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IN THE SUPREME COURT OF FLORIDA

BARRY TRYNELL DAVIS, JR., :

Appellant, :

v. : Case No.: **SC15-1794**

STATE OF FLORIDA, :

Appellee. :

______________________________/

On Appeal from the Circuit Court of the First Judicial Circuit in and for Walton County, Florida

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

An indictment charged Mr. Davis with (1) first-degree premeditated/felony murder of John Hughes; (2) first-degree premeditated/felony murder of Hiedi Rhodes; (3) burglary of Hughes' residence; (4) grand theft of his furniture and personal property; (5) grand theft of his Cadillac Escalade; (6) grand theft of his motorcycle; (7) burglary of his shed; (8) two counts of fraudulent use of Hughes' debit card; (9) three counts of forging checks drawn on Hughes' account at First National Bank of Hartford, Alabama; and (10) three counts of uttering those checks. [R2 229-34; R52 16] It alleged that the murders occurred around May 7, 2012,[1] and the other crimes occurred over the following days and weeks. [R2 229-34]

Davis filed a motion to suppress evidence obtained during, and as a result of, a search of his residence on July 10. [R2 277-87, 349-58] It was denied. [R5 991-93, R39 66-190] Davis argued that Florida's death penalty statute violated his federal and state constitutional rights to trial by jury, and cited Ring v. Arizona and Hurst v. Florida. [R2 300; R39 2-3] The trial court denied Davis' motion. [R5 995]

Jury selection took place. [R52 12 to R56 916] The guilt-phase trial occurred. [R56 917 to R74 4410] During the State's redirect examination of Tiffany Steward, Davis' ex-girlfriend and son's mother, the court overruled Davis' objection and admitted evidence that Davis possessed a revolver "in the past." [R70 3587-91; R71

[1]All subsequent dates refer to 2012 unless otherwise noted.

3907-08] During the State's closing, the court overruled Davis' objection and allowed the State to display a photo of Steward crying on the stand while testifying at trial. [R73 4185-87; Supplemental Record Volume 2 (SR2) 38] The jury found Davis guilty as charged. [R10 1924-26]

The penalty-phase trial occurred. [R74 4411 to R78 5167] As to the murder of Hughes, the jury recommended death by a vote of 9 to 3. As to the murder of Rhodes, the jury recommended death by a vote of 10 to 2. [R10 1939] The court held a Spencer hearing and a sentencing hearing. [R50 3-54; R51 2-37] As to each murder, the court sentenced Davis to death.[2] As to the other counts, the court imposed consecutive maximums totaling seventy years in prison. [R13 2428-29, 2457-67]

As to the murder of Hughes, the court found established, and weighed, the following aggravating circumstances: (1) contemporaneous murder of Rhodes (great weight); (2) committed for pecuniary gain and while engaged in robbery/burglary (merged) (great weight); and (3) committed in cold, calculated, and premeditated manner (great weight). [R 13 2408-10]

As to the murder of Rhodes, the court found established, and weighed, the following aggravating circumstances: (1) contemporaneous murder of Hughes (great weight); (2) committed for pecuniary gain and while engaged in robbery/burglary (merged) (great weight); (3) committed in cold, calculated, and premeditated manner

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[2]An appendix to this brief contains a copy of the court's sentencing order.

(great weight); **(4)** committed to avoid arrest (great weight); **(5)** heinous, atrocious, or cruel (great weight). [R 13 2410-13]

The court found that the following statutory mitigating circumstances had not been established: **(1)** under influence of extreme mental or emotional disturbance; **(2)** substantial impairment of capacity to appreciate criminality of conduct/conform conduct to law; and **(3)** age of defendant. [R 13 2413-16]

Of the forty-four non-statutory mitigating circumstances considered, the court found established, and weighed, the following: **(1)** history of traumatic brain injury (moderate weight); **(2)** diagnoses of mild neuro-cognitive disorder due to traumatic brain injury; major depressive disorder; generalized anxiety disorder; obsessive-compulsive disorder; and post-traumatic stress disorder (moderate weight); **(3)** saved elderly man from drowning (substantial weight); **(4)** special bond with son (moderate weight); **(5)** good father to son (moderate weight); **(6)** lived for first 8-10 years of life in most violent neighborhood in Los Angeles (little weight); **(7)** memories of blood, chalk lines, and other evidence of homicides on way to school (little weight); **(8)** loss of paternal grandfather at young age (little weight); **(9)** loss of family friend at young age (little weight); **(10)** mother was detached, unaffectionate, and had very limited contact with Davis after he moved to Florida to live with father (little weight); **(11)** felt abandoned by mom after move to Florida (little weight); **(12)** close bond with siblings (little weight); **(13)** capable of strong, loving relationships (little weight);

(**14**) exhibited good courtroom behavior (no weight); (**15**) helpful to older neighbor (little weight); (**16**) history of drug use (little weight); (**17**) previously incarcerated/exposed to shocking behavior (little weight); (**18**) personality disorder (little weight); (**19**) memory deficits from traumatic brain injury (little weight); and (**20**) family that loves him very much (moderate weight). [R 13 2416-27]

The court found that the following non-statutory mitigating circumstances had been established, but were "not mitigating in this case": (**1**) executive dysfunction; (**2**) borderline intellectual functioning in the area of perceptual reasoning and specific learning disorder with impairment in reading; (**3**) anxiety; (**4**) emotional distress due to relationship with Steward in weeks preceding murders; (**5**) felt abandoned by dad and stepmother when they became estranged after earlier arrest; (**6**) ridiculed for stuttering; (**7**) parents' dysfunctional relationship; (**8**) father moved to Florida when Davis was six and Davis did not see father until several years later; (**9**) sent to see father in Florida around nine and did not return to Los Angeles, as expected, at end of summer; (**10**) could not read and write at grade level until ten; (**11**) home-schooled for two years to catch up; (**12**) lived in Los Angeles during Rodney King riots; (**13**) first encountered racism in Pop Warner football when teammate called him "n" word; (**14**) victim of stabbing/robberies during early drug-dealing years when first estranged from family; (**15**) received GED; (**16**) provided assistance to Donna Gee, Takylah Glenn, and others; (**17**) loss of elderly gentleman from park at young age; (**18**) tic

disorder; **(19)** assisted Hughes in prison when inmates were planning to attack him; and **(20)** skilled in sports, including track and football. [R 13 2416-27; R51 16-33]

The court found that the following non-statutory mitigating circumstances had not been established: **(1)** haunted by poor impulse control; **(2)** others involved in removing Hughes' property did not face criminal charges; **(3)** 26 years old at time of offense; and **(4)** suffered concussions playing sports. [R 13 2416-27]

Davis filed a motion for new trial, which was denied. [R13 2522-28, 2533] He filed a notice of appeal. [R13 2536] This appeal follows.

STATEMENT OF THE FACTS

I. Guilt Phase.

A. Missing persons report and subsequent investigation.

Hughes and Rhodes were dating, and she often stayed at his residence. [R57 1062, 1066, 1113, 1146; R58 1193] Hughes picked Rhodes up from work on May 6. [R58 1193-94] That was the last time Rhodes' employer, Ray Webb, saw her. [R58 1192-94] Webb later spoke with Rhodes a final time on what he believed was May 8, when she called to confirm that she would be at work on May 9. [R58 1194-95]

When Rhodes failed to show up on May 9, Webb became concerned. [R58 1195] A day or two later, he drove to Hughes' and Rhodes' residences. [R57 1083; R58 1178, 1195-97] No one was at either residence. [R58 1195] No cars were present. [R58 1195] There was no sign of Rhodes' dog, who was old and lame but treated

well. [R57 1062-64, 1082, 1140, 1142, 1146-47; R58 1195; R59 1452] Hughes' residence looked empty. [R58 1195] Mops and buckets sat near the driveway. [R58 1195] On May 14, Webb requested a welfare check on Rhodes at Hughes' residence. [R58 1178, 1195-98] An officer responded, but no one was home. [R58 1178, 1182, 1212] Everything appeared normal. [R58 1182-83]

On May 24, Rhodes's sister contacted law enforcement and requested welfare checks at Rhodes' and Hughes' residences. [R57 1053, 1072-73, 1088; R58 1200, 1203] An officer responded to Hughes' residence. [R58 1199-1200] No one was home, but the house appeared empty and secure. [R58 1201] There were no signs of forced entry or struggle. [R58 1201-02] No one was at Rhodes' residence either. [R57 1084, 1086] The door was locked, and mail had stacked up. [R57 1086] Everything looked normal inside. [R57 1086-87]

On May 25, Investigator Stephen Sunday was assigned Rhodes' missing person case. [R59 1456; R60 1648-49] He was unable to trace Hughes' cell phone. [R59 1457-58] A few days later, he went to Hughes' residence. [R59 1459] No person or vehicle was there. [R59 1459, 1461; R60 1651] The home and shed were locked and secure. [R59 1459; R60 1651] Mail filled the mailbox. [R59 1461, 1466, 1493] From outside, the house appeared bare. [R59 1459; R60 1651] A mop bucket, mop, and broom were inside. [R 1459-50; R60 1651] Sunday spoke with Hughes' neighbors, Sam Doungdara and Julie McCloskey. [R59 1460; R60 1651-52] While he later

disputed its accuracy, Sunday's report indicated they said they saw Hughes and Rhodes loading a U-Haul about a week-and-a-half prior. [R60 1655-68, 1678]

On May 31, Sunday learned that Hughes left no forwarding address. [R59 1462, 1493] No records indicated Rhodes had a passport or Hughes left the country. [R59 1464] No records indicated either rented a U-Haul. [R59 1467] Sunday spoke with Hughes' cousin and informed her that Hughes was a person of interest in Rhodes' missing person case. [R59 1466; R61 1843, 1849-50]

On June 1, Sunday gained access to Hughes' residence. [R59 1469-72] No one was inside. [R59 1472] The residence was essentially empty. [R59 1472-74] In a corner of the master bedroom, sheet rock had been cut out of the wall. [R59 1472-73] Sunday learned that Hughes owned a 2003 Cadillac Escalade. [R59 1476-78] On June 5, Sunday spoke again with Hughes' cousin, who advised that two checks from Hughes' account had cleared First National Bank of Hartford, Alabama. [R59 1479-80; R61 1844-45] A check for $3540 was dated May 19. [R59 1480] A check for $8340 was dated May 24. [R59 1480] Both checks were made payable to "Barry Davis," and referred to moving expenses/property maintenance in the memo section. [R18 3309; R59 1480] Hughes' cousin opined that Hughes had not signed the checks. [R59 1480; R61 1845] Sunday called Davis, who agreed to meet in person. [R59 1480-81; R60 1671]

During the interview, Davis indicated Hughes was a good friend. [R19 3499-

3500, 3504] He had not spoken with Hughes since he helped move Hughes' furniture approximately a week prior. [R19 3499-3501] Hughes had called Davis and informed him that he had to move because he owed some people a lot of money. [R19 3499-3501] Davis was supposed to meet up with Hughes in the next few days to get the keys to Hughes' residence to clean the house. [R19 3501] Hughes intended to rent out his house, and Davis was thinking he could maintain Hughes' property. [R19 3503]

Davis had warned Hughes about the people Hughes owed money. [R19 3505] But it got to where Davis had to loan Hughes money even though Hughes did not want for anything. [R19 3505] Davis did not have a number for Hughes. [R19 3506-07] He had talked to Hughes four or five days prior about getting the keys to finish cleaning Hughes' house. [R19 3507] Hughes did not say where he was, but it became apparent that he was "pretty out there" on "meth and stuff." [R19 3507-10] Davis had given Hughes $15,000 to pay someone off, and Hughes and he later went to St. Cloud, Florida, where some of Davis' friends lived, so that Davis could get his money back.[R19 3511- 14] Davis had bought Hughes' Escalade six or seven months prior. [R19 3514-15]

Davis owned a handyman business–BJ Property Maintenance. [R19 3511] He was the main employee, but he would pick up day laborers as needed. [R19 3515-16] To help with moving Hughes' furniture, Davis had picked up a short white kid from the Fort Walton area. [R19 3515-16] He also picked up a black male named

Granddaddy. [R19 3515-16] Davis did not know their real names. [R19 3516] On the trip to St. Cloud, Hughes and Rhodes were in their own car. [R19 3516] Davis and his girlfriend also made the trip. [R19 3517]

Hughes had lots of drugs. [R19 3517] He sold drugs. [R19 3517] He did drugs. [R19 3517] Hughes would "get in over his head." [R19 3517] Hughes and Rhodes argued and fought, but Davis did not think they would hurt each other. [R19 3519] Davis did not know what Hughes did with his furniture and other property. [R19 3520] Davis had loaded the truck while Hughes and Rhodes were there. [R19 3520] Davis was not sure, but thought the truck was a yellow Ryder truck. [R19 3520] Davis' understanding was that Hughes was "on the run," and he was "good about avoiding people." [R19 3521-22] Davis had given Hughes $15,000 because Hughes needed the money, which Davis did not understand since Hughes had trust money as a result of his right hand being injured in a work accident and his family being rich. [R19 3525-27] The last time Davis had seen Hughes was two or three days after the trip to St. Cloud. [R19 3528] Davis asked him when they were going to finish cleaning up his house since Hughes had already paid Davis for the work. [R19 3528]

After the interview, Hughes' residence was processed. [R59 1507-08, 1391-1426] A cleaning solution had been applied near the missing sheet rock. [R59 1418-22] Bluestar–a latent bloodstains reagent–was applied throughout the residence, but no stains were detected. [R59 1422-24, 1430-31] On June 11, Sunday received

another check from Hughes' account. [R59 1513] The check for $4087 was dated May 26, made payable to "Barry Davis," and referred to property maintenance in the memo section. [R18 3310; R59 1513-14] Hughes' cousin opined that Hughes had not signed the check. [R59 1514; R61 1846-47] Sunday was unable to locate a black male named "Granddaddy" and a white male in Fort Walton Beach. [R59 1514-15]

On June 12, Sunday interviewed Terry Guice, who was present when Hughes' furniture was moved. [R59 1516-18] Guice was a black male. [R60 1555, 1673] Guice indicated that a yellow Ryder truck was used. [R59 1517; R63 2321] He verified that a little white guy was with them. [R60 1674; R64 2348] He confirmed that the owner of the furniture–a white male with a messed up hand–was present. [R59 1518, R60 1674; R63 2321; R64 2352-53]

Sunday learned that Hughes' debit card had been used at a convenience store, as well as at a Wal-Mart, and he obtained surveillance video from those times. [R59 1519, 1539] One video appeared to depict Davis using Hughes' card at an ATM at the convenience store on May 18. [R20 3818-30; R21 3831-43; R60 1587, 1603-09; R67 3074-75; R70 3669-73] The other video appeared to depict Davis using Hughes' card at an ATM at the Wal-Mart on May 10 and May 18. [R20 3811, 3813; R21 3844; R60 1587-88, 1598-1601, 1610, 1646; R67 3072-75; R70 3669-73]

On June 13, Sunday interviewed Davis by phone. [R59 1520] Davis was still waiting to hear from Hughes regarding Hughes bringing him the keys so Davis could

finish cleaning. [R59 1526] He remained unsure of the number from which Hughes had called. [R59 1526-27] Davis re-emphasized that Hughes had a drug problem and owed people money. [R59 1528-29] Davis' impression was that Rhodes also used drugs. [R59 1529] He was unsure exactly when Hughes had called him about wanting to move, but Hughes said something about going to Barbados. [R59 1530] Hughes was "ducking and dodging people" because he owed a lot of money. [R59 1530] Davis stated that they had loaded up the truck, he had paid his workers, and they had left. [R59 1531] It was a one-day move. [R59 1532] He did not know where Hughes went with the truck. [R59 1531] He was unable to provide additional details regarding the hired day laborers. [R59 1531-32]

Davis was not sure, but thought the moving truck was a yellow Ryder truck. [R59 1532] He was hesitant to share the name of the friend who they met in St. Cloud. [R59 1533] That was the last time he saw Hughes and Rhodes. [R59 1534] They were doing drugs. [R59 1534] He then clarified that Hughes was present at the time of the move. [R59 1535] An unidentified female was also with Hughes. [R59 1535-36] He was still supposed to get the keys from Hughes to finish cleaning, but Hughes did not owe Davis more money. [R59 1536-37] He thought Hughes and Rhodes had mistreated and sold Rhodes' dog. [R59 1537] Davis emphasized he would let Sunday know if he heard from Hughes. [R59 1538]

On June 18, a warrant to search a storage unit in Davis' name was executed.

[R59 1540-41] Four stools were found. [R59 1541-42] The next day, Sunday interviewed Cecil Galloway, a shorter, white male. [R59 1542; R60 1555-56; R62 2128] He indicated that a yellow Ryder truck was used when Hughes' furniture was moved. [R62 2108, 2137] The furniture was loaded up and Hughes drove off with it. [R62 2140] On June 20, Sunday interviewed Donna Gee, a black female. [R60 1556-57] Gee confirmed that the owner of the furniture–a white male with a bad hand, who she identified as Hughes–was present when the furniture was moved. [R60 1557-59; R62 1961, 1979] They discussed cleaning his residence. [R60 1558; R62 1979] His girlfriend was present. [R62 1979] An orangish-yellow, non-U-Haul moving truck was used. [R60 1558; R62 1965] The next day, Sunday showed photos of the stools to Kellie Kamens, a friend of Hughes, who identified them as Hughes'. [R60 1559; R70 3547-48]

On June 26, Sunday received surveillance video from a Publix in St. Cloud. [R60 1560] The video depicted Davis using Hughes' debit card on May 11 at an ATM, and purchasing a money transfer to Steward. [R20 3812; R60 1577-80, 1588, 1601-03; R67 3072] A couple of days later, property where Davis had previously lived in the New Harmony area (the New Harmony property) was searched. [R60 1560-63]

On July 10, a warrant to search for Hughes' debit card at Davis' residence in the Argyle area (the Argyle property) was executed. [R64 2436-37] Steward was present. [R64 2438] The card was never located, but multiple items, including furniture and

personal property, were photographed. [R64 2438-39, 2450-52, 2467-82] The next day, Steward was interviewed and advised that she had not seen Hughes in months. [R70 3694; R71 3727-30] A couple of weeks later, Galloway was interviewed again. [R62 2131] He indicated that Davis had advised that Hughes had gone on vacation, could not afford the house, and had to move. [R62 2131-32] Guice was also interviewed again. [R64 2358]

On September 4, Sunday showed photos taken during the July 10 search to Hughes' maid, who identified furniture and personal property as Hughes'. [R60 1564; R65 2570-79; R67 3042-45] On September 7, a warrant to search for property of Hughes at the Argyle property was executed. [R64 2439] Hughes' furniture and personal property, including a motorcycle, was seized. [R64 2440; R65 2570-79, 2656-80; R67 2949-55, 2965, 2982-88, 3017, 3045-48] Steward was interviewed again. [R71 3738] On September 12, Sunday showed photos taken during the July 10 search to Kamens, who identified furniture and personal property as Hughes'. [R60 1567-68; R65 2570-79; R67 2982-88] A few days later, Sunday did the same with another friend of Hughes, Billy Gorman, who also identified furniture and personal property as Hughes'. [R60 1568; R65 2570-79]

On October 4, Gee was interviewed again. [R62 1980, 2007] In exchange for her cooperation, she was offered use immunity. [R62 2008-09] She maintained that at the time Hughes' furniture was moved, Hughes and a female were present. [R62 1980-81,

2020-25] Galloway was interviewed again. [R62 2132] He indicated that Davis had advised that Hughes was out of town. [R62 2133-34] After the interviews, Hughes' personal property was recovered from Guice's residence. [R65 2719; R67 3041-42] Hughes' personal property, including a night stand, was also recovered from Gee's and Gee's mother's residences. [R62 1978; R65 2680, 2719-20, 2726-29; R67 3037-40] A swab of suspected blood was collected from the night stand and sent for testing. [R65 2680-91, 2706-10]

On October 5, Hughes' Escalade was discovered underneath a tarp at Kenneth Ingram's residence. [R64 2440-46, 2482-85; R72 4095-98] The vehicle was processed. [R 64 2445-46, 2453-66, 2490-2506, 2511-12] The inside was covered in mildew. [R64 2457-58, 2510] The rear seat and carpeting were missing. [R64 2460-61, 2496, 2513] Bluestar was applied. [R64 2462-64, 2517] Some areas luminesced, and samples were sent for testing. [R64 2464-66, 2500-06, 2517-31] On October 16, Hughes' personal property was recovered from an individual in Crestview, who had purchased it on Craigslist from Steward. [R65 2698-2704, 2716-19; R67 3041] A few weeks later, Hughes' fishing gear was recovered from Destin Pawn. [R65 2722-26; R67 2966-67]

On November 12, Steward initiated an interview with Investigator Donna Armstrong. [R69 3530-32; R70 3700] Steward asked regarding a $20,000 reward. [R71 3743-44] She claimed to have second-hand knowledge of what happened to

Hughes and Rhodes, and implicated Davis in their deaths. [R69 3532; R71 3745-58] Steward was interviewed further at the sheriff's department. [R69 3533; R71 3758-67, 3777-82] She was arrested on charges of dealing in property stolen from Hughes, and booked into jail. [R60 1568; R69 3533-34; R70 3702; R71 3759, 3794] The next day, Steward was interviewed again. [R69 3534; R70 3703; R71 3794] A prosecutor and Steward's attorney were present. [R69 3534-35] In exchange for her cooperation, Steward was offered use immunity. [R70 3703; R71 3893] For the first time, she claimed that she was present at the time of Hughes' and Rhodes' deaths. [R70 3703] On November 14, Steward accompanied Armstrong to recover some of Hughes' shirts from Davis' and her residence in Destin. [R69 3459-64, 3535-36; R70 3704-05] Steward reenacted what she claimed happened at Hughes' residence. [R69 3536; R70 3705] She was released from jail. [R69 3537] Davis was arrested. [R69 3537]

On November 15, Galloway was interviewed again. [R65 2635] After the interview, Hughes' personal property was seized from Galloway's residence. [R65 2635, 2649-53; R67 2961-64] The next day, Gee was interviewed again. [R62 1981] Gee stated that she had briefly met Hughes when Davis introduced them before Hughes' furniture was moved. [R62 1982] Gee's daughter, Takylah Glenn, was interviewed. [R61 1854, 1884] She claimed to have overheard Davis implicate himself in two killings. [R61 1885-86] A few days later, a more advanced version of Bluestar was applied at Hughes' residence. [R66 2742-46] A spot near the missing

sheet rock luminesced, and a sample was sent for testing. [R66 2746-50]

On January 2, 2013, Gee was interviewed again and indicated for the first time that she had never seen Hughes. [R62 1982-83, 1986] A week later, Galloway was interviewed again and stated for the first time that he helped Davis remove the back seat from, and clean, Hughes' Escalade. [R62 2120; R63 2155-61] A week later, Steward entered an agreement to testify against Davis in exchange for the dealing in stolen property charges being dismissed and her not being charged in connection with the deaths of Hughes or Rhodes. [R70 3705-06; R71 3901-02] On February 9, 2015, handwriting exemplars were obtained from Davis. [R68 3207-38] Davis completed the exemplars with substantial deliberation. [R68 3230-38]

B. Additional developments at trial.

McCloskey. McCloskey was Hughes' neighbor. [R58 1329] She testified that during the week of May 14, she saw a U-Haul at Hughes' residence. [R58 1334-36] She did not see people. [R58 1335] McCloskey claimed that she did not tell Sunday she saw Hughes and Rhodes putting items into a U-Haul. [R58 1340] McCloskey was unsure, but indicated she may have seen Hughes on May 13, which was Mother's Day. [R58 1335-41]

Doungdara. Doungdara lived with McCloskey. [R59 1354-55] She testified that around May 2012, she saw a moving truck at Hughes' residence. [R59 1356-61] She saw a black male and a white male talking near the shed. [R59 1359-61] She did not

recognize them, and did not see Hughes or Rhodes. [R59 1362-63] Doungdara claimed that she did not tell Sunday she saw Hughes putting items into a moving truck. [R59 1365-68] She ultimately asserted the same regarding Rhodes, but initially indicated that she may have told Sunday she saw Rhodes putting items into a moving truck. [R59 1366-68]

Patrick Davis. Patrick Davis was Hughes' neighbor. [R58 1205] Davis testified that on May 14, he saw a U-Haul at Hughes' residence. [R58 1205-12] He claimed that he walked over and spoke with Davis, who explained that Hughes was in Barbados and they were putting his stuff in storage. [R58 1212-14] Davis did not see Hughes, but saw a white male in his twenties, a Hispanic looking female, and another individual. [R58 1215-20] Hughes' Escalade was present. [R58 1220-21]

Other neighbors. Other neighbors testified that they saw a moving truck at Hughes' residence in May 2012. None saw Hughes or Rhodes, but they did see individuals present who they did not recognize. [R58 1225-29; R59 1375-87]

Testimony regarding Hughes' banking and finances. Because of the injury to his right hand, Hughes had a common practice of allowing other people to write entries in the bodies of his checks. [R58 1289, 1323] Acquaintances, friends, and family members opined that the checks drawn off Hughes' account in late May 2012 were not signed by Hughes. [R58 1289-92; R60 1724-26; R61 1845-47; R67 3004-05] Hughes had access to cash and assets. [R58 1295-99; R59 1685-1708; R67 3026]

Testimony regarding activities of Hughes and Rhodes after May 7. At the time of trial, acquaintances, friends, and family members of both Hughes and Rhodes testified that they had not seen or communicated with Hughes or Rhodes since May 7. [R57 1058, 1067-72, 1078-79, 1094-98, 1103-05, 1107-08, 1117-19, 1131-32, 1139-40, 1147, 1149; R58 1171-72, 1224, 1230-37, 1320-21; R59 1437-40, 1453-54; R61 1848-49; R67 2948, 2960-61, 3005, 3016, 3058-60; R68 3260-61; R69 3411-17]

Investigators Sunday and Armstrong. Multiple attempts to locate Hughes and Rhodes or their bodies were made. [R60 1594-96; R69 3449-51, 3508-09] Webb advised Sunday that he had last received a voice mail from Rhodes on May 7, and the last call from Hughes' cell to Webb was on May 7. [R59 1513; R69 3471-73] The electricity at the New Harmony property was disconnected on April 25 and reconnected on May 8. [R69 3494-95; R70 3550-53] All of Hughes' and Rhodes' vehicles were accounted for. [R60 1648]

John Davies and Alexander Ortega. Davies was an acquaintance of Davis who lived in St. Cloud. [R61 1763-65] Ortega operated a business in that area that sold hydroponic goods and supplies. [R61 1774-75] Both testified that Davis came to see them on May 11, but Hughes and Rhodes were not present. [R61 1766-71, 1774-79] Davie's sons subsequently purchased some hydroponic growing equipment from Ortega that was later discovered at the Argyle property. [R61 1779-1812]

Mark Carley. Carley rented U-Hauls and storage units. [R59 1518; R61 1814]

He testified that on May 14, Gee rented a truck and a storage unit. [R22 4123-24, 4128-29; R61 1815-18, 1822-29] Davis was present. [R61 1818-19] On May 17, Davis rented a unit, and on May 22, he rented a truck. [R22 4126-27, 4130-31; R61 1816-21, 1826-30] Carley claimed that during this period, he saw Davis, Gee, and some black males, but not Hughes or Rhodes. [R61 1819-22, 1829, 1833-34]

Ingram. Ingram was an acquaintance of Davis. [R65 2588] He testified that in 2012, Davis asked if he could leave his Escalade at Ingram's house for a few weeks while moving. [R65 2588-92] They moved it to Ingram's house, where it remained until it was seized by law enforcement. [R64 2445-46; R65 2591-99, 2607-08]

Guice. Guice was acquainted with Davis. [R63 2292-93] At the time he testified, he was serving a 30-month sentence. [R63 2290-2291] He had 18 prior felony convictions and a misdemeanor conviction of dishonesty. [R63 2291-92] Guice testified that in May 2012, Davis hired him to move furniture at Hughes' residence. [R63 2293-96] Galloway and Guice's girlfriend were present, but Hughes and Rhodes were not. [R63 2293-97] Davis had a key to the residence, and advised that the owner was out of town or moving or on the run. [R63 2298-99]

They loaded furniture and other property, including from a shed, and then unloaded it at a storage unit. [R63 2299-2309] Guice claimed a wall in a bedroom was damaged. [R632303-05] He maintained Davis asked him to tell law enforcement that a white male with a messed up hand was present and drove off with the furniture

in a Ryder truck. [R63 2317-18] Davis was driving an Escalade. [R63 2312-13] Guice ended up with furniture from the residence. [R63 2323-29] He was never charged with a crime. [R64 2373-76]

Gee. Gee was Glenn's mom and Davis's friend. [R61 1913-14] She had been offered use immunity in exchange for her cooperation. [R62 2008-09] She testified that on May 14, Davis contacted her about a moving and cleaning job at Hughes' residence. [R61 1917-24] Gee rented a U-Haul and a storage unit. [R61 1918-19] Davis was driving an Escalade. [R61 1919-20; R62 1970-71] The owner of the residence was Davis' friend, and Davis had a key. [R61 1937; R62 1974-75] No one was present when they arrived on May 14. [R61 1918-26; R62 1967] Gee saw a small, white dog, which had belonged to Rhodes and which Davis later left at Gee's house for a couple of weeks. [R61 1930-31; R62 1967-70] Gee asserted that part of a wall in the master bedroom had been cut out. [R61 1933-36] Gee and her mom later received some furniture that had been removed from the residence. [R61 1937-42; R62 1954-60]

Gee testified that she had never seen Hughes other than in a picture Davis showed her, and that she previously offered a contrary story at Davis' request. [R62 1961-65, 1979, 1991, 2055-57] Gee claimed that during an argument with Steward, Davis said he killed two people for their family to make it. [R62 1972] Gee maintained that he subsequently indicated Hughes owed him some money, and he hit

Hughes in the head. [R62 1974] She asserted that she lied to law enforcement for months, but eventually revealed that she had lied and had some of Hughes' property. [R62 1976-83, 1990-2041] Gee was never charged with a crime. [R62 2041-42]

Glenn. Glenn was Gee's daughter and Davis' friend. [R61 1854-57] She testified that in May 2012, she went to a house with her mom and Davis. [R61 1857-58, 1875-78] A small, white dog, who appeared old and lame, was in the laundry room. [R61 1861, 1878-81] Glenn claimed that during an argument, Davis said he killed two people for their family, and Steward replied that she did not know that. [R61 1866-67, 1885-93, 1907] Glenn overheard Davis having a phone conversation. [R61 1868] She maintained that he said he went to beat up a man who owed him money but accidentally killed the man; the man's girlfriend walked in freaking out and had to be calmed down by making her pass out; a wall had to be torn down because there was blood on it; and the bodies were burned. [R61 1868] Davis later brought Glenn the dog that had belonged to Rhodes, but Glenn only had the dog for two weeks. [R61 1862-64, 1882-83]

Galloway. Galloway met Davis in May 2012. [R62 2064] Galloway had memory problems. [R63 2161-62] He was concerned about his felony probation being violated. [R62 2129-31, 2153-55; R63 2166-69] Galloway testified that Davis hired him to move furniture. [R62 2065] A U-haul was present. [R62 2070] Davis was driving an Escalade. [R62 2082] He had keys to the residence and shed, and indicated

his friend, who was on vacation and could not afford the house, was paying him to move the stuff out. [R62 2082-85]

Furniture, electronics, appliances, recreational gear, and other property, including property in the shed, were loaded and taken to a storage unit. [R62 2070, 2075-76, 2083-90] Galloway claimed that sheet rock was cut out in the corner of the master bedroom. [R62 2071-73] He saw a small, white dog in the living room, and later at Gee's house.[R62 2078] He asserted that a white male came over from across the road and spoke with Davis. [R62 2094-95] Galloway ended up in possession of scuba and fishing gear from the residence. [R62 2090-91]

Galloway subsequently helped Davis move from the New Harmony property to the Argyle property in late May 2012. [R62 2091-93] Galloway testified that they moved property that had been removed from Hughes' residence into the Argyle property. [R62 2093, 2098-2101] They also moved such property to the homes of Gee and Guice. [R62 2099-2100] Galloway claimed Davis asked him to tell law enforcement that a yellow Ryder truck was used to move Hughes' property and a man with a messed up hand was present. [R62 2108, 2117] He maintained that in early June, he helped Davis clean and remove the back seat and carpet from the Escalade because a body had been in the truck. [R62 2109-15, 2120, 2127] Galloway helped Davis close in a room in the garage at the Argyle property. [R62 2102-03] Two white males set up hydroponic growing equipment in that room. [R62 2103-07]

Makenzie Roulhac. Roulhac was Gee's cousin and Steward's friend. [R63 2227-30] She testified that she was in the car with Davis and Steward, who were arguing, and he said he killed two people for their family. [R63 2237-40, 2255]

Steward. Steward was Davis' girlfriend, and their son was born in January of 2012. [R70 3587-91] Steward was offered use immunity in exchange for her cooperation. [R70 3703; R71 3893] She entered an agreement to testify against Davis in exchange for the dismissal of charges of dealing in stolen property pending against her in two cases. [R70 3705-06; R71 3900-04] Between those cases, Steward was facing up to 30 years in prison. [R71 3900-01] In addition, if she cooperated and testified against Davis, she would not face charges arising from the deaths of Hughes or Rhodes. [R71 3901-02] Steward understood such charges to carry a maximum of life in prison or death. [R71 3902]

She testified that in 2012, Davis and she lived together, off and on, at the New Harmony property, the Argyle property, and at a residence in Destin. [R70 3590, 3609] She met Hughes in 2011. [R70 3591-92] Davis occasionally sold him drugs. [R70 3592-93] On one occasion, Steward accompanied Davis to collect $100 that Hughes owed. [R70 3593-95] Steward claimed that in the months leading up to May 2012, Davis referred to kidnapping Hughes for ransom, to robbing or "getting him" for his money, and to the possibility of him getting hurt offshore. [R70 3612-14] It was apparent that Hughes had money. [R70 3613] Davis primarily sold drugs to

support his family, but in the first half of 2012, he seemed to be struggling financially. [R70 3595-96, 3609-11; R71 3865-67; R72 2923-24] Steward met Rhodes for the first time on May 7. [R70 3596]

That afternoon, Davis mentioned he needed to collect a debt from an unidentified man at a restaurant in the southern part of the county. [R70 3596-3600, 3611] Although Steward testified that they unexpectedly ended up at Hughes' residence, she also maintained that on the ride Davis commented he had to "get" Hughes or "whack him off" and had no drugs to sell. [R70 3611, 3615-16; R71 3795; R72 3930-31] Steward thought he was joking. [R70 3616; R71 3795-96; R72 3930] Once they arrived, Hughes invited them to eat with Rhodes and him. [R70 3611, 3616-17]

Rhodes and Steward went to a nearby Publix. [R70 3617-20] Steward asserted that while Rhodes was in the store, Davis kept calling and inquiring as to where they were. [R70 3620-22; R71 3797-99] Steward testified that when she entered Hughes' residence in front of Rhodes, Davis pushed Steward behind the door, told her to lock it, grabbed Rhodes, and pushed her up against the wall. [R70 3624] Davis curtly quieted Rhodes when she inquired as to what was wrong. [R70 3624] He did the same to Steward along with a threat when she screamed. [R70 3624] Steward also claimed that Davis then told her, while hitting Rhodes, to get out of the room so that he could think. [R70 3624-25] Steward stepped into the kitchen and saw Hughes laying on the bedroom floor under a sheet, surrounded by blood, including on a nearby wall and

night stand. [R70 3625-26, 3641] She heard what sounded like loud snoring coming from Hughes' body, but the body was motionless. [R70 3630] Steward maintained she then saw Davis and Rhodes on the floor in the game room, where Rhodes had her hands up while Davis was telling her to move them as he tried to strangle her. [R70 3627] Rhodes lost consciousness, and Davis drug her into the bedroom before turning on the water in the tub. [R70 3627-28] Davis told Steward to get his backpack out of the car. [R703628]

Steward went outside and returned with the backpack. [R703628-29] She asserted that Hughes and Rhodes were being placed in the tub face first. [R70 3629] Steward claimed Davis removed duct tape from the backpack and wrapped tape around their ankles while their heads and shoulders were underwater. [R70 3629] She also maintained that when she heard a noise, she stated that she thought they were still alive, but Davis indicated gas was simply leaving the bodies. [R70 3630] Steward testified that she begged Davis to let her go home to their son, and eventually she left in her vehicle. [R70 3631-32]

Steward first went to get gas. [R70 3632-35] Davis left Hughes' residence, and as he passed by the gas station in Hughes' Escalade, they saw each other. [R70 3633-35] As Steward drove, she spoke with Davis by phone. [R70 3633-36] She asserted that he shared his intent to go home to get cleaning supplies, travel back to Hughes' residence, clean up, and get the bodies. [R70 3634-35] Steward also testified Davis

threatened her and her family. [R70 3635-36] Steward went to her dad's house. [R70 3598-99, 3637-38]

The next day, Steward met up with Davis at the New Harmony property. [R70 3638] The power was turned back on, and Davis traveled to Hughes' residence. [R70 3640, 3652-53] Steward claimed that Davis said he did not want to kill Hughes; he pulled out a gun and forced Hughes to open his safe; when Hughes ran to his phone, Davis hit him; and he killed Hughes for money. [R70 3640; R71 3850, 3890-91; 3897-99; 3905-07] She maintained that Davis stated he pulled out the wall at Hughes' residence near where Hughes had been laying on the floor because there was blood on it, and he bleached the floor. [R70 3641-42] She asserted that Davis indicated he wrapped up the bodies, left them in the Escalade for a couple of days, cut them up, and burned them at the New Harmony property before scattering the ashes out of a car window. [R70 3642-43] Steward testified that a few days after May 7, she heard a saw at night, and later saw Davis bleach the porch, bring home firewood, burn a fire in a barrel, and drag a heavy container towards the fire. [R70 3644-49] But Steward never saw any bodies. [R70 3642-49; R71 3869-70]

Steward continued her relationship with Davis. [R70 3649-50] She claimed that Davis told her that after May 7, he had Hughes' debit card and he used Hughes' phone to check the account balance and Hughes' voice mails. [R70 3650-52] On the night of May 10, Davis traveled to St. Cloud, and the next day, Steward picked him

up after Davis wired her money. [R70 3657-61] Over the next couple of weeks, Davis moved property out of Hughes' residence, and later moved it into the Argyle property. [R70 3663-69, 3683-87] Steward maintained that during this time, Davis also used Hughes' card at ATMs at a convenience store and at Wal-Mart, wrote out and deposited two of Hughes' checks, and pawned some of Hughes' fishing gear. [R70 3669-82, 3687-88] She asserted that Davis bleached the inside of the Escalade and removed the back seat. [R70 3691-92] Between July 10 and September 25, Davis was in jail. [R70 3693-97; R71 3889] During July 2012, Steward sold some of Hughes' property on Craigslist. [R70 3693, 3696; R71 3744]

When Davis was released from jail in late September, Steward was happy, and they moved to a residence in Destin. [R70 3698-99] On November 11, Steward and Davis had a disagreement, and she called the police. [R70 3669-70] The next day, Steward arranged to meet with Armstrong, was arrested, and began implicating Davis in the deaths of Hughes and Rhodes. [R70 3700-06] Although she testified that she feared Davis, she continued to maintain a relationship with him after he was arrested and held pending trial in the present case. [R70 3709-11]

Mary Saunders. Saunders was a volunteer canine handler. [R66 2776-77] She testified her dogs were trained to detect human remains, including blood left by living persons. [R66 2777-2812, 2838, 2845] Saunders' dogs searched Hughes' Escalade. [R66 2812-15] Saunders claimed that her dogs responded to the front passenger area.

[R66 2817-26] Saunders' dogs also searched Hughes' residence, but neither dog detected human remains. [R66 2826-32]

Dr. Kenneth Furton. Furton had an expertise in forensic canine scent detection. [R66 2850-58] He opined that during their search of the Escalade, Saunders' dogs responded to the odor of human remains. [R66 2899-2900] He claimed it was scientifically plausible that a well-trained dog could detect the odor of bodies, or simply blood, that had been left in a vehicle for days–even if the bodies were subsequently removed; the vehicle was used for a month; some carpeting and a seat were removed; the interior was cleaned; and the vehicle sat closed for months. [R66 2900-06, 2910-15]

Jennifer Kay. Kay was a DNA analyst. [R68 3148-50] She testified that two samples removed from the Escalade gave partial DNA profiles, but Davis, Hughes, and Rhodes were excluded as the source of those profiles. [R68 3157-61, 3165, 3180] All other samples were negative for blood. [R68 3157, 3164, 3175-76] Kay analyzed a swab collected from a night stand that had been recovered from Gee's residence. [R65 2680-91, 2706-10; R68 3165-66] She opined that the swab was positive for the possible presence of blood and yielded a complete DNA profile matching Hughes. [R68 3166-68] Kay offered the same opinion regarding swabs collected from the area where sheet rock was missing at Hughes' residence. [R66 2746-50; R68 3169-74]

Kate Butler. Butler was a questioned document examiner. [R68 3263-69] She

testified that she examined copies of the checks drawn off Hughes' account in late May 2012; samples of Hughes' writing; and samples of Davis' writing, including the handwriting exemplars obtained from him. [R68 3207-38, 3269-76] While Butler opined that it was highly probable Davis wrote the entries in the bodies of the checks, she could neither eliminate nor identify either Davis or Hughes as having signed the checks. [R68 3276-80, 3299-3304; R69 3364, 3375-76] She also claimed the handwriting exemplars were distorted and not natural. [R68 3314-19]

Justin Fleck. Fleck was trained to analyze historical cell phone location data. [R72 3971-73] He testified that he conducted a historical site location analysis regarding phone numbers associated with Davis, Steward, and Hughes. [R72 3982-83] Fleck opined that on the evening of May 7, the phones associated with Davis and Steward were using cell towers in a manner consistent with the phones traveling from the New Harmony property to Hughes' residence around 7:30 or 8:00p.m., and remaining at Hughes' residence, or a nearby Publix, until about 10p.m. [R72 3998-4016, 4060-61] Those phones exchanged a series of calls around 9:30p.m., at which point the phone associated with Steward was using a tower close to the nearby Publix. [R72 4005-13, 4060-61] Around 10:15p.m., the phone associated with Hughes called a bank customer service number. [R72 4016-18] After 10p.m., the phones associated with Davis and Steward were using towers in a manner consistent with the phones traveling from Hughes' residence back to the New Harmony property. [R72 4016-35,

4060-61] Fleck claimed that in the early morning of May 8, the phone associated with Davis was using towers in a manner consistent with that phone being located at Hughes' residence. [R72 4035-40] Over the next two weeks, the phones associated with Davis and Steward were using towers in a manner consistent with the phones being located at Hughes' residence on multiple occasions. [R72 4054-60]

II. Penalty Phase.

A. Davis' background and character.

As a young child, Davis lived in public housing in an area of south-central Los Angeles known as "The Jungle." [R74 4443-45, 4454, 4459-60, 4463; R75 4497-98] His parents were "an item for a small period of time." [R74 4445; R75 4494-96] His father lived with them for a "period of time." [R74 4449-50, 4463; R75 4484, 4497-98, 4518-19, 4535] Davis' mother provided for Davis and tried to raise him right. [R74 4463-66; R75 4486, 4491-92] But gangs and gunfire were rampant; helicopters flew overhead; people got shot and killed. [R74 4445, 4448; R75 4483-84]

Davis was close to his paternal grandfather. [R74 4445; R75 4498-99] His grandfather's death during a carjacking left a young Davis wondering why his grandfather no longer came over. [R74 4445-46; R75 4499] Years later, Davis learned he had been murdered. [R75 4519-20] Davis' mother trusted a single neighbor to escort Davis to the store. [R74 4446-47] That neighbor often brought Davis sweets. [R74 4446-47] She was gunned down in an alley, and a young Davis

"found out that was her with the blood on the ground." [R74 4447]

After Davis' grandfather's murder, his father moved across the country to Panama City. [R74 4449; R75 4500] Davis was approximately five. [R74 4449; R75 4499] Davis did not see his father again for a number of years. [R74 4449, 4465; R75 4500-01, 4536] One summer, he was sent to visit his father. [R74 4450; R75 4536] A "momma's boy," Davis expected to return home to his mother. [R74 4450-51, 4460, 4464, 4467; R75 4501, 4511, 4537] Plans changed when his father discovered Davis struggled with reading and writing. [R74 4451, 4465; R75 4501-02, 4511, 4537-38] Against his wishes, Davis remained in Florida with his father and stepmother, who provided for Davis and tried to raise him right. [R74 4451, 4465, 4525; R75 4529-30, 4548-49]

Davis struggled to adjust to the culture in Panama City. [R75 4525-26] His was the only African-American family in the neighborhood. [R75 4508-09] At approximately eight, Davis began playing tackle football. [R75 4504, 4542] He was the only African-American child, and was called "the N word" and taunted. [R75 4509-10] Davis continued playing football through high school. [R75 4504, 4541-42] His father could recall only one game where Davis took a real hard hit to the head and left the game. [R75 4505, 4521-25] His stepmother was unaware of a major head injury, but remembered "him being hurt and being hit in the head." [R75 4547-48] Davis was not one to complain about being hurt. [R75 4506] He was often involved

in collisions and tackles. [R75 4508]

For the first two years in Florida, Davis was home schooled. [R75 4503, 4537-39] His reading and writing improved. [R75 4521, 4539] He then attended a series of schools. [R75 4511-12, 4521, 4539-40] Davis struggled academically and appeared to suffer from learning disabilities, but his father and stepmother were unaware of any diagnosed mental disorders. [R75 4530-32, 4543-50] In addition to football, Davis excelled at running track. [R75 4512] While working for a neighbor as a freshman, Davis saved an elderly, disabled man from drowning, and was honored by law enforcement. [R75 4512-13, 4526]

After Davis remained in Florida, his relationship with his mother suffered. [R74 4452-59; R75 4485, 4538-40] Davis and her barely spoke by phone. [R74 4452, 4461; R75 4540] Three years passed before his first return visit. [R74 4452] Two years later, he returned for a final visit. [R74 4452, 4459] She never came to see him. [R74 4453] She had no pictures of her son following age nine. [R74 4458] At trial, Davis' mother struggled to remember his birth date. [R74 4454, 4459] After visiting his mother at fourteen, Davis did not see her again until she testified at trial. [R74 4458-59] Over fifteen years had passed. [R74 4458-59]

B. Additional developments at trial.

Dr. Julie Harper. Harper was a psychologist. [R76 4668] She evaluated Davis' cognitive abilities. [R76 4670, 4672] She learned that anxiety caused Davis' heart to

race and his mind to go blank; led to detailed list-making; and often revolved around the care his son was receiving from Steward. [R76 4731-32] Harper was informed of "symptoms related to obsessive impulsive disorder," such as Davis having to keep his person and surroundings extremely clean. [R76 4732] She became aware that Davis was regularly exposed to violence and loss as a young child; viewed his mother as emotionally distant; and experienced head trauma. [R76 4733-43; R77 4895-96] Harper discovered that leading up to May 7, Davis and Steward grew apart, and he felt isolated from her and his family. [R76 4741-42]

Cognitive testing suggested Davis' memory and attention were impaired. [R76 4677-79, 4696-4702] He struggled to restrain his impulses and multi-task. [R76 4679-82] He labored to solve problems rationally and be "mentally flexible." [R76 4682-85] Although his I.Q. scores were average-to-low-average in other categories, Davis' perceptual reasoning cognitive abilities–that is, the way he reasoned about things he saw when words were not used–was worse than low average. [R76 4687-95; R77 4887-89] They were in the fourth percentile. [R76 4691] They were near the borderline for intellectual disability. [R76 4690-91] The results of a subsequent neurological examination and PET scan, which suggested a frontal lobe abnormality, were consistent with the results of Harper's evaluation. [R77 4885, 4914-15]

Harper diagnosed Davis with a mild neuro-cognitive disorder due to traumatic brain injury. [R76 4747-48] That mental disorder had a "profound effect" on Davis.

[R76 4749] He struggled to reason, process feedback, and make good decisions. [R76 4749-51] She also diagnosed him with borderline intellectual functioning in the perceptual reasoning area. [R76 4747; R77 4878, 4887-89] That mental disorder was extreme. [R77 4879-80] It impaired Davis' ability to accurately process, and fluidly reason based upon, visual stimuli. [R77 4889-90] For instance, if an individual near Davis quickly raised his hand to point, Davis may think that individual was about to hit him in the head. [R77 4890-91] In other words, Davis could misperceive that someone was attacking him. [R77 4891-92]

Harper also diagnosed Davis with obsessive compulsive disorder and a learning disorder with impairment in reading. [R76 4747; R77 4875, 4878] Finally, Harper diagnosed Davis with a generalized anxiety disorder and a major depressive disorder. [R76 4747] The degree to which Davis was depressed varied, but around May 7 he suffered from depression due to the breakdown of his relationship with Steward coupled with concern for his son's well-being. [R76 4752-53; R77 4903]

Davis' mental disorders–particularly, the neuro-cognitive disorder and the borderline intellectual functioning–caused Davis to experience extreme mental disturbance. [R77 4879; 4910-13] Davis was under the influence of those disorders on May 7. [R76 4747-48; R77 4879] As a result, the homicides of Hughes and Rhodes were committed while Davis was under the influence of extreme mental disturbance. [R77 4879-80, 4910-13]

Dr. Geoffrey Colino. Colino was a neurologist. [R75 4554] He conducted a neurological examination of Davis. [R75 4558-70, 4593-94] Colino learned of multiple occasions on which Davis lost consciousness while playing football, boxing, and riding all-terrain vehicles. [R75 4560-61, 4597-98] Colino was informed of Davis' frequent past use of methylone, which is "profoundly toxic to the nervous system," and extensive history of ritualized, almost "obsessional," list-making. [R75 4561-62, 4565-66, 4602-03] Colino became aware the environment in which Davis developed as an early child was "suboptimal." [R75 4562, 4587-90] Mental status testing suggested Davis suffered from memory problems. [R75 4567-68] An analysis of Davis' nerves suggested a possible tic disorder. [R75 4568-69] A subsequent PET scan revealed abnormally low activity in Davis' frontal lobe, right temporal lobe, and neocortex, all of which were consistent with head trauma and/or toxic chemical exposure and/or nutritional deprivation at an early age. [R75 4579-89]

Colino emphasized that the frontal lobe abnormality had a large effect on Davis' behavior. [R75 4601-02, 4607-08] It caused Davis to have difficulty knowing right from wrong; regulating his impulses, moods, and behavior; conforming to social norms; and empathizing and understanding the impact of his behavior on others. [R75 4605-06, 4609-10] Put another way, Davis' executive function was impaired. [R75 4610] As a result, Davis' capacity to conform his conduct to the requirements of the law was substantially impaired on May 7. [R75 4607-13]

Dr. Joseph Wu. Wu was the director of a neuro-cognitive imaging program and a professor of psychiatry. [R76 4765-66] He had an expertise in the use of PET scan and MRI imaging to assess cognitive disorders, including traumatic brain injury. [R76 4768, 4771-73, 4831-32] Wu reviewed and interpreted Davis' PET scan. [R76 4769-71] It revealed abnormally low activity in Davis' frontal lobe, right temporal lobe, and neocortex. [R76 4796-4803; R77 4864] The PET scan was consistent with the results of the neuropsychological testing performed by Harper and Colino. [R76 4804] For instance, the results of both were consistent with Davis undergoing multiple head traumas; suffering injuries to his frontal lobe; and experiencing executive function deficits– such as decreases in memory, cognition, impulse control, and social judgment, and increases in aggression and violence. [R76 4804-19, 4825]

Wu diagnosed Davis with multiple traumatic brain injuries. [R76 4839-42] Davis had "especially prominent damage in the frontal lobe areas." [R76 4842] Wu opined that the homicides of Hughes and Rhodes were the result of Davis' "poor ability to regulate aggressive impulses." [R76 4823-24] As a result of Davis' traumatic brain injuries, his capacity to conform his conduct to the requirements of the law was substantially impaired on May 7. [R76 4850-52]

Dr. Gregory Prichard. Prichard was a psychologist. [R77 4955] The State hired him to examine Davis. [R77 4959] Prichard met with Davis for less than two hours. [R77 4960, 4964-65, 5015] Prichard felt like the police reports were probably the

most important source of information for his examination. [R77 4961, 5021-23; R78 5070-71] He reviewed the other doctors' reports, but conducted no testing of his own. [R77 4959-64, 5016-17; R78 5063] Prichard was not able to accurately interpret neurological test results. [R77 4963, 5017, 5025-26] He was not able to read a PET scan. [R77 4963, 5024, 5026]

In rebuttal, Prichard testified he did not think Davis suffered from a major mental illness. [R77 4987-98, 5030, 5037-50, 5049; R785067-68] While he did not dispute either that Davis suffered from borderline intellectual functioning in perceptual reasoning or that such individuals could misperceive stimuli, Prichard maintained that disorder was not relevant to "the decision of an individual to plan and commit homicide." [R77 4998-99, 5048-49; R78 5068-70] Prichard claimed Davis suffered from some indeterminate personality disorder with anti-social and narcissistic characteristics. [R77 4999-5001, 5050] He opined that the homicides of Hughes and Rhodes were not committed while Davis was under the influence of extreme mental disturbance. [R77 5002-08, 5012] He asserted that Davis' capacity to conform his conduct to the requirements of the law was not substantially impaired. [R76 5008-14]

SUMMARY OF THE ARGUMENT

I. Reversible error occurred when the court denied Davis' motion to suppress and admitted evidence obtained during, and as a result of, the July 10 search of his home. First, the actions of the officers executing the search warrant exceeded the

scope of the warrant because those actions were unrelated to the objective of locating Hughes' debit card, and instead, were designed to widely gather information on anything of potential evidentiary value. Second, the officers' excessive actions constituted a Fourth Amendment search separate and apart from the search authorized by the warrant because those actions went beyond cursorily inspecting items that came into view while searching for Hughes' card, and instead, constituted both an additional physical intrusion on Davis' home and an additional invasion of his reasonable expectation of privacy. Third, even if the items of potential evidentiary value initially came into view while searching for Hughes' card, those items were not in "plain view" for purposes of the plain view doctrine because the officers lacked probable cause to believe they were evidence of a crime.

II. Reversible error occurred when the court admitted evidence that Davis possessed a revolver "in the past." That evidence was not relevant because the State failed to show any link between the revolver and the crimes for which Davis was on trial. Even if relevant, the probative value of that evidence was substantially outweighed by the danger of unfair prejudice because while the State had no need for that evidence, it inflamed the jury and appealed improperly to its emotions.

III. Reversible error occurred when the court allowed the State, during its closing, to display a photo of Steward crying on the stand at trial. That impermissible demonstration appealed to the jury's sympathy and caused its verdict to rest upon

emotional grounds rather than the facts proven by the evidence.

IV. Reversible error occurred when the court found that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and sentenced Davis to death. First, Davis' death sentences were imposed in violation of his Sixth Amendment right to trial by jury because the judge, rather than the jury, made those critical findings necessary to impose the death penalty. Second, the error in requiring the judge, rather than the jury, to make those critical findings is structural because it always results in there being no jury verdict within the meaning of the Sixth Amendment and constitutes a structural defect in the constitution of the death-penalty-trial mechanism. Third, even if that error is not structural, the State cannot prove beyond a reasonable doubt that the error did not contribute to Davis' death sentences because it would be sheer speculation to conclude that the jury fully appreciated its unique responsibility and unanimously found–beyond a reasonable doubt–that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances.

V. Reversible error occurred when the court found that Rhodes' murder was committed for the purpose of avoiding arrest. The evidence was insufficient to establish beyond a reasonable doubt that Davis' sole or dominant motive for murdering Rhodes was to eliminate her as a witness. Instead, the evidence

demonstrated that Davis' motive for murdering Rhodes was to gain financially by taking possession of Hughes' property.

VI. Reversible error occurred when the court found that Hughes' murder was committed in a cold, calculated, and premeditated manner. The evidence was insufficient to establish beyond a reasonable doubt that Hughes' killing was the product of cool and calm reflection; Davis had a careful or prearranged design to murder Hughes before the fatal incident; or Davis exhibited heightened premeditation. Instead, the evidence demonstrated that Davis' conduct on May 7 in connection with Hughes' murder was akin to a series of spontaneous acts, taken without reflection, rather than carried out as a matter of course. Davis' isolated references to "getting" or "whacking" Hughes failed to prove heightened premeditation, and during the brief time between the deadly struggle with Hughes and placing his body in the tub, Davis was unfit for cool and calm reflection.

VII. Reversible error occurred when the court failed to properly evaluate multiple non-statutory mitigating circumstances. First, the court failed to expressly and specifically articulate why twenty non-statutory mitigating circumstances were "not mitigating in this case, and therefore...given no weight." Second, without evaluating evidence that contradicted its decision, the court assigned no weight to the mitigating circumstances that Davis suffered from executive dysfunction and borderline intellectual functioning in the area of perceptual reasoning. Third, the

court failed to assign sufficient weight to Davis' history of traumatic brain injury.

ARGUMENT

I. Reversible Error Occurred When the Court Denied Davis' Motion to Suppress and Admitted Evidence Obtained During, and as a Result of, the July 10 Search of His Home.

The warrant executed on July 10 authorized a search of Davis' home for the sole purpose of locating Hughes' debit card. [R16 2837] A sheriff's office general order provided that prior to the execution of a warrant, "the entire area to be searched will be videotaped or photographed." [R15 2807; R39 178-79] It also stated that at "the conclusion of the search, the premises will again be videotaped and/or photographed." [R15 2807]

Sunday helped prepare the warrant affidavit, but was not present at the time of the warrant's execution. [R39 79-80, 103-05, 140-41] Sunday lacked probable cause to believe, but still suspected, that Hughes' furniture may be located at Davis' home. [R39 113-16, 122] Crime Scene Investigator (CSI) Laura Gainey videotaped, photographed, and collected evidence during the July 10 search. [R39 175, 178] Regarding the general order, Gainey testified that she "photograph[s] everything as is prior to the search." [R39 179] However, during the search, she "photograph[s] what's happening" "[i]f it has evidentiary value in it." [R39 179-80]

Hughes' card was not found, but Gainey "videotaped everything" and took approximately 150 photos. [R16 2838; R39 181-83, 187] She placed photo markers

next to, and photographed, "[m]arijuana shake inside a round hat box" and "a smoking device" found in a bathroom closet. [R39 180] Those were the only items seized. [R39 183] Beyond that, Gainey maintained she simply photographed and videotaped "the rooms and the items in the areas that were searched." [R39 180-81] However, when asked if she did "anything other...than what" the general order required, Gainey clarified that she "photographed and videoed anything that [she] was asked to photograph and video." [R39 183]

Gainey's understanding was that Davis' home was being searched for Hughes' card. [R39 175] But she and other officers "were aware that furniture had been missing from [Hughes'] house." [R39 186] And she remembered officers talking about the possibility of property at Davis' home, including a moped and a vehicle, having been stolen from Hughes. [R39 184-86]

Gainey was specifically told to photograph the moped and a VIN number on the vehicle. [R39 187] She was instructed to photograph several TVs and their serial numbers. [R39 186-87] As she was "taking photographs...of the back of a TV," a sergeant stopped her from taking photos focused on specific items because "that was not within the scope of the search warrant." [R39 187]

The majority of the 150 photos that Gainey took focus on a specific part of an

item, a specific item, or a specific set of items. [P2-154[3]] Few photos show the general premises or even wide views of specific areas. [P2-154] More specifically, approximately twenty photos are closeups of serial numbers, VIN numbers, brand names, title certificates, or the like. [P13, 30, 61, 63-65, 68-70, 76-77, 83-86, 91, 93-94, 97-98, 129] Approximately sixty photos focus on specific furniture, furnishings, electronics, appliances, or personal property. [P2 -12, 14-29, 31-44, 59-60, 62, 66-67, 71-75, 88-90, 92, 95-96, 138] Approximately fifty photos closely document paperwork, receipts, cards, books, or the like. [P 99-128, 130-37, 139-50, 154] Approximately fifteen photos detail hydroponic growing equipment and materials. [P49-58, 78-82] Seven photos depict the marijuana and paraphernalia found in the bathroom closet. [R39 180; P45-48, 151-53] Finally, a single photo focuses on an unattached building. [P 87]

Family members, friends, and associates of Hughes subsequently identified the property depicted in the pictures from July 10 as Hughes'. [R39 190] On September 7, a warrant to search for the property identified as Hughes' was executed at Davis' home. [R39 190]

Davis argued that the search of his home on July 10 exceeded the scope of the search warrant. [R2 277-78, 284, 357] More specifically, while the warrant authorized

[3]The record on appeal includes a disc containing the photos, which are labeled numerically. [SR2 31] Those photos will be referred to as P followed by the appropriate number. The video that Gainey took was not placed into evidence.

a limited search for Hughes' card, the officers converted that limited search into a general search for anything of potential evidentiary value and documented that process in photos and video. [R2 277-78, 284, 357] The sheriff's office general order provided no legal authority for the general search of Davis' home. [R2 357] Davis noted that by utilizing the "fruits" of the unlawful July 10 search, officers obtained a second warrant, and during that warrant's execution on September 7, took additional photos and seized property. [R278; R39 189-90] Consequently, both sets of photos, the property seized on September 7, and any identifications derived from those photos or property should be suppressed. [R2 286; R39 189]

The court denied Davis' motion. [R5 991-93] It found that the officers followed the sheriff's office policy and practice of photographing and videoing searches. [R5 992-93] The court concluded that no "inventory search" occurred. [R5 992]

At trial, Davis regularly objected and renewed his motion to suppress; the court denied those requests but granted a continuing objection; and during both the guilt and penalty phases, the State repeatedly utilized evidence obtained during, or as a result of, the July 10 search. [R21 4017-30; R22 4031-4123; R25 4821-30; R26 4831-33; R56 931-32, 934; R57 990-94, 998-99; R60 1565-68, 1578-80; R61 1779-87, 1805-10; R64 2433, 2436-40, 2448-52, 2466-82; R65 2570-79, 2655-80; 2698-2703; R67 2948-55, 2981-88, 3017-18, 3036, 3042-48; R68 3193-94, 3196-97, 3206-07; R70 3684; R73 4180-81, 4195-96, 4220-22; R77 4939-53, 4944, 4948-49, 4953-

54, 4970, 5014]

A. The actions of the officers executing the search warrant at Davis' home on July 10 exceeded the scope of the warrant.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." Florida v. Jardines, 133 S.Ct. 1409, 1414 (2013). Consequently, "an officer's leave to gather information is sharply circumscribed when he steps off [public] thoroughfares and enters" a private home. Id. at 1415. That is particularly so when officers execute a search warrant in a home:

> The manifest purpose of th[e] particularity requirement [of the Fourth Amendment] was to prevent general searches. By limiting the authorization to search to specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus, the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found."

Maryland v. Garrison, 480 U.S. 79, 84 (1987). Put another way, a "distinct objective of [the warrant requirement] is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). Thus, "police actions in execution of a warrant [must] be related to the objectives of the authorized intrusion." Wilson v. Layne, 526 U.S. 603, 611 (1999).

In the present case, the officers' actions at Davis' home on July 10 were

unrelated to the objective of locating Hughes' debit card, and instead, were designed to widely gather information on anything of potential evidentiary value. The sole authorized objective of that search was to locate Hughes' card. [R16 2837] But during the search, Gainey photographed items if they had general "evidentiary value." [R39 179-80] No nexus with Hughes' card was required. And other officers' exercised their discretion to tell Gainey which items needed to be photographed. [R39 183] For instance, Gainey recalled being specifically told to photograph the moped, the vehicle, and several TVs, including closeup photos of VIN and serial numbers. [R39 186-87; P62-65,71-77, 88-98] Officers on scene may have had a hunch that those items had potential evidentiary value. [R39 184-86] But none of those items were connected to Hughes' card. And when a sergeant became aware of the situation, she directed Gainey to stop taking photos focused on specific items because "that was not within the scope of the search warrant." [R39 187]

The photos themselves document the officers' wide-ranging, exploratory efforts to gather information on anything of potential evidentiary value. Approximately sixty photos focus on specific furniture, furnishings, electronics, appliances, or personal property. [P2 -12, 14-29, 31-44, 59-60, 62, 66-67, 71-75, 88-90, 92, 95-96, 138] In addition, approximately twenty photos are closeups of serial numbers, VIN numbers, brand names, title certificates, or the like. [P13, 30, 61, 63-65, 68-70, 76-77, 83-86, 91, 93-94, 97-98, 129] Approximately fifty photos closely document paperwork,

receipts, cards, books, or the like. [P 99-128, 130-37, 139-50, 154] Approximately fifteen photos focus on hydroponic growing equipment and materials. [P49-58, 78-82] Finally, seven photos depict the marijuana and paraphernalia found in the bathroom closet. [R39 180; P45-48, 151-53] Thus, few, if any, of the 150 photos document items that possess evidentiary value related to Hughes' card.

B. The officers' excessive actions in widely gathering information on anything of potential evidentiary value constituted a Fourth Amendment search separate and apart from the search authorized by the warrant.

"The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." Terry v. Ohio, 392 U.S. 1, 28-29 (1968). Thus, the "manner in which [a] search [is] conducted is...as a vital a part of the inquiry as whether [the search was] warranted at all." Id. at 28. More specifically, "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." Id. at 18.

And"[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" Jardines, 133 S.Ct. at 1414. But "property rights 'are not the sole measure of Fourth Amendment violations.'" Id. That is, "'the Fourth Amendment protects people, not [only] places.'" Terry, 392 U.S. at 9. Thus, a Fourth Amendment "violation occurs when government officers violate a person's 'reasonable expectation of privacy.'" United States v. Jones, 132

S.Ct. 945, 950 (2012). Such an expectation "'has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" Id. at 951.

In the present case, the officers' actions in widely gathering information on anything of potential evidentiary value went beyond cursorily inspecting items that came into view while searching for Hughes' card. Instead, the scope of the officers' efforts to gather information unrelated to Hughes' card was wide, and the manner in which they went about that task was intense. First, the officers permanently recorded the presence and appearance of dozens, if not hundreds, of items that had potential evidentiary value unrelated to Hughes' card. [P2-86, 88-154] They did so in a deliberate, goal-oriented fashion. Second, the officers gathered information on anything of potential evidentiary value from throughout Davis' home and outbuildings. [P2-154] In other words, they inventoried all of the potentially incriminating items in Davis' home. Third, most of those items were inspected and photographed with great care and thoroughness. In fact, approximately half of the over 150 photos are closeups of either serial numbers, VIN numbers, brand names, and title certificates, or paperwork, receipts, cards, and books. [P13, 30, 61, 63-65, 68-70, 76-77, 83-86, 91, 93-94, 97-98-128, 129-37, 139-50, 154]

Further, the officers' actions in widely gathering information on anything of potential evidentiary value constituted a physical intrusion on Davis' home and

effects separate and apart from the intrusion related to searching for Hughes' card. The physical intrusion on Davis' home and effects for the limited purpose of locating Hughes' card was one thing. But the physical intrusion for the purpose of widely gathering information on, and permanently recording, anything of potential evidentiary value was a qualitatively different thing. The latter intrusion entailed a careful and thorough inspection and documentation of dozens, if not hundreds, of Davis' papers and effects from throughout his home. Even if that intrusion was not excessive in a spatial or temporal sense, it amounted to a "general, exploratory rummaging" through Davis' home.

Finally, the officers' actions in widely gathering information on anything of potential evidentiary value constituted an invasion of Davis' reasonable expectation of privacy separate and apart from the invasion related to searching for Hughes' card. Society recognizes and permits an expectation that strangers will not intrude upon the privacy of an individual's home for the purpose of locating a single item of personal property. But society further recognizes and permits an expectation that even if strangers intrude upon the privacy of an individual's home for that limited purpose, they will not also widely gather information on, and permanently record, anything of potential evidentiary value. That latter expectation is reasonable because a person's home is their most intimate and familiar space. A search of a person's home reveals a plethora of private and personal details. That is particularly true where, as here, the

search is wide-ranging, thorough, and documented in pictures.

C. Even if the items of potential evidentiary value initially came into view while searching for Hughes' debit card, those items were not in "plain view" for purposes of the plain view doctrine.

"'The burden is on those seeking the exemption [from the warrant requirement] to show the need for it.'" Coolidge, 403 U.S. at 455. One potential exception is the plain view doctrine. Under that doctrine, objects in plain view may be searched if three conditions are satisfied. One, "the officer [must] be lawfully located in a place from which the object can be plainly seen." Horton v. California, 496 U.S. 128, 137 (1990). Two, the object's "incriminating character must be 'immediately apparent.'" Id. at 136. Three, the officer must "have a lawful right of access to the object itself." Id. at 137. However, "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." Coolidge, 403 U.S at 466. "If an officer could indiscriminately search every item in plain view, a search justified by a limited purpose...could be used to eviscerate the protections of the Fourth Amendment." Arizona v. Hicks, 480 U.S. 321, 326 (1987) (O'Connor, J., dissenting). Thus, for an object's criminal character to be considered "immediately apparent," the officer must have probable cause to believe that the object is evidence of a crime. Hicks, 480 U.S. at 326.

In the present case, even if the items of potential evidentiary value initially came into view while searching for Hughes' card, those items were not in "plain view" for

purposes of the plain view doctrine. Other than the marijuana and paraphernalia found in the bathroom closet, the officers lacked probable cause to believe that the items they inspected and photographed were evidence of a crime. In other words, those items' criminal character was not immediately apparent. If otherwise, the officers could have not only searched, but also seized, those items under the plain view doctrine. See, e.g., Rimmer v. State, 825 So.2d 304, 313 (Fla. 2002). However, the only items seized were the marijuana and paraphernalia. [R39 183] And Sunday acknowledged that at the time of the July 10 search, he lacked probable cause to believe that Hughes' furniture was located there. [R39 114, 122] That probable cause did not arise until Hughes' friends and family were later shown the pictures from July 10 and identified the items depicted as Hughes' property. [R39190]

On a related note, the sheriff's office general order provided no legal justification for the officers' actions in widely gathering information on anything of potential evidentiary value. That order does not trump the Fourth Amendment. Thus, the trial court's ruling turned on an incorrect legal conclusion that the officers' actions were justified because they followed the sheriff's office policy and practice of photographing and videoing searches. [R5 992-93] That ruling should be reviewed de novo. See, e.g., Jardines v. State, 73 So.3d 34, 54 (Fla. 2011) (stating that as to a ruling on a motion to suppress, "the reviewing court must defer to the trial court's factual findings if supported by competent, substantial evidence but must review the

trial court's ultimate ruling independently, or de novo.").

D. Although it does not appear this Court has previously addressed these precise circumstances, other courts' decisions should serve as persuasive authority for concluding that the general search of Davis' home for anything of potential evidentiary value was unlawful.

The principles and reasoning contained within a trio of United States Supreme Court decisions are instructive. In Hicks, after a bullet was fired through the floor of his apartment into the unit below, officers entered Hicks' apartment to search for a shooter, other victims, or weapons. 480 U.S. at 323. During that search, an officer noticed stereo equipment, which he suspected had been stolen. Id. He recorded the serial numbers, but had to move some of the equipment to do so. Id. The Court concluded that the officer's "moving of the equipment...constitute[d] a 'search' separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment." Id. at 324-25. It reasoned that "taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents,...produce[d] a new invasion of [Hicks'] privacy unjustified by the exigent circumstance that validated entry." Id. at 325. In contrast, "[m]erely inspecting those parts of the [stereo equipment] that came into view during the [search for the shooter, victims, and weapons] would not have constituted an independent search, because it would have produced no additional invasion of [Hicks'] privacy interest." Id.

In Jardines, officers "us[ed] a drug-sniffing dog on [Jardines'] porch to

investigate the contents of [his] home." 133 S.Ct. 1413. The Court concluded that those actions constituted a search. Id. at 1417-18. It recognized that an officer was allowed to physically intrude onto a homeowner's porch to knock on the front door, but reasoned that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating information is something else." Id. at 1416. The Court emphasized that the scope of the license to approach a front door and knock "is limited not only to a particular area but also to a specific purpose." Id. Three justices reasoned that a search also occurred because the officers' actions "invaded [Jardines'] 'reasonable expectation of privacy,' by nosing into intimacies [he] sensibly thought protected from disclosure." Id. at 1418 (Kagan, J., concurring).

In Stanley v. Georgia, officers executed a search warrant at Stanley's home for the purpose of locating evidence related to bookmaking activities. 394 U.S. 557, 558 (1969). During that search, they found reels of film in a drawer, viewed them, and seized them as obscene matter. Id. The Court decided the case in favor of Stanley on the rationale that the obscenity statute at issue violated the First Amendment. Id. at 559. But three justices concurred in the result only on the ground that the officers' handling of the film was unlawful under the Fourth Amendment. Id. at 572 (Stewart, J. concurring in the result). They reasoned that the officers exceeded the scope of the warrant, and the plain view doctrine was inapplicable because "the contents of the films could not be determined by mere inspection." Id. at 570-71. In conclusion, the

justices emphasized:

> This record presents a bald violation of th[e] basic constitutional rule [that officers cannot undertake exploratory searches even with a warrant]. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.

Id. at 572.

The officers' actions challenged in Hicks, Jardines, and Stanley, as well as in the present case, were unrelated to the objectives of their authorized entry–in Hicks, to find evidence related to the shooting; in Jardines, to approach and knock on the front door; in Stanley, to uncover evidence related to bookmaking; and in the present case, to locate Hughes' debit card. Thus, those actions exceeded the scope of the officers' legal authority to intrude upon the defendant's home and effects. Further, the officers' actions here in widely gathering information on anything of potential evidentiary value were qualitatively equivalent to the officer in Hicks moving the stereo equipment, the officer in Jardines using the drug dog, and the officer in Stanley viewing the films. All of those actions went beyond merely inspecting items that came into view during an authorized search. And all of those actions constituted both an additional physical intrusion on the defendant's home and effects and an additional invasion of his reasonable expectation of privacy. Thus, all of those actions amounted to a search separate and apart from the authorized activity. Finally, even

more than in Stanley, to condone what happened here would be to approve of a "general, exploratory rummaging" through an individual's private home.

Beyond that trio of decisions, the Supreme Judicial Court of Massachusetts concluded–in a case directly on point to the present case–that the actions of officers executing a warrant exceeded the scope of the warrant, those actions constituted a separate Fourth Amendment search, and that search was unlawful. In Commonwealth v. Balicki, officers obtained a warrant that authorized the search of Balicki's home for multiple items of furniture, electronics, and personal property. 762 N.E.2d 290, 295 (Mass. 2002). The officers executing the warrant were accompanied by a police photographer, which was "not unusual...because police sometimes photographed and videotaped the scene of a search to protect themselves from accusations of damaged or missing property." Id. But during the search of Balicki's home, the photographer was directed "to photograph and videotape each room in the home and anything...identified to the photographer as having potential evidentiary value." Id. Ultimately, the interior of Balicki's home was videotaped, and while several photos "show[ed] wide views of rooms...[o]thers focus[e]d on specific items," including furniture, electronics, and paperwork. Id. at 296.

The Supreme Judicial Court of Massachusetts concluded that "the limited search authorized by the warrant was converted into a general search of the home for potential evidence." Id. at 299. It reasoned: "The line between the limited search

authorized by the warrant and the general search...conducted was crossed when the officers inspected everything of potential evidentiary value in every room of the house, in essence conducting an inventory search." Id. The court further explained:

> While such a search would have been improper even without the use of the video and still cameras, their use not only documented the offending nature of the search, it also contributed to its intrusiveness. It is one thing to be present in a home carrying out the directives of a warrant, and of necessity being in a position cursorily to notice many of its contents. It is quite another to inspect the contents of a home and to create a permanent record of it for [future] inspection...The use of videotape and photographs in this case goes far beyond the limited photographic preservation of the condition of a search scene...[o]r of evidence, in situ, that the police otherwise have a right to seize pursuant to a warrant or any exception thereto.

Id. at 299-300. Finally, the court rejected the argument "that the officers acted properly because they videotaped and photographed only that which was in plain view." Id. at 300. It reasoned: "The fact that the officers seized certain items pursuant to the plain view doctrine does not mean that...rationale [can be extended] to support a general exploratory search of the home, photographing or videotaping anything they might find to be interesting or suspicious." Id.

In the present case, as in Balicki, the officers' actions in widely gathering information on anything of potential evidentiary value exceeded the scope of the warrant being executed. Further, the officers' actions in both instances went beyond merely inspecting items that came into view during the execution of the warrant. Instead, in both cases, the officers created a permanent record of items of potential

evidentiary value; they did so throughout the individual's home; and they did so with great care and thoroughness. Thus, as in Balicki, the officers' actions in the present case amounted to a general search, separate and apart from the limited search authorized by the warrant. Finally, like the officers there, the officers here seized certain items–the marijuana and paraphernalia found in the bathroom closet–pursuant to the plain view doctrine. But as in Balicki, that fact does not justify the general exploratory search of Davis' home for anything of potential evidentiary value.

E. Both evidence obtained during the unlawful search on July 10 and evidence later derived from that search should have been excluded.

"'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Wong Sun v. United States, 371 U.S. 471, 485 (1963) (emphasis added). Thus, "[t]he exclusionary rule prohibits the introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search." Murray v. United States, 487 U.S. 533, 536 (1988). "Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search....'" Id. at 536-37. "The question to be resolved when it is claimed that [derivative] evidence...is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was 'come at by exploitation of [the initial] illegality or instead

by means sufficiently distinguishable to be purged of the primary taint.'" Segura v. United States, 468 U.S. 796, 804-05 (1984).

In the present case, evidence obtained during the unlawful search on July 10 should have been excluded. At trial, the State introduced photos taken on July 10 into evidence. [R21 4017-30; R22 4031-64; R25 4821-30; R26 4831-33; R61 1779-81; R77 4944] It also displayed photos taken on July 10 during its guilt-phase opening and closing. [R57 990-91; R73 4195-96, 4220-21; S38, 42, 96] Further, Gainey, Armstrong, and Lieutenant Angie Hogeboom testified concerning things they saw on July 10. [R64 2433, 2436-39, 2448-52, 2466-82; R77 4942-54] This evidence concerned knowledge acquired during the unlawful search on July 10. Thus, it should have been excluded.

In addition, evidence later derived from the unlawful search on July 10 should have been excluded. As an initial matter, following that search, family members, friends, and associates of Hughes identified the property depicted in the pictures taken on July 10 as Hughes'. [R39 190; R60 1565-68] On that basis, a warrant to search for Hughes' property was obtained. [R64 2439] On September 7, that warrant was executed at Davis' home, and photos were taken and property was seized. [R39 190; R64 2440; R65 2655-80]

At trial, the State introduced photos taken and property seized on September 7 into evidence. [R22 4065-4123; R61 1779-81; R65 2675-80] It also displayed photos

taken on September 7 during its guilt-phase opening and closing. [R57 991-93; R73 4180-81; S11, 81] CSI James Carey testified concerning things he saw during the September 7 search. [R65 2655-80] He also identified the property seized from an individual in Crestview as property previously located at Davis' home by referring to pictures taken on July 10. [R65 2698-2703] Both Sunday and State Attorney Office Investigator Melissa Vause linked an "LA Dodgers" hat depicted in photos taken on July 10 and September 7 to the hat worn by the individual using Hughes' card in various surveillance videos. [R60 1578-80; R68 3193-94, 3196-97, 3206-07]

Further, Ortega identified hydroponic growing equipment and materials depicted in pictures taken on July 10 as items his business sold to Davies' sons. [R61 1781-87; 1805-10] Steward identified property depicted in pictures taken on September 7 as property Davis had not possessed prior to May 7. [R70 3684] Multiple friends and acquaintances of Hughes identified property depicted in pictures taken on July 10 and September 7 as belonging to Hughes. [R65 2571-78; R67 2949-55, 2981-88, 3017-18, 3042-48] Finally, based largely on evidence that was acquired during the July 10 search and that concerned Davis' involvement in selling "herbal incense," Prichard opined that Davis' capacity to conform his conduct to the requirements of the law was not substantially impaired. [R77 4970, 5014] All of this derivative evidence was "come at" by exploiting the unlawful search of Davis' home on July 10. Thus, it should have been excluded.

This Court has previously applied the relevant rules of law to circumstances analogous to those of the present case and concluded that both evidence acquired during an unlawful search and evidence later "come at" by exploiting the unlawful search should have been excluded . See Moody v. State, 842 So.2d 754, 755-60 (Fla. 2003) (concluding that a gun and other property reported stolen from a vehicle found at the scene of a murder, as well as the murder weapon, should have been suppressed where the gun was seized during an illegal stop of Moody; after the gun was linked to the murder, a warrant was obtained; during the subsequent searches, the other property reported stolen was discovered; and a friend of Moody's later turned the murder weapon into police and admitted he bought it from Moody).

The Third District Court of Appeal has done the same. See Hidalgo v. State, 959 So.2d 353, 353-55 (Fla. 3d DCA 2007) (concluding that an officer's knowledge of a pawn shop receipt, stolen watches, and Hidalgo's confession should have been suppressed where the officer examined the receipt, which listed two watches, during an illegal pat-down of Hidalgo; officers subsequently learned that similar watches had been reported stolen; watches at the pawn store listed on the receipt were later identified as the stolen watches; and after his arrest, Hidalgo confessed).

The court admitted evidence obtained during, and as a result of, the unlawful search. Davis' convictions and sentences violate his right to be secure against unreasonable searches and seizures. Amend. IV, U.S. Const.; Art. I, § 12, Fla. Const.

II. Reversible Error Occurred When the Court Admitted Evidence that Davis Possessed a Revolver "in the Past."

On cross-examination, after Steward testified that Davis took a gun with him on May 7, she was asked to explain a November 13 statement in which she stated Davis did not have a gun that evening. [R71 3890-99] Steward made clear that she had "remembered later on"; she had given a written statement in January 2013 in which she indicated that Davis took a gun; and although she did not see a gun on May 7, Davis later told her that he had a gun that evening. [R71 3893-3900] On re-direct examination, Steward elaborated on the contents of her January 2013 statement, and further clarified that she had never claimed to have seen a gun on May 7. [R71 3905-07] The State then asked: "You had only seen a gun in the past in the possession of Mr. Davis?" [R71 3907] Steward replied in the affirmative, and indicated that she had previously seen a revolver in Davis' possession. [R71 3908]

Davis objected and argued that Steward's testimony concerning his possession of a revolver "in the past" was not relevant, and if relevant, any probative value was substantially outweighed by the danger of unfair prejudice. [R71 3907-08] The court overruled Davis' objections. [R71 3907-08]

A. Evidence that Davis possessed a revolver "in the past" was not relevant.

"'[F]or evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action.'" Amoros v.

State, 531 So.2d 1256, 1259-60 (Fla. 1988); see also § 90.401, Fla. Stat. (2015). But "evidence of collateral...acts committed by the defendant is *not* admissible where its sole relevance is to prove the bad character or propensity of the accused." Agatheas v. State, 77 So. 3d 1232, 1239 (Fla. 2011). In particular, "for evidence of a firearm to be admissible as relevant in a criminal trial, 'the State must show a sufficient link between the weapon and the crime.'" Id. at 1236. Finally, while "[t]he standard of review of a trial court's evidentiary rulings is abuse of discretion," that "court's discretion is limited...by the rules of evidence and by the principles of stare decisis." McDuffie v. State, 970 So. 2d 312, 326 (Fla. 2007).

In the present case, evidence that Davis possessed a revolver "in the past" had no logical tendency to prove or disprove a fact which was of consequence to the outcome of Davis' trial. The State failed to show a link between that revolver and the crimes for which Davis was on trial. For instance, there was no indication that the same firearm, or even the same type of firearm, was used in connection with any of those crimes. As a result, the sole relevance of evidence that Davis possessed a revolver "in the past" was to prove Davis' bad character or propensity.

Two prior decisions of this Court should control the outcome on this issue. First, in Jackson v. State, although a witness "testified that Jackson possessed a gun at the time [of the incident at issue], he did not describe the gun." 25 So. 3d 518, 528 (Fla. 2009). "Later in the proceedings, [a witness] testified that Jackson usually carried a

'little pistol' in his waistband." Id. This Court concluded that evidence that Jackson "usually carried a 'little pistol'" was not relevant. Id. It reasoned: "Nothing in the record linked the 'little pistol' that [the witness] described to the gun that Jackson possessed when kidnapping" the victim. Id. at 529. This Court distinguished Amoros, 531 So.2d at 1260, where "the trial court did not err in admitting facts that [Amoros] was seen in possession of a gun on a prior occasion [because] the bullet fired from that gun showed that the same weapon was used to kill the victim in the case under review." Jackson, 25 So.3d at 528.

Second, in Agatheas, the victim was killed by gunshot, but no murder weapon was recovered. 77 So. 3d at 1235. Agatheas' ex-girlfriend testified that when she got home on the night of the murder, both Agatheas and the backpack in which he always kept his gun were gone. Id. at 1234. Subsequently, the State introduced evidence that when Agatheas was arrested years later, a revolver was recovered from his backpack. Id. at 1234-38. This Court concluded that evidence that a revolver was recovered from Agatheas' backpack was not relevant. Id. at 1233, 1239-40. It reasoned that the "revolver was in no way connected to the murder," and its "only possible relevance...would be to demonstrate Agatheas' bad character or propensity. Id. at 1237, 1239.

In the present case, similar to in Jackson, Agatheas, and Amoros, evidence indicating that Davis possessed a gun at the time of the crimes and at other times was

introduced. And like in Jackson and Agatheas, but unlike in Amoros, the State failed to show a link between the revolver Davis possessed "in the past" and the crimes for which he was on trial. As a result, this Court's prior decisions compel the conclusion that evidence Davis possessed a revolver "in the past" was not relevant.

B. Even if relevant, the probative value of evidence that Davis possessed a revolver "in the past" was substantially outweighed by the danger of unfair prejudice.

"Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice...." § 90.403, Fla. Stat. (2015).

> "Unfair prejudice" has been described as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." This rule of exclusion "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." In performing the balancing test to determine if the unfair prejudice outweighs the probative value of the evidence, the trial court should consider the need for the evidence, the tendency of the evidence to suggest an emotional basis for the verdict, the chain of inference from the evidence necessary to establish the material fact, and the effectiveness of a limiting instruction. The trial court is obligated to exclude evidence in which unfair prejudice outweighs the probative value in order to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt.

McDuffie, 970 So. 2d at 327.

In the present case, evidence that Davis possessed a revolver "in the past" offered little probative value. There was no link between that revolver and the crimes for which Davis was on trial. That evidence did not tend to prove any element of any of the offenses charged. Finally, Steward made clear that she did not see a gun on

May 7; she had never claimed otherwise; and Davis told her that he had a gun that evening. [R71 3893-3900, 3905-07] In those circumstances, the State had no need for evidence that Davis possessed a revolver "in the past."

On the other hand, that evidence presented a great danger of unfair prejudice. That evidence inflamed the jury. It appealed improperly to the jury's emotions. Any jury will look unfavorably on a defendant on trial for multiple murders who maintains possession of a revolver. That is particularly true where, as in the present case, the jury hears ample evidence that the defendant was engaged in the drug business, and the State argues in closing that the jury should believe its key witness's claim that the defendant possessed a gun on the day of the murders because the witness has "seen him with a black revolver in the past, and he's not the first drug dealer to have one." [R61 1774-88; R62 2102-07; R63 2169-70; R70 3592-96; R73 4218] In those circumstances, a jury will perceive the defendant to be an inherently violent or criminal person. Thus, evidence that Davis possessed a revolver "in the past" unduly suggested that the jury should convict him based upon an emotional response to his violent or criminal character, rather than evidence establishing his guilt.

The Second District's decision in Green v. State, 27 So.3d 731 (Fla. 2d DCA 2010), which this Court discussed with approval in Agatheas, 77 So.3d at 1236-37, should serve as persuasive authority. In Green, evidence indicating that Green possessed a gun at the time of the murder at issue was introduced. 27 So.3d at 733-

34. Two days after the murder, a gun was recovered from Green's bedroom, but the State was unable to connect that gun to the crimes for which Green was on trial. Id. at 734, 737. The Second District concluded that "any probative value of the firearm found in Green's bedroom was outweighed by the danger of unfair prejudice." Id. at 738. It reasoned that the firearm was "unconnected to the charged crimes" and recognized "the possibility that the jurors would improperly rely on this evidence to determine that since Green owned this [gun], he must have owned another one that he used to commit the charged crimes." Id.

In the present case, similar to in Green, the State introduced evidence that Davis possessed a revolver that had no link to the crimes at issue. Like evidence that Green had a firearm in his bedroom, evidence that Davis possessed the revolver "in the past" unduly suggested the jury should convict based upon an emotional response to Davis' violent or criminal character, rather than evidence establishing his guilt. As a result, to maintain uniformity in this area of the law, this Court should conclude that the probative value of evidence that Davis possessed a revolver "in the past" was substantially outweighed by the danger of unfair prejudice.

The court admitted irrelevant, unfairly prejudicial evidence. Davis' convictions and sentences violate his rights to due process and to be free from cruel or unusual punishments. Amends. V, VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla. Const.

III. Reversible Error Occurred When the Court Allowed the State, During Its Closing, To Display a Photo of Steward Crying on the Witness Stand.

On direct examination, at the conclusion of Steward's testimony regarding what she saw occur at Hughes' residence on May 7, the following exchange occurred:

"Q. Okay. Did there come a time–were you crying like you are now?

A. Yes.

Q. And did you say "let me go home to my son" more than once?

A. Yes."

[R70 3631] Subsequently, during its closing, the State displayed a closeup photo of Steward crying–with her head in her hands–while on the witness stand at trial. [R73 4185-87; R74 4411-12; SR2 38] Davis objected and argued that the photo was an appeal to the jury's sympathy. [R73 4185-87] The court found the photo to be an accurate portrayal of her demeanor, and overruled Davis' objection. [R73 4186-87]

The trial court erred. "'A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view...with emotion...." Cardona v. State, 185 So.3d 514, 520 (Fla. 2016). "Closing argument 'must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant.'" Id. And while "trial court rulings regarding the propriety of comments made during closing argument [are normally reviewed] for an abuse of discretion," id. at 520, "[t]o the extent that the decision turns on...a conclusion of law it would be reviewable de novo." Philip J.

Padovano, Florida Appellate Practice § 19.3 (2015 ed.).

In the present case, the State's display of a photo of Steward crying on the stand appealed to the jury's sympathy for Steward. More generally, that display caused the jury's verdict to rest upon emotional grounds rather than the facts proven by the evidence. The closeup photo reflected the key moment at trial when Steward finished recounting what occurred at Hughes' residence on May 7. [R70 3631] At that moment, Steward was looking down–head in hands–weeping. [SR2 38] The photo also highlighted Steward's alleged emotional state immediately prior to departing Hughes' residence on May 7, when she claimed to have been crying and begging Davis to let her go home to their son. [R70 3631] As a result, the photo inflamed the jury. It appealed improperly to the jury's emotions. It unduly suggested that the jury should feel sympathy for Steward, and by the same token, hostility towards Davis.

It appears few, if any, appellate courts have addressed a situation where the State takes a photo of a witness on the stand testifying at trial and later displays that photo during its closing at the same trial. However, the reasoning of the dissent in Brown v. State, 550 So.2d 527 (Fla. 1st DCA 1989), is instructive. In Brown, during its closing argument, the State used a styrofoam head to demonstrate how the victim was stabbed. Id. at 528. On appeal, the majority focused solely on whether the manner in which the State used the styrofoam head was an accurate replication of the evidence, and affirmed. Id. at 528-29. In contrast, while disagreeing that the State's

actions were an accurate reproduction of the evidence, the dissent also focused on the effect of the State's use of the exhibit on the jury. Id. at 530 (Zehmer, J., concurring and dissenting). More specifically, the dissent reasoned that "the error stems from the fact that the prosecutor engaged in an impermissible demonstration during argument that served only to inflame the jury and cause the verdict to rest upon emotional grounds rather than the truth of the facts proven by the evidence presented." Id.

Applying that reasoning to the present case, the error here stems from the fact that the State engaged in an impermissible demonstration during its closing. The demonstration was impermissible because no "still photographs...developed during...a judicial proceeding shall be admissible as evidence in the proceeding out of which [they] arose." Fla. R. Jud. Admin. 2.450(h). Also, because the photo of Steward memorialized her fragile emotional state during only a single moment of her testimony, the State's display of that photo unduly emphasized and bolstered the State's version of events. Cf. Gormady v. State, 185 So.3d 547, 551 (Fla. 2d DCA 2016) ("[The detective's] testimony...was crucial to the State's case, and the partial read-back of his statements on direct examination 'served to emphasize a version of events favorable to the State and diminish a version favorable to the defense.'"). And by appealing to the jury's sympathy, the State's impermissible display inflamed the jury and caused its verdict to rest upon emotional grounds rather than the truth of the facts proven by the evidence presented.

The court allowed the State to appeal to the jury's sympathy. Davis' convictions and sentences violate his rights to due process and to be free from cruel or unusual punishments. Amends. V, VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla. Const.

IV. Reversible Error Occurred When the Court Found That Sufficient Aggravating Circumstances Existed and There Were Insufficient Mitigating Circumstances To Outweigh the Aggravating Circumstances, and Sentenced Davis to Death.

A. Davis' death sentences were imposed in violation of his Sixth Amendment right to trial by jury.

In Hurst v. Florida, the Supreme Court held Florida's capital sentencing scheme unconstitutional because the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. 616, 619 (2016). As the Court explained, this holding followed from its decisions in Apprendi v. New Jersey and Ring v. Arizona. Hurst, 136 S. Ct. at 621. In Apprendi, the Court held "that any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." Id. In Ring, the Court held "that Arizona's capital sentencing scheme violated Apprendi's rule because the State allowed a judge to find the facts necessary to sentence a defendant to death." Id. Under Arizona's law, a defendant convicted of first-degree murder could not be sentenced to death unless a judge found at least one aggravating circumstance. Id. Because "'the required finding of an aggravating circumstance exposed Ring to a greater punishment than that authorized by the jury's

guilty verdict,'" Ring's death sentence "violated his right to have a jury find the facts behind his punishment." Id.

Applying the same analysis to Florida's capital sentencing scheme in Hurst, the Court held that Florida, like Arizona, "does not require the jury to make the critical findings necessary to impose the death penalty." Id. at 622. Similar to Arizona, in Florida, "the maximum sentence a capital felon may receive on the basis of [a first-degree murder] conviction alone is life imprisonment." Id. at 620. But the Court recognized that in terms of the critical findings necessary to impose death, Florida's sentencing statute differed from Arizona's in that it required more than the finding of a single aggravating factor to impose death:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1)(emphasis added). The trial court *alone* must find "the facts...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3)....

Id.

The Supreme Court correctly construed Florida's capital sentencing scheme.[4] "Because [such an] issue involves the interpretation of a statute, this Court's review is de novo. As with all cases of statutory construction, it is the Court's purpose to

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[4]Following the Hurst decision, Florida's capital sentencing scheme was amended. Ch. 16-13, Laws of Fla. Unless otherwise noted, subsequent references to Florida's capital sentencing scheme concern the scheme under consideration in Hurst and in effect at the time of the trial in the present case.

effectuate legislative intent....In construing a statutory provision, the Court looks first to the actual language used in the statute." Polite v. State, 973 So. 2d 1107, 1111 (Fla. 2007). "When possible, [a court] 'must...construe related statutory provisions in harmony with one another.'" Clines v. State, 912 So. 2d 550, 557 (Fla. 2005).

Florida law provides that "a person who has been convicted of a capital felony shall be punished by death *if* the proceeding held to determine sentence according to the procedure set forth in [section] 921.141 results in findings by the court that such person shall be punished by death, *otherwise such person shall be punished by life imprisonment*." § 775.082(1)(a), Fla. Stat. (2015) (emphasis added). Further, "the proceeding held to determine sentence [under section 921.141] results in findings by the court that [a person convicted of a capital felony] shall be punished by death" *only if* the court sets "forth in writing its findings...as to the facts: [t]hat sufficient aggravating circumstances exist...and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3), Fla. Stat. (2015).

Thus, life imprisonment is the maximum punishment authorized by a jury's verdict that a person is guilty of a capital felony. And such a person is not exposed to greater punishment–that is, he is not eligible for death–unless and until the trial court finds both that (1) sufficient aggravating circumstances exist and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Under Florida's capital sentencing scheme, those are the "critical findings necessary to impose the death penalty." Any other interpretation of Florida's scheme would disregard the actual language used in sections 775.082 and 921.141, fail to construe those provisions in harmony with one another, and conflict with Hurst.

In the present case, as in Hurst, the jury's verdict that Davis was guilty of first-degree murder authorized a maximum punishment of life in prison. Like Hurst, Davis was not exposed to greater punishment–that is, not eligible for death–until the court found that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Because the judge, rather than the jury, made those critical findings, Davis' death sentences were imposed in violation of his Sixth Amendment right to trial by jury.

B. The error in requiring the judge, rather than the jury, to make the findings that sufficient aggravating circumstances exist and there are insufficient mitigating circumstances to outweigh the aggravating circumstances is structural.

"Although most constitutional errors have been held amenable to harmless-error analysis, some will always invalidate a conviction." Sullivan v. Lousiana, 508 U.S. 275, 279 (1993). "Errors of this [second] type are so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome." Neder v. United States, 527 U.S. 1, 7 (1999). As a general matter, in determining whether a particular error is structural as opposed to subject to harmless-error analysis, the United States Supreme Court has distinguished

between "'structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards'" and "trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented.'" Sullivan, 508 U.S. at 281. In this broader context, structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence...and no criminal punishment may be regarded as fundamentally fair." Neder, 527 U.S. at 8-9. And such errors are "not subject to harmless-error analysis because [they] 'vitiate[] *all* the jury's findings' and produce[] 'consequences that are necessarily unquantifiable and indeterminate.'" Id. at 11.

More specifically, in determining whether an error in denying a defendant his right to trial by jury is structural, the Supreme Court has indicated that the appropriate inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Sullivan, 508 U.S. at 279. In those circumstances, the focus must be on the "guilty verdict" actually rendered "because to hypothesize a guilty verdict that was never in fact rendered–no matter how inescapable the findings to support that verdict might be–would violate the jury-trial guarantee." Id. For instance, a judge "may not direct a verdict for the State, no matter how overwhelming the evidence." Id. at 277. With similar considerations in

mind, "[h]armless error review looks...to the basis on which 'the jury *actually rested* its verdict.'" Id. Accordingly, where the denial of the right to trial by jury results in "there [being] no jury verdict within the meaning of the Sixth Amendment," that error is not subject to harmless-error analysis, and thus, structural.

With respect to Florida's capital sentencing scheme, the error in requiring the judge, rather than the jury, to make the findings that sufficient aggravating circumstances exist and there are insufficient mitigating circumstances to outweigh the aggravating circumstances is structural. First, under the scheme, that denial of the right to trial by jury always results in there being no jury verdict within the meaning of the Sixth Amendment. For the Florida scheme to produce such a verdict, the jury would have to determine that the critical findings necessary to impose the death penalty had been established beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") Further, "it is constitutionally impermissible [under the Eighth Amendment] 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." Caldwell v. Mississippi, 472 U.S. 320, 328 (1985). And because that Eighth Amendment requirement and the Sixth Amendment requirement of a jury

verdict are interrelated in this context, the jury would have to appreciate that it, rather than the judge, is responsible for making the critical findings necessary to impose the death penalty. Cf. Sullivan, 508 U.S. at 278 (reasoning that because "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated," "the jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt").

However, under Florida's capital sentencing scheme, the jury is not instructed that it has to determine beyond a reasonable doubt that sufficient aggravating circumstances exist and there are insufficient mitigating circumstances to outweigh the aggravating circumstances. On the other hand, the jury is repeatedly instructed that its decision as to punishment is an advisory recommendation, and the judge is responsible for deciding which punishment to impose. See Fla. Std. Jury Instr. (Crim.) 7.11. Thus, even assuming the jury unanimously finds that sufficient aggravating circumstances exist and there are insufficient mitigating circumstances to outweigh the aggravating circumstances, no verdict within the meaning of the Sixth Amendment is actually rendered. Without such a verdict, it is logically impossible for a reviewing court to determine that "the verdict actually rendered in this trial was surely unattributable to the error." Put another way, there is no "verdict actually rendered" upon which harmless-error analysis can operate. The most a reviewing court can conclude is that a properly instructed jury would surely have

determined beyond a reasonable doubt that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances. But that is the equivalent of approving a directed verdict for the State on the critical elements necessary to impose the death penalty.

Second, the error in requiring the judge, rather than the jury, to make the findings that sufficient aggravating circumstances exist and there are insufficient mitigating circumstances to outweigh the aggravating circumstances is a structural defect in the constitution of the death-penalty-trial mechanism. As an initial matter, "the right to trial by jury in serious criminal cases [is] 'fundamental to the American scheme of justice," and embodies "'a profound judgment about the way in which law should be enforced and justice administered.'" Sullivan, 508 U.S. at 277, 281. And under Florida's capital sentencing scheme, the denial of that right–by requiring the judge, rather than the jury, to make the critical findings necessary to impose the death penalty–"will always result in the absence of 'beyond a reasonable doubt' jury findings." Id. at 285 (Rehnquist, C.J., concurring). Further, the jury never appreciates that it, rather than the judge, is responsible for making those critical findings. Overall, the error vitiates the jury's critical findings necessary to impose the death penalty and produces consequences that are necessarily unquantifiable and indeterminate. As a result, under Florida's scheme, a penalty-phase trial cannot reliably serve its function as a vehicle for determining a defendant's eligibility for the

death penalty, and no death sentence can be regarded as fundamentally fair.

The Supreme Court's decision in Sullivan should control the outcome on this issue. In Sullivan, the judge gave an unconstitutional definition of "reasonable doubt," and the jury found Sullivan guilty of first-degree murder. Id. at 277. On appeal, the Court concluded that a constitutionally deficient reasonable doubt instruction was structural error. Id. at 276-82. Initially, the Court found that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt," and explained: "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine...whether he is guilty beyond a reasonable doubt." Id. at 278. With that in mind, the Court decided that the error was structural because "there has been no jury verdict within the meaning of the Sixth Amendment," and reasoned:

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt–not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Id. at 280.

In addition, the Court decided that giving a constitutionally deficient reasonable

doubt instruction was structural error because "denial of the right to a jury verdict of guilt beyond a reasonable doubt" was a "'structural defect[] in the constitution of the trial mechanism.'" Id. at 281. In that context, the Court stressed the fundamental importance of "the right to trial by jury." Id. The Court reasoned that without the "basic protection" provided by that right, "a criminal trial cannot reliably serve its function," as well as that "the deprivation of that right [produces] consequences that are necessarily unquantifiable and indeterminate." Id. at 281-82.

Even more than in Sullivan, Florida's capital sentencing scheme produces no jury verdict within the meaning of the Sixth Amendment. Whereas the jury in Sullivan was given a constitutionally deficient reasonable doubt instruction, under the Florida scheme, the jury is not instructed as to any standard of proof–much less beyond a reasonable doubt–by which it must determine that sufficient aggravating circumstances exist and there are insufficient mitigating circumstances to outweigh the aggravating circumstances. In addition, the jury is repeatedly told that its decision as to punishment is an advisory recommendation and the judge is responsible for deciding which punishment to impose. Thus, there is even less of a constitutionally sufficient jury verdict here upon which harmless-error scrutiny can operate. Similar to in Sullivan, under the Florida scheme, the most an appellate court can conclude is that a properly instructed jury would surely have determined that the critical findings necessary to impose the death penalty had been established beyond a reasonable

doubt. But the Sixth Amendment (and the Eighth Amendment) requires more than appellate speculation about a hypothetical jury's action.

Further, similar to the error in giving a constitutionally deficient reasonable doubt instruction, the error in requiring the judge–rather than the jury–to make the critical findings necessary to impose the death penalty will always result in the absence of "beyond a reasonable doubt" jury findings as to those crucial issues. In either event, the error vitiates the jury's critical findings and produces consequences that are necessarily unquantifiable and indeterminate. Thus, in both instances, the trial cannot reliably serve its function–in Sullivan, to determine whether the defendant was guilty of first-degree murder, and under Florida's capital sentencing scheme, to determine whether a defendant already convicted of first-degree murder is eligible for the death penalty. As a result, Sullivan compels the conclusion that the error in requiring the judge, rather than the jury, to make the findings that sufficient aggravating circumstances exist and there are insufficient mitigating circumstances to outweigh the aggravating circumstances is structural.

C. Even if the error in requiring the judge, rather than the jury, to make the critical findings necessary to impose the death penalty is not structural, the State cannot prove beyond a reasonable doubt that the error did not contribute to Davis' death sentences.

As an initial matter, for Davis to be lawfully sentenced to death under Florida's capital sentencing scheme, the jury would have to find that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to

outweigh the aggravating circumstances. See discussion supra pp. 70-73. And those critical facts would have to be established beyond a reasonable doubt. See discussion supra pp. 75-76. The jury would also have to appreciate that it, rather than the judge, was responsible for making the critical findings necessary to impose the death penalty. See discussion supra p. 76. Finally, the jury would have to make those critical findings unanimously. See Jones v. State, 92 So.2d 261, 261 (Fla. 1957) (indicating that under the Florida Constitution, "the verdict of the jury must be unanimous").

However, in the present case, the jury was not instructed as to any standard of proof–much less beyond a reasonable doubt–by which it had to determine that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances. On the other hand, the jury was repeatedly instructed that its decision as to punishment was an advisory recommendation, and the judge was responsible for deciding which punishment to impose. [R10 1940-52] Finally, without making any factual findings, the jury advised the court to impose death by votes of 9-3 and 10-2. [R10 1939] In those circumstances, it would be sheer speculation to conclude that the jury fully appreciated its unique responsibility and unanimously found–beyond a reasonable doubt–that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Cf. Bottoson

v. Moore, 833 So. 2d 693, 708 (Fla. 2002) (Anstead, J., concurring) ("[C]ompared to our ability to review the actual findings of fact made by the trial judge, there could hardly be any meaningful appellate review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation....).

In marked contrast, the judge clearly found that sufficient aggravating circumstances existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and sentenced Davis to death. [R13 2407-29] In these circumstances, the State cannot prove beyond a reasonable doubt that the error in requiring the judge, rather than the jury, to make the critical findings necessary to impose the death penalty did not contribute to Davis' death sentences.

D. This Court should reverse Davis' death sentences and remand for imposition of life sentences.

First, remand for life sentences is required under Section § 775.082(2), Florida Statues (2015), which provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

After the Supreme Court ruled that Florida's capital sentencing scheme was unconstitutional in Furman v. Georgia, 408 U.S. 308 (1972), this Court addressed the

provision now identified as section 775.082(2):

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.

Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972). Citing Donaldson, this Court subsequently reduced to life imprisonment all death sentences imposed under the capital sentencing scheme determined to be unconstitutional in Furman. Anderson v. State, 267 So. 2d 8, 9-10 (Fla. 1972); Walker v. State, 296 So. 2d 27, 30 (Fla. 1974). Thus, when it was declared unconstitutional in 1972, this Court considered Florida's capital sentencing scheme–or put another way, "the death penalty as [then] legislated"–to be part of "the death penalty" for purposes of section 775.082(2). Because the Supreme Court's decision in Hurst puts this Court in the same position as it was at the time of Furman, it must reduce to life imprisonment death sentences imposed under the capital sentencing scheme held unconstitutional in Hurst.

Second, Chapter 2016-13, Laws of Florida, cannot be applied retroactively to Davis. There, the legislature declared: "This act shall take effect upon becoming a law." Ch. 16-13, § 7, Laws of Fla. Nothing in Chapter 2016-13 conveys a legislative intent for the act to apply retroactively to cases prior to its enactment. Further, the Florida Constitution prohibits the amendments to sections 775.082 and 921.141 from

applying retroactively. See Art. X, § 9, Fla. Const. ("Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.)

The judge, rather than the jury, made the critical findings necessary to sentence Davis to death. Davis' death sentences violate his rights to due process, to trial by jury, and to be free from cruel or unusual punishments. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, 22, Fla. Const.

V. Reversible Error Occurred When the Court Found that Rhodes' Murder Was Committed for the Purpose of Avoiding Arrest.

The court found that the evidence established beyond a reasonable doubt that the murder of Rhodes was committed for the purpose of avoiding arrest. [R13 2410-11] More specifically, Davis' primary purpose for killing Rhodes was to avoid his arrest for the crimes against Hughes. [R13 2411] The court reasoned that after incapacitating Hughes, Davis requested that Steward and Rhodes return to the residence. [R13 2410] Davis never stated he intended to take property from Rhodes, who had no property of significant value. [R13 2410-11] Rhodes "would have been able to identify" Davis, but did not pose a threat to him. [R13 2411]

The trial court erred. "To establish the avoid arrest aggravator where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness." Connor v. State, 803 So.2d 598, 610 (Fla. 2001). "Mere speculation on the part of the State

that witness elimination was the dominant motive...cannot support [that] aggravator." Id. "Likewise, the mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravator." Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996). "A trial court's conclusion regarding an aggravator should be upheld if the trial court applied the correct rule of law and the trial court's findings are supported by competent, substantial evidence." Connor, 803 So.2d at 610.

In the present case, the evidence was insufficient to establish beyond a reasonable doubt that Davis' sole or dominant motive for murdering Rhodes was to eliminate her as a witness. Instead, the evidence demonstrated that Davis' motive was to gain financially by taking possession of Hughes' property. Clearly, Davis' sole motive was not witness elimination. As the trial court found, Rhodes' "murder became an essential step in [Davis'] plan to resolve his financial problems by stealing [Hughes'] property." [R13 2411] Further, the State could only speculate that Davis' dominant motive was witness elimination, rather than pecuniary gain. At most, Rhodes could have identified Davis. Davis never expressed an intent to eliminate Rhodes as witness. She never even saw him commit a crime. The court itself found that Davis "had not yet completed the taking of [Hughes'] property when he attacked [Rhodes] when she entered [Hughes'] home." [R13 2411]

Two prior decisions of this Court should control the outcome on this issue. In Connor, after Margaret Goodine ended an affair with Connor, he began harassing her.

Id. at 602. When Margaret was at work, Connor murdered her husband and drove off with her daughter, Jessica. Id. Jessica's body was later discovered at Connor's residence. Id. at 603. On appeal, the State argued that as to Jessica's murder, the avoid arrest aggravator had been established because "whether or not Jessica witnessed the murder or saw her father's dead body, she could at the very least place Connor at the murder scene." Id. at 610. But this Court concluded that there was "insufficient evidence to support the trial court's conclusion that the State proved the avoid arrest aggravator beyond a reasonable doubt." Id. This Court reasoned: "Although the State's theory regarding Jessica's murder is possible, it is certainly also plausible that Connor's motive for killing Jessica had nothing to do with witness elimination but rather was related to his obsession with Margaret and was part of a plan to hurt Margaret." Id.

In Zack v. State, Zach was broke and on the run. 753 So.2d 9, 13-14 (Fla. 2000). After Smith and he spent most of the day together, Zach sexually assaulted and murdered Smith before taking her car and property. Id. at 14. This Court concluded that even though Smith "was able to identify Zach," the evidence was insufficient to establish that Zach's dominant motive was witness elimination. Id. at 20. This Court reasoned: "The record suggests only that Smith's murder was part of Zach's premeditated plan to kill her and take her car and possessions. While it is true that Zach did not have to murder Smith to accomplish his monetary goals, this alone does

not make Zack's dominant motive the desire to avoid arrest." Id.

Similar to the evidence in Connor and Zach, the evidence in the present case indicated that Rhodes could have identified Davis and placed him at Hughes' residence. But even more than there, the evidence here suggested that rather than witness elimination, Davis' motive for killing Rhodes related to his scheme to take possession of Hughes' property for financial gain. According to the trial court, it was an "essential step in [Davis'] plan." As a result, this Court's prior decisions compel the conclusion that the evidence was legally insufficient to establish beyond a reasonable doubt that Davis' sole or dominant motive for murdering Rhodes was to eliminate her as a witness.

The trial court improperly found and considered the avoid arrest aggravator. Davis' death sentence violates his rights to due process, to trial by jury, and to be free from cruel or unusual punishments. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, 22, Fla. Const.

VI. Reversible Error Occurred When the Court Found that Hughes' Murder Was Committed in a Cold, Calculated, and Premeditated Manner.

The court found that the evidence established beyond a reasonable doubt that the murder of Hughes was committed in a cold, calculated, and premeditated (CCP) manner. [R13 2410] It reasoned that Davis needed money, knew that Hughes had assets, and told Steward that he had to "get" or "whack off" Hughes. [R13 2410] After Hughes was incapacitated, Davis could have fled, but remained at the scene

waiting for Steward and Rhodes. [R13 2410] The court concluded that Hughes was still alive because Steward maintained she heard "snoring." [R13 2410] When Davis attacked Rhodes, he told Steward to leave the room so that he could "think," and after Rhodes was incapacitated, Davis asked Steward to bring him the backpack. [R13 2410] The court determined that Davis bound Hughes and Rhodes with duct tape and submerged them in the tub to ensure their deaths. [R13 2410]

The trial court erred. To establish the CCP aggravator, the State must prove beyond a reasonable the following elements:

> "that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); that the defendant exhibited a heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification."

Middleton v. State, 188 So.3d 731, 748 (Fla. 2015).

In the present case, the evidence was insufficient to establish beyond a reasonable doubt that Hughes' killing was the product of cool and calm reflection; that Davis had a careful or prearranged design to murder Hughes before the fatal incident; or that Davis exhibited a heightened premeditation. Instead, the evidence demonstrated that leading up to May 7, Davis was struggling financially and willing to use force to take possession of Hughes' property for his own pecuniary gain. [R61 1868; R62 1974; R70 3593-95, 3609-10, 3612-14; R72 3923-24] On May 7, Davis pulled a gun and forced Hughes to open his safe. [R71 3897-98, 3905] When Hughes

tried to run to the phone on his night stand, Davis hit Hughes in the head. [R62 1974; R71 3850, 3890, 3898, 3905, 3907] A bloody struggle ensued, and Hughes was mortally injured. [R70 3625-26, 3630, 3641] The gun was never fired. [R71 3896-97, 3906-07] At trial, Steward repeatedly testified that Davis later stated he did not want to kill Hughes, but Hughes ran. [R70 3640; R71 3850, 3890]

Further, Davis' isolated references to "getting" Hughes or "whacking him off" appeared to be made in jest. [R70 3615-16; R71 3794-96] Those quips failed to prove heightened premeditation. See Patrick v. State, 104 So.3d 1046, 1067-68 (Fla. 2012) (finding that Patrick's statements to his cell mate that he had planned to kill the victim were insufficient to prove heightened premeditation). In addition, only minutes passed between the deadly struggle with Hughes and the placement of Hughes' body in the bathtub. [R70 3617-31; R72 3941-46, 4007-13] Throughout that short span of time, Davis was gripped by an emotional frenzy, and thus, unfit for cool and calm reflection. [R70 3620-31] Those circumstances are inconsistent with developing heightened premeditation. See Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990) (concluding that the circumstances were inconsistent with developing heightened premeditation where "Thompson had thirty minutes to think about what he was doing before he killed" the victim, but during that time "Thompson's mental state was highly emotional rather than contemplative or reflective").

Two prior decisions of this Court should control the outcome on this issue. In

Middleton, Middleton walked over to the victim's residence with a knife after indicating that he was owed money. Id. at 736. He demanded money from the victim. Id. When she refused and attempted to push him outside, he attacked her. Id. While she was still alive, he drug her into her bedroom. Id. There, he cut her throat, and subsequently stole her property. Id. This Court concluded that the evidence was "inconsistent with the murder being a product of cool and calm reflection"; insufficient to establish "that Middleton had a careful prearranged plan or design to murder the victim before he entered her residence"; and "not indicative of a heightened, premeditated intent to murder." Id. at 748-49. This Court reasoned:

> Although Middleton procured a knife prior to entering the victim's residence, there is no evidence he possessed the weapon for the purpose of attacking the victim. Rather, Middleton planned to commit a robbery....After a struggle ensued, Middleton fatally stabbed the victim. It was during the course of his struggle that Middleton formulated his intent to kill her. Middleton's behavior at the time of the murder can be aptly described as murder committed in a frenzied rage or during a heated struggle following the victim's refusal to give him money. [T]his spontaneous murder...was not carried out as a matter of course....

Id.

In Hamblen v. State, Hamblen needed money and decided to rob a store. 527 So.2d 800, 801 (Fla. 1988). "Hamblen pulled his gun and told [the victim] he wanted money." Id. The victim "gave him a small amount of cash from her cash drawer," but subsequently advised that "she had more money in the back of the store." Id. "As they proceeded toward the rear, he saw her touch a button that he suspected

(correctly) was for a silent alarm." Id. In response, Hamblen became angry and shot the victim. Id. This Court concluded: "While the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation and calculation required to support this aggravating circumstance." Id. at 805. This Court reasoned:

> [T]he evidence does not indicate that Hamblen had a conscious intention of killing [the victim] when he decided to rob [the store]. It was only after he became angered because [the victim] pressed the alarm button that he decided to kill her. Unlike those cases in which robbery victims have been transported to other locations and killed some time later, Hamblen's conduct was more akin to a spontaneous act taken without reflection.

Id.

Similar to the defendants in Middleton and Hamblen, Davis needed money, confronted Hughes with a previously procured weapon, and demanded money. Like in those cases, when Hughes attempted to disrupt Davis' robbery plan, Davis reacted impulsively. As in Middelton, a heated struggle ensued during which Davis became emotionally frenzied and Hughes was mortally injured. In those circumstances, similar to the actions of Middleton and Hamblen, Davis' conduct in connection with Hughes' murder was more akin to a series of spontaneous acts, taken without reflection, rather than carried out as a matter of course. As a result, this Court's prior decisions compel the conclusion that the evidence was legally insufficient to establish beyond a reasonable doubt that Hughes' murder was committed in a cold, calculated,

and premeditated manner.

The trial court improperly found and considered the CCP aggravator. Davis' death sentence violates his rights to due process, to trial by jury, and to be free from cruel or unusual punishments. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, 22, Fla. Const.

VII. Reversible Error Occurred When the Court Failed To Properly Evaluate Multiple Non-Statutory Mitigating Circumstances.

With respect to twenty of the forty-four non-statutory mitigating circumstances, the court concluded: "This non-statutory mitigating circumstance is established, but it is not mitigating in this case, and therefore it is given no weight." [R 13 2416-27] As to the vast majority of those, the court either simply stated its conclusion or briefly recited testimony that proved the circumstance existed before stating its conclusion. [R13 2416-27] Those twenty circumstances included: **(1)** executive dysfunction; **(2)** borderline intellectual functioning in the area of perceptual reasoning and specific learning disorder with impairment in reading; **(3)** anxiety; **(4)** emotional distress due to relationship with Steward in weeks preceding murders; **(5)** felt abandoned by dad and stepmother when they became estranged after earlier arrest; **(6)** ridiculed for stuttering; **(7)** parents' dysfunctional relationship; **(8)** father moved to Florida when Davis was six and Davis did not see father until several years later; **(9)** sent to see father in Florida around nine and did not return to Los Angeles, as expected, at end of summer; **(10)** could not read and write at grade level until ten; **(11)** home-schooled

for two years to catch up; **(12)** lived in Los Angeles during Rodney King riots; **(13)** first encountered racism in Pop Warner football when teammate called him "n" word; **(14)** victim of stabbing/robberies during early drug-dealing years when first estranged from family; **(15)** received GED; **(16)** provided assistance to Gee, Glenn, and others; **(17)** loss of elderly gentleman from park at young age; **(18)** tic disorder; **(19)** assisted Hughes in prison when inmates were planning to attack him; and **(20)** skilled in sports, including track and football. [R 13 2416-27]

Further, while the court found that Davis' history of traumatic brain injury (TBI) was established, it assigned only moderate weight to that mitigating circumstance. [R13 2419] It noted that Davis played football for years, but his father was aware of a single head injury. [R13 2419] The court also described how Davis' three experts opined that he "suffers from brain abnormality due to head injuries." [R13 2419]

The trial court erred. "[T]he sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence." Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). And "the determination of the court [to impose a death sentence] shall be supported by specific written findings of facts based upon [aggravating and mitigating] circumstances." § 921.141(3), Fla. Stat. Mindful of these directives, in Campbell v. State, this Court declared:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstances proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory

> factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence...The court next must weigh the aggravating circumstances against the mitigating....

571 So.2d 415, 419-20 (Fla. 1990). "A mitigating circumstance can be defined broadly as 'any aspect of a defendant's character or record and any of the circumstances of the offense' that reasonably may serve as a basis for imposing a sentence of less than death." Id. at 419 n.4.

"[W]hile a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case." Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000). That is, "the trial court may assign weight based on the context of the mitigating circumstance." Fletcher v. State, 168 So.3d 185, 219 (Fla. 2015). But "mitigating evidence cannot be dismissed." Id. And "Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight." Cox v. State, 819 So.2d 705, 723 (Fla. 2002).

"Whether a particular circumstance is truly mitigating in nature is...subject to de novo review...[and] the weight assigned to a mitigating circumstance is...subject to the abuse of discretion standard." Blanco v. State, 706 So.2d 7, 10 (Fla. 1997).

However, the "sentencing order must reflect 'reasoned judgment' by the trial court as it weighed the aggravating and mitigating circumstances." Oyola v. State, 99 So.3d 431, 446 (Fla. 2012). As this Court has more fully explained:

> While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, *death is different*. Since the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to "expressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence."
>
> This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of....[The sentencing order] can only satisfy Campbell and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty....If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

Walker v. State, 707 So.2d 300, 319 (Fla. 1997) (internal citations omitted).

In the present case, the trial court failed to properly evaluate multiple non-statutory mitigating circumstances. First, the court failed to thoughtfully and comprehensively analyze twenty of the forty-four non-statutory mitigating circumstances. More specifically, rather than expressly and specifically articulating why the twenty non-statutory mitigating circumstances were "not mitigating in this case, and therefore...given no weight," the court treated its consideration of those circumstances as an academic exercise in which the mitigation could be summarily

addressed and disposed of.

The court clearly found each of the twenty circumstances to have been established by the evidence and yet entitled to no weight. [R13 2416-27] But in terms of reasoning or analysis in support of its decision to assign no weight, the court merely declared: "This non-statutory mitigating circumstance...is not mitigating in this case." [R13 2416-27] Is that phrase intended to convey that while the respective circumstance is mitigating in nature, it is not relevant to Davis' character or the circumstances of the murders? Or that while generally recognized as mitigating and technically relevant, the respective circumstance is entitled to no weight for reasons or circumstances unique to this case? Is the court requiring that the respective circumstance have a specific nexus to Davis' actions in order to be given weight? The answers to those questions are unclear because the court failed to expressly and specifically articulate its reasoning or analysis.

To the extent that the court assigned no weight simply because it found the proposed circumstances had no nexus to Davis' actions, the court abused its discretion. See Fletcher, 168 So.3d at 219 ("[A] trial court cannot require a nexus between the crime and mitigating evidence.") Similarly, to the extent that the court assigned no weight based on the general context of those circumstances, the court abused its discretion because it failed to explain why reasons or circumstances unique to the present case supported such a conclusion. See Ford v. State, 802 So.2d 1121,

1139 (Fla. 2001) (Pariente, J., concurring in result only) ("In Trease, we placed the burden on the trial court to demonstrate why a proposed mitigating circumstance is entitled to no weight for reasons or circumstances unique to that case.").

This Court has previously applied the relevant rules of law to circumstances analogous to those of the present case and concluded that the trial court failed to thoughtfully and comprehensively analyze non-statutory mitigating circumstances. See Oyola, 99 So.3d at 447 ("[T]he sentencing order violated the requirements [of] Campbell because the trial court did not expressly evaluate, in a well-reasoned fashion, how the evidence presented failed to support the mitigating evidence ....Rather, it merely gave a brief summary of its findings with regard to the mitigators, and did not expressly and specifically articulate why the evidence...warranted the allocation of slight weight to the nonstatutory mitigation evidence presented.").

Second, despite finding that they had been established by the evidence, the trial court assigned no weight to the mitigating circumstances that Davis suffered from executive dysfunction and borderline intellectual functioning in the area of perceptual reasoning. In the context of the present case, those circumstances were especially mitigating in nature and relevant to both Davis' character and the circumstances of Hughes' and Rhodes' deaths. Thus, under any thoughtful and comprehensive analysis, those circumstances were entitled to be weighed as mitigation.

Regarding Davis' executive dysfunction, Colino and Wu made clear that

condition was a product of Davis' TBI, in particular the abnormalities in his frontal lobe; as a result, Davis struggled to monitor himself, including checking his impulses, regulating his moods, and generally inhibiting his own behavior; those neuropsychological deficits led to increased aggression, rage, and violence, as well as impaired social judgment and a lack of empathy for others; and those deficits contributed to Davis' actions on May 7. [R75 4606-13; R76 4811-17, 4823-25, 4849-52] But in its sentencing order, the court completely overlooked this testimony. It just observed that Harper testified Davis "has some level of executive dysfunction," "has some problems with memory," and "would have to make 'bizarrely detailed lists' in order to accomplish tasks for the next day." [R13 2423] The court apparently equated executive dysfunction with simple memory deficits.

Regarding Davis' borderline intellectual functioning in the area of perceptual reasoning, Harper explained that condition impaired Davis' ability to analyze and synthesize visual stimuli and reason based on that stimuli. [R76 4690-91; R77 4889-90] As a result, if an individual near Davis quickly raised his hand to point, Davis may think that individual was about to hit him in the head. [R77 4890-91] In other words, Davis could misperceive that someone was attacking him. [R77 4891-92] But in its sentencing order, the court made no mention of this testimony. It just stated: "Harper testified that the defendant suffers from borderline intellectual functioning in the visual spatial area and that the defendant has impairment in reading," and

proceeded to focus on Davis' reading abilities. [R13 2425] The court may have equated borderline intellectual functioning in the area of perceptual reasoning with simple reading struggles. Regardless, as to both Davis' executive dysfunction and borderline intellectual functioning in the area of perceptual reasoning, the court failed to evaluate evidence in the record that contradicted its decision to assign no weight to those proposed non-statutory mitigating circumstances.

Third, the trial court failed to assign sufficient weight to Davis' history of TBI. The court found that circumstance established by the evidence, and gave it moderate weight. [R13 2419] But as the court's refusal to assign weight to Davis' executive dysfunction demonstrates, the court completely failed to appreciate the relationship between Davis' history of TBI, his executive dysfunction, his neuropsychological deficits, and his actions on May 7. Without such an appreciation, the court was incapable of fairly and deliberately considering, and assigning weight to, Davis' history of TBI.

The court failed to properly evaluate non-statutory mitigating circumstances. Davis' death sentences violate his rights to due process, to trial by jury, and to be free from cruel or unusual punishments. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, 22, Fla. Const.

CONCLUSION

Mr. Davis' convictions and sentences should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Jennifer L. Keegan, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Appellant, Barry Trynell Davis, Jr., #P29305, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this 12th day of July, 2016.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

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