

IN THE SUPREME COURT OF FLORIDA

BRANDON LEE BRADLEY,

Appellant,

vs.

CASE NO. SC14-1412

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT COURT,  
EIGHTEENTH JUDICIAL CIRCUIT,  
IN AND FOR BREVARD COUNTY

APPELLANT'S INITIAL BRIEF

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## STATEMENT OF THE CASE AND FACTS

### *OVERVIEW*

This appeal is from a conviction of first-degree murder and a sentence of death. The State's proof included a videotape of Appellant shooting the victim, a sheriff's deputy, eight times with a semi-automatic pistol. (XXV 541-43; XXVIII 1026) The defendant admitted the shooting, explaining that he saw the officer reach for her gun. (XXVIII 1162-63, 1169; XXIX 1239, 1244) On the videotape the defendant, before shooting, asked several times "are you going to shoot me?" and "why are you going to shoot me?" (XXV 542-43) The officer's sidearm was still strapped into her holster after her death. (XXV 546-47) It was undisputed that Appellant and his co-defendant were heavily intoxicated at the time. (XXVI 692-96) The co-defendant and another State witness testified that the defendant said at the time he would have to shoot the cracker, or the bitch, because he was a wanted man and she'd seen his tag and his face. (XXVI 682-84; XXV 579-81) Those witnesses' testimony was impeached, and the case was defended on the theory that neither felony-murder nor premeditation was shown. (XXVI 627-43, 693-733; XXXII 1962-65, 1967, 1970-73)

At the penalty phase, the defense relied on proof of brain damage resulting in likely inability to control responses to fear. (XXXIV 2302; XXXVI 2762-66) The death recommendation was ten to two. (VIII 1571) Appellant will argue in this court

that the State won its verdicts by manipulating the jury's emotions, that the trial court erred in weighing the mitigating proof, and that his case is not one of the least mitigated to come before this court.

### *THE CHARGES*

Appellant, Brandon Lee Bradley, was indicted for the premeditated murder of Barbara Pill, a law enforcement officer in lawful performance of her legal duties, with a firearm. (II 372) He was further indicted for robbery, aggravated fleeing and eluding, and resisting arrest with violence. (II 372-73) His co-defendant, Andria Kerchner, was indicted for felony-murder, robbery, and burglary. (II 372-73) The offenses were alleged to have taken place March 6, 2012. (II 372-73) The defendants' cases were severed for trial. (III 500)

### *PRETRIAL MOTIONS*

Appellant moved, before trial, for an order precluding the State from seeking a verdict based on sympathy or extra-record evidence. (IV 725-29, 731, 733, 738; V 843-45) The court granted the motion. (I 58)

Appellant also moved for orders requiring a unanimous jury, and requiring that jury to make all findings necessary to imposition of the death penalty. (IV 642-53, 657-58, 721-23, 741-72; V 794-98, 837-39) Those motions were denied. (I 115-19)

The defense also moved to strike all references in the jury instructions, or in

argument, to the jury's verdict being "advisory" or a "recommendation." Its position was that such language impermissibly diminishes the importance of the life-or-death recommendation. (IV 733, 788; V 789-90, 861-65) That motion was denied as well. (I 113-15)

### *LIMITATION ON VOIR DIRE*

During voir dire, defense counsel sought to ask the venire members if they could still consider mitigating evidence if they heard the case was aggravated not only by the fact that the victim was a police officer, but also by the facts that at the time the defendant was fleeing a robbery, while on probation, with a violent felony in his past. (XVI 128-29; XVII 349-54) The court permitted counsel to ask if the venire members would still consider a life sentence if six non-specified aggravating factors were proved, and to ask if they would still consider life if it were proved that the victim was a police officer. (XVI 130, 158; XVII 215, 245) The court, however, excluded questioning as to the nature of any other specific aggravating factors. (XVI 131) The judge ruled as she did because she believed it would be unfair for the jury to hear, before the penalty phase, about the defendant's violent past. (XVII 360) Defense counsel expressly offered to waive any legal issue in that regard; the court stood by its ruling. (XVII 361-62) When the parties agreed to the jury panel, the defense renewed its objection to the limits on voir dire. (XXIII 130-31)

In his penalty-phase opening statement, counsel for the State invited the jury to weigh the case in mitigation against “the fact that [the defendant] was placed on and was actually on felony probation when he committed this crime, along with [the fact] that he has that prior crime of violence, that robbery, along with the fact that he’s fleeing, escaping from another scene, the robbery.” (XXXIV 2294) He also gave his view that committing a murder while on court supervision “by itself ought to be enough to justify the death penalty.” (XXXIV 2288)

#### *OPENING STATEMENTS*

In its opening statement in the guilt phase, counsel for the State asserted:

The evidence will show that [Appellant] killed Deputy Pill because he had a plan to kill any police officer who tried to send him back to prison.

(XXIII 156)

[The deputy] was about to find out [Appellant] was a wanted criminal, she was about to send him back to prison, for that she had to die. Deputy Barbara Pill was killed because on the morning of March 6<sup>th</sup> of 2012 the defendant, Brandon Bradley, knew more than she did. They say that in the fog of battle information is the key to survival and on the morning of March 6th Barbara Pill didn’t have the information that she needed to survive.

(XXIII 157)

She didn’t know that there was a life or death battle

coming up with a man named Brandon Bradley. She didn't know that it was a battle that had been set in motion almost a year earlier.

(XXIII 157) The defense objected to that portion of opening statement on the basis that it was argumentative; the objection was overruled. (XXIII 158, 161)

### *THE PROOF AT TRIAL*

The defendant's probation officer, Charles Colon, testified that in February, 2011 he sought and obtained multiple warrants for the defendant's arrest, for violating probation by absconding. (XXIV 224-26, 232) When Colon was first called to the stand, he identified himself as a "high risk specialist officer." (XXIV 224) The defense objected and moved for a mistrial, which was denied. (XXIV 229-30)

Jason Seaton testified that in November, 2011, his Glock pistol was stolen in Melbourne; he identified a pistol found in the defendant's SUV after the shooting as his. (XXIV 249-50, 257-58) A firearms analyst testified that Mr. Seaton's pistol was the weapon used to fire on Deputy Pill. (XXVII 961-64; XXVIII 1032, 1038) Seaton's brother-in-law Robert Marks testified that he had stolen the gun and sold it to a black man behind the "Last Call" in Eau Gallie. (XXIV 238-42)

An employee of the Melbourne EconoLodge established that Andria Kirchner was a registered guest there on March 6, 2012. (XXIV 303-08) Employees and a guest of the motel testified that on the morning of the 6th, they saw Appellant and a

young white woman removing the room's furnishings and putting them in a white SUV. (XXIV 290-94, 310-13, 351-56) Two motel employees testified that the defendant was unresponsive to their protests, and that he appeared to be under the influence of some kind of drug. (XXIV 316-17, 344-46, 370-71) The defendant drove away with the motel's property, brushing an employee at some 3 miles per hour with the SUV as he did so. (XXIV 317-19, 346)

Andria Kirchner testified below as follows: on March 6, 2012, she was nineteen and had been dating Appellant since mid-February. (XXVI 676, 678, 712) During that time he was "paranoid" and carried a gun in his vest pocket or on the console of his vehicle. (XXVI 727, 678) She did not know why specifically he had acquired the gun. (XXVI 715) The last two weeks of their three-week affair consisted of a drug-fueled binge. (XXVI 692-93) On the night of March 5-6, they consumed Xanax, codeine, Ecstasy, and marijuana, and possibly some cocaine; all of those drugs affect her memory. (XXVI 693-95, 726) They stole meaningless items from the motel that morning due to their drug-addled state. (XXVI 679-80, 697) After they left the motel, the defendant told her he was afraid to go back to prison, and intended to do whatever he needed to do to avoid that eventuality, even "shoot these crackers." (XXVI 682-84) After they were pulled over, he thought he was going to be shot by the officer. (XXVI 686-87, 733) She did her best to dissuade him from shooting, to

no avail. (XXVI 685) At no time did he ask her to hand him the gun. (XXVI 712) She did not at the time of trial remember talking to police later that day, but knows that she lied when she did so. (XXVI 700-01, 710-11) Although she was herself charged with first-degree murder in this case, in 2014 she pleaded to accessory after the fact to murder, agreeing to testify against Mr. Bradley in exchange for a penalty of 12 years in prison followed by three years on community supervision. (XXVI 676-77, 734)

Jeffrey Dieguez testified that he was on the phone with Andria that morning and that she left the line open after their conversation, allowing him to hear the entire incident. (XXV 578-79) Cellphone records showed a 32-minute call took place between their two phones at the relevant time. (XXV 559-61) Dieguez testified as follows: he heard a siren “whoop” then heard Brandon, whom he knows, tell Andria “give me the gun” so he could shoot the bitch who had seen his face and his tag. (XXV 579-81) He then heard Andria protest, and gunshots ensue. (XXV 581-82) Dieguez was impeached with a prior statement in which he said he did not recognize the man’s voice on the call. (XXV 586-88) He was also impeached with a prior statement in which he said he had heard no siren. (XXV 595-600; XXVI 626-27) He explained the disparities by pointing out that when he first spoke to police, he was in the hospital recovering from being robbed and stabbed. (XXV 597; XXVI 646) That

testimony was also impeached, by a police officer who testified she took Dieguez's statement in the hospital after he attempted suicide. (XXX 1503-05) Mr. Dieguez admitted he takes eighteen pills a day, some of them "due to [his] psychiatric history," including Oxycodone and Xanax. (XXV 588-89; XXVI 635-36) He also admitted he has been told the pills affect his memory. (XXVI 642-43)

Five bullets hit Deputy Pill, one in the head. The medical examiner who conducted the autopsy testified that the gunshot wounds caused her death. (XXVIII 1106, 1128) An area resident testified that the shots were fired in rapid succession. (XXVI 649-52, 655) As noted above, the shooting was caught on the deputy's dashboard video camera, and that videotape was played for the jury. (XXV 482, 485, 531, 541-46; State Exhibit 42) The court cautioned the onlookers not to display emotion as the tape was played. (XXV 541)

After the shooting, a chase culminated in the SUV rolling into a ditch which was variously described as four to five feet deep and as ten feet deep. (XXVII 822-26, 834-39, 863) The end of the chase can be seen on videotaped Exhibits 60 and 61 in the record. Police personnel recovered the gun referred to above, and two magazines, from the SUV. (XXVII 934-35, 941, 953-55) There was a bullet in the gun's chamber, one in a ten-capacity magazine found on the dashboard, and nine in another magazine found in the SUV. (XXVII 954-55, 959-61) The gun had a standard six-

and-a-half-pound trigger pull. (XXVIII 1030) The defendant's touch DNA was on the handle of the gun, and his fingerprint was on a box of ammunition found in the car. (XXVIII 1066-72; XXIX 1366-68)

Mr. Bradley did not testify at trial, but his March 6 interview with police was played for the jury. (XXVIII 1151-1200; XXIX 1222-46; State Exhibit 165) He slept on the floor of the interrogation room for the seven hours following his arrest. (XXVIII 1141-42; XXIX 1257) The officer who questioned him after he was awakened testified that although he seemed tired, his answers during that interview were prompt and stayed on topic. (XXVIII 1146; XXIX 1254-55, 1265) A different officer established that Appellant appeared "confused, surprised, startled" when he exited the SUV after it rolled into the ditch, but that "I didn't see anything wrong with him." (XXVIII 1084-86) Two defense experts testified that they believed Appellant was under the influence of various drugs when he gave his statement, to the point that he was unable to consider the usual warnings and voluntarily waive his rights; two State experts, called in rebuttal, testified to the contrary. (XXX 1509 - XXXI 1795)

During the taped interview, the defendant said he shot the deputy because she was trying to get her gun out of its holster and she feared she would kill him. (XXVIII 1162-63, 1168-69, 1238-39, 1244) He agreed with an officer that he got the gun to protect himself in his violent neighborhood. (XXVIII 1177-81) The defendant also

said Andria did not hand him the gun, but he later agreed with an officer that she had done so. (XXVIII 1162, 1185-88)

*“LIKE A SOLDIER”*

The defense moved to limit the guilt-phase testimony of witness Amanda Ozburn. (VII 1254) In a proffer she testified as follows:

- ◆ in 2011, the defendant habitually carried a black gun which resembled the one in evidence.
- ◆ He appeared nervous around police officers.
- ◆ He told her that he had outstanding arrest warrants, and that if he were pulled over he would run. (XXIX 1303, 1314-15)

The State asked whether in addition the defendant had said that if he got pulled over, “they’re going to have to hold court in the streets, because I’m going out like a soldier.” (XXIX 1303) Ozburn admitted she had told police the defendant made that statement, but said that she no longer recalled the defendant ever actually saying that. (XXIX 1313-14, 1315-16) The court, at the request of the defense, considered a transcript of Ozburn’s deposition that had been filed with the court. (XXIX 1318, 1325) In the deposition Ozburn testified that she recounted the statement to police within an hour of her arrest on felony charges which were later dropped (SR 7-9, 25), that the arrest took place three days after Deputy Pill was shot (SR 7), that numerous

officers questioned her while she was shackled (SR 7, 29-30), that she had been up all the previous night abusing cocaine and Xanax (SR 25-37), that those drugs have a deleterious effect on her memory (SR 39), and that she could not be sure whether she had in fact told police what the interview transcript reflected. (SR 36-38)

The defense argued that the witness was impermissibly being called for the primary purpose of impeaching her with the “like a soldier” statement. (XXIX 1304-06) The State asserted it was also calling her for her testimony that the defendant habitually carried a gun and had told her he had open warrants. (XXIX 1306-07) The defense noted that testimony was cumulative of previously-given trial testimony. (XXIX 1318) The court overruled the objection, and the parties and court agreed that given that ruling, the prior inconsistent statement should be considered by the jury only as reflecting on Ozburn’s credibility. (XXIX 1310-12, 1320-24)

In the jury’s presence, Amanda Ozburn testified that the defendant carried a black gun that looked like the gun in evidence, that he told her he had outstanding warrants, that he was nervous about encountering police, and that he told her he’d run if he were stopped. (XXIX 1328-30) She further admitted that she had told police the defendant made the “like a soldier” statement. (XXIX 1330-31) The court read the agreed-on limiting instruction, i.e., “this statement just given by this witness, attributing comments to the defendant, should not be considered as a proven fact but

for the purpose of impeachment of this witness. ‘Impeachment’ means information you may consider in determining the believability or credibility of the witness.” (XXIX 1331) On cross-examination, Ms. Ozburn explained that she reported the “like a soldier” statement to police while she was under arrest for unrelated charges and while she was under the influence of drugs, and that she did not recall the defendant ever in fact making the statement. (XXIX 1333-39)

*GUILT PHASE: CLOSING ARGUMENT AND VERDICTS*

In its initial guilt-phase closing, the State argued “Amanda Ozburn...told you that [Appellant] told her he knew about his warrants *and what he’d do.*” (XXXII 1934) (emphasis added) The defense in its guilt-phase closing noted that Ozburn had repudiated the statement she attributed to the defendant, and argued the statement could be considered only as regards her credibility. (XXXII 1960-61, 1966) In its final closing, the State responded “Amanda Ozburn told you he said he’d run from police, he didn’t want to go back to prison.... Don’t believe for a second that [the defendant] isn’t carrying that gun in case he gets pulled over, because he’s got to do something or he’s going back to jail.” (XXXII 1986-87)

In its guilt-phase closing, the defense also argued as follows:

DEFENSE: Something that hangs over this case, maybe more than any I’ve ever done, is the interest of law enforcement, Brevard County Sheriff’s Department and all of its witnesses. This was a long-time law enforcement

deputy who died tragically and senselessly. Law enforcement is family and when Barbara Pill died, that was one of theirs. They enforce the laws here in this county...as well as...the prosecutor...they work hand in hand throughout the course of this trial and any other case involving the Sheriff's Department, and that interest hangs over this case, and in some negative ways.

This case was investigated by long-time colleagues of Barbara Pill, and some questions that I would pose [include] "did the Sheriff's Department take interest in how this case is to be decided?"

(XXXII 1956-57)

Did [a bias toward obtaining a conviction] affect the officers' testimony?

(XXXII 1960)

The Sheriff's Department..did everything they could to avoid...finding drugs in Mr. Bradley's system, and the reason they did that is they didn't want you to have that evidence. And the reason they didn't want you to have that evidence, I would submit, is they wanted vengeance, so much more because Barbara Pill is one of their own.

(XXXII 1973) In its final guilt-phase closing, the State responded as follows:

STATE: They are looking, as [defense counsel] says, for vengeance. No question about it. A deputy, a member of our family has been killed, and yes, they want vengeance.

(XXXII 1980) The jury was instructed in accordance with the standard instructions for use in criminal cases. (XXXII 1997-2000; XXXIII 2022-59) After deliberating for

an hour and a quarter, it returned verdicts of guilty as charged. (VIII 1507, 1467, 1509-11; XXXIII 2070-71)

*PENALTY PHASE: PROOF*

Appellant was twenty-two at the time of the 2012 shooting. (XXXVI 2727) The State showed that in 2008, he was convicted of robbery. (XII 2040) Gary Shrewsbury testified that he was the victim of that robbery, and that while it was taking place the defendant put a gun to his forehead and said “take this cracker out in the woods and kill him.” (XXXIV 2308-10, 2316-17)

Carrie Ellison, the defendant’s girlfriend in 2010 and 2011, testified for the defense that in November, 2011, the defendant’s cousin Travontey was killed. (XXXV 2566-71) At the time she was carrying the defendant’s baby, but she miscarried on the day of the funeral. (XXXV 2571-72) She testified that the defendant changed after those two events, becoming paranoid and using drugs more heavily; she further testified that at that time he began carrying a gun regularly to protect himself. (XXXV 2572-75) The defendant’s brother Anthony Nelson testified similarly, clarifying that Travontey was a close friend they saw on a daily basis rather than a blood relative. (XXXVI 2631-33) Anthony and another brother, Lawrence Nelson, testified that during Appellant’s childhood their mutual stepfather regularly beat all of them without reason or mercy, and that their mother failed to protect them

from him. (XXXV 2582-90, 2594-2600; XXXVI 2622-23)

Neuropsychiatrist Dr. Joseph Wu testified that he reviewed both an MRI and a PET scan of the defendant's brain. (XXXIV 2347, 2360-61) He saw significant abnormalities, some of which might be attributable to post-traumatic stress, but which as a whole are more likely to have been caused by physical trauma. (XXXIV 2362-66, 2368, 2382-83) Noting that Appellant's school records showed average test scores, and that recent neuropsychological testing placed him in the fifth to eighth percentile of functioning, Dr. Wu's expressed view was that "something happened between the time he was a kid in fourth grade and the testing now." (XXXV 2429)

The anomalies Dr. Wu saw include significant atrophy of the amygdala. (XXXIV 2364) That part of the brain "is involved with processing fearful emotions;" he believes that the shrinking he saw there would result in an abnormal "tendency to misperceive and to have a greater fear response to a situation." (XXXIV 2364, 2397-98) He also saw abnormally high metabolic activity in the temporal poles, which are areas associated with anxiety. (XXXIV 2367) He further saw a deficit, amounting to two standard deviations from the norm, in the orbital frontal cortex, an area involved with impulse control; he believes the damage he saw there would cause disproportionate reactions to provocation. (XXXIV 2367-69) Dr. Wu further testified that psychoactive medications like Xanax exacerbate these problems acutely.

(XXXIV 2398) He concluded that Appellant is able to control his conduct, but is likely to misperceive events and significantly overreact to them. (XXXV 2424-25)

Dr. Wu also established that after his 2012 arrest, Appellant was prescribed Risperidone and Doxepin, which treat both psychosis and depression. (XXXV 2451) The court read the jury a standard instruction informing them that the defendant was taking psychotropic medications at the time of trial. (XXXII 1997-98)

Neuropsychologist Dr. Jacquelyn Olander testified in the penalty phase that the defendant reported to her that he had heard voices since middle school, and that he experienced paranoid feelings for about six months before the shooting. (XXXV 2488-89) He also reported to her that on the day of the shooting, he ingested Xanax, cocaine, codeine, and hallucinogenic mushrooms. (XXXV 2490-91) She concluded that at that time his capacity for calm reflection was substantially impaired, that he acted under the influence of extreme mental or emotional disturbance, and that his ability to conform his conduct to law was substantially impaired. (XXXV 2496-98)

Dr. Olander testified in the guilt phase that Appellant had in the past suffered three head injuries, the most serious occurring at age fifteen when he fell off a set of monkey bars and lost consciousness. (XXXI 1642-43, 1675) In the penalty phase, counsel for the State suggested to Dr. Olander that the brain damage Dr. Wu discussed might have taken place when Appellant's SUV slipped into the ditch after

the shooting. (XXXV 2523-24) She responded that nothing in the police reports she had read suggested he was injured in that incident. (XXXV 2524, 2544-45)

*PENALTY PHASE: CLOSING ARGUMENT*

In its penalty phase closing, the State relied on Amanda Ozburn’s testimony that the defendant had said “I’m not going back to prison.” (XXXVI 2720) The defense objected, and argued at the bench that the court had instructed the jury the defendant’s statement could be used only in weighing Ozburn’s credibility. (XXXVI 2720-21) The State agreed that it could not rely on the “like a soldier” statement, but argued that it could rely, as a substantive matter, on Ozburn’s testimony that the defendant said he would run from police. (XXXVI 2721-22) The court ruled that the argument thus far had been appropriate. (XXXVI 2722-23) The State went on to argue “you all will make the factual decision about what it was that Miss Ozburn said occurred back in December of 2011, but certainly she talked about how Mr. Bradley was spooked when he saw...police vehicles, and that he said he would run *at a minimum* if he were apprehended, or he was stopped, by police.” (XXXVI 2723) (emphasis added)

In its penalty-phase closing counsel for the State also argued as follows:

I submit to you if there is brain damage...all of that impact arose after the shooting of Deputy Pill, when he was running from the law in that March 6, 2912 car chase and subsequent crash.

(XXXVI 2735)

I submit to you the obtaining a gun wasn't just because he was concerned about a hit but rather he was concerned about not wanting to go back to prison.

(XXXVI 2736)

The defendant has a full-scale IQ of 70 as assessed in 2013...by Dr. Olander...but he was a functioning human being. We're not talking about someone who had to have full care on a daily basis to take him places, to tell him what to do and to hold his hand.

(XXXVI 2737)

STATE: There's no..testimony by anybody that disputes that Mr. Bradley was abused by his stepfather...but does that justify the killing of a law enforcement officer?

(XXXVI 2728-29)

STATE: Another mitigator is that in October of 2011... the defendant's cousin was shot to death, which had a emotional and psychological impact on the defendant. All right, defendants have relatives die in some sudden unexpected ways, certainly that impacts everybody, but does it justify the killing of a uniformed police officer? I suggest it does not.

(XXXVI 2735)

STATE: Another mitigator is that several of the defendant's friends and relatives were murdered or died, which appeared to emotionally affect the defendant. People die, it's a fact of life that all of us at one point in the course of time is going to be confronted with. We are all going to die, all of your relatives are going to die, it's going to

happen, but it does not justify the killing of another human being.

(XXXVI 2736-37)

STATE: When you go back to the jury room, I urge you to talk to your fellow jurors, express your opinions, discuss the weighing factors, mitigating versus aggravating. I submit to you that if you do, you will come to the same conclusion that justice calls for, that the Pill family calls for, that the Brevard County Sheriff's Office family calls for, the law enforcement[t] family calls for.

DEFENSE: Objection. [At bench:] That is an entirely inappropriate argument suggesting that the family, the law enforcement community, the community at large wants the death penalty. That's not permitted. We can't comment, we can't present evidence on what the family [of] the defendant wants, the State can't present evidence on what all these various agencies want.... [T]hat was not presented in the courtroom for a reason.... That is entirely improper argument and should not be considered by this jury. I move for a mistrial. A curative instruction isn't going to fix it.

THE COURT: I'm concerned about what the family of the Sheriff's Office wants, that's the one I'm concerned about. Not the Pill family, the family of the law enforcement officers.

DEFENSE: Also there's a message-to-the-community argument in there, which is also prohibited...to introduce any suggestion that the death penalty should be given because that's what the law enforcement community wants...[is to urge] a vote for a death penalty for reasons that this jury has no business considering. There is no way to undo what has been suggested to this jury by that comment...an instruction from this court will highlight it, it would compound it, it cannot be fixed.

STATE: Judge, the defense all the way through this case has been alleging that law enforcement...has been fashioning their testimony such as to obtain a conviction in this case, and what I said is entirely consistent with what their position has been all the way through.

DEFENSE: ...his position is...what the sentence should be, based upon a source which this jury cannot consider, [but it] has now been brought to their attention that...the vote of law enforcement is a vote for the death penalty.

THE COURT: I'm going to sustain the objection as to law enforcement. I'm going to deny the request for a mistrial.

(XXXVI 2742-45) The court proposed a curative instruction which would tell the jury to disregard the objected-to comments and not to consider them. (XXXVI 2747) The defense agreed to accept the proposed instruction in light of the court's rulings.

(XXXVI 2748) The court instructed the jury as follows:

THE COURT: Ladies and gentlemen of the jury, you are to disregard any comments made by the State as it relates to what the law enforcement community wants, and the wishes of the family, with regard to a sentence. This is not to be considered by you in your deliberations.

(XXXVI 2748-49)

### *MERGED AGGRAVATING FACTORS*

The defense argued at the close of the State's case in the penalty phase that the aggravating factors "the victim is a law enforcement officer" and "the offense was committed to avoid arrest" should be merged into a single aggravating factor.

(XXXIV 2329) The request was denied. During the penalty-phase charge conference, the defense again renewed the request. (XXXVI 2667-73) The State at that juncture agreed with the defense, noting it had provided the court with the standard jury instruction on “doubling.” (XXXVI 2668, 2670) The court responded “it’s my understanding..that I have to [instruct on both factors], and that you give this doubling instruction.... I’m not aware of any case that says in the doubling instruction to specifically point out which two you’re referring to.” (XXXVI 2671) The defense objected to any instruction which did not convey to the jury that the two specific factors in question merge; the court overruled the objection. (XXXVI 2671-72)

The court instructed in the penalty phase that “[t]he State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.” (XXXVII 2822; VIII 1554) The State argued to the jury that “avoid arrest” and “victim is a law enforcement officer” should be treated as a single aggravating factor. (XXXVI 2712) Ultimately, the judge merged those two aggravators in her sentencing order. (IX 1664, 1669-70)

*PENALTY PHASE: INSTRUCTIONS, DELIBERATIONS AND VERDICT*

The jury was instructed in accordance with the standard instructions for use in

the penalty phase, including statements that the jury's recommendation is advisory. (XXXVI 2793-94) The jury deliberated for three hours; during that time they asked to listen again to the dashboard videotape, and shortly thereafter asked for headphones. (VIII 1561-62; XXXVII 2834, 2839) Their recommendation, by a vote of 10-2, was for a sentence of death. (XXXVII 2848)

### *SENTENCING ORDER*

In its sentencing order the court found that “[t]he evidence of the Defendant’s guilt of the charged offenses was overwhelming, and beyond a shadow of any doubt.” (IX 1664) As noted above, the court found and merged the aggravating factors of “avoid arrest” and “victim is a law enforcement officer.” (IX 1664, 1669-70) The judge also found, as aggravators, that the defendant was on felony probation at the time of the shooting, had been convicted of a prior violent felony, had committed the murder in the course of fleeing from a robbery, and had acted in a cold, calculated, and premeditated manner. (IX 1665-68, 1670-75)

The court expressly relied on the testimony of Andria Kerchner and Jamie Dieguez, in finding that the defendant in fact said during the traffic stop that he had to kill the officer because she had seen his face and his tag, and in finding that he fired despite Andria’s begging him not to. (IX 1672-73) The court further expressly relied on Amanda Ozburn’s testimony, in finding that the defendant obtained a gun

and pre-planned the outcome of any police stop he might be involved in. (IX 1671-72) The court based its ruling that the murder was cold, calculated, and the result of heightened premeditation on that finding. (IX 1670-72) The court also relied on its finding that the gun was obtained as part of a plan to avoid police in ruling that neither of the mental-health-related statutory mitigating factors is present. (IX 1678)

As to the statutory mitigating factor “defendant was under the influence of extreme mental or emotional disturbance,” the judge ruled that “i[m]pairment due to substance abuse...at the time of the offense cannot be used to support this mitigating circumstance because the Florida Legislature has eliminated this as a mitigating factor at sentencing,” citing [Section 921.0016\(5\), Fla. Stat. \(2012\)](#). (IX 1676-77) She went on to find that while the defendant proved by competent, substantial evidence that he suffered from a brain abnormality at the time of sentencing, “it is impossible to determine” whether the brain damage post-dated the shooting, since it “may have been sustained in the crash that ensued.” (IX 1678) She further found that if the brain damage existed at the time of the murder, it did not affect the defendant’s actions. (IX 1679) The court concluded that the defendant’s actions before, during, and immediately after the shooting did not suggest that he was unaware his actions were criminal, and did not suggest that he was unable to conform his conduct to the requirements of law. (IX 1678)

As to the separate statutory mitigator “defendant was unable to conform his conduct to the requirements of law,” the court noted that the experts’ conclusions conflicted, and found that the mitigator was not proved by competent, substantial evidence. (IX 1679-80)

The court gave no weight to the defendant’s age of twenty-two. (IX 1680)

As to non-statutory mitigation, the court found the defense had not proven traumatic brain injury as a mitigating fact, in light of the fact any such injury may have post-dated the shooting, and in light of her conclusion that any such injury did not affect his conduct. (IX 1684-85) The court found the defense *had* proven a deficit in brain function, but gave that factor no weight for the same reasons. (IX 1684)

As to intellectual disability, the judge found that Dr. Olander’s 2013 testing resulted in a full-scale IQ score of 70, but concluded that the score “was not proven to be mitigating under the facts in the case at hand, thus, the Court assigns it no weight.” (IX 1688-89) That conclusion was supported in the order by the following findings:

- ◆ “[C]ompetent, substantial evidence showed...that the Defendant was not mentally retarded or mentally disabled, and did not suffer from any defici[t] in adaptive functioning.”
- ◆ The Defendant not only financially supported himself, but also helped his

family and his friends.

- ◆ The Defendant earned a high school diploma.
- ◆ The Defendant engaged in long-term goal-directed behavior and plans.
- ◆ The Defendant’s foresight and acts of self-preservation indicate that he has the ability to adapt to his surroundings.
- ◆ The defendant planned and prepared for months for any encounter with law enforcement by taking steps to illegally obtain a firearm and keep ammunition within his arm’s reach.
- ◆ The evidence did not show a manifestation of low IQ or adaptive deficits before age eighteen.

(IX 1688)

The judge further found that after Travontey’s death and Carrie’s miscarriage, Appellant “appeared to be paranoid [and] obtained a gun to protect himself.” (IX 1686-87) The court gave that factor little weight. (IX 1687)

The court gave “some weight” to the following nonstatutory mitigation: childhood physical abuse, childhood emotional abuse, emotional abandonment by the defendant’s mother, further abuse in the household that the defendant witnessed as a child, and the absence of a loving father or male role model. (IX 1681-82) The court gave “little weight” to other factors, including Appellant’s positive relationship with

his brother, his generosity to others, drug abuse at an early age, the impact of Travontey's death and the deaths of other loved ones, the fact Appellant has been diagnosed with polysubstance abuse, the fact he has been prescribed psychotropic medications, and his cooperation with authority. (IX 1683, 1686-87, 1689)

The court assigned each aggravating factor great weight, and further stated that each of the aggravating factors standing alone outweighed the combined showing of mitigation. (IX 1664, 1691)

Timely notice of appeal from the June 27, 2014 orders of conviction and sentence was filed with the trial court on July 11, 2014. (IX 1646, 1700)

## SUMMARY OF ARGUMENTS

**Point one.** The defense sought a mistrial during the penalty phase when the State argued the jury should reach “the conclusion that justice calls for, that the victim’s family calls for, that the Brevard County Sheriff’s Office family calls for, the law enforcement family calls for.” The mistrial should have been granted; in this emotion-filled case, the objected-to argument relied on facts not in evidence, sought a response that did not depend on the proof but rather on appeals to sympathy and outrage, and invoked the imprimatur of the government as a basis for the death penalty. The objected-to argument, combined with further improper but unobjected-to arguments made in closing, denied Appellant a fair penalty proceeding.

**Point two.** In voir dire, the court precluded the defense from asking if the venire could consider a life sentence if they knew the defendant was not only guilty of killing an officer, but guilty of doing so as a probationer with a violent conviction in his past who was then fleeing a robbery. The State throughout the proceedings emphasized the very factors of the case that the defense unsuccessfully sought to probe with the jury. On those facts, limiting questioning of the potential jurors amounted not only to an abuse of discretion, but to a violation of Appellant’s rights to trial by an impartial jury and to due process of law, protected by the federal and Florida constitutions.

**Point three.** Over objection, the State called witness Amanda Ozburn during the guilt phase primarily to impeach her with an inflammatory out of court statement she had attributed to the defendant but which she later recanted. The statement was that if the defendant were ever stopped by police, he intended to go out like a soldier. Reversal for a new trial is warranted; if that relief is not granted, given the inflammatory nature of the disputed statement, this court should order a new penalty phase.

**Point four.** Appellant's probation officer identified himself as a "high risk specialist;" a subsequent motion for mistrial was denied. The jurors may have concluded that the defendant was assigned to a "high risk specialist" *because he was known to threaten officers*, thereby giving the State an unfair advantage in presenting those of its witnesses who testified to such threats. Alternatively, the jury may have assumed the defendant required high-risk treatment *because his prior offenses were alarming in nature*. Either line of speculation by the jury would have prejudiced the defense in the guilt phase; the court abused its discretion in denying the requested mistrial.

**Point five.** The defense argued that two of the aggravating factors the State relied on, i.e., "victim is a law enforcement officer" and "offense was committed to avoid arrest," should be merged. Ultimately, the judge merged those two aggravators

in her sentencing order; however, the defense objected to any instruction which did not convey to the jury that those two factors merge. The instruction the jury heard omitted portions of the standard “doubling” instruction, and was ineffective to convey the judge’s meaning. The jury’s weighing process was skewed by the incorrect instruction; this court should reverse Appellant’s sentence and remand for the jury to reweigh the aggravating and mitigating evidence.

**Point six.** The judge ruled that impairment due to substance abuse at the time of the offense is not relevant to mitigation; this court holds to the contrary. The judge also discounted evidence of a brain abnormality based on the view that the brain damage in question may have been sustained after the shooting. The record does not support that supposition. The judge further gave a 70 IQ score no significance, based on a finding that the defendant adapted to society in adulthood. The federal courts hold that such a finding should not be made on a record such as the one in this case. The judge’s weighing of the aggravating and mitigating circumstances falls short of this court’s requirements in that it is based on misapprehensions as to the law and the proof.

**Point seven.** Appellant acknowledges this court’s rule that where certain aggravating factors are present, the defendant is entitled to no relief pursuant to [Ring v. Arizona, 536 U.S. 584 \(2002\)](#). Appellant further acknowledges that this court

rejects the position that Ring requires death recommendations to be unanimous. However, the United States Supreme Court has accepted review in Hurst v. State, 147 So. 3<sup>rd</sup> 435 (Fla. 2014), rev. granted, 135 S. Ct. 1531 (2015), to consider whether Florida's death-sentencing scheme violates the federal Sixth or Eighth Amendments in light of Ring. Appellant urges this court to hold this matter in abeyance until Hurst is decided, and to permit additional briefing on this point in the event the Supreme Court's decision in Hurst may warrant relief in this case.

**Point eight.** The defense moved to strike all references in the jury instructions to the jury's verdict being "advisory" or a "recommendation." That motion was denied; the jury was instructed in accordance with the standard instructions for use in capital cases. Appellant acknowledges that this court has rejected this argument, but submits that as a matter of federal law those references in the standard instructions run afoul of the rule announced by the Supreme Court in Caldwell v. Mississippi, 472 U.S. 320 (1985).

**Point nine.** This case is not one of the least mitigated this court has reviewed.

## ARGUMENT

### POINT ONE

THE COURT ERRED IN DENYING A MISTRIAL WHEN THE STATE RELIED ON NON-RECORD FACTS DURING PENALTY-PHASE CLOSINGS. THE STATE'S PENALTY-PHASE CLOSING AS A WHOLE DENIED APPELLANT DUE PROCESS AND THE HEIGHTENED RELIABILITY GUARANTEED BY THE EIGHTH AMENDMENT, AND INFRINGED ON HIS RIGHT TO TRIAL BY AN IMPARTIAL JURY.

The defense immediately sought a mistrial when the State argued that the jury, in its penalty phase deliberations, should reach “the conclusion that justice calls for, that the victim’s family calls for, that the Brevard County Sheriff’s Office family calls for, the law enforcement family calls for.” The defense argued that the State’s exhortation was based on facts not in evidence, that it amounted to a prohibited “message to the community” argument, and that it sought a death recommendation based on “reasons that this jury has no business considering.” The State responded that the defense had opened the door; the court denied a mistrial, and instructed the jurors to disregard any comment regarding what sentence the victim’s family, or the law enforcement community, wanted. The defense objected that the proposed curative instruction was inadequate to cure the problem, but eventually agreed to it when the court continued to deny the requested mistrial. The mistrial should have been granted; in this emotion-filled case, the objected-to argument relied on facts not in evidence,

sought a response that did not depend on the proof but rather on appeals to sympathy and outrage, and invoked the imprimatur of the government as a basis for the death penalty.

#### *STANDARD OF REVIEW*

This Court reviews a ruling on a motion for mistrial under an abuse of discretion standard. [Salazar v. State, 991 So. 2d 364, 371 \(Fla. 2008\)](#), *cert. den.*, [555 U.S. 1187 \(2009\)](#). For a prosecutor's comments to warrant a new trial, they “must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.” [Salazar at 372](#). This court considers the cumulative effect of improper prosecutorial comments, both those the defense objected to and those the defense did not object to, in determining whether a defendant received a fair trial. [Merck v. State, 975 So. 2d 1054, 1061 \(Fla. 2007\)](#); [accord Ruiz v. State, 743 So. 2d 1, 7 \(Fla. 1999\)](#).

#### *WISHES OF THE LAW ENFORCEMENT FAMILY*

In a case where the prosecution during penalty phase “unfairly exploited the jurors’ natural sense of sympathy and outrage for...fallen officers,” this court reversed a death sentence. [Campbell v. State, 679 So. 2d 720, 724 \(Fla. 1996\)](#). A natural side

effect of appealing for sympathy for the victim of a crime is to arouse hostile emotions toward the accused. [Brown v. State, 593 So. 2d 1210, 1211-12 \(Fla. 2d DCA 1992\)](#). Where, as here, comments in closing argument are intended to, and do, inject such elements of emotion into the jury's deliberations, the prosecutor has ventured far outside the scope of proper argument. [Garron v. State, 528 So. 2d 353, 359 \(Fla. 1988\)](#).

In [Garron](#), this court reversed a death sentence where the prosecutor in his penalty-phase closing, among other appeals to emotion, invoked the deceased victim's presumed desire to see the defendant punished by death. [528 So. 2d at 359](#) and nn. 8-9. Here the State announced not only that the victim's family wanted death, but that the Brevard County Sheriff's Office *and* the larger law enforcement community felt the same way. As the defense argued below, that argument was entirely based on facts which were not in evidence, and which would not have been admissible as evidence. Permissible victim-impact testimony excludes the survivors' opinions about what penalty they would like to see imposed. [E.g., Walls v. State, 976 So. 2d 1156, 1179 \(Fla. 2006\)](#). Such evidence is inadmissible because it invades the province of the jury. [See United States v. Brown, 441 F. 3<sup>rd</sup> 1330, 1352 \(11<sup>th</sup> Cir. 2006\)](#), *citing* [Payne v. Tennessee, 501 U.S. 808 \(1991\)](#).

Arguing facts not in evidence is improper. [Patrick v. State, 104 So. 3<sup>rd</sup> 1046, 1065 \(Fla. 2012\)](#). Such a practice “exempt[s]...evidence from admissibility requirements and from the crucible of cross-examination.” [Ruiz v. State, 743 So. 2d 1, 7 \(Fla. 1999\)](#). No lawyer in trial may “allude to any matter that the lawyer does not *reasonably* believe is relevant or that will not be supported by admissible evidence.” R. Reg. [Fla. Bar 4-3.4\(e\)](#) (emphasis added). Prosecutors, in particular, “should refrain from argument which would divert the jury from its duty to decide the case on the evidence.” [Pope v. Wainwright, 496 So. 2d 798, 803 n.4 \(Fla. 1986\)](#), *citing* [ABA Standards for Criminal Justice 3-5.8\(d\)](#) (2d ed. 1980). Because the prosecutor is an agent of the state, such arguments imply that the prosecutor has unique knowledge that has not been presented to the jury. [Tindal v. State, 803 So. 2d 806, 810 \(Fla. 4th DCA 2001\)](#). In this case, the *implication* of unique access was bypassed when the prosecutor directly conveyed the views of the officers he had worked with throughout the proceedings.

As was also argued below, it is improper for the State to appeal to community sensibilities and civic conscience. [Birren v. State, 750 So. 2d 168, 169 \(Fla. 3d DCA 2000\)](#). “Such argument is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial.... Our condemnation of a ‘community conscience’ argument is not limited to the use of

those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation. Such appeals serve no proper purpose and carry the potential of substantial injustice.” [Id. at 169-70](#) (citations omitted).

This court holds that “[i]t is particularly improper, even pernicious, for the prosecutor to seek to invoke...the sanction of the government itself as a basis for conviction of a criminal defendant.” [Ruiz v. State, 743 So. 2d 1, 4 \(Fla. 1999\)](#). In [Williard v. State, 462 So. 2d 102 \(Fla. 2d DCA 1985\)](#), the State argued to the jury

[w]hen you folks speak, the community speaks. We want you - the attorneys, the judge, everyone in this case - wants you to speak. We want you to tell the members of this community that the defendant’s conduct...is unacceptable.

[462 So. 2d at 103](#). The Second DCA condemned the argument, citing [Carr v. State, 430 So. 2d 978 \(Fla. 3<sup>rd</sup> DCA 1983\)](#), where a nearly identical argument was made. The Third DCA in [Carr](#) held that the argument was “prejudicial and inflammatory,” and “infected with error,” but affirmed where the defendant had been caught in the act of burglary. [430 So. 2d at 979](#) and n.2. Obtaining a death sentence by telling the jurors that the authority figures in the case would vote that way is patently no less “pernicious” than obtaining a conviction by such means. [See generally Ruiz, supra](#).

In response to the mistrial motion, the State argued “[t]he defense all the way through this case has been alleging that law enforcement ... has been fashioning their

testimony such as to obtain a conviction in this case, and what I said is entirely consistent with what their position has been all the way through.” Defense counsel in his guilt-phase closing, on April 1, had argued that a bias toward obtaining a conviction might have affected Sheriff’s Office witnesses’ testimony, and might have diminished their interest in uncovering exculpatory evidence, because “law enforcement is family and when Barbara Pill died, that was one of theirs...that interest hangs over this case...they wanted vengeance.” When he immediately responded, in his closing in the guilt phase, counsel for the State observed “No question about it. A deputy, a member of our family has been killed, and yes, they want vengeance.” In his penalty-phase closing a full week later, counsel urged the jury to recommend a death sentence because that was what law enforcement wanted, then argued in justification that the defense had opened the door. The governing caselaw does not support the State’s position.

In [United States v. Young, 470 U.S. 1 \(1985\)](#), a mail-fraud case, defense counsel argued in closing that the prosecutors had unfairly presented the case, had withheld exculpatory information, and had filed the charges without believing they were true. [470 U.S. at 4-5](#). Counsel for the government, in responding in his closing, stated that he did in fact think the defendant was guilty, “if we are allowed to give our personal impressions since it was asked of me.” [Id. at 5](#). Neither attorney objected to

the other's conduct in the trial court; Young, on appeal to the Tenth Circuit, argued that the prosecutor's response amounted to "plain," or fundamental, error. The Tenth Circuit agreed with the defendant, but the Supreme Court reversed. While it held the argument was improper, the Supreme Court found insufficient prejudice to warrant reversal on a plain-error basis, because the jurors had clearly overcome the distraction in that they acquitted Young on the most serious charge he faced. [Id. at 17-18](#) and n.15.

The Third DCA distinguished Young in [Fryer v. State, 693 So. 2d 1046 \(Fla. 3<sup>rd</sup> DCA 1997\)](#). Fryer's counsel, in closing argument in a burglary and theft case, questioned the honesty of the arresting officer; in response, in his closing, the prosecutor announced that he believed the officer, and that in his opinion defense counsel knew his client was guilty. The DCA held the State's response "went well beyond simply righting the scale" and reversed. [693 So. 2d at 1048](#). Here, as in Fryer, the State's response went well beyond the scope of any invitation extended during the guilt phase.

In affirming the conviction in Young, the Supreme Court noted that "[i]t should come as no surprise that in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony." [470 U.S. at 10](#). That factor also distinguishes this case from Young; here the "heat of argument" was not involved,

as the prosecution plainly calculated its response to the guilt-phase closing throughout the week-long penalty phase. The trial court abused its discretion by accepting the State's "fair reply" position. Fryer; cf. Young.

#### *WISHES OF THE VICTIM'S FAMILY*

A mistrial was also warranted by the argument that Barbara Pill's family favored a death recommendation. That disclosure was also calculated to evoke an emotional response, was also based on facts not in evidence, and was also "far outside the scope of proper argument." Garron v. State, supra, 528 So. 2d 353, 359 (Fla. 1988). Garron involved the murder of the defendant's wife, Le Thi, and her daughter, in the aftermath of a sexual approach the defendant made to another daughter; the case was defended solely on the basis of insanity. 528 So. 2d at 354-55. In closing, the State argued "if Le Thi were here, she would probably argue the defendant should be punished for what he did...listen to the screams and to her desires for punishment for the defendant, and [we] ask that you bring back a recommendation that will tell the people of Florida, that will deter people from - " Id. at 359. This court, in reversing, held the argument was so inflammatory that "[w]hile it is true that instructions to disregard the comments were given, it cannot be said that they had any impact in curbing the unfairly prejudicial effect of the prosecutorial misconduct." Id. In this case, the argument was more egregious; while Garron's jury could have taken

the State's imagined awareness of *what the victim would have wanted* with a grain of salt, here counsel for the State coolly disclosed what he was hearing from actual survivors, as well as actual officers. The trial court's instruction to disregard that argument is no likelier to have had effect than the similar instruction in Garron. The State's conduct might well have influenced jury members to reach a more severe verdict than that they would otherwise have done, see Salazar v. State, supra, and the trial court therefore abused its discretion by denying the requested mistrial.

#### *UNPRESERVED COMMENTS*

The State repeatedly argued in its penalty-phase closing, without objection, that traumatic events in the defendant's life which were proved as mitigation do not justify killing a law enforcement officer. Also, the objected-to series of comments made by the State included the assertion that "justice" - in addition to Barbara Pill's family and co-workers - demands a death recommendation; the defense did not obtain a ruling on that aspect of the State's argument. This court weighs unobjected-to improprieties along with objected-to argument in determining whether the defendant received a fair trial. Merck, supra; Ruiz, supra.

In asserting that trauma in the defendant's past does not justify killing an officer, the State dismantled a straw man of its own creation; the defense, in putting on mitigation, never claimed that the showing it had made *justified* taking a life. As

this court holds, a “straw man” in this context is a “hypothetical assumption of nonexistent facts.” [Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 530 \(Fla. 1974\)](#). Where the State suggests, then debunks, an alibi defense, the courts reverse, since such manipulation leads the jury to believe the defendant bears the burden of proving his innocence. E.g., [Morgan v. State, 700 So. 2d 29, 30 \(Fla. 2d DCA 1997\)](#). Here, the “trauma doesn’t justify a murder” argument was used to lead the jury to discount valid mitigating evidence.

In [Merck v. State, 975 So. 2d 1054 \(Fla. 2007\)](#), the State argued in the penalty phase that nothing in the defendant’s background could diminish what he had done to the victim. [See 975 So. 2d at 1070](#). This court held that the comment did not amount to the sort of pervasive error that warrants fundamental-error treatment. [Id. at 1064](#). Justice Pariente and two other dissenting Justices would have reversed Merck’s sentence because argument disparaging mitigation evidence is inconsistent with [Hitchcock v. Dugger, 481 U.S. 393 \(1987\)](#), which holds that an advisory jury cannot be precluded from considering valid mitigation. [Merck at 1070 and n. 6](#) (Pariente, J., dissenting). In this case the State went beyond arguing that *no mitigation can diminish the enormity of murder*; here it argued that what the defendant had just showed in mitigation did not morally justify the murder in question. Here also, the argument was part of a pervasive theme; after appealing to non-evidentiary bases for

a death recommendation that included sympathy and outrage, the State added an appeal to disregard valid mitigation.

As to the comment that justice demands a particular recommendation, this court holds that the State may not “vouch for” its decision to seek death “by claiming that it is clear that this is a case that demands the death penalty.” [Braddy v. State, 111 So. 3<sup>rd</sup> 810, 848 \(Fla. 2012\)](#), *citing* [Brooks v. State, 762 So. 2d 879, 901 \(Fla. 2000\)](#). In contrast, in [Davis v. State, 136 So. 3<sup>rd</sup> 1169, 1207 \(Fla. 2014\)](#), this court held the State may argue that a particularly egregious aggravating factor “cries out for” the death penalty. Here the prosecutor did not rely on some aspect of the proof, but simply announced his view that justice, in this case, demands a recommendation of death. When a witness who speaks for law enforcement announces an opinion on the ultimate question in a criminal case, this court holds that the testimony “can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges..., and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence.” [Martinez v. State, 761 So. 2d 1074, 1080 \(Fla. 2000\)](#). In this case the prosecutor’s opinion on the ultimate question, his denigration of valid mitigation, and his unsupported “law enforcement community” and “victim’s family” arguments were all calculated to induce a death recommendation regardless what the evidence showed. Weighed together, the arguments denied Appellant a fair penalty

proceeding.

In all criminal cases, the sentencing process must satisfy the requirements of the federal due process clause, since the defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence. [Gardner v. Florida, 430 U.S. 349, 358 \(1977\)](#). Improper prosecutorial argument can amount to a due process violation. [Donnelly v. DeChristoforo, 416 U.S. 637 \(1974\)](#). In death-penalty cases, it is of vital importance to the defendant and the community that the decision to impose that penalty be, and appear to be, based on reason rather than caprice or emotion. [Gardner at 358](#). The right to due process warrants relief where the State encourages a jury to take into account matters that are not legitimate sentencing considerations, and where there is a reasonable probability the outcome of the proceeding was affected. [Johnson v. Wainwright, 778 F. 2d 623, 629-31 \(11<sup>th</sup> Cir. 1985\)](#). The federal courts look to whether improper considerations were deliberately placed before the jury. [DePew v. Anderson, 311 F. 3<sup>rd</sup> 742, 749 \(6<sup>th</sup> Cir. 2002\)](#). Where the State appeals to the community's conscience, the federal courts consider whether that appeal was calculated by the prosecutor to incite the passions and prejudices of the jury. [United States v. Solivan, 937 F. 2d 1146, 1151 \(6<sup>th</sup> Cir. 1991\)](#). The ultimate question is whether the jury was able to fairly judge the evidence in light of the impropriety. [Wilson v. Sirmons, 536 F. 3<sup>rd</sup> 1064, 1117 \(10<sup>th</sup> Cir. 2008\)](#). Here, the

State's calculated appeal to non-evidentiary bases for a death recommendation put the jury's ability to fairly judge the evidence very much at risk, and the curative instruction failed to undo the damage. See [Garron v. State, supra](#). Appellant's right to due process of law, protected by Florida's constitution as well as the federal constitution, was not adequately protected at the penalty phase, and this court should accordingly reverse the sentence appealed from.

The right to trial by an impartial jury, protected by the federal and Florida constitutions, was also adversely affected. Arguments that urge jurors to send a message to the community have been held to violate the right to an impartial jury. [Gaines v. Commonwealth, 283 S.W. 3<sup>rd</sup> 243 \(Ky. Ct. App. 2008\)](#); see [Commonwealth v. Patton, 985 A. 2d 1283 \(Pa. 2009\)](#).

The need for heightened reliability in capital proceedings, protected by the federal Eighth Amendment, also was not met in this case. See generally [Beck v. Alabama, 447 U.S. 625, 637-38 \(1980\)](#), citing [Gardner v. Florida, supra](#), for the principle that the Supreme Court guards the reliability of capital sentencing determinations by insuring that such decisions are not made based on caprice or emotion. A "reliable" verdict, in this context, results when the courts can be confident the decision-maker gave independent weight to those aspects of the defendant's character and record that were proffered in mitigation, so that the risk that the death

penalty will be imposed in spite of factors which may call for a less severe penalty was minimized. See Beck, 447 U.S. at 638 n.13. Here, since the State affirmatively sought a sentencing recommendation based on non-evidentiary bases, this court should conclude the requisite reliability is absent, and reverse the death sentence appealed from.

## POINT TWO

THE TRIAL COURT ERRED IN LIMITING THE DEFENSE QUESTIONING OF POTENTIAL JURORS. THE ERROR AMOUNTED TO A DENIAL OF THE RIGHTS TO TRIAL BY AN IMPARTIAL JURY, AND TO DUE PROCESS OF LAW.

The trial court allowed the defense to ask venire members if they could still consider mitigation, and still consider voting for a life sentence, if they knew the victim had been an officer acting in the line of duty. The court further allowed the defense to ask the venire if they could still consider mitigation if they found the presence of six unnamed aggravating factors. However, the court precluded the defense from asking if the venire could consider life if they knew the defendant was not only guilty of killing an officer, but guilty of doing so as a probationer with a violent conviction in his past who was then fleeing a robbery. The State throughout the proceedings emphasized the very factors of the case that the defense unsuccessfully sought to probe with the jury. On those facts, limiting questioning of the potential jurors amounted not only to an abuse of discretion, but to a violation of Appellant's rights to trial by an impartial jury and to due process of law, protected by the federal and Florida constitutions.

### *STANDARD OF REVIEW*

Whether a jury panel should have been questioned on a specific subject is

reviewed for abuse of discretion. [Davis v. State, 698 So. 2d 1182, 1190 \(Fla. 1997\)](#).

### *RIGHT TO AN IMPARTIAL JURY*

The Supreme Court “ha[s] not hesitated, particularly in capital cases, to find that certain inquiries must be made of the venire in order to effectuate constitutional protections.” [Morgan v. Illinois, 504 U.S. 719, 730 \(1992\)](#), *citing* [Turner v. Murray, 476 U.S. 28 \(1986\)](#). In [Turner](#), a capital case where the defendant was African-American and the victim was white, defense counsel was not allowed to ask whether those facts would affect the venire’s ability “to render a fair and impartial verdict based solely on the evidence.” [476 U.S. at 30-31](#). The Court reversed Turner’s death sentence, holding that the circumstances created an unacceptable risk that the penalty had been meted out arbitrarily or capriciously. [Id. at 35-36](#). In [Morgan v. Illinois](#), the inquiry permitted by [Wainwright v. Witt, 469 U.S. 412 \(1985\)](#), was curtailed; the Court reversed Morgan’s death sentence, holding that generalized questions asking if potential jurors can be fair and impartial, or if they can follow the law, can be insufficient to elicit bias. [Morgan, 504 U.S. at 734-36](#).

“Much like cross-examination is the engine of truth in our justice system, voir dire is the engine of selecting a jury that will be fair and impartial.” [Ellington v. State, 292 Ga. 109, 735 S.E. 2d 736, 761 \(Ga. 2012\)](#). The right to due process requires that voir dire be sufficient to allow the parties and court to elicit juror bias. [Ellington](#),

*citing* [Morgan v. Illinois](#). Those facts which have substantial potential to arouse the kind of bias that may disqualify a juror should be disclosed in voir dire, since without that disclosure the necessarily general questioning that takes place may be not bring to light “potentially biased views, which all concerned have a duty to investigate thoroughly.” [State v. Clark, 981 S.W. 2d 143, 147 \(Mo. 1998\)](#). “When the crime itself is likely to inflame...passions...[s]ome prospective jurors...may [be] unable to remain dispassionate and impartial when deciding whether the death sentence should be imposed.” [State v. Jackson, 107 Ohio St. 3<sup>rd</sup> 53, 836 N.E. 2d 1173, 1191-92 \(Ohio 2005\)](#). In both [Clark](#) and [Jackson](#), the prosecution in a death case successfully opposed efforts to explore juror bias where the victim had been a small child.

Here, the defense sought to learn whether potential jurors would consider the case to be over once they heard not only that the victim was an officer, but that the defendant had a prior armed robbery conviction and was on the run from another robbery. It was clear the jury would learn, in the guilt phase, that the defendant committed the new robbery while on probation. The defense announced before voir dire that it was willing to waive any issue that would normally arise from having the jury also learn, before guilt-phase deliberations, just why Appellant was on probation, in exchange for a more searching voir dire. Here, as in the [Ellington](#) case from Georgia and the [Jackson](#) case from Ohio, the facts the defense sought to explore with

the venire were undisputed. [735 S.E. 2d at 757](#); [836 N.E. 2d at 1190](#). Here also, as in both of those cases, counsel did not seek a commitment from the jury, but instead sought to ascertain if the jurors could put strong feelings aside in order to consider a life sentence. [Ellington, 735 S.E. 2d at 761-62](#); [Jackson, 836 N.E. 2d at 1190](#).

The Supreme Court in [Morgan](#) and in [Turner v. Murray](#) vacated death sentences, noting that the unparalleled range of subjective decision-making entailed in the death-sentencing process creates a unique opportunity for prejudices to operate undetected. [Turner, 476 U.S. at 35](#). In this case, the limitation on voir dire should not be deemed harmless as to the penalty phase. Here as in [Ellington](#), the prosecutors, “[a]fter strenuously objecting to any inquiry about the jurors’ views as to [the controversial subject matter in the case], focused on [those facts] from opening statement in the guilt/innocence phase to closing argument in the sentencing phase as a principal reason that [the defendant] should receive the death sentence.” [735 S.E. 2d at 755](#). The State proved through its first guilt-phase witness that Appellant was on probation at the time of the shooting, and in its opening, closing, and penalty-phase closing repeatedly emphasized its theory that the defendant had a plan to kill any officer who might return him to prison. The jury’s 10-2 death recommendation might have been different after a more searching voir dire; reversal for a new penalty phase is thus warranted.

### POINT THREE

THE TRIAL COURT ERRED BY ALLOWING  
THE STATE TO CALL AMANDA OZBURN FOR  
THE PRIMARY PURPOSE OF IMPEACHING HER  
TESTIMONY.

#### *STANDARD OF REVIEW*

In evidentiary matters the trial court's discretion is limited by the rules of evidence and the applicable case law. [Twilegar v. State, 42 So. 3<sup>rd</sup> 177, 194 \(Fla. 2010\), cert. den., 131 S. Ct. 1476 \(2011\).](#) A court's erroneous interpretation of those authorities is subject to *de novo* review. [Pantoja v. State, 59 So. 3<sup>rd</sup> 1092, 1095-96 \(Fla.\), cert. den., 132 S. Ct. 496 \(2011\).](#)

#### *§90.608, FLORIDA STATUTES*

In Florida, since a 1990 statutory amendment, parties have been allowed to impeach their own witnesses. [Section 90.608, Florida Statutes,](#) now broadly provides on its face that “[a]ny party, including the party calling the witness, may attack the credibility of the witness by...introducing statements of the witness which are inconsistent with his present testimony.” However, under the amended statute, “[g]enerally...if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded.” [Morton v. State, 689 So. 2d 259, 262-64 \(Fla. 1997\),](#) *receded from on other grounds in* [Rodriguez v. State, 753 So. 2d 29 \(Fla. 2000\).](#)

Accord Felton v. State, 120 So. 3<sup>rd</sup> 126 (Fla. 4<sup>th</sup> DCA 2013), and Bleich v. State, 108 So. 3<sup>rd</sup> 1132 (Fla. 5<sup>th</sup> DCA 2013).

To determine whether a party has called a witness “for the primary purpose of impeachment,” the courts consider (1) whether the witness’s testimony surprised the calling party, (2) whether the witness’s testimony affirmatively harmed the calling party, and (3) whether the impeachment of the witness was of *de minimis* substantive value. Felton; Bleich; Ruff v. State, 31 So. 3d 833, 837 (Fla. 4th DCA 2010). The first factor, surprise, is absent where, as here, the party calling the witness knows that she had recanted earlier testimony favorable to that party. Hernandez v. State, 31 So. 3rd 873 (Fla. 4th DCA 2010).

Factor (2) is whether the witness’s testimony was in fact unfavorable to the party who called him. “The pivotal question is whether the party is calling a witness with the reasonable expectation that the witness will testify to something helpful to the party’s case aside from the prior inconsistent statement.” Ruff at 837, citing McCormick on Evidence §38 at 142-43 (John W. Strong ed., 5th ed. 1999) (emphasis added). Here, in addition to the “going out like a soldier” statement, Ms. Ozburn testified only that the defendant habitually carried a gun, that he knew he had warrants out, and that he wanted to avoid returning to prison. That proof was cumulative of testimony that had already been given by the probation officer and Andria Kerchner.

Here as in Ruff, the remaining testimony given by the witness “was not substantive evidence of any facts in dispute.” [31 So. 3<sup>rd</sup> at 838](#). In short, the State had no reasonable expectation, when it called Ms. Ozburn, that she would do anything significant for its case except serve as a vehicle to bring the “going out like a soldier” statement to the jury’s attention.

As to factor (3), whether the impeachment was *de minimis*, the courts consider the positive impact the impeaching matter had on the State’s case. [Hernandez v. State, supra, 31 So. 3<sup>rd</sup> at 879](#). Here, as in Felton and Ruff, far from being *de minimis*, the impeachment was “the centerpiece” of the testimony elicited from the witness in question. [Felton, 120 So. 3<sup>rd</sup> at 129](#); [Ruff, 31 So. 3<sup>rd</sup> at 838](#). Here also, the impeachment testimony was undoubtedly inflammatory, on the facts of this case.

[State v. Richards, 843 So. 2d 962 \(Fla. 3<sup>rd</sup> DCA 2003\)](#), [Lawrence v. State, 829 So. 2d 955 \(Fla. 3<sup>rd</sup> DCA 2002\)](#), and [Laur v. State, 781 So. 2d 452 \(Fla. 4<sup>th</sup> DCA 2001\)](#) are all distinguishable here. In each of those cases the courts held that the witness was called for a legitimate forensic purpose and was incidentally impeached. See Richards and Lawrence (witness was present during incident that gave rise to charges); Laur (witness, who was victim of charges, gave detailed inculpatory testimony).

As the defense also argued below, the statement witness Ozburn attributed to

Appellant was not reliably shown to have ever been made by him. The error in admitting her testimony thus affected the penalty phase as well as the guilt phase. The fact the confrontation clause is inapplicable to the penalty phase does not doom defendants to be sentenced to death on the basis of unreliable hearsay. [United States v. Fields](#), 483 F. 3<sup>rd</sup> 313, 337-38 (5<sup>th</sup> Cir. 2007). The federal due process clause requires that some minimal indicia of reliability accompany a hearsay statement introduced at sentencing. *Id.*; [United States v. Perry](#), 982 F. 2d 1365, 1369 (9<sup>th</sup> Cir. 1993); [United States v. Beaulieu](#), 893 F. 2d 1177, 1181 (10<sup>th</sup> Cir. 1990); [United States v. Sunrhodes](#), 831 F. 2d 1537, 1543 (10<sup>th</sup> Cir. 1987). The “minimal indicia” rule insures that information the sentencer relies on bears a rational relationship to the decision to impose a particular sentence. [United States v. Fulbright](#), 804 F. 2d 847, 853 (5<sup>th</sup> Cir. 1986). Here the State’s proffer consisted of Ozburn’s report that she gave the statement at issue at a police interview while under the influence of drugs, and that she could no longer remember the defendant ever making the statement. That proffer lacks the requisite indications that the statement was sufficiently reliable to come into evidence.

#### *THE ERROR WAS NOT HARMLESS*

The error in admitting the “like a soldier” statement cannot reasonably be deemed harmless in this case. In [Bleich, supra](#), the Fifth DCA held that admitting a

co-defendant's statement amounted to reversible error, where that statement was "extremely prejudicial" and where the prosecutor compounded the error by relying on the statement, in closing, as if it were substantive evidence of guilt. [Bleich at 1134](#). Here the State in opening laid the groundwork by referring to a "life or death battle" between Appellant and Deputy Pill. In closing, the State argued that the defendant told Ozburn that *at a minimum* he would run from police if in danger of being arrested. Here as in [Ellis v. State, 622 So. 2d 991 \(Fla. 1993\)](#), an inculpatory statement was admissible only for impeachment, but in closing the State relied on it "almost entirely for its substantive effect on the fact finder." [622 So. 2d at 996-97 \(Fla. 1993\)](#). Here, as in [Ellis](#), "the prior statement ... became a prominent feature of the trial .... [It] tended to give substantial weight to the case against [the defendant.]" [622 So. 2d at 998](#).

In this case not only the jury's recommendation, but the court's death sentence, was affected by the error argued on this point; the court in its sentencing order expressly found that Ozburn's testimony supported findings not only that the murder was the result of heightened premeditation, but that both mental-health-related statutory mitigating factors were absent. Reversal for a new trial is warranted; if that relief is not granted, given the inflammatory nature of the disputed statement, this court should order a new penalty phase.

## POINT FOUR

THE TRIAL COURT ERRED IN DENYING A  
MISTRIAL IN THE GUILT PHASE, AFTER  
APPELLANT’S PROBATION OFFICER  
TESTIFIED HE WAS A “HIGH-RISK SPECIALIST.”

The State’s first guilt-phase witness, probation officer Charles Colon, testified that after Appellant absconded from probation, he sought and obtained multiple arrest warrants. When Colon was first called to the stand, he identified himself as a “high risk specialist.” The defense moved for a mistrial, which was denied. The court abused its discretion in so ruling.

### *STANDARD OF REVIEW*

This court reviews a ruling on a motion for mistrial for abuse of discretion. [Salazar v. State, 991 So. 2d 364, 371 \(Fla. 2008\)](#), *cert. den.*, [555 U.S. 1187 \(2009\)](#).

### *PREJUDICE IN THE GUILT PHASE*

A chief point of contention below was whether the defendant shot the deputy in a premeditated effort to avoid a return to prison. That theory depended on the jurors’ believing that the defendant in fact made the statements that Jeffrey Dieguez, Andria Kerchner, and Amanda Ozburn attributed to him. The jurors may have concluded that the defendant was assigned to a “high risk specialist” *because he was known to threaten officers*, thereby giving the State an unfair advantage in presenting its case. [Rodriguez v. State, 842 So. 2d 1053 \(Fla. 3<sup>rd</sup> DCA 2003\)](#) is apposite; there the

court reversed an aggravated assault conviction where the jury heard that after the incident that gave rise to the charge, the alleged victim successfully obtained a restraining order. The DCA held that the fact the order was issued unfairly bolstered the victim's version of events, in that clearly the issuing judge had believed that version. Here, similarly, the fact of the "high-risk" designation tended to show that one or more authority figures had judged the defendant's threats sufficiently believable to warrant taking precautions.

Alternatively, the jury may have assumed the defendant required high-risk treatment *because his prior offenses were alarming in nature*. As this court holds, "vague and unverified information regarding...prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury." [Gerals v. State, 601 So. 2d 1157, 1162-63 \(Fla. 1992\)](#). See also [State v. Emmund, 698 So. 2d 1318 \(Fla. 3<sup>rd</sup> DCA 1997\)](#), where the DCA affirmed an order precluding the State from referring in the jury's presence to Emmund's violent career criminal status; in so holding the DCA noted "it is difficult to conceive" that jurors would not be affected by hearing of that status. [698 So. 2d at 1320](#). Either line of speculation by the jury would have prejudiced the defense from the outset. Accordingly, the court abused its discretion in denying the requested mistrial.

The prejudice to the defendant in the guilt phase amounted to a denial of the

right to due process of law. The federal courts hold that an incorrect evidentiary ruling creates fundamental unfairness that implicates due process concerns where the evidence admitted is “crucial, critical, [and] highly significant.” See [Hill v. Secretary, Florida Department of Corrections, 578 Fed. Appx. 805, 810 \(11<sup>th</sup> Cir. 2014\)](#). In this case, the general suggestion that the defendant has an alarming prior record, and the alternative suggestion that it is true that the defendant has a history of threatening harm to police officers, both meet the test set out in [Hill](#). Reversal of the conviction appealed from, and remand for a new trial, is thus warranted on federal and state constitutional grounds, as well as on the ground the trial court abused its discretion by denying the requested mistrial.

## POINT FIVE

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE REQUEST TO INSTRUCT THE JURY THAT THE AGGRAVATING FACTORS “VICTIM IS A LAW ENFORCEMENT OFFICER” AND “OFFENSE WAS COMMITTED TO AVOID ARREST” MERGE AND SHOULD BE CONSIDERED AS ONE FACTOR.

The defense argued below that “the victim is a law enforcement officer” and “the offense was committed to avoid arrest” should be merged into a single aggravating factor. Ultimately, the judge merged those two aggravators in her sentencing order; however, the defense objected to any instruction which did not convey to the jury that those two factors merge. The judge overruled the objection, based on her understanding that the partial standard “anti-doubling” instruction the State had provided her with was correct. The instruction the jury heard was defective, and may have skewed the weighing process.

### *STANDARD OF REVIEW*

Review of a purely legal question is *de novo*. [Jackson v. State, 64 So. 3<sup>rd</sup> 90, 92 \(Fla. 2011\)](#).

### *SKEWING OF THE WEIGHING PROCESS*

What the court instructed was that “[t]he State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you

find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.” The standard instructions for use in the penalty phase call for the court to read those two sentences; a note to judges provides “*you must also give the jury an example specifying each potentially duplicitous aggravating circumstance.*” Fla. Std. Jury Instr. (Crim.) 7.11, West’s Florida Criminal Laws and Rules at J-76 (2015) (emphasis added). That note to the standard instructions cites to, and correctly reflects, [Castro v. State, 597 So. 2d 259 \(Fla. 1992\)](#). This court clarified the law in [Castro](#), announcing that a proper “doubling” instruction advises that if the jurors find two specific duplicative aggravating factors are present, they must consider the two as one. [597 So. 2d at 261](#). Where the court instructs on both “avoid arrest” and “victim is a law enforcement officer,” to avoid error it must both give an effective “anti-doubling instruction” *and* merge the two aggravators in its sentencing order. See [Sims v. State, 681 So. 2d 1112, 1117-18 \(Fla. 1996\)](#).

Failing to give *any* “anti-doubling instruction” as to the “avoid arrest” and “victim is a law enforcement officer” factors was deemed harmless error in [Armstrong v. State, 642 So. 2d 730 \(Fla. 1994\)](#). In [Armstrong](#), three valid remaining aggravating factors were present *and* the mitigation showing was “negligible.” [642 So. 2d at 738-39](#). [Armstrong](#) should not control here, where it was shown in mitigation that the

defendant has significant brain damage and achieved a recent IQ score of 70.

In this case, the State argued to the jury that “avoid arrest” and “victim is a law enforcement officer” should be treated as a single aggravating factor. The fact the State correctly argued the law to the jury should not be dispositive of the issue now raised; as the courts recognize, a correct argument by counsel does not render harmless a ruling denying a legally correct jury instruction. [Cliff Berry, Inc., v. State, 116 So. 3<sup>rd</sup> 394, 411-12 \(Fla. 3<sup>rd</sup> DCA 2012\)](#), *citing* [Gardner v. State, 480 So. 2d 91, 93 \(Fla. 1985\)](#). The argument of counsel is likely viewed by jurors as advocacy, as distinct from the court’s instructions, which are likely viewed as “definitive and binding statements on the law.” [Cliff Berry, 116 So. 3<sup>rd</sup> at 412](#) and n.17, *citing* [Boyde v. California, 494 U.S. 370, 384 \(1990\)](#). The Supreme Court noted in [Boyde](#) that the argument of counsel is usually billed in advance as having no evidentiary force. *See* [Cliff Berry](#) at n.17. Here, in accordance with Florida’s standard instructions, the court twice told the jury, before both the guilt-phase and penalty-phase closings, that “what the attorneys say is not evidence or your instruction on the law.” (XXXII 1903; XXXVI 2708)

This court has reversed the sentence of death “[w]hen the weighing process itself has been skewed” by the jury’s consideration of an invalid aggravating factor. [Jackson v. State, 648 So. 2d 85, 90 \(Fla. 1994\)](#), *citing* [Stringer v. Black, 503 U.S. 222,](#)

[232 \(1992\)](#). [Accord \*Sochor v. Florida\*, 504 U.S. 527, 532 \(1992\)](#). The federal Tenth Circuit has held that considering duplicative aggravating factors necessarily skews the weighing process in the manner addressed in [Stringer v. Black](#), [United States v. McCullah](#), 76 F. 3<sup>rd</sup> 1087, 1111 (10<sup>th</sup> Cir. 1996). The United States Supreme Court noted in [Jones v. United States](#), 527 U.S. 373 (1999), that it had never considered the question decided in [McCullah](#); the Court declined to address the issue in [Jones](#), because the factors involved in that case were not truly duplicative. This court has held that the factors at issue in this case *are* duplicative. [Sims, supra](#). When the same aggravating factor is counted twice, the defendant is essentially condemned twice for the same culpable act. [McCullah](#), 76 F. 3<sup>rd</sup> at 1111. This court should therefore reverse the death sentence appealed from and remand for the jury to reweigh the aggravating and mitigating evidence. [Id. at 1112](#).

## POINT SIX

THE TRIAL COURT ERRED IN WEIGHING THE PROOF OFFERED IN MITIGATION. APPELLANT'S RIGHT TO RELIABLE SENTENCING PROCEEDINGS, GUARANTEED BY THE FEDERAL EIGHTH AMENDMENT, WAS ADVERSELY AFFECTED.

### *STANDARD OF REVIEW*

For this Court to sustain a trial court's final decision in its sentencing order, competent, substantial evidence of record must support the trial court's weighing process. [Oyola v. State, 99 So. 3d 431, 446 \(Fla. 2012\)](#), *citing* [Campbell v. State, 571 So. 2d 415, 419-20 \(Fla. 1990\)](#), *receded from on other grounds in* [Trease v. State, 768 So. 2d 1050, 1055 \(Fla. 2000\)](#).

A finding that a statutory mitigating factor is absent will be affirmed if that finding is supported by competent, substantial evidence. [Ault v. State, 53 So. 3<sup>rd</sup> 175, 187 \(Fla. 2010\)](#), *cert. den.*, [132 S. Ct. 224 \(2011\)](#).

The weight assigned to an established mitigating circumstance is reviewed for abuse of discretion. [Ault at 187](#). A ruling amounts to an abuse of discretion if it is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. [Johnson v. State, 969 So. 2d 938, 949 \(Fla. 2007\)](#), *cert. den.*, [553 U.S. 1007 \(2008\)](#), *citing* [Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 \(1990\)](#).

## *SUBSTANCE ABUSE*

In finding the statutory mitigating factor “extreme mental or emotional disturbance” to be absent, the judge ruled that “i[m]pairment due to substance abuse ...at the time of the offense cannot be used to support this mitigating circumstance because the Florida Legislature has eliminated this as a mitigating factor at sentencing,” citing [Section 921.0016\(5\), Fla. Stat. \(2012\)](#). The cited section of the sentencing guidelines has been repealed, but was succeeded by a similar provision in the Criminal Punishment Code, [Section 921.0026\(3\), Fla. Stat. \(2015\)](#). However, the same rule does not apply to capital sentencing. This court holds that heavy drug use at the time of a murder, combined with brain damage, can support the mitigating factor that the defendant acted under extreme mental or emotional disturbance. [Bright v. State, 90 So. 3<sup>rd</sup> 249, 264 \(Fla. 2012\)](#), *citing* [Knowles v. State, 632 So. 2d 62 \(Fla. 1993\)](#).

The judge also found that the murder in this case was cold, calculated and premeditated (“CCP”). Impairment due to consumption just before the crime is relevant to the presence of the CCP aggravator. *See* [Brown v. State, 143 So. 3<sup>rd</sup> 392 \(Fla. 2014\)](#) (affirming in light of non-proximate use of drugs); [White v. State, 616 So. 2d 21 \(Fla. 1993\)](#) (striking CCP factor); [Penn v. State, 574 So. 2d 1079 \(Fla. 1991\)](#) (striking CCP factor). The record does not suggest that the trial court took the

defendant's advanced degree of intoxication into account in finding that aggravator.

The evidence must support the court's weighing process. [Oyola, supra](#). Here the evidence casts doubt on that process, and this court should remand for the court to consider the defendant's intoxication at the time of the shooting.

### *BRAIN DAMAGE*

In finding the "extreme mental or emotional disturbance" statutory mitigator absent, the judge found that while the defendant proved by competent, substantial evidence that he suffered from a brain abnormality at the time of sentencing, "it is impossible to determine" whether the brain damage post-dated the shooting, since it "may have been sustained in the crash that ensued." She further found that if the brain damage existed at the time of the murder, it did not affect the defendant's actions.

As to non-statutory mitigation, the court found the defense did not prove traumatic brain injury as a mitigating factor, in light of the possibility that any such injury may have post-dated the shooting, and in light of her conclusion that any such injury did not affect his conduct. The court found the defense *did* prove a deficit in brain function, but gave that factor no weight for the same reasons.

Dr. Wu described the defendant's brain damage as significant, and testified that it must be the result of an event that occurred sometime between fourth grade, when the defendant achieved average scores on intelligence tests, and 2013, when he scored in

the fifth to eighth percentiles. The record does not support the supposition that the significant event in question was the SUV's rolling into the ditch as a result of the chase after the shooting. Exhibit 61, at 11:30:19 - 11:30:30, shows the slow-speed end of the chase, and the arresting and interrogating officers testified that the defendant seemed fine to them when he exited the vehicle. The court's ruling giving no weight to deficient brain function amounts to an abuse of discretion in that it is based on a clearly erroneous assessment of the evidence. Ault; see [Cooter & Gell v. Hartmarx Corp.](#) Its separate finding that traumatic brain injury was not proved is not supported by competent, substantial evidence. See Ault. On remand, the court should reconsider the substantial mental health-related mitigation put on by the defense.

#### *INTELLECTUAL DISABILITY*

The judge found that 2013 testing had resulted in a full-scale IQ score of 70, but assigned that fact no weight because the proof showed adaptive conduct, including the facts the defendant earned a high school diploma, and "not only financially supported himself, but also helped his family and his friends." The court also cited "foresight and acts of self-preservation," and "long-term goal-directed behavior and plans." The court finally found "the evidence did not show a manifestation of low IQ or adaptive deficits before age eighteen."

As to onset in childhood, since Dr. Wu's opinion was that the deficits he was seeing dated to sometime after the fourth grade, the evidence in this case does not support the conclusion that since the deficits are not congenital they are not significant. As to adaptive functioning, the Eleventh Circuit Court has held it is unreasonable for a court to make findings on adaptive functioning where, as here, evidence of intellectual disability is offered in mitigation rather than in bar of execution. [Burgess v. Comm'n'r, Alabama Department of Corrections, 723 F. 3<sup>rd</sup> 1308, 1315-19 \(11<sup>th</sup> Cir. 2013\)](#). This is so because evidence offered in mitigation is "presented in an entirely different context and without the benefit of any explanation how it would or would not be consistent with mental retardation." [723 F. 3<sup>rd</sup> at 1316](#). The findings that were made in this case regarding adult adaptive functioning were not only made on an inadequate record, [see Burgess](#), but the trial judge did not specify whether in making those findings she applied the clear and convincing standard of proof dictated by [Section 921.137\(4\), Florida Statutes](#), or a different standard. This court has reserved the question whether the courts may constitutionally require the defense to prove intellectual disability by clear and convincing evidence. [E.g., Dufour v. State, 69 So. 3<sup>rd</sup> 235, 253 \(Fla. 2011\), cert. den., 132 S. Ct. 1150 \(2012\)](#).

The sentencing order's weighing of aggravating and mitigating evidence thus is not supported by competent substantial evidence. The reliable sentencing proceeding

guaranteed by the Eighth Amendment has not yet taken place in this case. See generally [Lockett v. Ohio, 438 U.S. 586, 601 \(1978\)](#). As it did in Oyola, this court should reverse the sentencing order and remand for reweighing of the aggravating and mitigating factors. [99 So. 3<sup>rd</sup> at 447](#).

POINT SEVEN

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

*STANDARD OF REVIEW*

Review of a purely legal question is *de novo*. [Jackson v. State, 64 So. 3<sup>rd</sup> 90, 92 \(Fla. 2011\)](#).

*HURST v. FLORIDA*

Appellant acknowledges this court's rule that where certain aggravating factors are present, the defendant is entitled to no relief pursuant to [Ring v. Arizona, 536 U.S. 584 \(2002\)](#). [Martin v. State, 107 So. 3<sup>rd</sup> 281, 322 \(Fla. 2012\)](#), *cert. den.*, [133 S. Ct. 2832 \(2013\)](#) (defendant committed a prior violent felony, defendant was on felony probation); [Belcher v. State, 961 So. 2d 239, 253 \(Fla. 2007\)](#), *cert. den.*, [552 U.S. 1026 \(2007\)](#) (murder was committed in the course of a felony). Appellant further acknowledges that this court rejects the position that Ring requires death recommendations to be unanimous. *E.g.*, [Coday v. State, 946 So. 2d 988, 1006 \(Fla. 2006\)](#), *cert. den.*, [551 U.S. 1106 \(2007\)](#). However, as this court well knows, the United States Supreme Court has accepted review in [Hurst v. State, 147 So. 3<sup>rd</sup> 435 \(Fla. 2014\)](#), *rev. granted*, [135 S. Ct. 1531 \(2015\)](#), to consider whether Florida's death-sentencing scheme violates the federal Sixth or Eighth Amendments in light of Ring.

In Hurst, the State must defend the Florida Legislature's unique decision to

dispense with Florida's historic jury-unanimity requirement solely for death recommendations. The American jury system is predicated on meaningful deliberations, which are not guaranteed where a consensus need not be reached. [Hurst v. State, 147 So. 3<sup>rd</sup> at 450-52](#) (Pariente, J., concurring in part and dissenting in part). Florida's system presents an unacceptable risk of rushed, rather than deliberative, decision-making, which is inconsistent with the requirements of the Sixth and Eighth Amendments. [Id.](#)

Appellant urges this court to hold this matter in abeyance until [Hurst](#) is decided, and to permit additional briefing on this point in the event the Supreme Court's decision in [Hurst](#) may warrant relief in this case.

## POINT EIGHT

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO STRIKE REFERENCES IN THE STANDARD JURY INSTRUCTIONS TO THE JURY'S ADVISORY ROLE IN RECOMMENDING A SENTENCE.

### *STANDARD OF REVIEW*

Review of a purely legal question is *de novo*. [Jackson v. State, 64 So. 3<sup>rd</sup> 90, 92 \(Fla. 2011\)](#).

### CALDWELL v. MISSISSIPPI

The defense moved before trial to strike all references in the jury instructions to the jury's verdict being "advisory" or a "recommendation." Its position was that such language impermissibly diminishes the importance of the life-or-death recommendation. That motion was denied; the jury was instructed in accordance with the standard instructions for use in capital cases. Those instructions include multiple references to the advisory nature of the jury's role (XXXVI 2793, 2794; XXXVII 2822, 2828, 2829), multiple references to the "recommendation" it will return (XXXVI 2796, 2797; XXXVII 2826, 2827, 2828, 2829), and a reference to that recommendation's being "not binding." (XXXVI 2794) Appellant acknowledges that this court has rejected this argument, e.g., Rigterink v. State, 66 So. 3<sup>rd</sup> 866, 897 (Fla. 2011), but submits that as a matter of federal law those references in the standard instructions run

afoul of the rule announced by the Supreme Court in [Caldwell v. Mississippi, 472 U.S. 320 \(1985\)](#).

In [Caldwell](#), the defense argued to the jury that “you can give [the defendant] life or you can give him death. It’s going to be your decision.... You are the judges and you will have to decide his fate.” [472 U.S. at 324](#). In response, the State argued “[defense counsel] know that your decision is not the final decision...the decision you render is automatically reviewable by the Supreme Court.” The Mississippi Supreme Court affirmed Caldwell’s subsequent death sentence, but the United States Supreme Court reversed, holding “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” [Id. at 328-29](#). The holding in [Caldwell](#) is rooted in the Eighth Amendment, which permits death sentences only where procedural safeguards guarantee that the sentencer will act with due regard for the consequences of its decision. [Id. at 329-30](#). The Court reasoned that

[t]his problem is especially serious when the jury is told that the alternative decision-makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a “right” to make such an important decision than has the jury.

[Id. at 333](#). Here, the same temptation exists, with the relatively minor distinction that

Florida's instructions tempt jurors into believing that a respected trial judge, whom they have come to know in a long and difficult proceeding, will be the alternative decision-maker. The motion to alter the standard instructions should have been granted as a matter of federal constitutional law; reversal of the sentence appealed from is warranted based on Caldwell.

## POINT NINE

### THE DEATH PENALTY IS NOT PROPORTIONATE IN THIS CASE.

#### *STANDARD OF REVIEW*

This court undertakes a qualitative proportionality review in every capital case, in which it compares the totality of the circumstances in the case before it with those in other capital cases. [Urbin v. State, 714 So. 2d 411, 416-17 \(Fla. 1998\)](#). The number of aggravating and mitigating factors is not dispositive of the proportionality question. [Urbin, 714 So. 2d at 416](#). This court deems death to be a disproportionate remedy where the case is not *both* one of the most aggravated, and least mitigated, cases to come before it for review. [Crook v. State, 908 So. 2d 350, 357 \(Fla. 2005\)](#).

#### *SHOWING IN MITIGATION*

Substantial mental imbalance and loss of psychological control are two of the weightiest mitigating factors in capital cases. [Santos v. State, 629 So. 2d 838, 840 \(Fla. 1994\)](#). Neuropsychiatrist Dr. Joseph Wu testified he saw significant brain abnormalities in this case which would predispose Appellant to overreact to fear and to have difficulty with anxiety and impulse control. Dr. Wu also testified that use of psychoactive recreational drugs would exacerbate those problems acutely. The proof at trial established that Appellant had ingested codeine, cocaine, marijuana, Xanax, Ecstasy, and possibly psilocybin at the time of the shooting. Neuropsychologist Dr.

Jacquelyn Olander testified that at that time Appellant's capacity for calm reflection was substantially impaired; that he acted under the influence of extreme mental or emotional disturbance; and that his ability to conform his conduct to law was substantially impaired. Both Dr. Wu's and Dr. Olander's testimony was unrefuted. It was also unrefuted that the defendant's stepfather beat him on a regular basis, and that his mother did not protect him from the mistreatment.

While the trial judge found the defendant's age, 22, deserving of no weight, elsewhere in the sentencing order she found that the crime in this case was "senseless...selfish, foolish, and futile" - i.e., marked by qualities typical of youth. (IX 1680, 1691) In [Crook, supra](#), this court held that the showing in mitigation - consisting of young age, an abusive childhood, mental deficiencies, organic brain damage, and a substance abuse problem which aggravated the defendant's mental deficiencies - was "overwhelming." [Crook v. State, 908 So. 2d 350, 358 \(Fla. 2005\)](#). While this court concluded that Crook's case was in fact among the most aggravated it had reviewed, it held that the overwhelming mitigation controlled. [Id. at 358-59](#).

In [Crook](#), this court relied on [Cooper v. State, 739 So. 2d 82 \(Fla. 1999\)](#), which is also similar to this case. In [Cooper](#), this court cited "evidence of brutal childhood, brain damage, mental retardation, and mental illness" as well as young age; this court concluded that although the case was on one of the most aggravated to come before this

court, the aggravation was outweighed by those factors. [739 So. 2d at 85-86.](#)

[Robertson v. State, 699 So. 2d 1343 \(Fla. 1997\)](#), *receded from on other grounds* in [Delgado v. State, 776 So. 2d 233 \(Fla. 2000\)](#), is also similar to this case. In [Robertson](#), this court cited young age, impaired capacity at the time of the murder due to drug and alcohol use, an abused and deprived childhood, history of mental illness, and borderline intelligence as controlling, despite the presence of the weighty “heinous, atrocious, and cruel” and “in the course of a violent felony” aggravators. [699 So. 2d at 1347](#). This case, like [Crook](#), [Cooper](#), and [Robertson](#), is not among the least mitigated cases this court has reviewed. As it did in those cases, this court should conclude that the death penalty is not proportionate here.

## CONCLUSION

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

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

If that relief is denied, this court should vacate Appellant's death sentence and remand for imposition of a life sentence (see Point Nine).

If that relief is denied, this court should vacate the sentence and remand for reweighing of the aggravating and mitigating factors (see Point Six).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to the Office of the Attorney General at [capappdab@myfloridalegal.com](mailto:capappdab@myfloridalegal.com), and Assistant Attorney General Stacey Kircher, at [stacey.kircher@myfloridalegal.com](mailto:stacey.kircher@myfloridalegal.com), and mailed to the Appellant on this 28th day of October, 2015.

CERTIFICATE OF COMPLIANCE

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

Nancy Ryan  
Nancy Ryan