 35-40 minutes after the gunfire. Nixon told police what he had seen a year later. R13:721-728.

Justin Harper, 21, had lived in the 45th and Cleveland area all his life and knew Breon from the neighborhood. Two days after the murder, Breon told Justin he had taken a guy named Terry to the house to buy drugs, Terry tried to rob the people, and Breon had run out the back door. Justin didn't know the Terry he was referring to. A year or so later, Justin told the police he knew nothing about it. When he talked to them again, and they told him he wasn't in any trouble, he told them the same thing he said in court. R13:746-750.

Breon's father, Ray Dukes, knew Terry Smith from the neighborhood and had worked with Terry. Breon called Dukes several days after the murders and said he and Terry rode to the house on a scooter to buy narcotics. They were in the kitchen and Breon was counting the money when he heard Terry say, "Give it up." Gunshots started, and Breon ran out the back door. Dukes later told Detective Paul there was an anonymous tip that his son had information about the case. He didn't mention Terry Smith to Detective Paul. R13:753-762.

Ulysses Johnson, 27, grew up in the same neighborhood as Terry and had known him eight or nine years. Ulysses' brother, Raylan Johnson, 23, was closer in age and closer friends with Terry. Ulysses, Raylon, and another friend, Jonathan Peterson, were at home that night when Terry called Ulysses on his cell phone, hysterical, and asked him to come get him. Ulysses,

Raylan, and Peterson picked Terry up near George Washington Carver School, at Cleveland and 45th, which is close to 5533 Ahmad Drive. Ulysses drove, with Raylan in the front passenger seat, and Peterson in the back. They got there in five minutes. R14:845-853. Terry got in the back, acting "real paranoid," i.e., moving around, nervous. Terry said he thought he had killed some people and he didn't know what he was doing and he was real nervous about it. He kept repeating, Man, I think I shot three people. He said when he got to the house, they opened the door. The first dude came, and he shot him, and then he shot the other people that were in the house. And then he said he heard somebody else shooting in the back and he ran. He never mentioned Breon. Ulysses couldn't hear the entire conversation because people were talking at the same time. R14:854-855. On the way back to the house, Terry said he wanted to go back but Ulysses told him to get out if he wanted to go back. Ulysses returned to his house and told Terry to leave. When Terry got out of the car, Ulysses saw that he had what looked like a black Glock. Ulysses went inside to his room, while the other three stayed outside in the front yard, talking. R14:856-858, 868. Ulysses didn't see any of the three of them come inside, go in the back yard, or bury a gun or burn clothes. R14:871-872. He didn't see the gun again until his brother sold it in the front yard. Raylon was outside with Kodi Harris, and

Kodi called someone to come buy the gun. The gun was wrapped in a towel, which Ulysses saw handed to someone else. Peterson and Raylon were there when the gun was sold but he didn't think Terry was there. R14:875-877. On June 15, 2007, the police came to Ulysses' job and asked him to come down to the station. He went but denied knowing anything about it. After the interview, he went home and told his brother he got interviewed by police but didn't tell him what he said. Raylon got interviewed the next day. The second time police came and got Ulysses, they told him what they had learned from their investigation, and that he could be arrested if he didn't tell the truth or give them additional information. Ulysses eventually wrote and signed a statement, saying, "He said he had shot three people, two dudes and a girl." Ulysses said he had never met Breon Williams and was not close friends with Terry. R14:860-864, 873-874. Ulysses testified that Terry said he may have touched the door but conceded he had not mentioned this in his first interview with police, sworn statement, second interview, or deposition. R14:878-880. Ulysses was never charged in the case, but his brother, Raylon, was charged with accessory after the fact. R14:881.

Jonathan Peterson had known Terry for a year through his close friend, Raylon. Ulysses answered the phone that night, then passed it to Raylon. Raylon talked briefly, and they

picked Terry up off 45th, across from Hamilton Park. Terry got in the back with Peterson, nervous and fidgeting. After they pulled off, he told them to go back to the house, he'd left some dope on the counter or table and possibly touched the door. Later, he said he had to shoot them niggers. At some point, he pulled a gun from his waistband. They refused to go back to the house and went home. R14:892-898. Raylon and Terry went to the rear of the house, talking. Peterson and Ulysses went to Ulysses' room to sit down and talk. At some point, another man came in and went to the back and talked to Raylon and Terry. Peterson heard Terry tell the third man, "Keep an eye on it with me, keep it real with me, bro," which Peterson took to mean the person knew what happened. The third person left. At some point, Peterson went outside and talked to Terry, tried to keep him calm. Raylon came out with a bag containing the clothes Terry was wearing. They went in the back yard and buried the gun, which was wrapped in a t-shirt, then threw the clothes in the barrel and burned them. Terry left that night. 14:899-901. A few days later, some people came over and Raylon sold them the gun. It was a 10 mm, which Peterson had seen on Terry previously. Peterson, Ulysses, Ray-Ray, and Terry were all there. Kodi brought the person to buy the gun. Terry talked about the robbery. He said he and someone else went in the house. He shot Desmond in the kitchen and shot a second man in

the living room area. Somebody else came through the hallway returning fire, and they exchanged shots. He possibly shot a third person. R14:901-903, 931-932.

Peterson had been in jail since January 2008, charged with second-degree murder and possession of firearm by a convicted prison. He was facing life in prison on the murder charge. In January 2009, he was contacted by Detective Nelson. Initially reluctant to talk, he eventually told him what he knew and gave a written statement: "Terry got in the car after we went and picked him up. He said he had touched the door and that he left something on the table, to go back. He had a gun on him when he got in the car, also. When we got back to the house, he changed clothes and told the third man to get rid of the gun. About 30 minutes later he left. A week later he told me that he shot Bert and Desmond. He said Desmond opened the door and he shot him in the kitchen. Then he said he shot Bert in the living room. He said somebody came through the hallway shooting back at him in the house. He said he then left the house." R14:904-908. Peterson said he did not know Breon Williams. He pled guilty to lesser included charges of two counts of manslaughter with a firearm and possession of firearm by convicted felon and was facing 3-25 years, as part of his plea agreement to testify truthfully against Smith and against Bud Haney and Donnell Carter. R14:909, 922. He had also agreed that if he failed to

testify to the satisfaction of the state attorney, his plea would stand but not the negotiated disposition. R14:924.

Walter Dumas, 24, testified he was currently in jail for possession of cocaine and violation of probation. Dumas said Kodi Harris told him in June 2007 that Raylan Johnson was selling a gun. Kodi took Walter to Raylan's house, where Walter bought a Glock 20 for $200. Raylan said the gun was his. Other people were there but Walter didn't know them. A friend borrowed the gun three weeks later and never returned it. Walter initially denied buying the gun when interviewed by police. 14:944-951.

Edward Haney, 22, was currently in prison. Haney was 14 when he met Terry, and Terry was one of his best friends. Haney also was friends with Raylan in June 2007. Haney was in a juvenile program on June 5, 2007. He was released June 15, 2007, and returned to the neighborhood. He saw Terry and Raylon that day, and Ray-Ray bragged that he had killed some people at Ahmad Drive. Terry didn't say anything about it. Haney didn't believe Ray-Ray and thought Ray-Ray was trying to impress him. R15:1018-1022, 1038. Later, Ray said he had picked Terry up from the murder scene. R15:1023. Ray also said later that he didn't do the shooting but was there for it, that he went with Terry, and Terry started shooting. R15:1041. In April 2008, when police were looking for Haney in connection with another

shooting, Terry let Haney hide out at his house. When Haney came on the news as a wanted person in that shooting, Terry told Haney he should have been smarter, shouldn't have gotten caught, and that he, Terry, killed three people and didn't get caught. He told Haney he went to the house on a scooter with a dude named Breon. Breon was going to buy drugs. A dude named Desmond, a dude named Bert, and a female got shot. Breon got scared and tried to leave. Breon kept dropping the keys because he was scared but eventually got out of the house. Terry said he used a 10 mm gun. R15:1023-1028.

When Haney was arrested on April 15, 2008, Detective Nelson questioned him about the Ahmad Drive murders, and Haney told him what he knew. By that time, Haney and Ray-Ray had had a falling out. On Oct 28, 2010, Haney pled guilty to two counts of racketeering, one count of shooting deadly missiles, and one count of possession of a firearm by a convicted felon. He was sentenced to 30 years in prison on the racketeering and to 15 years in prison on the other two charges. He also was sentenced to 40 years with a 25-year minimum mandatory on an attempted first-degree murder. R15:1029-1032.

Haney said he had contact with Terry on Monday of this week, when he came back for the trial, and Terry had told him to lie, to say he had said Terry committed the murders because the police told him that Terry said he, Haney, was responsible.

Haney said Terry also told him to say Raylan killed the people. R15:1033-1034.

Officer Nelson questioned Terry on April 1, 2009, at the Sheriff's Office, after reading him his rights. The interview was recorded and played for the jury.[4] R15:1107-1109. In the first portion of the interview, the detectives told Terry they could prove that Terry was at the house and shot three people inside and that the crime could result in life imprisonment or execution. They told him that unless he confessed, he would be portrayed as a cold-blooded animal that does not care about human life. Terry repeatedly denied any involvement in the crime. R15:1111-1165. The detectives then drove Terry to 5533 Ahmad Drive. Terry said he had never been there and asked the detectives to take him to his neighborhood and to his house to see it for the last time.[5] R16:1204-1207. Back at the station, the police continued the questioning, and Terry repeatedly denied his involvement in the shooting. Terry said he had never seen Desmond, Bert[trum Gibson], Breon, or Peterson and that Peterson was a crackhead. R15:1199. After the interview, Nelson arrested Terry for the murders. Nelson testified that as

[4] The first portion of the interview was played by the state during its examination of Detective Nelson. The defense played the remaining portion of the interview during its cross-examination of Nelson.

[5] The transport video also was played for the jury. R16:1204-1207.

he walked him to the jail, Terry said he would talk to them if they took the death penalty off the table. R16:1208-1209.

The defense published the remaining portion of the interrogation. In this portion of the interrogation, Terry told the officers 43 times that he was ready to go back to his cell, to take him back to his cell, or that he was done talking. The detectives told him they would take him back when they were ready and urged him to confess. He continued to deny any involvement in the crime. When they asked if Desmond tried to shoot him and if the young lady tried to shoot him, he said he wasn't there. R16:1228-1295.

On cross-examination, Nelson said if a suspect says, "take me to my cell, take me to my cell," but continues answering questions, Nelson continues the questioning. If a suspect says, "take me to my cell," and Nelson then asks another question, and the suspect answers back, Nelson interprets that to mean the suspect wants to keep talking. Nelson stops the questioning only if the suspect says, "I do not wish to talk to you, I wish to have a lawyer present." R16:1220-1223. Nelson agreed that he continued questioning Breon Williams when Breon asked him 5 times in 45 minutes to take him back to his cell and continued questioning Kirk Brewer after Kirk said he was done and didn't want to talk anymore 7 times. Nelson said he put on a wire on

someone four different times to try to get Terry to talk about the case but Terry said nothing about it. R16:1296-1297.

Nelson arranged for Peterson and Terry to be in the same room on February 24, 2009. Nelson monitored the conversation and concluded they clearly knew each other. R15:1106.

Raylan Johnson was arrested for three counts of accessory after the fact of murder. R16:1305.

Leonard Patterson testified for the defense. Patterson said he spoke to Desmond on the phone late in the late evening the night he was killed and then went to his house, arriving 10 minutes after the phone call. Patterson drove into the back yard and saw the back door open, which was unusual. Inside, he noticed smoke and smelled gunpowder. He didn't touch anything. When he saw Desmond lying on the floor, he backed out of the house and called Desmond's wife, who called the police. Patterson returned to the scene and spoke to the police. A scooter he had seen the first time he arrived was no longer there. R16:1336-1344.

Penalty Phase

Jeff Rodgers is the owner and operator of a McDonald's franchise and a retired Broward County Sheriff's detective (20 years). Terry worked for Rodgers' franchise from June 2005 to June 2006 on the production line. Rodgers testified that he had daily contact with Terry and that Terry was an "exceptional

employee." Terry was "attentive, well-groomed, paid attention to detail, was always on time, quiet, stayed to himself." He was respectful to the supervisors. On a scale of one to ten, Rodgers rated Terry a ten and would have hire him again, if that was possible. In Rodgers' opinion, Terry has the potential for rehabilitation because he was an "exceptional kid" who followed instructions well and was very cooperative. R19:1581-1589.

Paula Ravnell is the general manager at Burger King and was the store manager at the McDonald's where Terry worked in 2005-2006, supervising 40-50 people. Terry worked for Ravnell for six to eight months, and she had contact with him five days a week. He was a "great employee," "very responsible," "very respectful." Terry had no problems with fellow employees and was protective of Ravnell and the other employees. Ravnell believed Terry could be a good example to others, that he could learn from his mistakes and teach others not to make the same mistakes. R19:1591-1595.

Tommie Smith, Jr., 27, is Terry's older brother. The family included their mother, Barbara Smith, their dad, Tommie Smith, Sr., a younger brother, Tyree Smith, and a sister, Jannic Campbell. Their mom died in October. Terry had a close relationship with his mom, as did all the children. Terry was respectful to his parents. All of them were. If disrespectful, they would have gotten chastised for it. Tommie graduated from

high school but Terry dropped out in 9th grade. Tommie had a good relationship with Terry. Terry went everywhere Tommie went. Tommie walked Terry to school and picked him up from school. When their mother went to work, Tommie looked out for Terry. Terry was outgoing when he was playing outside or doing sports. Inside, when people were sitting around talking, he was quiet. When their sister moved out, Terry helped her with her children, sometimes spending the night. He helped feed them, change their diapers, dress them, do their hair. Terry also helped his friends. He was close to Ms. Latimer, a family friend they called "auntie." Tommie loved his brother and would continue a relationship with him and visit him if he were sent to prison. R19:1591-1595.

Tyree Smith, 19, works at Jaxport, getting cars off the train. Tyree graduated from high school, where he was active in football, track, and basketball. Tyree testified that Terry supported his activities and motivated him to stay in school and stay off the streets. When Tyree was 16, he decided to move out of the house, but Terry told him to stay home, that he was moving too fast. Terry also told him to stay in school, to study hard, to keep his grades up. Terry told him to choose wisely who he hung around with and not to hang around a bad crowd. Terry was respectful towards their mother and did chores around the house. Terry was devastated when she died. Terry

was protective of Tyree as a younger brother. When bigger, older football players hit Tyree too hard, Terry told them to ease up on him. Terry treated his wife, Frednika, well. He watched his sister's children all the time. Tyree loves Terry and would visit him in prison. R19:1598-1601.

Frednika Smith, 28, is a nurse assistant at Brooks Rehabilitation Center. Frednika married Terry on June 2, 2008. She was 25, he was 19. Terry treated her children, twin boys, 5, and a daughter, 2, like they were his own kids. He took care of them when she worked, was there for them, and taught her daughter how to be a lady. Terry kept the house clean, cared for the children, put them to bed, bathed them, got them up in the morning, and cooked breakfast for them. Terry also had a daughter of his own, Aliyah, who stayed with them most weekends. Terry loved his kids and was very protective of them. He was a good husband and acted older than his age. He was really there for her and her kids. He had a close relationship with his mother, talked to her daily, and checked on her. Frednika had a good relationship with Jovanni, Aliyah's mother. She and Jovanni were friends and were there for each other and their kids. If Terry was sent to prison, Frednika would visit him and would foster a relationship between him and his son, Terry Smith Jr., who was born after Terry was arrested. R16:1602-1609.

Crystal Richardson, 20, Frednika's sister, used to live with Terry and Frednika. Crystal testified that Terry helped out with the kids while Frednika worked. He fed them, played with them, and was kind to them. Terry was respectful to his in-laws and they liked him. R19:1610-1611

Jovanni Stovall, 23, has worked at McDonald's since 2005. Jovanni met Terry there in 2006. Her first impression of Terry was that he was "quiet." They had a child together, Aliyah, but decided together not to become a family unit at that time. Terry supports Aliyah financially. He loves Aliyah a lot and helped care for her. He kept her while Jovanni worked and spent a lot of time with her on weekends. He kept her a lot because he didn't go out much. Jovanni taught Terry how to bathe her, change her diaper, feed her, and he was eager to learn. Jovanni has visited Terry at the jail and has taken Aliyah to visit him. Terry remains her best friend. R19:1613-1618.

Angela Crosby, 46, Jovanni's mother and Aliyah's grandmother, works for the Duval County School Board. Ms. Crosby said Terry was a loving father to Aliyah and was there at her birth. Terry is respectful to her and her daughter, and has provided for his daughter as best he could. R19:1619-1620.

Jannic Watson, 30, is Terry's sister. Jannic has seven children: Dreshan Ward, 14, Christopher Ellison, 13, BriHan Ellison, 12, Ashanti Campbell, 8, Jaiken Ellison, 7, Joikerrah

Smith, 7, and Vallise Watson, 3. She had first child at age 15 and moved out of the house at age 16. Terry came to live with her when he was 15 and she was working most nights. Terry was responsible for the children while she worked. He helped feed them, bathed them, got them in bed, made sure they were up for school in the morning, and changed their diapers. He did everything for them that a father would do. R19:1622-1623. He did this for a year and a half, until he got married, and was especially close to her oldest son. He never complained. He also helped pay the bills. The utility bill was in his name, and he paid that. He gave them things for their birthdays and made sure they had clothes and shoes when she couldn't get them. He was very dependable and helped her out when she needed him. Jannic loves her brother, said he was "my heart." R19:1625.

Tommie Smith, Sr., 54, is Terry's father. Terry was born April 20, 1988. Mr. Smith was working as a ready mix concrete truck driver at the time, about 70 hours a week. He was mostly out of the house earning a living for the family. His wife, Barbara, was the primary caregiver, but she, too, worked. Terry was always respectful to him and his wife. Terry was very close to his mom, all the kids took care of their mom. They were disciplined with a belt when they did wrong, or were spanked, or had their advantages taken away, wouldn't let them go outside, watch TV, that kind of thing. Mr. Smith had seen Terry with his

daughter, Aliyah. He always had Aliyah when he could get her and took good care of her and loves her very much. Terry dropped out of school in 9th grade. He got in some trouble in school and got suspended. Mr. Smith visited Terry when he was staying with his sister and taking care of her kids. Mr. Smith said it was hard as a working father, going to work early, coming home late. They were not a wealthy family. Terry got good grades in elementary school but developed behavior problems in junior high school and got into fights a lot. He left home at age 18. Sometimes teenagers can be impulsive and immature and don't weigh the consequences of their actions. Sometimes they are reckless. They have a mind of their own. Mr. Smith loves his son. R19:1626-1638.

Keturah Latimer is married to Thomas Latimer, and has four living children, one deceased. Mrs. Latimer knew Terry's parents before he was born. Her husband and Terry's father were best friends. They had cookouts together and went to each other's homes. Terry was like a cousin to her son, who was murdered on Sept 12, 2001. Everyone took it hard, including Terry. Terry was always there to help her out. R19:1638-1642.

Spencer Hearing

Christopher Mew is a resource security officer at Grand Park Alterative School. Mew knew Terry and counseled him at Grand Park when Terry was in the eighth grade and 14 or 15 years old. Mew said Terry has always been a loner. He's not very big even now, and at Grand Park, he was very small and quiet. He kept to himself, but kids pushed him around and picked on him. Mr. Mew kept Terry around him a lot to help him get by. Mew said Terry grew up in a "terrible" neighborhood Terry, 45th Avenue B. The crime rate is bad, and only two percent of the kids from that neighborhood graduate. R9:1558-1559. The kids go to inner city schools, and if they can't pass the FCAT, they go back to the neighborhood. R9:1561. Mew said he had a good talking relationship with Terry. Terry was "trying to keep his head on right," and was thinking about being a merchant seaman. He had a lot of temptations though. R9:1562. Grand Park was for students who have disciplinary problems in their neighborhood school. R9:1563.

Dr. Stephen Bloomfield is a licensed psychologist, specializing in clinical and forensic psychology. Bloomfield received his doctorate from the University of Massachusetts and became licensed in 1984. He worked with troubled kids in youth centers and with street gangs in New York City and Brooklyn. He was chief administrator for children, adolescent, and substance

abuse services in Western Massachusetts for the Department of Mental Health. He was the primary consultant to the Massachusetts Department of Social Services on high profile juvenile and dependency cases. He moved to Florida and began providing forensic services. He has been active in professional associations and has received numerous awards both state and nationally. He has taught at the university level and is a member of the Board of Psychology. R9:1563-1565.

Dr. Bloomfield met with Smith eight different times, interviewing and administering various psychological tests. Bloomfield also reviewed four sets of documents: Administrative documents (appointments, court orders), Smith's educational records, documents that Bloomfield generated, including psychological testing, and arrest and booking reports, including supplemental reports and other documents contained in those files. Background is important to see if there's consistency between current testing and impressions and the person's background and to get a full picture of the person throughout his or her life. R9:1566-1567.

The testing showed that Smith functions in the borderline intelligence range, which is just above mental retardation. Bloomfield found no indications of brain damage. On the Wechsler Adult Intelligence Test, he scored 68 on Verbal Comprehension, which placed him in the 2nd percentile, meaning 98

percent of people the same age would score higher. This falls within the high end of mild mental retardation to the middle of the borderline intellectual function. On the Perceptional Reasoning Test (putting together different puzzles), he scored an 82, which is in the 12th percentile, meaning 88 percent of people his age scored higher than he does. On the Working Memory test, his score was 92, the 30th percentile, which means 70 percent of people score higher. His Processing Speed score was 89, or the 23rd percentile. His Full Scale IQ, which is a composite of the four sub-scales was 77, which is in the 6th percentile, meaning 94 percent of people of his age would score higher. His General Assessment Intelligence, also taken from those same scores, was 73, or in the 4th percentile. R9:1568-1573, 1579.

Bloomfield testified that decision-making is more concrete for persons who are borderline intelligent than for people with a higher IQ. The borderline individual gives less thought, is less able to abstract the variables in the decision, and is less able to weigh all the consequences, and therefore is more prone to act on less information. The borderline individual sees things as black or white, rather than seeing a gradation of how to come to a decision. R9:1573, 1575.

People with borderline intellectual functioning know and are frustrated by their limitations. They can't perform adult

daily living skills adequately. They have certain jobs they are comfortable with. They get frustrated easily because they know, more clearly than do people with mild mental retardation, that they're not performing as high as other people. Young people in this category, especially males, often have conduct problems in school because they would rather be seen as tough or acting out than as slow. Terry was not doing well in school, and part of his response was to get in trouble because he would rather be seen as the kid with trouble than the kid who just couldn't get it. R9:1573-1574.

Borderline intellectual functioning affects adaptive skills, which sometimes leads to an attempt to find an environment where the person can function. R9:1575.

Dr. Bloomfield testified that adolescents don't make good decisions because their brains are still developing, that behavioral and physical science research now clearly shows that the adult brain is not fully developed until age 20 or 21. Adolescents thus act more impulsively and don't weigh consequences the way a fully formed mature adult would. They also are more rehabilitative because their personalities and brain functions are not fully formed. Adolescents are more impulsive, have less judgment, higher risk-taking, and less weighing of consequences, but have greater potential for rehabilitation. R9:1576-1578.

In Dr. Bloomfield's opinion, Smith could be rehabilitated if the rehabilitation is designed for someone who's maturing and has low functioning. Whoever is working with him can't assume he can do everything that he thinks he can do. R9:1578.

Bloomfield was aware that Smith had been involved in many fights at school and that his mother once called the police because he was being defiant and had brought illegal drugs into her home at the age of 15. R9:1581. Bloomfield was also ware that Smith he was involved in a fight with another inmate in January 2010, for which he received 30 days confinement, was defiant with a police officer and had to be pepper-sprayed and handcuffed in May 2010, and was disciplined for fighting at the jail in August 2010. R9:1582. When asked didn't these incidents occur after he was "outside of the influences of the neighborhood that he was living in," Dr. Bloomfield said no, acting out behavior could continue until there is some acknowledgement that he needs intervention for someone of his intellectual capacity. Furthermore, the intervention must be geared to someone with his level of functioning. Intervention had been attempted in the past but it failed to take into account his intellectual functioning. His FCAT scores were consistently low from way back, indicating a cognitive deficit rather than lack of effort, but he was never tested. R9:1585.

Accordingly to Bloomfield, "there's this vicious cycle of the cognitive deficit and the acting out behavior and then the fact that he's not mentally retarded." Many young boys, when they reach 7th, 8th, 9th grade, they make a decision, a concrete thinking decision that they would rather have their peers think they are acting-out tough kids instead of dumb or slow or worse words that are used, and so they make a bad decision. The intervention system is not comprehensive enough to tackle the issue of low cognitive function and behavioral acting out. Grand Park Alternative School is very successful with kids who have a high level of functioning because it's geared to kids who can achieve. When Smith is called a loner or functional at the McDonald's where he worked, that's consistent with the finding that he could function at a low level. He keeps to himself because he doesn't want to be found out as being slower than he wants his street image to be. R9:1585-1586.

SUMMARY OF ARGUMENT

Point 1. The evidence is legally insufficient to support Smith's convictions for premeditated murder. The evidence shows that Smith attempted to rob Robinson, Gibson, and Keenan at gunpoint. Robinson pulled a gun on Smith, and Smith shot him seven times. At some point during that initial gunfire, Gibson or Keenan, who were sitting at the kitchen table, retrieved a rifle from somewhere. The forensic evidence showed someone fired thirteen shots from an AK-47 rifle from the hallway and back bedroom, and Smith fired four more shots from the kitchen/dining and living room areas. Although the trial court found that Smith walked to the opposite end of the house "to hunt down and murder" Gibson and Keenan, the forensic evidence contradicted this, as no shell casings from Smith's gun were anywhere down the hallway. The evidence shows, rather, that Gibson or Keenan fired at Smith with the AK-47 rifle from the hallway and back bedroom as Smith fired at them from the dining and living rooms. There is no evidence to indicate who initiated the gunfight between Gibson/Keenan and Smith. Gibson and Keenan were each shot once, and Smith may not have known the extent of their injuries when he fled. The evidence is consistent with a spur-of-the-moment gun fight in response to armed resistance to the robbery. Premeditation, however, requires a fully formed conscious purpose to kill existing in

the perpetrator's mind for a sufficient length of time to permit reflection. That has not been established here.

Point 2. The trial judge erred in assigning greater weight to the felony murder aggravator on the basis that the murders were premeditated. Section 921.141, Florida Statutes (2007) limits the aggravating circumstances to those specifically listed, and this Court has held improper the consideration of nonstatutory aggravating circumstances, including premeditation. By assigning additional weight to the felony murder aggravator, based on its finding of premeditation, the trial court, in effect, improperly considered simple premeditation as a nonstatutory aggravating circumstance.

Point 3. Death is a disproportionate penalty for this robbery murder of drug dealers by a 19-year-old with borderline intellectual functioning. Although three people were killed, this case is similar to other robbery murders involving reflexive shootings with no premeditated intent to kill. The evidence shows that Smith shot Robinson after Robinson pulled a weapon and that he shot Gibson and Keenan as Gibson or Keenan was shooting at him with an AK-47 rifle. Only two aggravating factors were found, both related to the circumstances of the present crime. The mitigation is compelling. Smith was 19 years old at the time of the crime. Although raised by hard-working parents who did their best, Smith, with an IQ of 77,

fell prey (was unable to resist) to the influences of a violent, gang-infested neighborhood. Despite this, Smith has a history of working hard and respecting authority in a structured work place and was deemed a good candidate for rehabilitation by his former employer, a retired detective, and Dr. Bloomfield, an expert in forensic psychology. Smith has a family that loves him, he helped his sister raise her seven children when she was working the night shift at McDonald's, and he has a daughter who loves him and three step-children he has treated as his own. This case is not the most aggravated, nor the least defensible of first-degree murders. Life in prison is the appropriate penalty.

Point 4. The death penalty was improperly imposed in this case because Florida's death penalty statute is in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

Point 1

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT SMITH'S CONVICTIONS FOR PREMEDITATED MURDER IN THE DEATHS OF BERTHUM GIBSON AND KEENETHIA KEENAN.

This issue was preserved by appellant's motions for judgment of acquittal at the close of the state's case and at the close of all the evidence. R16:1308, 1348. Furthermore, this Court has an independent duty in all death sentence appeals to review the record to confirm that the jury's verdict is supported by competent, substantial evidence. See Davis v. State, 2 So. 3d 952, 966-967 (Fla. 2008).

A judgment of acquittal is appropriate if the state fails to present sufficient evidence to establish a prima facie case of the crime charged. See Olsen v. State, 751 So. 2d 108 (Fla. 2d DCA 2000). The standard of review on appeal is de novo. State v. Williams, 742 So. 2d 509 (Fla. 1st DCA 1999).

Because there were no witnesses to the shootings of Gibson and Keenan and no direct evidence as to Smith's intent, the evidence of premeditation is entirely circumstantial. To prove premeditation by circumstantial evidence, "the evidence must be inconsistent with every other reasonable inference that could be drawn." See Larry v. State, 104 So. 2d 352, 354 (Fla. 1958); accord Long v. State, 689 So. 2d 1055, 1057 (Fla. 1997). As this Court said in Davis v. State:

> It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

90 So. 2d 629, 631 (1956); see also Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997)(where evidence fails to exclude all reasonable hypotheses that the homicide occurred other than by premeditated design, the conviction for premeditated murder cannot be sustained); Crump v. State, 622 So. 2d 963 (Fla. 1993)(state must exclude every other reasonable inference that may be drawn from circumstantial evidence to show existence of premeditation through circumstantial evidence); Cochrane v. State, 547 So. 2d 928, 930 (Fla. 1989)(circumstantial evidence must not only be consistent with premeditation, it also must be inconsistent with every other reasonable inference).

Premeditation may be inferred from factors such as the type of weapon used, the presence or absence of provocation, previous difficulties between the parties, and the nature and manner of wounds inflicted. Spencer v. State, 645 So. 2d 377 (Fla. 1994).

Here, the state's theory was that when Desmond Robinson pulled a gun in response to Smith's attempt to rob him of drugs, Smith shot Desmond, then stepped over Desmond's body and shot

Gibson and Keenan when he could have fled the scene without further violence. See R17:1273, 1278, R5:929. The trial court went further, finding that after shooting Robinson, "Smith walked to the opposite end of the house to hunt down and murder" Gibson and Keenan. R6:1046. In its sentencing order, the trial court wrote:

> When they arrived at the residence, the Defendant and Breon Williams were let into the secured residence by Desmond Robinson. The Defendant and Breon Williams entered the home through the locked rear entrance on the back porch, located near the northeast corner of the residence. That entrance opened into the kitchen/dining area of the home. Breon Williams went to the nearby kitchen counter to count out the money for his drug purchase, when he heard the Defendant tell an individual to "Give it up." Breon Williams then heard gunshots and turned to run out of the residence. As Breon Williams was leaving, he saw the Defendant shoot Desmond Robinson multiple times.
>
> At the time of his death, it appears from photographic evidence that Desmond Robinson was armed or attempting to arm himself. However, the evidence establishes that Desmond Robinson died before ever having a chance to discharge his firearm. The Defendant shot Desmond Robinson seven times, including one shot to the back of the head, causing an instantaneous death.
>
> At that time, Berthum Gibson, another individual inside of the residence, began exchanging gunfire with the Defendant. Instead of fleeing the residence through the same back porch door he entered that was located immediately behind him, the Defendant stepped over Desmond Robinson's dead body and proceeded down the hallway of the residence, ultimately arriving in the southeast bedroom, located at the opposite end of the residence. The Defendant killed Berthum Gibson, as well as an unarmed Keenethia Keenan.

R6:1040-1041 (Emphasis added); Appendix A. The trial court also found that "[t]he path of travel and the location of the wounds suffered by Berthum Gibson and Keenethia Keenan reveal the Defendant's premeditated intention." R6:1046.

First, the trial court's finding that Smith went down the hallway to the back bedroom to hunt down and murder Gibson and Keenan is not supported by competent, substantial evidence. This finding actually is contradicted by the ballistics evidence. Second, although the evidence is consistent with the state's theory that Smith could have left the house without further violence, the evidence also is consistent with another reasonable scenario, i.e. that Smith shot Gibson and Keenan because they were shooting at him.

Detective Kicklighter testified that the ballistics evidence showed there were two locations of shooters, one location was the hallway and back bedroom, the other location was the kitchen and living room areas, and that gunfire was going to and from these two locations. All of the 10 mm shell casings fired from Smith's gun were found in the kitchen or living room areas (8 in the kitchen/dining area and 3 in the living room). No shells fired from Smith's weapon were found in the hallway. This evidence shows that Smith never fired his weapon in the hallway or southeast bedroom.

The hallway and back bedroom were strewn, on the other hand, with 7.62 shell casings from the AK-47 rifle found in Gibson's hand after the shooting. Gibson and/or Keenan thus fired at Smith with the rifle from these areas. Gibson was shot once in the abdomen and Keenan was shot once in the chest, so both were facing Smith when they were shot.

The evidence thus shows that after Smith shot Desmond, a gun battle ensued between Smith and Gibson and/or Keenan. During that gun battle, Gibson or Keenan fired thirteen rounds at Smith from the hallway and back bedroom, while Smith fired four shots, with one bullet striking Gibson and one bullet striking Keenan.

Desmond Robinson was found with a Glock handgun in the palm of his right hand. The evidence thus is consistent with the jury and trial court's findings that Smith shot Desmond when Desmond pulled his weapon, and that this was a reflexive shooting, not premeditated murder. The evidence also shows that either Gibson or Keenan retrieved a rifle during the initial gunfire and that someone fired 13 rounds from that rifle. There is no evidence showing the location of the rifle before it was retrieved by one of the victims. And, although Gibson ended up with the rifle, there is no evidence showing who retrieved the rifle or who fired the shots. There also is no evidence showing who fired first, Smith or Gibson/Keenan, or whether Smith fired

because he had a rifle aimed at him, just as he fired at Desmond when Desmond pulled his gun. Did Gibson or Keenan grab the rifle from the living room and take aim at Smith as he stood in the dining room/kitchen area? Did Keenan get caught in the crossfire as Gibson and Smith fired shots to and from the hallway?

These scenarios are reasonable and consistent with the ballistics evidence. In other words, the evidence is consistent with a continuous gun battle that began when Smith shot Desmond, and continued between Smith and Gibson/Keenan, when they retrieved the rifle and took aim at Smith. The evidence is consistent with there being no time for reflection between the time Desmond pulled his gun and the cessation of shooting on both sides.

Premeditation requires "more than a mere intent to kill." Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987), cert. denied, 485 U.S. 943 (1988).

> Premeditated design is more than a mere intent to kill. It is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation and entertained in the mind both before and at the time of the homicide.

Dupree v. State , 615 So. 2d 713, 715 (Fla. 1st DCA 1993), review denied , 623 So. 2d 495 (Fla. 1993).

While no particular length of time is necessary, the purpose to kill must be formed before the act and must exist for

a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of the act. Wilson v. State, 493 So. 2d 1019 (Fla. 1986). While intent may be inferred from circumstantial evidence, the point of time at which the specific intent to kill is inferentially formed cannot be left to guesswork and speculation. Weaver v. State, 220 So. 2d 53, 59 (Fla. 2d DCA 1969), cert. denied, 225 So. 2d 913 (Fla. 1969).

Accordingly, this Court has found the evidence insufficient to prove premeditation during robbery murders where the evidence was consistent with a spontaneous reflexive shooting. Mungin v. State, 689 So. 2d 1026 (Fla.)(evidence of premeditation insufficient where defendant shot store clerk once in the head at close range with weapon procured in advance and which defendant had used before), cert. denied, 522 U.S. 833 (1997); Terry v. State, 668 So. 2d 954 (Fla. 1996)(evidence of premeditation insufficient where during robbery of gas station, husband, who was held in garage while wife was held in store, heard a scream, and thirty seconds later, heard a shot, and wife was found dead in store area); Jackson v. State, 575 So. 2d 181 (Fla. 1991)(evidence of premeditation insufficient where victim shot in chest at distance of three feet and evidence consistent with spontaneous reflexive shooting).

Here, too, the evidence is consistent with a spur-of-the-moment reflexive shooting. The evidence showed gunfire from Smith's weapon going from the kitchen/dining and living room areas down the hallway, and gunfire from the rifle wielded by Gibson or Keenan going from the hallway and back bedroom towards the living room/dining areas. There were no witnesses to who initiated that gun fight. Anthony Nixon, who heard the shooting from across the street, heard the smaller caliber weapon first--consistent with the rifle--and then a larger caliber weapon—consistent with Smith's handgun. Nixon's testimony is consistent with Smith returning fire after being shot at by Gibson or Keenan with the AK-47 rifle.

Furthermore, there is no indication that Smith knew he had fatally shot Gibson or Keenan when he left the house. Each victim was shot once, Gibson in the abdomen and Keenan in the chest. Although both ended up in the southeast bedroom, the evidence does not indicate their locations when shot. Gibson was still alive, rifle in hand, with bullets to spare, when Smith fled the scene. This suggests Smith fled when he no longer felt threatened, not because he believed he had killed the victims.

There must be proof of a decision to kill, made prior to the actual attempt to kill. While no particular length of time is necessary in order to make the specific intent premeditated,

nevertheless, some time must have passed, however brief, during which the specific intent is reflected on or entertained. Weaver, 220 So. 2d at 59.

In Weaver, the defendant shot Officer Eustis after the officer responded to a disturbance at the Weaver's home. Weaver did not testify. An upstairs neighbor testified for the defense that the officer asked to come in, that Weaver refused, saying he knew his rights, and when the officer made a step towards Weaver, Weaver pushed him back. The officer then sprayed mace, some of which hit the neighbor in the face. As the neighbor turned to go upstairs, he saw Weaver and the officer tussling with each other towards the banister. The neighbor went upstairs and saw nothing further. Officers Lee and Harrell arrived at 8:13 p.m., having heard the same dispatch to which Eustis had responded, which was sent out at 8:08 p.m. Everything that occurred that night between Officer Eustis and Weaver thus transpired in less than five minutes. When Lee and Harrell arrived, they heard a woman scream, heard Eustis exclaim, "No! No!" and then heard a sporadic series of shots. As the officers approached, they saw Weaver standing in front of an automobile pointing a revolver toward the ground, and both saw the flash of the last shot as Weaver held the gun pointed toward the ground under the car. As Lee approached, Weaver threw the gun to the ground and said, "Yes, G__D__it, I killed

him," at which point Lee noticed Eustis' body lying under the car. The revolver belonged to Eustis and fired the fatal bullets. Three bullet wounds entered the body, two in the back. There were nitrate deposits on the officer's hand that could have been caused by a discharging firearm.

In finding this evidence insufficient to support premeditation, the court reasoned:

> Here there is a fatal gap in the evidence on the question of just when the intent to kill was formed, assuming it was formed in the first instance; and therefore, it is impossible to determine the duration of its existence. We have already observed that from the point of time when the witness Biezell last observed the difficulty between appellant and the deceased officer (which at that time was a mere shoving match) until Officers Lee and Harrell arrived, there is no way of knowing what ensued in the course of the struggle; nor is there, indeed, any evidence of just how long the struggle lasted until the fatal shots were fired. We don't even know which of the combatants fired the first shot, since there is uncertainty as to how many shots were fired after the officer was heard to plead, 'No! No!'. At that point, we can assume the appellant had the gun, but since only four shots were reasonably accounted for thereafter, and there were six empty shells, we don't know whether the officer had already been hit by the fatal bullet at the time he exclaimed, nor do we know any of the circumstances which surrounded the parties at that time. And other circumstantial evidence on this point, as it is, is susceptible of at least two inferences, thus probative of none. For example, a paraffin test showed powder burns on the right hand of the officer. They could have occurred either by the officer drawing his gun and firing the first shot (the erring bullets were not found), and thereafter appellant could have wrestled the gun from him and fired the remaining shots; or the nitrate could have gotten on the officer's hand from one or another of

> the shots fired by the appellant, if we assume that the appellant somehow got the gun first and was the felonious aggressor from the beginning. We don't know, either, what, if any, other threats, real or apparent, were made by the officer which may have motivated or precipitated a specific intent to kill in the mind of appellant, and, if so, when they occurred. In short, we again say that fixing a point of time at which a specific intent to kill was formed can only be left to speculation. We conclude, therefore, that the evidence is insufficient, as a matter of law, to support a finding of premeditation.

220 So. 2d at 59-60.

Here, as in Weaver and the other cases cited above, there is a fatal gap in the evidence on the question of when or whether any intent to kill was formed. We don't know who fired first or what, if any, threats motivated the shooting. The evidence is susceptible of at least two interpretations, thus probative of none, see id., including the possibility that Smith fired reflectively only after threatened by Gibson or Keenan. The evidence therefore is insufficient, as a matter of law, to support a finding of premeditation.

Point 2

THE TRIAL COURT ERRED IN GIVING ADDITIONAL WEIGHT TO THE FELONY MURDER AGGRAVATING CIRCUMSTANCE ON THE BASIS THAT THE MURDERS WERE PREMEDITATED.

In its sentencing order, the trial court found as an aggravating circumstance that the murders of Gibson and Keenan were committed during a felony, an attempted robbery. The trial court gave the felony murder aggravating circumstance great weight, reasoning that "in cases where premeditation is present, such as is the case for the deaths of Berthum Gibson and Keenethia Keenan, the weight given to this aggravating circumstance should be greater." R6:1046. Assigning extra weight to the felony murder aggravator based on premeditation was tantamount to considering premeditation as a nonstatutory aggravator and therefore improper.

A trial court's decision as to the weight afforded an aggravating circumstance is reviewed for abuse of discretion. See, e.g., Sexton v. State, 775 So. 2d 923, 934 (Fla. 2000).

In the present case, the trial court found the felony murder aggravating circumstance based on evidence that the murders were committed during an attempted robbery. In his sentencing order, the judge wrote:

> The jury's verdict in the guilt phase, finding the Defendant guilty of Count Four (Attempted Robbery) proves this aggravating circumstance beyond a reasonable doubt. In addition, the Court independently finds that this aggravating circumstance

> has been proven based on the evidence presented at trial. At trial, Breon Williams testified that he went to 5533 Ahmad Drive West with the understanding that he and the Defendant would be purchasing cocaine. Breon Williams testified, however, that while he was standing in the kitchen counting his money, he heard the Defendant tell someone to "Give it up," followed by gunshots. Breon Williams, while fleeing from the residence, observed the Defendant shoot Desmond Robinson multiple times.
>
> In cases where premeditation is present, such as is the case for the deaths of Berthum Gibson and Keenethia Keenan, the weight given to the aggravating circumstance should be greater. In the case *sub judice*, as to Counts One and Three, the murders of Berthum Gibson and Keenethia Keenan, the jury made as special finding that the killing was premeditated. The Court independently makes this finding as well. Rather than exiting through the door of the residence immediately behind the Defendant after he murdered Desmond Robinson, the Defendant stepped over the dead body of Desmond Robinson and walked to the opposite end of the house to hunt down and murder Berthum Gibson and Keenethia Keenan. The path of travel and the location of the wounds suffered by Berthum Gibson and Keenethia Keenan reveal the Defendant's premeditated intention. Indeed, Ms. Keenan was unarmed at the time she was shot.
>
> This aggravating circumstance has been given great weight in determining the appropriate sentence in this case as to Counts One and Three.

R6:1045-1046 (emphasis added).

Section 921.141, Florida Statutes (2007), limits the aggravating circumstances to those specifically listed in the statute. Accordingly, this Court repeatedly has held any consideration of nonstatutory factors improper. Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Walton v. State, 547 So.2d 622 (Fla. 1989); Blair v. State, 406 So. 2d 1103 (Fla. 1981);

Perry v. State, 395 So. 2d 170 (Fla. 1981); Miller v. State, 373 So. 2d 882 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978). Indeed, consideration of premeditation as an aggravating factor specifically has been disapproved by this Court. Brown v. State, 381 So. 2d 690 (Fla. 1979).

In the present case, assigning greater weight to the robbery aggravator based on simple premeditation violated the Legislature's decision to limit consideration of aggravating factors to those in the statute and was thus an abuse of discretion.

The trial court also abused its discretion in giving greater weight to the felony murder aggravator based on a factor completely unrelated to the aggravating factor. While the weight to be given an aggravating circumstance is within a trial court's discretion, that discretion must be exercised in a reasonable manner. That is, there must be "logic and justification for the result." Cannakiris v. Cannakiris , 382 So. 2d 1197, 1203 (Fla. 1990); see also Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). Just as the weight of the prior violent felony aggravator should depend on the circumstances of the underlying felony or felonies, see, e.g., Sexton v. State, 775 So. 2d 923, 934 (Fla. 2000)(no abuse of discretion in affording little weight to 1965 robbery conviction because of its temporal remoteness), the weight of the felony murder

aggravator should be based on the circumstances of the underlying felony or felonies.

Finally, as argued in Point 1, supra, the evidence was insufficient, as a matter of law, to support a finding of premeditation.

The trial court abused its discretion in assigning extra weight to the felony murder aggravator based on simple premeditation. Since it's unclear what weight the trial court would have assigned the aggravating factor absence this error, or what affect the error had on the court's determination of the appropriate sentence, this error requires resentencing by the trial judge.

Point 3

THE DEATH SENTENCE IS DISPROPORTIONATE FOR THIS 19-YEAR-OLD WITH BORDERLINE INTELLECTUAL FUNCTIONING WHO, DURING A DRUG DEAL, ATTEMPTED TO ROB THE DRUG DEALERS, AND THEN SHOT THEM WHEN THE DRUG DEALERS RESISTED THE ROBBERY BY ARMING THEMSELVES AND SHOOTING AT HIM.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). That is, death as a punishment is unique in its finality and its total rejection of the possibility of rehabilitation. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The Legislature, therefore, has reserved its application for "only the most aggravated and least defensible of crimes." Id.; accord Terry v. State, 668 So. 2d 954 (Fla. 1996); Urbin v. State, 714 So. 2d 411 (Fla. 1998); see also Almeida v. State, 748 So. 2d 922 (Fla. 1999)("death penalty is not warranted unless the crime falls within the category of both the most aggravated and least mitigated of murders").

In deciding whether death is an appropriate punishment, the Court must consider the totality of the circumstances in comparison to other cases. This entails a qualitative review by the Court of the underlying basis for each aggravator and mitigator.

The present crime is neither the "most aggravated" nor the "least defensible" of crimes. Smith went to the home of Desmond

Robinson, a drug dealer, purportedly to buy drugs. Instead of buying the drugs, Smith tried to rob the drug dealers at gunpoint. The drug dealers resisted with weapons and gunfire, including firing thirteen shots at Smith with a high velocity rifle. Smith shot in response to this threat. The evidence was consistent with a spontaneous shooting, with no time for reflection, and thus was insufficient to establish premeditation. See Point 1, supra.

There were only two aggravating circumstances, felony murder and prior violent felony. The felony murder aggravator (with attempted robbery as the underlying felony) is the weakest aggravating circumstance of all, as it is inherent in every felony murder prosecution. This Court implicitly recognized this in Rembert v. State, 445 So. 2d 337, 340-41 (Fla. 1984), in which the Court reduced the death sentence to life where the underlying felony was the only aggravator, even though there were no mitigating circumstances. This Court also has consistently reduced to life cases where the underlying felony is the only aggravating circumstance. See Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982); Clark v. State, 609 So. 2d 513 (1992); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Furthermore, as discussed in Point 2, supra, the trial

court improperly assigned greater weight to the felony murder aggravator based on its finding of premeditation.

In addition to the relatively weak felony murder aggravator, the trial court properly found as an aggravating circumstance that Smith was previously convicted of another capital felony, based on the contemporaneous killings of the other two victims. The trial court gave this aggravator greater weight because Gibson and Keenan were the second and third victims killed. R6:1045.

This Court has said the prior violent felony aggravator, when based on a contemporaneous or prior murder, is one of the weightiest in Florida's sentencing scheme. See Sireci v. State, 825 So. 2d 882, 887 (Fla. 2002). In some cases, the Court has found this aggravating circumstance, standing alone, supports the death penalty, e.g., Ferrell v. State, 680 So. 2d 390 (Fla. 1996)(prior murder characterized as "weighty" because it bore many earmarks of present crime); Duncan v. State, 619 So. 2d 279 (Fla. 1993)(affirming death sentence where prior violent felony aggravating factor was based on a prior second-degree murder of a fellow inmate), while in other cases the Court has reduced the death sentence to life despite a prior murder. See, e.g., Jorgenson v. State, 714 So. 2d 423 (Fla. 1998)(weight of prior murder minimized because old and defendant shot man who was attacking his sister); Larkins v. State, 739 So. 2d 90 (Fla.

1999)(20-year-old prior murder minimized where defendant had since led crime-free life). Accordingly, the prior violent felony aggravator, though weighty, still must be viewed under the particular circumstances of the case.

In the present case, the evidence is consistent with a spontaneous reflexive shooting in response to armed resistance to Smith's attempt to rob some drug dealers. As discussed in Point 1, supra, there were no witnesses to the deaths of Bertrum Gibson and Keenethia Keenan. Desmond pulled his gun, Smith shot him, and a gunbattle ensued between Smith and the others, who were armed with a high-powered rifle. The evidence does not show that Smith could have left the house without being shot. If Gibson or Keenan came up the hallway shooting, Smith reasonably may have believed he had no choice but to shoot or be shot. Thus, although the shooting resulted in three deaths, the evidence is consistent with a spur-of-the moment reaction to a deadly threat.

Smith's response is consistent with the expert testimony about his mental deficiencies. Dr. Bloomfield testified that Smith has borderline intellectual functioning, with a full-scale IQ of 77, or the 6th percentile, meaning 94% of people his age would score higher. On one of the sub-tests, verbal comprehension, he scored in the 2nd percentile.

The trial court summarized Dr. Bloomfield's findings as follows: "Defendant is immature for his age, suffers from depression, is very vulnerable to outside influences, has a need for approval, has borderline intellectual functioning, does not have normal intellectual capacity (which he contends impacts all of the Defendant's decision-making), has adaptive skills functioning deficit, has some suicidal ideations, has no major psychopathology traits, is impulsive, and is capable of rehabilitation." The trial court gave this mitigating circumstance, "mental mitigators," moderate weight. R6:1050-1051.

This Court has long recognized mental mitigation as among the most compelling. Low intellectual functioning also is a compelling mitigator, as it affects every part of an individual's life. As Dr. Bloomfield explained, decision-making is more concrete for persons with borderline intellectual functioning. They give less thought, are less able to abstract relevant variables, less able to weight consequences, and therefore more prone to act on less information. People with borderline intellectual functioning, unlike persons with mental retardation, are aware of and frustrated by their limitations. Young people in this category, especially males, often have behavior problems in school because they would rather be seen as tough and acting out than slow or "the kid who just couldn't get

it." R9:1574. They also can't perform adult daily living skills adequately, which sometimes leads to an attempt to find an environment where they person can function.

In Smith's case, he not only had borderline intelligence, he was small-framed and quiet, and thus was picked on and pushed around by the other kids. Although Smith was sent to an alternative school for his acting out behavior, his cognitive deficit was never identified. The school he attended was geared towards kids who can achieve, not those with low cognitive function, so he got caught in "this vicious cycle of the cognitive deficit and the acting out behavior and then the fact that he's not mentally retarded." R9:1585-1586.

There were additional compelling mitigating circumstances. Smith has a family that loves him, a caring family, and he has cared for them. He has been a good brother to his sister and his younger brother. He has advised his younger brother to stay in school, not to fall in with a bad crowd. He realizes he has done wrong and doesn't want that to happen to his younger brother. This shows love and concern for his brother. He helped rear for over a year his seven nieces and nephews. While his sister was working the night shift at McDonald's, he was taking care of her seven children at night and getting them off to school in the morning. He was a good father to his stepchildren and cared for them the same way he did his nieces

and nephews. He cared for and loves his own child, Aliyah, as shown by Aliyah's mother's testimony. He has always been respectful of his elders, as brought out by the testimony of his daughter's grandmother, Angelo Crosby, and his neighbor, Keturah Latimer, and each of his brothers, and sister, and his father.

The trial court further found as mitigating that Smith grew up in a "terrible" neighborhood with a high crime rate and very low graduation rate. Mr. Mew, the school resource officer who knew and counseled Smith at Grand Park Alternative School when Smith was 14, 15 years old, testified that only 2 percent graduate and thus get out of the neighborhood. Mr. Mew further testified that Smith was a loner, a small kid, who was picked on and pushed around.

Smith also is a good candidate for rehabilitation. Dr. Bloomfield testified that he can be rehabilitated, as did Jeffrey Rodgers, a retired law enforcement officer who was a detective for 20 years and Smith's former employer. Dr. Bloomfield testified that Smith was capable of being rehabilitated if he obtains services that take into account his lack of maturity and low-level intellectual functioning. Rodgers testified Smith had the potential for rehabilitation because he was an exceptional kid, followed instructions well, and was very cooperative. Although Smith has been involved in several episodes at the jail —- two fights with other inmates

and an incident of "defiance" with a correctional officer —- he was a good, dependable employee, which suggests he would do well in a structured environment. As Dr. Bloomfield testified, acting out in the jail prior to any intervention does not mean he would not eventually settle down and do well.

Compared to other cases, the death penalty is a disproportionate penalty. This was an unplanned, reflexive shooting in response to being threatened with guns and gunfire during a drug deal gone bad. Smith has severe mental limitations, an IQ of 77, and a compromised ability to make good decisions. He came from a "terrible" neighborhood, rife with crime, drugs, and gang violence. He came from a loving family, but they were not wealthy, and both parents worked. Smith has shown through his actions that he can be responsible and respectful to others and a dependable worker. He can be rehabilitated. The death penalty is not warranted for someone this young, with this many strikes against him, and who has the ability to be a productive member of society. The crime is neither the worst, nor the least defensible, of first-degree murders, nor is the offender. Life in prison is the appropriate penalty for Terry Smith.

Point 4

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

This issue was preserved by Smith's Motion to Declare Section 921.141, Florida Statutes, Unconstitutional Because Only a Bare Majority of Jurors is Sufficient to Recommend a Death Sentence and Motion to Declare Section 921.141, Florida Statutes, Unconstitutional for Lack of Appellate Review. R2:320-336. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2007), does not provide for such jury determinations.

Smith acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court

previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.); cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Additionally, Smith is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So. 2d 1129, 1133-1135 (Fla. 2005) (including footnotes 4 & 4, and cases cited therein); Steele. At this time, Smith asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Smith's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Smith respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 2, reverse for a new sentencing proceeding; Issues 3-4, vacate Smith's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

_____

NADA M. CAREY
Assistant Public Defender
Florida Bar No. **0648825**
Leon County Courthouse
301 South Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8500
nadaC@leoncountyfl.gov
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **STEPHEN R. WHITE,** Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and to **TERRY SMITH**, #A-130985, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, March 5, 2012.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

_____

NADA M. CAREY
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

TERRY SMITH,

Appellant,

v. **CASE NO. SC11-1076**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT

APPENDIX	DOCUMENT
A	Sentencing Order, filed May 12, 2011
B	State's Exhibit 1