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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC18-227

SEAN ALONZO BUSH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Bush." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

STATEMENT OF THE CASE

On September 8, 2011, Bush was indicted by the grand jury of St. Johns County, Florida, for the May 31, 2011, murder of Nicole Bush. Bush's trial began on July 17, 2017. On August 2, 2017, the jury returned a verdict of guilty on two Counts: Count I) First degree premeditated and felony murder; and, Count II) Burglary to a Dwelling with an Assault or Battery while Armed with a Firearm. On August 17, 2017, the jury unanimously voted that Bush be sentenced to death. The trial court imposed that sentence on December 21, 2017. Notice of appeal was filed on January 8, 2018. Bush filed his *Initial Brief* on August 29, 2018.

STATEMENT OF THE FACTS

In May 2011, Nicole Bush[1] was separated from Appellant and the Bushes shared custody of their two sons who were six and nine years old. Nicole resided in a townhome in the Julington Creek Plantation neighborhood located in northwest St. Johns County, Florida. The Defendant resided in a home located on the west

[1] For clarity, the victim will be referred to by her first name.

side of Jacksonville, Duval County, Florida. Appellant had custody of the boys at his home every other weekend and on nights where Nicole worked late. (TT72-3, 86). [2]

Tracie Walker and Nicole were best friends and co-workers in 2011. (TT69-70). Walker testified that Nicole worked part of the day on May 30, 2011, Memorial Day. (TT75, 85). The two friends texted each other several times and Nicole indicated she did not have plans for that evening. (TT75-6). On May 31, at about 6:15 a.m., Walker received a call from Nicole's phone. Walker kept saying "hello" but Nicole did not respond. Walker hung up. (TT77). Her friends did not call her so early in the morning, so she called Nicole's phone. After Nicole answered, Walker heard Nicole " … gasping for breath" and say "help" several times before Nicole's phone went dead. (TT78, 79). Walker called Nicole again, but her phone went directly to voicemail. (TT78, 79). Worried, Walker called their mutual friend, Lenora Jerry, and explained what had occurred.

Lenora Jerry called Nicole after receiving Walker's call. (TT92, 96). Jerry heard Nicole whisper " … send help. I can't make it to the door." (TT96-7, 109). Nicole did not respond to any of Jerry's questions before the call was disconnected. (R97, 110). Jerry called 911 and requested a well-being check on

[2] Cites to the trial transcripts will be "TT" followed by the appropriate page number. Cites to the pleadings, penalty phase and *Spencer* hearing and will be "R" following by the appropriate page number.

Nicole. The dispatcher advised her to call Nicole back to see if she answered. When Jerry did not get an answer, she called Walker and said she and her husband, Thalmus Billington, would go to Nicole's. (TT97-8).

Jerry and Billington arrived at Nicole's about ten minutes later. Jerry called 911 and gave the dispatcher Nicole's physical address. (TT100). Nicole's garage door was open and the interior door from the garage in to the home was slightly opened. (TT100-01). Billington walked around the house and did not notice any broken windows. Jerry advised the 911 dispatcher that she and her husband would enter the home through the garage. (TT102). Deputy Graham Harris, St. Johns County Sheriff's Office, responded to Nicole's gated-community home. (TT111-13, 123). Jerry and Billington told him that the garage door and interior door in the garage that led in to the house were both open when they had arrived. (TT124). Harris checked the home's exterior and ensured the windows were intact and exterior doors were locked before he entered through the open interior door in the garage. (TT123, 124-25). Harris heard a mumbled voice coming from the upstairs. There were red stains on the carpeted stairwell. (TT117). Harris found Nicole in the master bedroom, lying face down, partially nude "and blood everywhere, bed, floor, wall." (TT119, 126). Nicole was injured "… asking for help …" (TT120). Harris asked Nicole who had injured her, but she responded she did not know.

"She … always refer[red] to the attacker or shooter as a he or him." Nicole told Harris that she had been shot in the head. (TT121, 125-26).

Paramedic Michelle Grant responded to Nicole's home. (TT133-34). Grant observed a large quantity of blood on the stairs and on the floor around the victim. (TT135). Nicole was only wearing a bra and torn underwear which was hanging around her waist. (TT136). Grant observed a gunshot wound to Nicole's head with an exit wound on the top of her head. (TT136). There was a large quantity of blood, "It was like her head was dipped in blood …" There was another gunshot wound in Nicole's arm, bruising on her forearms, and another bullet wound to Nicole's face. (TT136). Grant asked Nicole who shot her, but Nicole did not know. (TT138, 143). She died at the hospital a short time later. (TT488).

Crime Scene Technician Stefanie Whittington photographed possible shoe impressions and blood on the floor in the garage/kitchen area. (TT147, 151-52, 173-74). She collected swabs from those areas, as well as swabs from the doorknob on the door leading from the garage into the kitchen. (TT169, 172-73). Photographs were taken of bloodstains on the stairwell leading up to the second floor and various blood spatter patterns on the walls in Nicole's bedroom. (TT176-82, 216). Whittington collected the interior and exterior doorknobs and handles to the master bedroom. (TT182-84, 189). She also collected a jewelry box located at the foot of the bed. (TT185). She located and collected a Verizon Samsung cell

phone found underneath a pillow on the bed. (TT185, 234, 238). Pillows were photographed, as well as a "hole" in the wall behind the bed, and blood spatter on that wall. (TT186, 188). Photographs were also taken of a pillow found on the floor that contained bullet holes. (TT237). Whittington was unsuccessful in her search for a "hidden key" that was purportedly hidden in the garage. (TT188-89). Whittington also collected a projectile, which police had located in the master bedroom wall. (TT202). The master bedroom was cluttered and in disarray and appeared as if a struggle had occurred. (TT219, 236).

Dr. Jesse Giles, medical examiner, performed the autopsy on Nicole Bush on June 1-2, 2011. (TT438, 442). Dr. Giles obtained fingernail clippings, head hair, pubic hair, and blood samples.[3] He photographed her entire body and administered a sexual assault kit.[4] (TT449, CD of photographs, State Exh. 17). Blood cards were made, and Nicole's fingerprints and palm prints were obtained. (TT443-47). The victim had three types of injuries: gunshot wounds, sharp force injuries, and blunt force injuries. (TT452). Nicole had six gunshot wounds: five were to her head and one was at her left elbow. (TT453, 464, R692-715, 724). In Dr. Giles'

[3] Angie Hosford from the Forensics Unit at the St. Johns County Sheriff's Office collected the evidence and obtained Nicole's prints. (TT480-81, 483-84).

[4] Chi-Tai Tang DNA analyst, FDLE, examined the sexual assault kit and concluded there was no seminal fluid present. (TT816-17, 819, 821).

opinion, the wound to the elbow was a defensive wound.[5] (TT464). None of the gunshots entered her brain; they were all in soft tissue. Three of the head wounds did not have stippling. (TT455, 457, 464). There was also a noticeable blunt force injury at top left side of the victim's forehead— "a tear, a laceration." (TT455). Dr. Giles removed a piece of metal fragment from one of the grazing head wounds. (TT456). He also removed "a little bit of fuzzy material" found in a gunshot wound path. (TT458). One of the bullets went through Nicole's eyebrow and then through her eyeball which immediately blinded her. It then entered the top part of her facial bones and exited through the top part of her mouth, which was then swallowed and ended up in Nicole's small bowel. (TT459-60).

Nicole had fractures to her facial bones and inside her skull above her right eye. In Dr. Giles' opinion, the gunshot wounds that impacted Nicole's skull area could have caused a concussion and unconsciousness. (TT466, 479). However, she "probably would wake up from that very shortly though." (TT466). There were blunt force injuries to the victim's head, face, and both her upper and lower extremities. (TT466, R726, 728-36). Nicole's scalp was split and there were multiple blows to her head with at least three to the top of her head. (TT467, R714-19). A paint chip was found inside a blunt force wound behind Nicole's ear.

[5] The victim was 5 foot, 10 inches, and weighed 303 pounds. (TT452).

(TT467). In Dr. Giles' opinion, the blunt force injuries were consistent with someone using a baseball bat. (TT, 467).

Dr. Giles also observed a blunt force injury to Nicole's lower lip. The soft tissue on the inside was crushed. (TT468). Due to a lack of injury to Nicole's teeth, gum, and jawbone, Dr. Giles opined that this injury was caused by blunt force rather than a gunshot, even though the injury had the appearance of a "round hole." (TT468, R709-13). There were also tiny lacerations on the inside of the victim's upper lip. In Dr. Giles' opinion, these injuries were caused by Nicole's upper lip hitting her teeth due to blunt force impact across her mouth area. (TT469). There were blunt force injuries to the victim's shoulder. There were abrasions or "scraping" across the back of Nicole's shoulder and "a long column-like rod-like distribution … so there's been [an] object here [that] hit at least three times." (TT469, R722). There were blunt force injuries on the front of the victim's shoulder going down Nicole's left arm consistent with "a rod like structure." (TT470, R723). There was a lot of hemorrhage underneath this area with "a lot of crushing and tearing of the muscle down inside." (TT470). Nicole's left forearm also contained multiple rod-like injuries. (TT471, 472). In Dr. Giles' opinion, "this is a significant blow along the outside of that arm and shoulder." (TT470). Dr. Giles observed several blunt force blows to Nicole's right forearm. (TT472, R730).

Injuries on her legs and knees also indicated blunt force trauma. (TT472, R726-27, 731-32, 734-36).

Dr. Giles testified that Nicole Bush had also sustained sharp force injuries. (TT473). There was a stab wound above Nicole's left knee that entered her left kneecap. There was a two-inch deep stab wound to her left breast. (TT473, 474). There was a stab wound on the outside of her left arm as well as another stab wound about two inches deep on the inside of Nicole's right arm. (TT474, 475). Dr. Giles opined that the weapon was not a sharp weapon but had a rounded or blunt area to it and contained a very thin, single-edge blade. (TT474, 475). Because there was very little hemorrhage in the areas where the stab wounds were inflicted, in Dr. Giles' opinion, the sharp force injuries were inflicted later as far as the order of injuries. (TT475, 476). In Dr. Giles' opinion, Nicole Bush was conscious through much of her attack. (TT476-77). Giles said there were "three different types of wounds … multiple wounds of different types over multiple parts of her body and she had defensive injuries. There's been a significant struggle that's continued for some period of time here before she finally succumbed." (TT477). In Dr. Giles' opinion, the cause of the death for Nicole Bush's death was a result of hypovolemic shock due to multiple injuries: gunshots, blunt force trauma, and stab wounds. (TT477).

Sergeant Sean Tice, St. Johns County Sheriff's Office, investigated Nicole Bush's murder. (TT246-48, 433). Tice informed Sean Bush of his wife's death during a phone call and asked to meet with Bush at his home. (TT248-49, 274). The first interview was conducted at Appellant's home at about 2:31 p.m. on May 31. (TT248, 251-52, 274). The interview was audio-recorded in its entirety and an edited version was published for the jury. (TT250, 272, State Exh. 14).[6] During the interview, Tice reminded Bush that, during their earlier phone call, Tice said Nicole "was deceased [from] an accident …" but he now told Bush that Nicole had died as the result of a gunshot. (TT274). Appellant said Nicole had "no enemies." (TT274). Tice informed Appellant that when a female spouse is killed, police talk to the boyfriend or husband in order to remove him from any suspicion. (TT274-75).

Appellant and Nicole married in 2002. (TT277, 278, 279). In 2005, Appellant and Nicole relocated to Jacksonville, Florida. (TT279-80). Appellant had previously adopted Nicole's son from a previous relationship and together they had another son. (TT281). Their marriage started breaking apart after they moved to Florida. In 2006, they separated for about six to eight months, but got back together in 2007. (TT282-84). In July 2009, they separated but "were doing

[6] The jury was provided with redacted transcripts of the interview. (TT273).

better." Although they lived in separated homes,[7] Bush said, "we had relations in between." (TT288-89, 290). The last time they were intimate, however, was sometime in 2010. (TT312-13). Appellant said he was never physical with Nicole—he never put his hands on her and never threatened to hurt her in any way. (TT287). Appellant said Nicole bought her townhome in St. Johns County in early 2010. Although Appellant never lived there, he "was there a lot … help out with the kids and stuff." He did not have a key to the home, but Nicole made one accessible to him "if necessary." A key was only placed in the garage when it was necessary for Appellant to get in to Nicole's home to take care of their boys. (TT290-91, 292, 340). He only used the key left in the garage to get in to the house and stayed there until Nicole got home. Bush never made a copy of the key. (TT293).

Appellant said the last time he used the key was on the evening of May 27, the Friday before Nicole was murdered. (TT293-94, 299). Bush claimed Nicole "had a bit of a meltdown. The kids were stressing her … so she wanted me to take the kids." (TT294). Appellant met Nicole at a local Ale House where he picked up the children. (TT294-95). He then went to Nicole's home to get some of the boys' things and pick up their dog. Appellant used the code box on the outside of the garage to get in the garage to get the hidden house key. (TT341). He used the key

[7] Bush lived with a roommate, Kathy Phillips. (TT427).

at the front door. Bush said the interior door in the garage leading into the kitchen area of the home was always locked and there was no key for it. (TT298-99). Appellant returned the key to the same spot in the garage when he left. (TT296-97, 298). He was only at the house for three to five minutes and did not return during the weekend. (TT300).

On Saturday, May 28, Appellant and his boys went to the barbershop. (TT328-29). They returned to Appellant's home and stayed there for the rest of the day and night. (TT329, 331). On Sunday, May 29, Appellant and the children spent the entire day at his home. (TT327-28, 332). On Monday, May 30, Appellant and his sons spent the day at his home watching television. (TT317, 318). At some point, however, he went to Winn Dixie and then was home all night. (TT319, 320, 341-42). On Tuesday, May 31, at about 7:15 a.m., Bush said he went to the gas station to check on the price and then returned home to take the children to school. (TT321-22). His roommate Kathy Phillips had left by the time he returned. (TT322). Appellant had planned for the children to spend the weekend with him and then he would take them to school on Tuesday, May 31.[8] Nicole would get

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[8] Donna Hughes testified that she worked in the before and after school care program at Julington Creek Elementary in May 2011 where the Bushes' two sons attended. (TT560). Parents typically dropped their children off at the same time every day. Parents were not required to sign in their children if they were running late. (TT570-71). Nicole Bush brought her two sons to the program almost every morning, with the exception of May 31. (TT562, 563-64). On that day, Appellant, whom she had never seen before, dropped the children off at about 7:40 a.m.,

them at the end of that day. (TT300-01). Bush said he and Nicole spoke several times during the weekend with the last phone call taking place the prior evening at about 8:58 p.m. She also spoke to one of the children. (TT302, 306-07, 323, 333).

Appellant agreed to go to the Sheriff's Office to allow police the opportunity to copy all the information and pictures on his cell phone. (TT305, 342). Sgt. Tice testified that Bush came to the Sheriff's Office later that evening at 7:00 p.m. on May 31. Bush submitted his cell phone and was interviewed a second time. (TT344). Bush agreed to have a gunshot residue test conducted, even though he had washed his hands, and he also gave a DNA sample.[9] The second interview was audio and video-recorded. (TT344). A redacted version was published for the jury. (TT346, State Exh. 15). The jury was provided with redacted transcripts of the interview. (TT346-47, 349).

Appellant explained that since he cleaned Nicole's house and she occasionally cut his hair, his DNA might be in her home. (TT358). He said he had been in every part of Nicole's house, "… the bedroom…. the kids' room …the kitchen … and that he had "handled probably everything in there from the toilets to the floors." (TT359-60, 391). At Sgt. Tice's request, Appellant took off his shirt to show Tice whether he had any recent injuries. (TT390). Pictures were taken of

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which was "pretty late in the morning. We were already cleaning up." Appellant asked Hughes to give the boys something to eat. (TT563-64).

[9] Buccal swabs were also obtained from Bush's two minor sons. (TT597).

Bush's hands, chest, legs, back and feet to show there were no injuries. (TT396, 398-99). Tice also noted that Appellant had a slight limp to which Bush explained that he broke his foot when he jumped off a three-foot stage at work during a company event. (TT399-400). Tice informed Appellant that the clothing and shoes he wore on May 30 would be sent to a lab to be evaluated. (TT390).

Appellant gave a written statement regarding his whereabouts for the prior few days. (TT405-06, State Exh. 16). Bush also clarified that he had planned on going to the Shell gas station because they offered a Winn-Dixie discount, but he did not go. (TT408-09). He wanted to clear up any discrepancy regarding a neighbor stating that she had seen Bush in Nicole's neighborhood on May 30. (TT409). At some point when Sgt. Tice left the interview room, Appellant said, "I'm going to jail. I'm going to prison. I'm going to prison." (TT418). At the end of the second interview, Bush's phone was returned to him.

Kathy Phillips was Appellant's roommate in May 2011. (TT675, 676). Phillips said Appellant told her he paid child support for four children. He agreed to pay five hundred dollars a month for rent and utilities. (TT677-79). Phillips said Appellant kept to himself and mostly paid the rent on time. (TT682). The Bushes two minor sons came over every other weekend and left on Sundays. Sometimes the boys brought their dog with them. (TT683, 697). Phillips recalled Appellant drove a Dodge blue-colored van that he parked near the mailbox. (TT684). Phillips

learned Appellant became unemployed prior to March 2011 when Bush explained he had been laid off several months prior. In April 2011, Bush's church paid his rent for him. (TT688-89).

On May 30, 2011, Phillips worked for a few hours and then went to her relative's home before returning home between 9:00-10:00 p.m. (TT689-90). She saw Bush's van parked outside but she did not see Bush or his sons before she went to bed. (TT690-91). Philips was "a heavy sleeper" and did not hear any noise during the night or hear anyone leave the house. (TT691, 699). On May 31, Phillips rose at 5:45 a.m. She did not see or hear Appellant or his children. Before leaving at about 6:20 a.m., she brought the trash can back to the side of the house as the trash had already been picked up. Phillips noticed Appellant's van was not parked in its usual place near the mailbox. (TT691-93, 695).

Det. Tice testified that on June 1, at 2:20 p.m., he and Det. Hines went to Appellant's home to retrieve his computers. (TT429, 489). Appellant initially only gave his desktop to Tice and Hines claiming the laptop was "out for repair" but agreed to bring it to the Sheriff's Office later that day. (TT428-30, 490-91). After receiving the laptop later that day, Sergeant Steven Gazdick made a copy of the hard drive and Det. Kevin Kier conducted the forensic examination of the contents. (TT498-502, 504). Bush's computers were returned to him on June 3. (TT430, 546).

Kier testified he utilizes computer software to retrieve information from computers that is stored in an "unallocated" or "deleted" space. Kier uses software that allows extraction of all the data from the original hard drive without causing any information to be written to it. (TT510-11). A mathematical equation ("hash value") verifies that the information obtained is a precise and reproducible image that is identical to the original data. (TT511-12). Kier downloaded the data from Appellant's cell phone on May 31, 2011, subsequent to Bush's written consent. (TT514-15). Initially, there were errors in the downloading process. Therefore, it was possible some of the data was not captured with Kier's process. (TT553, 556). Nonetheless, the information obtained indicated that there were no text messages exchanged between Appellant and the victim on May 30, 2011. (TT523-24). On May 31, at 7:49 a.m., Appellant texted the victim and said the children had been dropped off at school on time. (TT525).

On June 3, 2011, Kier extracted data from Nicole's phone. (TT530-31). The data indicated that on May 30, Nicole received a call from Appellant's cell phone at about 7:30 p.m. (TT532). She also received an incoming call at 10:37 p.m. from a contact referenced as "Enrique" which lasted about an hour.[10] (TT532-33). That was the last activity on the victim's phone until Appellant's text was received the following morning. (TT533).

[10] There was no other reference to "Enrique" throughout the trial.

Kier also processed Appellant's Dell laptop. (TT534). Although there was no functioning operating system on the hard drive, Kier was able to locate remnants of some files in the deleted/unallocated area—all dated June 1, 2011, at 3:02 p.m., "like they were just installed that day." (TT537-38, 539). Kier said at the time he examined the laptop it contained a Toshiba hard drive. (TT535).

On June 3, 2011, Sergeant George Harrigan and Detective Charles Brantley met with several of Nicole's family members who had custody of Nicole's two young boys at the time. They met at Nicole's home, so they could collect some of the boys' belongings. (TT587, 602). Harrigan escorted the relatives through the house and asked them to look around to see if anything appeared to be missing. Relatives specifically mentioned Nicole's laptop computer and "an aluminum baseball bat that was next to her bed that she used for protection." (TT588).

Harrigan and Brantley walked around and inspected the house after Nicole's family left. They looked around Nicole's bedroom and Harrigan moved her dresser away from the wall to see if anything slid down behind it. (TT589, 591, 603). After the dresser was moved, detectives found a laptop computer with a lot of jewelry around it and on top of it. (TT588-89). Harrigan said the jewelry was not visible without significant movement of the dresser. (TT589-90). Harrigan went downstairs toward an area where he noticed footprints by the couch. As he checked all around the couch cushions and pulled them back "kind of punching" the area, a

"bat … popped right out." (TT592-93, 605, 614). Harrigan removed the cushions and searched the rest of the couch. (TT605-06). Crime scene technician Shawn Vollmar collected the red bat and the other items of evidence. (TT595, 604, 624, 626, 628). He also swabbed the inside of the couch. (TT630).

On June 4, because of finding the hidden bat and other potential evidence, detectives set up covertly-placed camera equipment in Nicole's home. Appellant was informed he could access the home with a key to obtain items he claimed he needed. (TT595, 781, 838).[11] Detective Vincent Russo set up two "pixel" movement sensor cameras—one faced toward the red couch where the bat was found, and another camera faced Nicole's dresser. (TT788-89, 793, 795-96). The interior house lights were left on for the cameras to pick up pixel contrast which determined any movement. (TT796). Det. Tice contacted Appellant who then picked up Nicole's house keys later that day, and then returned the the keys to Tice on June 6. (TT839).

Detective James Jackson placed a "delicate-type" evidence tape across three doors of Nicole's home. If the tape was broken at any point forward, it would indicate someone had entered the home. (TT779-80). On June 5, at 8:00 a.m. and 12:00 p.m., Jackson checked the residence and found the tapes intact. On June 6, at

[11] Tice testified that Bush made several requests to have access to Nicole's house as he needed some "items" for the family dog. (TT431-32).

7:00 a.m., Jackson found the tape had been broken on the front door. (TT781-82). He then removed the police cameras from the home. (TT782, 797).

Det. Tice spoke with Appellant on June 6 via telephone and June 8 via video and audio recording. Redacted portions of each were published for the jury. (TT847-59, 885-930). During the June 6 telephone interview, Appellant asked if the family members had taken any items from Nicole's house other than clothing—"any personal effects … that they were allowed to take?" (TT850-51). Tice said they were not allowed to take anything else, but they probably had Nicole's car keys. (TT851). Tice asked Bush, "were you able to get in the house and get everything you needed for the dog and everything?" Bush replied, "I just grabbed some food. The place was an absolute wreck." (TT851). Bush asked, "Was it supposed to be sealed? Because there was tape." Tice informed him that police sealed the home in case they had to go back but "when they realized they didn't … that's when they called me, and that's when I called you. So, yeah, that's no big deal." (TT852). During the June 8 interview, Bush acknowledged and waived his *Miranda*[12] rights. Tice told Bush he was a "person of interest," but was not under arrest, and that he had to explain some discrepancies in his prior statements. (TT887-88, 890).

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[12] *Miranda v. Arizona,* 384 U.S. 436 (1966).

In clarifying his whereabouts for the weekend leading up to Nicole's murder, Appellant reiterated that he took his boys to the barber shop on Saturday, May 28, and subsequently discovered his gas cap was missing. After the haircuts, he bought a gas cap and gas. (TT896-99). On Sunday, May 29, Appellant responded to Nicole's text message that he and the boys would not be going to church because he did not feel well. (TT902). Bush said he did not tell police that Nicole texted him late on Monday night, May 30, at 10:53 p.m., that she had "made it home safely" because he forgot about it. He said he could not recall every conversation the two had and, "that wasn't an effort to hide anything." (TT911-12). In addition, Bush could not explain why his phone locator was deactivated from May 28 through June 1 because he had not turned that feature off. (TT913). He suggested, however, that although he installed many updates on his phone, a phone application may have "installed" which "turned it off." (TT914). Tice informed Bush, "It's a huge problem because it's … off … when the incident occurred …" and "reactivated" after the murder. (TT915, 916).

Tice informed Appellant that it was "absolute" that someone had eliminated stored data on Bush's laptop computer after Tice spoke with him on May 31. Bush admitted he tried to fix it himself but was unsuccessful and "screwed it up." (TT917). Appellant admitted "it looks bad" that he altered his laptop, but he had done nothing to his phone. (TT919, 920). Bush could not explain why browser

history had been deleted from the computer. (TT922). Tice asked Appellant where he had been in the early morning hours on May 31. Bush previously said he went to check gas prices near his home but now he stated he first walked the dog, and then went to see if "Brenda Eckling" was home. He was gone for a few hours. (TT924-25, 928). Appellant admitted it looked bad for him that he could not specifically explain his whereabouts in the early morning hours on the day Nicole was murdered. (TT929-30).

Brenda Daniels testified that she had a romantic "friend" relationship with Bush in May 2011. (TT938-39). Daniels and Bush texted each other about a week prior to Nicole's murder. (TT941). On May 31, 2011, Daniels left her home at about 6:30-6:45 a.m. to take her niece and nephew to school. (TT942). She did not see Appellant's car or Appellant at any time that morning. (TT943).

Sergeant Thomas Marmo, St. Johns Sheriff's Office, testified that, on September 29, 2011, he drove the 26-mile route that Appellant would have driven from Appellant's home to the victim's house on the morning of May 31, 2011. (TT945, 946-47). Marmo left Appellant's house at 5:00 a.m. With light traffic conditions and driving the speed limit, Marmo arrived at Nicole's home in 30 minutes. He turned around and drove the same route back. (TT947, 951-52). Marmo testified that he also parked his car in a grassy area just outside the back gate of Nicole's gated community and then walked a mapped-out route at a regular

pace from the car to the victim's home—about a 5-minute walk. (TT947-48, 949, 952).

Crime scene technician Stephanie Whittington processed the red bat. (TT644-45). She obtained some red-brownish stains, swabbed several areas for touch DNA, and processed the bat for bloody fingerprints. (TT647-48). Whittington also processed the victim's white laptop computer found underneath the bedroom dresser as well as a jewelry box previously collected. (TT651-54).

Aimee Monie, crime scene technician, collected several pairs of Appellant's Timberland-brand shoes. (TT704-08, 715). She photographed each pair of shoes, swabbed suspected areas for blood and conducted "blind swabbings"—swabs taken from several areas of the shoes where there were no visible signs of suspected blood. She also performed a presumptive test for blood. (TT715-16). Monie said one pair of Appellant's shoes tested positive for the presence of blood; however, there was no blood spatter on the uppers. (TT717, 720, State Exh. 40).

Lynn Ernst, crime laboratory analyst, examines footwear and tire impression evidence submitted to the Florida Department of Law Enforcement "FDLE." (TT733-34). Ernst received five pair of Appellant's Timberland shoes.[13] She also received ten pieces of wood floor planks located between the staircase and the living room couch from the victim's home. (TT739, 740). Photographs of both the

[13] All of the Timberland-brand footwear had a similar outsoul design. (TT745). (TT749).

outsoles and uppers were taken of each pair of shoes, as well as test impressions from the outsoles. She also photographed the bloody shoe impressions left on the wood flooring planks and calibrated them to the natural size. (TT743, 744, 753). There were five areas of value suitable for comparison. (TT746, 748). In comparing Appellant's Timberland shoes, powder test impressions, and inked impressions, Ernst concluded that the right shoe from each of the Timberland pair of shoes matched the five areas of value found on the wood planks "in the design, the physical size, and the shape …" (TT749, 750-51, 753).

Emily Martin, DNA analyst employed by FDLE, developed full DNA profiles on Sean and Nicole Bush and their two sons. (TT966-67). She processed several pieces of evidence for the presence of any biological substances. (TT958-59). Results from the sexual assault kit did not contain any foreign DNA. (TT968). Testing on Nicole's fingernail scrapings contained Nicole's blood. (TT969). An analysis of the swabbings obtained from the interior and exterior garage doorknobs was inconclusive for comparison purposes. (TT969).

DNA testing on the pillow collected from Nicole's bedroom contained a mixture of two individuals with the major contributor matching Nicole's DNA profile. (TT973). Although the minor contributor contained DNA of another individual, it was limited and therefore insufficient for inclusion purposes. (TT974). Four of five swabs obtained from the victim's jewelry box also contained

Nicole's DNA. Martin did not obtain any results from one of the swabs which was taken from the clasp part on the jewelry box. (TT974-75, 976).

Testing of swabs taken from the side part of Nicole's computer contained a DNA mixture with the major contributor matching Nicole's DNA. The minor contributor, which contained male DNA, was insufficient for inclusion purposes. Appellant and the Bush children were excluded as a contributor to the minor DNA profile. (TT982, 997, 998).

Chemical testing on a pair of Appellant's Timberland shoes tested positive for the presence of blood. Martin was unable, however, to obtain any DNA results from the blood. (TT983, 989, 998-99). In addition, Martin was unable to obtain any DNA results from swabs taken from the right Timberland shoe. (TT991-92).

Martin conducted DNA testing on swabs taken from the inside portion of Nicole's couch. (TT984). She obtained a mixture which contained the DNA profile of at least two people—Nicole Bush, Appellant, and one of their sons were all included as possible contributors to that mixture, with the other son excluded as a possible contributor. (TT984-85). Martin conducted DNA testing on swabs taken from the handle and grip of the baseball bat found inside the couch. (TT985). She obtained a mixture of at least two individuals with the major contributor matching the DNA profile of the victim and the minor contributor as insufficient for

inclusion purposes. Testing on a blood stain obtained from the bat also matched the DNA profile of Nicole Bush. (TT986).

Amanda Bortolussi was a DNA analyst for Bode Technology in 2011. She analyzed DNA and performed serology testing on evidence. (TT1003). Bortolussi received known STR/DNA profiles obtained from Sean and Nicole Bush and their sons, M.B. and J.B. (TT1013). She processed Appellant's Y-STR profile from his DNA extract. She then analyzed the red metal bat found in the victim's couch. She performed both Y-STR testing, which is male specific and analyses the Y chromosome, and STR testing, which analyses the total DNA. (TT1005, 1007).

Results indicated the handle contained a DNA mixture of at least two individuals—Sean Bush could not be excluded as a possible contributor to the mixture. Bortolussi concluded that Sean Bush "matches the major component of the Y-STR profile found on the bat."[14] (TT1012, 1014). Bortolussi also said that since Y-STR profiles are passed from father to son, "any paternal relative that Sean Bush had would also not be able to be excluded as a contributor." (TT1014).

Bortolussi also performed STR/DNA testing on the bat handle. Results indicated a mixture of at least two individuals. Bortolussi concluded, "Sean Bush … and Nicole Bush cannot be excluded as possible contributors to the DNA profile." (TT1017, 1019). In Bertolussi's opinion, Appellant's DNA was on the red

[14] Bortolussi calculated that "99.961 percent" of the male population would be excluded as possible contributors to that profile." (TT1015).

metal bat handle. (TT1018, 1022, 1029). Malik Bush/M.B. was excluded as a possible contributor (because he is not Appellant's biological son) but Jalen Bush/J.B. could not be excluded as a contributor. (TT1019, 1022, 1028).

Robert Perkins, installation manager for ADT Security Corporate in Jacksonville, installed and monitored security systems for many years. (TT1046-47). On June 23, 2011, Perkins met with Dets. George Harrell and Charles Brantley to inspect the security panel[15] at the victim's home with the intent of removing the "event buffer"—the portion of the alarm system that collects all the history activity on the system. (TT1047-48, 1064, 1116). The keypad/control panel in the victim's home was in the kitchen with a plugged-in transformer directly below the keypad. (TT1054). Det. Brantley noticed that the power cord near the A.C. adaptor had been cut. (TT1117-18).

Perkins inspected the system and did not notate anything wrong with the installation. (TT1051, 1054). Nonetheless, after several attempts of restarting the security program, Perkins was unable to remove the event buffer. He was instructed to photograph the equipment in place and then remove it. (TT1051, 1055, 1064, 1117). The equipment was eventually sent to the manufacturer located in Canada for removal of the event buffer. (TT1057).

[15] This security system was installed by an ADT dealer through the dealer program. Perkins did not oversee dealer installs. (TT1058).

Jason Breed is the director of systems integration in the engineering division of Johnson Controls Incorporate, "JCI." His department works with the requirements of new security systems as well as field investigations into control panels that are returned from the field. (TT1069-70, 1102). On August 18, 2011, Breed received the security alarm panel previously removed from the victim's home. (TT1071). He examined the event buffer which stored all the communication information—including when the security system was turned on and off. (TT1073, 1074, 1103). Using computer software, the information contained within the original control panel was uploaded to another and then converted to readable data. (TT1074).

Buffer explained how the alarm system worked: no master code needed to be entered on the keypad when the alarm system was activated in either "stay mode" or "away mode"—only the corresponding key button on the control panel was pressed and held for two seconds which then activated the system's 10 perimeter zones (the doors and windows). One interior zone, zone 11, consisting of a motion detector, was not armed in the stay mode; however, all zones were activated in away mode. The exit delay for away mode was 60 seconds; the entry delay mode was programmed for 30 seconds. If someone re-entered the home after it was set in away mode, a valid code had to be entered on the control panel to disarm it. Nicole's system only had one valid code. (TT1077-81).

Breed opined that the alarms were not received by the central monitoring center due to potential phone line damage or issues. (TT1088). In his opinion, the power cord to the keypad/control panel had been cut at 5:59 a.m. and the backup batter power engaged. (TT1090). Although Breed testified that alarms activated on May 31, 2011, he could not testify as to what generated these events. “All I can say is that there were alarms on that date and there hadn’t been previously.” (TT1114).

Kristi Nieman, records custodian for the parent company of Minnesota Life Insurance Company, testified that Nicole Bush carried a life insurance policy through work totaling $815,240.00. (TT1121-24). The primary beneficiary was Sean Bush. (TT1125). Upon learning of Nicole’s death, representatives from Minnesota Life attempted to contact Bush but were unsuccessful. (TT1127). Bush, however, called the company on July 20 inquiring how to proceed with a claim. The call was recorded and published for the jury. (TT1126-27, 1129-37). Bush filed a written claim on Nicole’s policies on July 26, 2011. (TT1125-26).

Det. Tice interviewed Appellant a third time on August 24, 2011, at Sharon Bennett’s home. (TT728, 1191-92). Tice donned body-worn surveillance equipment and video-recorded half of the interview until the equipment malfunctioned. (TT1193). A redacted version was published for the jury. (TT1193, 1196-1228).

Bush asked Tice about the warrants that had been served, specifically the one where his Timberland boots were collected. (TT1197). Tice explained that bloody footprints were observed in Nicole's home and Bush's boots were checked to see if they matched the bloody footprints. Tice told Bush, "Some of them (bloody footprints) are pretty close to matching, so we're not going to be able to return them because FDLE's opinion is that your boots are those boots that were in the tracks." (TT1197-98). Bush asked if there was blood on his boots, but Tice said, "No. No blood on the boots." However, Tice said Timberland boots all have the same sole which was like the bloody tracks, "so it could be the Timberlands, or … we don't have the right pair of Timberlands …" (TT1198). As a result, Tice informed Bush that his boots would not be returned to him at this point. (TT1225).

Tice informed Bush that after the murder, police had put hidden cameras in the victim's home "because we knew whoever had committed this murder left items behind in specific locations." Tice further told Bush, " … you went in there, and you went to those locations." (TT1199-1200). Tice said, "… you went to the couch, where one of the murder weapons was, and you went upstairs under the dresser, where the laptop and the jewelry was hidden." Bush initially said he did not go upstairs to the dresser, but Tice said, "You had the flashlight in your hand? I'm telling you, it's on film." Bush admitted he went upstairs but did not remember touching the dresser. (TT1200, 1222).

Bush denied reaching down in to the couch, but Tice said, "I'm tell you that there's video. That's why I gave you the key … to see if you were actually involved…" (TT1201). Bush said he used a flashlight because he was leaving the residence and he thought the lights were supposed to be off. (TT1202, 1206-07). Bush said, " … it sounds to me like a crazy setup" but he agreed that the killer would probably return for hidden objects. (TT1204-05). Bush again stated, "I know I didn't dig in any sofa" but at some point, he had walked past it. (TT1205, 1212, 1214).

Bush admitted that he might have looked "under the sofa" or "up under the chairs" for a cordless phone. (TT1213, 1215, 1219, 1221). He did not, however, move any cushions. (TT1214). Tice told Bush he would review the video clips and see if what Bush claimed, "kind of fits." (TT1221-22). After the body cam malfunctioned, Tice took notes regarding the rest of the interview. (TT1229). Tice testified that when he confronted Appellant about the bat, Bush claimed he did not know anything about a bat and never played baseball with his sons, either. (TT1229).

Ramone Gregory is married to Nicole Bush's sister, Kim. (TT1237-38). Gregory testified that he has worked in law enforcement for over 17 years and was currently employed by the Tampa Police Department. (TT1237). After Nicole's murder, Gregory contacted Bush, because he was next of kin, and only Bush could

have Nicole's body released from the medical examiner's office. (TT1241-42). Gregory said detectives told Nicole's family that Bush was a "person on interest" for the murder. As a result, Gregory obtained a phone recording device from the Tampa PD and recorded his conversations with Bush. (TT1243).

Gregory coordinated with detectives to set up making tape-recorded phones calls to Bush. (TT1319). Gregory "just wanted to know the truth." (TT`1320). He spoke with Appellant on June 23, 2011, July 14, 2011, and two calls on August 25, 2011. (TT1244). The redacted calls were published for the jury. (TT1245-71, 1274-1314).

During the June 23rd call, Gregory told Bush that his wife Kim had spoken to Nicole the night before she was killed. Kim told Gregory that Nicole had confided in her that Bush "pretty much begged (Nicole) to keep the kids - - because (Bush) was feeling lonely and depressed and … couldn't find a job." (TT1250). In addition, one of Appellant's sons told Gregory that their dad told them he kept them overnight on May 30 because "… it got kind of late and … it would just be more convenient for me to just drop y'all off tomorrow." (TT1251). Bush denied "begging" Nicole to keep the children the night of May 30. "It was just convenient." (TT1252). When Gregory reminded Bush that he had previously claimed Nicole wanted him to keep the children because she was angry with them,

Bush clarified that he had the children two weekends in a row and kept them "out of convenience" during the night of May 30. (TT1252-53).

During the first phone call on August 25, Gregory informed Bush that a detective had called him and said Nicole had been beaten to death with a bat she kept in the house and "not killed with a gun." Gregory said this was the first time he had gotten this information. (TT1284, 1286, 1298). Bush said he did not know anything about it. (TT1287). Gregory said police told him that had spoken to Appellant about the bat and that Bush knew Nicole had been beaten. During the second call on August 25, Gregory asked Bush how did he not see a bat in Nicole's bedroom because he knew Nicole paid Bush to clean her home. Bush explained that Nicole only paid him to clean her bathrooms. (TT1302-03). Bush did not know all the details of Nicole's house and his access was "limit[ed]." (TT1303).

Sharon Bennett met Appellant via the Internet in 2009. They were a couple in May 2011. (TT1142, 1143). Bennett believed they were exclusive with each other, but they never lived together. (TT1144). She was aware that Appellant had children and had met the two youngest boys. (TT1145). Bennett did not know Appellant was married to Nicole when they first met. She found out about one and a half years after viewing Appellant's Facebook page. When she confronted him, he told her that he and Nicole were in the process of a divorce. (TT1144-45). Around January 2011, Bennett told Appellant their relationship needed to change.

She said, “I told him … I’m not going to be anybody’s secret anymore, so you have a time limit to get this divorce done.” Bennett further said, “This year is (sic) going to be some changes.” Otherwise, she did not want to pursue the relationship anymore. She and Appellant also discussed getting married. (TT1146).

Bennett was not with Appellant during May 27-30, 2011, because he told her he had his boys for the holiday. (TT1147). Bennett thought Appellant had his boys every other weekend, Friday until Sunday, and during long holidays. (TT1148). Bennett learned of Nicole’s murder after Bush informed her on May 31. From that day forward, they spent more time together. (TT1149). Bush proposed marriage to her three times: the first time was during casual conversation in January 2011; the second time was shortly after Nicole’s murder; and the third time, “I thought he was pretty serious after he was arrested.” (TT1150).

Bennett recalled a night when she and Appellant were together at his home after Nicole’s death. Around 10:00 p.m., Bush borrowed Bennett’s car and told her, “he was going to get some air” and he left. (TT1152-53, 1175). Bennett waited up for him although he was gone several hours. (TT1154). Bennett noticed the passenger seat in her car was pushed back and there was lint or debris on the seat. Bush claimed it was dog food. (TT1154, 1176). Bush eventually told Bennett that he had gone to Nicole’s house to pick up items for the dog. (TT1155). He parked “around the corner” from Nicole’s home. (TT1159). Bennett said Bush told her he

knew the code to get into Nicole's garage and knew where the "hide-a-key" was hidden so he could access Nicole's home. (TT1160). Bennett said Bush told her that he also looked for a phone and "some papers for the children." (TT1156, 1175). In addition, Bennett said he told her that he turned off the lights and used a flashlight to look around because he did not want anyone to know he was there, including neighbors. (TT1156, 1176).

Bennett testified that Bush typically wore Timberland boots.[16] He kept them neat in boxes or under his bed. (TT1157). Bush had a particular pair of older Timberland boots that were his favorites. She did not see that pair after the investigation commenced. (TT1158).

Bennett testified that Bush told her about Nicole's life insurance policy shortly before he was arrested. (TT1151). The day after his arrest, Bush called Bennett from the Duval County jail before he was transferred to the St. Johns County jail. (TT1160-61, 1174). The phone call was published for the jury. (TT1162-73). Bush told Bennett that he might not "make it out" but that he loved her and wanted to marry her. He asked Bennett to go to his home or check with his roommate to see if police had confiscated any of his belongings. He said, "… just check out what's going on over there … scoop up what you can and then if the computer's still there grab it." In addition, "Any papers you can get ahold of grab

[16] Bennett identified State Exhs.38-41 as Bush's boots. (TT1157).

all of that up because they may be trying to -- serve a new warrant … Just get over there as soon as you can … they ain't got no reason to serve a new warrant …" (TT1166, 1169, 1171). Bennett testified she went to Bush's home and collected his laptop, but it was eventually turned over to Corporal Tolbert. (TT1174). She did not collect all of Bush's property from Phillips' house. (TT1176).

Corporal Eugene Tolbert testified that on August 30, 2011, he obtained a search warrant for Bush's Dell laptop which was executed at Sharon Bennett's home. (TT727, 728). On September 1, a subsequent search warrant was obtained for another forensic examination of the computer. (TT729). Tolbert also obtained search warrants for another pair of Timberland boots located at Bush's home, as well as a HP desktop computer tower. (TT730-31). Tolbert secured a subpoena for bank records from Appellant's five accounts for the period of January 1, 2010, through July 2012. For the six months prior to Nicole's murder, the five accounts contained either minimal amounts or a negative balance. (TT1322-29).

On September 6, Det. Kier re-examined Appellant's laptop and discovered that the Toshiba hard drive had been replaced with a Seagate hard drive. The computer was now a functioning one. (TT548-49). The image of the Seagate hard drive and other digital evidence was sent to the Florida Department of Law Enforcement "FDLE" for additional testing. (TT550).

Jim Stafford is an audio engineer and manages a company that enhances audio and video clips for forensic purposes. (TT822-23). Stafford examined several video clips recorded by the hidden cameras police placed in the victim's living room, with the task of determining if "anything … moved in the room." (TT824-25). Stafford explained that he used a program[17] to create before and after still photos from the video clips that indicated movement. (TT825-26). Stafford used images from video clips captured on June 5, 2011, at 11:22 p.m., and June 6, 2011, at 7:30 a.m., obtained from the camera aimed at the red couch. (TT827, 829). The images indicated that, between those two times, the lower couch cushion had been moved approximately 2.31 inches. (TT830, 833, 834-35). Stafford did not observe any person on the video clips. (TT836).

Peter Lardizabal, currently the manager of the firearms lab section for the St. Johns County Sheriff's Office, formerly worked for FDLE for over 35 years. Most of his time was spent as a senior crime lab analyst in the firearms and tool mark section. (TT1332). Lardizabal examined lead alloy fragments that were collected from the crime scene. (TT1339, 1344, State Exhs. 13, 18). Although the pieces were insufficient to compare to a specific firearm, in Lardizabal's opinion, the

[17] Stafford testified he used an "Arithmetic function" from the Ocean Systems program which is also used by the Federal Bureau of Investigations, the Central Intelligence Agency, the Drug Enforcement Agency, and the National Geospatial-Intelligence Agency. (TT825). The "Subtraction function" is used to combine before and after pixels from video clips to create the still photos. (TT826).

remnants “almost certainly” were from a .22 long rifle, a rimfire caliber design. (TT1340, 1346). Lardizabal said that since this type of cartridge is a lower power cartridge, it would not generate much force and produces a far less noise than other higher calibers. (TT1343).

One of the fragments contained a whitish building material. (TT1344, State Exh. 13). The other fragments contained trace material consistent with some sort of fibers. (TT1345-46, State Exh. 18). In examining the pillow and pillow case (TT1348, State Exh. 10), Lardizabal observed three gunshot wounds or damage which in his opinion, was consistent with the muzzle of the firearm being placed against the pillow and pillowcase at the time the shots were fired. (TT1348-49, 1350, State Exh. 10). The three holes had a pattern that was typical with a rimfire caliber, such as a .22 long rifle. (TT1350). In Lardizabal’s opinion, the pillow would have decreased the gunshot sounds. (TT1351).

Christopher Hendry was employed as a senior crime lab analyst in the digital/computer forensic evidence section of FDLE in 2012. (TT1365-67). Hendry examined a copy of the Seagate hard drive made from Appellant’s computer. (TT1371). He conducted a “key words” search and then prepared a search term report. (TT1373-74). Hendry testified that internet searches containing the words “How to make a homemade silencer/suppressor” were conducted on January 8, 2011, and January 11, 2011. (TT1386). On January 19, 2011, an internet search

was conducted using the search word "silencer." On January 22, 2011, an internet search query was conducted containing the words "silencer+plan." (TT1384). On February 22, 2011, there were multiple internet searches related to the words "suppressors and silencers" but the file was deleted or overwritten. (TT1385).

Hendry also searched for the term ".22 cal." (TT1387). On January 22, 2011, he located a search query using the words "build a .22 caliber suppressor." (TT1388). Hendry also conducted a term search on Appellant's HP desktop/workstation. (TT1389). On June 1, 2011, there were numerous queries for the term "blood." The file, however, had been deleted. (TT1390). In Hendry's opinion, all the search term queries were tied to web page searches. (TT1408).

Detective David Causey, St. Johns County Sheriff's Office, conducted an examination of forensic images obtained from a duplicate copy of the Seagate hard drive from Appellant's laptop computer. (TT1414). Causey compared the "original search term query" with the "search term" results. For example, a google query search was conducted for the term "silencer" which auto-populated selectable search options that included "silencer plan"—which was the result chosen by the user/Appellant. (TT1419-20). Causey also located a user search conducted on January 11, 2011, on "Google Images" for the term "homemade suppressor." (TT1420, 1427, 1430). In addition, there was a search conducted using the term "unemployment LO" which auto-populated a return with the user choosing

"unemployment loans with bad credit." A search for "policy loans" was also conducted but in "Private" mode. (TT1423, 1424-25, 1455). Causey also located a search conducted on July 18, 2011, for the term "first 48." Other searches were conducted for "forensic footwear analysis" and, on July 20, 2011, a search for the query "Minnesota Life" occurred. (TT1427, 1455, 1457). The search terms "silencer" and "suppressor" were also searched in "private" mode. (TT1427). Causey said that, although terms can be searched in "private" mode, it does not prevent a forensic examiner from finding that data. (TT1431). Causey said that a narrow search yields fewer options. (TT1444). For example, there was a query "build a .22 caliber suppressor." Causey said these words were the exact query as typed in by the user and the web page was then visited. (TT1453).

On August 2, 2017, Appellant was found guilty of all counts as charges in the indictment. (TT1748). The penalty phase commenced on August 14, 2017. (R6689-7707).

Cherise Conte-Bush testified that she was Appellant's wife in 1998. Together with their young daughter, they lived in a two-family house with Conte-Bush's grandparents. (R6737-39). On April 15, 2000, Appellant and Conte-Bush had planned a romantic evening. Appellant told Conte-Bush to ensure their daughter was asleep before he got home. (R6739-40, 6741, 6744). Conte-Bush said Appellant ran a bath for her, and, as she lay in the water, he told her she was a

good wife, he was happy he married her, and hoped to have more children. (R6741). Appellant said, “I have a surprise for you.” Conte-Bush attempted to get out of the bath, but Appellant insisted she stay in the tub. He instructed her, “ … close your eyes and I’m going to get your surprise.” (R6742). Appellant returned, stood behind her and again stated that she was a good mother and wife and he was very happy with her. (R6742). He said, “Are you ready for your surprise” and then he threw an electrically-charged rod into the bathtub. (R6743, 6752). Conte-Bush’s back began to burn as she screamed. (R6743, 6748). She got out of the tub, but Bush grabbed her and attempted to throw her back in. She kept her back against the wall, so Appellant could not push her into the tub. (R6743-44). Appellant started choking her. As she screamed, their daughter came to the bathroom door and attempted to get in the room. Appellant pushed the door closed but their daughter was able to open it. (R6744). Appellant stopped choking Conte-Bush and said, “ … you hear those voices? - - you hear those voices? And he pointed to the floor.” (R6744-45). She told Appellant “there are no voices” as she pushed past him, grabbed their daughter, ran to the bedroom, and attempted to call 911. Discovering that phone line was dead, she ran to the kitchen, grabbed that phone, and succeeded in calling 911. (R6745). Conte-Bush told the dispatch operator something was wrong with her husband and to send police. She said, “ … my husband just tried to kill me.” Conte-Bush grabbed her daughter and car keys and

ran out of the house. (R6746). When Conte-Bush returned home the next day, she found the burnt rod hidden underneath her daughter's bed. (R6747). Conte-Bush had a $100,000 life insurance policy with Appellant named as the beneficiary. (R6747). Appellant was ultimately convicted of aggravated assault. (R6747).

Sharon Bennett testified that she dated Bush for about two years just prior to Nicole Bush's murder. Prior to Nicole's death, Bennett recalled an early morning when Appellant came to her house crying and stating that, " … something was going on in his life and he really - - wanted to hurt … Nicole." He asked Bennett if she knew where he could get a gun so he could kill Nicole. (R6756). Bennett said Appellant claimed he could shoot Nicole at Nicole's apartment because "the parking lot [was] dark …" (R6767). Bennett said Bush told her that his mother was mentally challenged and they rarely had a permanent place to stay. Bennett never met Appellant's mother and testified that Appellant's stories were all self-reported. (R6766).

Several witnesses read victim impact statements: Cynthia Thompson, the victim's mother; Kimberly Gordon, the victim's older sister; and Tracy Walker, the victim's co-worker and best friend. (R6774-79; 6781-86; 6787-93).

Mark Bush,[18] Appellant's younger brother by about a year, testified that Appellant and he grew up in New Jersey with their mother, Dorothy Bush. Mark

[18] For clarity, Appellant's relatives will be referred to by first names.

testified that the family moved many times and occasionally they used a shopping cart to move their personnel items. Mark testified that Appellant was sexually assaulted when they were in elementally school. (R6862-63). Mark had not seen Appellant since they were in their thirties. (R6879). Mark never met Appellant's two younger children and only met Appellant's oldest son Amir and Appellant's only daughter once or twice. (R6824, 6879-80).

Amir Bush testified that he was twenty-two years old and Appellant's oldest child. (R6890-91). Amir lives in New Jersey with his mother, Appellant's first wife. His parents divorced when he was four-years-old. (R6892, 6917). Amir testified that Appellant ensured that he and his younger sister frequently spent time together. Noel Chambers, Appellant's cousin, testified that Appellant was "somewhat of a geek" growing up, very technologically savvy. (R6969, 6999). He also was "somewhat of an outcast" and stayed to himself. (R6969, 6070).

James Aiken testified that he was employed by the South Carolina Department of Corrections for over 40 years. He has been involved with the classification placement system for over 45 years. (R7085). Aiken reviewed Appellant's prison records and school records. (R7102). Appellant had one disciplinary report (for a violation of possession of a paper clip with his legal mail) and two other "write-ups." (R7103). In Aiken's opinion, Appellant was a

"compliant inmate" who could be properly managed; however, he should be placed in maximum security due to his conviction. (R7107, 7108).

Amy Brown Nguyen testified that she is a GIS ("Geographical Information System") analyst. (R7259). She is also a member of the National Alliance of Sentencing Advocates and Mitigation Specialists and conducts training courses in capital sentencing with the goal of preventing defendants from receiving a death sentence. (R7264, 7312-13). Nguyen did not interview Appellant or family members. (R7266, 7324). She testified that she relies on census data for her work in human geography and wants results to be completely independent from family influence. (R7266-67). She has worked on about 70 federal and state cases but only for the defense. (R7312-13). Nguyen prepares a "cultural map" based on risk factors in a person's background and where he grew up. (R7319, 7326). In reviewing Appellant's younger years, she determined there were several risk factors in Bush's life that included an abundance of single-mother homes, lack of education attainment, community disorganization, and poverty. (R7269-70, 7275-76, 7278-81, 7283-84, 7297, 7308).

Dr. Jeffrey Toomer, forensic psychologist, testified that he interviewed several of Appellant's family members which included Mark Bush, Appellant's brother, Juanita Whitfield, Appellant's first wife, and David Bush, Appellant's uncle. He did not interview Appellant, talk to him, or conduct an evaluation.

(R7328, 7332, 7362, 7392, 7403). Family members believed Dorothy Bush "had problems." (R7392). Toomer reviewed school records, hospital records, and records relating to Dorothy Bush. (R7332, 7362). He did not review any police reports and did not know the details of the crimes. (R7416). In Toomer's opinion, Bush was not raised in a community that fostered stability. (R7333-34). There was no structure, safety, or sameness in Appellant's upbringing, nor was there any intervention. Appellant's childhood was filled with trauma after trauma. (R7335, 7363). Based on the records and interviews, in Toomer's opinion, there were many stressors in Appellant's life including poor schools, constant movement, and poverty, which leads to "the lack of control"—by someone "by being violent and by being the most powerful in a particular dynamic." (R7345-49). Toomer said that individuals that are raised with these type of "negatives" and have "problems the rest of their lives … problems in personal relationships." (R7351, 7401-02). Toomer said all of the negative factors in Bush's early life affected him "his entire life" up to the time he murdered his wife. (R7402-03). Nonetheless, because Toomer never spoke to Appellant his opinion was based upon "the presentation of symptomology … the review of the records …" (R7411).

Dr. Janice Wilmoth, neuropsychologist, testified she conducts training courses for the St. Johns Sheriff Office that includes mental health training, crisis management, and dealing with the mentally ill. (R7423, 7424). Wilmoth reviewed

Appellant's school records and documents relating to Dorothy Bush, including her earning statements, social security disability information, and her death certificate. (R7423-24). Although she did not interview Appellant, she spoke to Juanita Whitfield. In addition, she was present during the testimony of Amir Bush and Mark Bush. (R7425, 7497, 7501-02). Wilmoth testified that it would have been helpful to interview the Appellant, but she was instructed by the defense not to do so. She did, however, use Mark Bush's perceptions of their childhood. (R7502). Wilmoth had no knowledge if Appellant suffered from a mental illness. (R7503). Wilmoth said that, even if a child had a schizophrenic parent, it would not affect the ability to understand that premeditated murder is wrong. (R7505).

On August 17, 2017, the jury returned its advisory verdict unanimously recommending that Bush be sentenced to death for the murder of Nicole Bush. (R7693-94).

A *Spencer*[19] hearing was conducted on November 3, 2017, at which time the Appellant presented additional mitigating circumstances. (R7708-7798).

Deputy Dustin Johnson testified that he works at the St. Johns County Detention Center. (R7715). Johnson said that Appellant's records did not indicate he had any incidents of violence. (R7721).

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[19] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

Deputy Graham Harris testified that when he reported to Nicole Bush's home on the morning of May 31, 2011, she was able to tell him that her children were with their father. She did not know what had happened to her and responded, "I don't know" when asked who her attacker was. She referred to her attacker as a male. (R7726).

Ronald McAndrew testified that he is a prison and jail consultant which included 23 years of employment with the Florida Department of Corrections. (R7727-29). He met with Appellant and reviewed his jail records. In McAndrew's opinion, Appellant would not be a harm to himself or others in an open population prison setting, although it was "fair to say" he could not predict what would happen. (R7735, 7742).

Sean Bush testified on his own behalf and maintained his innocence. (R7757).

The State entered additional victim impact statements. (R7759-61).

On December 21, 2017, the court followed the jury's unanimous advisory recommendation and imposed a sentence of death on Sean Alonzo Bush for the murder of Nicole Bush. (R7810). The court found the following aggravating circumstances: 1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person - great weight; 2) the capital felony was committed while the defendant was engaged, or was an

accomplice, in the commission of burglary - great weight; 3) the capital felony was committed for pecuniary gain - great weight; 4) the capital felony was especially heinous, atrocious, or cruel – great weight; and 5) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification – great weight. (R4324-35).

Bush did not rely on any statutory mitigating circumstances. The court found the following non-statutory mitigating circumstances: 1) subjected to chronic poverty – moderate weight; 2) experienced chaotic frequent changes of childhood homes and schools – moderate weight; 3) raised and witnessed ongoing violence in drug and crime infested neighborhoods – moderate weight; 4) suffered physical abuse, emotional deprivation and emotional abuse – moderate weight; 5) Bush's mother prostituted herself to provide shelter/food – slight weight; 6) subjected to domestic violence and witnessed multiple events of domestic violence against his mother - slight weight; 7) saw alcoholism first-hand – slight weight; 8) suffered major trauma by being sexually molested by a juvenile – moderate weight; 9) was known as an outcast as a child and a teen because of his clothing and "techy/nerdy" personality – less than slight weight; 10) worked as a teenager to support his mother and brother – slight weight; 11) adults, agencies, school system, and doctors failed to intervene – slight weight; 12) Bush's family never owned a car – less than slight weight; 13) missed many school days and received poor grades in

elementary school and high school, but graduated from high school and obtained I.T. certifications - slight weight; 14) abandoned by his father, did not have a male role model; however, Bush was present in his children's lives – moderate weight; 15) overcame a chaotic childhood and dysfunctional family life and made achievements in his own life; provided emotional and financial support for his children, achieved good employment and education – moderate weight; 16) consistent periods of employment since high school – slight weight; 17) strong work ethic, useful occupation and strong skill set in the area of technology – slight weight; 18) Bush was crushed when his mother died and that he was not there for her – slight weight; 19) Bush's aunt's death was difficult as she was his second mother – slight weight; 20) Bush's family loves him; he has the capacity to form loving relationships with family and friends and has the support of his family – slight weight; 21) provided mature advice to friends and family - slight weight; 22) helpful to others by providing advice to live lawful lives and respect parents – slight weight; 23) good qualities that include humor and caring, a good listener, able to provide sound advice; and cares about animals – less than slight weight; 24) has a special bond with his children, loves his children and adopted children as equals – less than slight weight; 25) volunteered in his son's classroom – slight weight; 26) could continue to have a relationship with his children with a life sentence without the possibility of parole – slight weight; 27) demonstrated good

behavior in jail for the six years prior to his conviction; had one disciplinary report; was a non-violent and compliant inmate; had no problems with female staff; would likely function well in a controlled environment and adjust well to prison life – moderate weight; 28) positive influence on county inmates – slight weight; 29) participated in religious services in jail – slight weight; 30) demonstrated appropriate courtroom behavior- less than slight weight; 31) a life sentence without parole in a prison setting would protect society from Bush – slight weight; 32) likely will not engage in criminal behavior in a structured, controlled prison setting – slight weight; 33) potential for rehabilitation – slight weight; and 34) amenable to a productive life in prison – moderate weight. (R4336-58).

The trial court also considered non-statutory mitigating circumstances not presented to the jury but presented to the court at the *Spencer* hearing: a) residual doubt – no weight; b) State's pre-trial offer of life in prison - no weight; c) cost of a death sentence versus a life sentence – no weight; and d) a life sentence would provide the victim's family with closure – no weight. (R4358-62). The court agreed with the jury's unanimous vote and found the Appellant should be sentenced to death. (R4364).

This appeal follows.

SUMMARY OF THE ARGUMENT

POINT I: The trial court properly denied Appellant's motion for a judgment of acquittal. Appellant's argument to the contrary, the evidence against him was not entirely circumstantial. The evidence presented during trial was sufficient to sustain the conviction. Appellant was convicted by competent, substantial evidence which included direct evidence of Appellant's DNA from one of the murder weapons found at the murder scene, his admission that he was away from his home at the time of the murder, and a financial motive to murder Nicole Bush.

POINT II: The trial court did not err by not holding a *Richardson* hearing during the testimony of DNA analyst Emily Martin. Her change in testimony was a clarification which did not amount to a discovery violation, nor was there any indication that the State was aware of a change in testimony. Even if there had been a discovery violation, the violation was inadvertent and did not adversely affect defense trial strategy.

POINT III: The trial court did not abuse its discretion when it opposed admission of victim's statement that the boys were with their father as a dying declaration. The statement neither concerned the cause of what the victim believed was to be her impending death nor the circumstances surrounding the impending death. Even if it were error, such error was harmless beyond a reasonable doubt as the exclusion of the statement in no way undermined Appellant's theory of defense.

POINT IV: The trial court properly denied Appellant's motion in limine to exclude testimony of law enforcement officers and Appellant's proposed limiting instruction for those opinions. The statements made by Appellant were in response to permitted interview techniques. Furthermore, the standard jury instruction read by the court not only addressed the issue of opinion testimony, but the trial court took the additional precaution of giving the limited instruction to the jury each time a recording was played.

POINT V: The trial court did not abuse its discretion by admitting a photographic exhibit. The still images the State introduced were neither altered nor manipulated.

POINT VI: The trial court did not err when it denied Appellant's request for a special jury instruction regarding the victim's undergarments. Appellant failed to show that his proposed special instruction was supported by the evidence; not adequately covered by the other instructions; and a correct statement of the law and not misleading or confusing.

POINT VII: The trial court did not abuse its discretion when it prevented Appellant from stating during closing argument that detectives had gone undercover to induce Appellant to apply for an insurance payout, when Appellant was referencing facts not in evidence.

POINT VIII: The trial court properly denied Appellant's proposed penalty phase jury instructions. The trial court gave the standard penalty phase jury instructions

and advised the jury that it can consider any other aspect of the defendant's character and any other circumstances of the offense. The standard penalty-phase jury instructions did not "impermissibly shift the burden to the defense to prove that death is not the appropriate sentence".

POINT IX: Appellant has failed to establish fundamental error affected the penalty phase jury instructions.

POINT X: There was no prosecutorial misconduct during comments in penalty phase closing arguments. The complained of statements were either proper comments on the evidence or did not rise to a level which would require a mistrial.

POINT XI: The victim impact statements were properly admitted as they were within the parameters of Payne[20] and did not fall within one of the proscribed categories of victim impact evidence delineated in *section 921.141(7*).

POINT XII: There was no cumulative error in the penalty phase.

POINT XIII: Appellant's constitutional challenges to Florida's capital sentencing process have been repeatedly rejected. Florida's capital punishment scheme is constitutional.

POINT XIV: Appellant's sentence is proportionate.

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[20] *Payne v. Tennessee*, 501 U.S. 808 (1991).

POINT I

THERE WAS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY VERDICT FOR FIRST DEGREE MURDER.

Appellant argues that the State's evidentiary theory requires an impermissible stacking of inferences to arrive at the essential identity element. However, this issue is without merit as the trial court properly denied the motion for JOA.[21] "Direct evidence is evidence which requires only the inference that what the witness said is true to prove a material fact." *Kocaker v. State*, 119 So.3d 1214, 1224 (Fla. 2013). The record reflects that there was competent, substantial evidence to support Bush's conviction for the first-degree murder of Nicole Bush. The baseball bat was proven to exhibit DNA from the victim and DNA from the

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[21] A de novo standard of review applies to motions for judgment of acquittal. *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). This Court has stated:

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. … Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. … If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. … However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

(citations omitted). "Proof based entirely on circumstantial evidence can be sufficient to sustain a conviction in Florida." *Orme v. State*, 677 So. 2d 258, 261 (Fla. 1996).

Defendant. The weapon matched the injuries sustained by the victim. Appellant's statement that he was away from his home at the time of the murder, together with DNA evidence, takes this case out of the more defense-friendly circumstantial evidence standard of review.

While Bush invokes the circumstantial evidence rule, asserting that this case is analogous to *Wright v. State,* 221 So.3d 512 (Fla. 2017), *Wright* is distinguishable from this case. Although there was extensive testimony presented at trial about the DNA evidence found on a glove, this Court held that evidence to be circumstantial because there was no competent, substantial evidence to establish a nexus between the glove and the murders. *Id*. at 524. No such deficiency exists here. By contrast, Bush was proven to have had the opportunity, the motive, and the weapon to kill Nicole.

The direct evidence at trial as testified to by Dr. Giles, indicated that the cause of death for Nicole was a result of hypovolemic shock due to multiple injuries: gunshots, blunt force trauma, and stab wounds. In his opinion, the blunt force injuries were consistent with someone using a baseball bat. The jury heard testimony from Detective Harrigan, that Nicole's family told police that Nicole's red metal bat that she kept by her bed was unaccounted for. After searching, Harrigan found the red metal bat hidden inside the living room couch. There was direct evidence linking Bush's DNA to the baseball bat found hidden in the

victim's couch. A baseball bat which Bush vehemently denied ever seeing or touching. Yet, Amanda Bortolussi, a DNA analyst, concluded that Bush's entire DNA profile at all 13 genetic markers, were found on the handle of that bat. Moreover, on June 4, because of finding the hidden bat and other potential evidence, detectives set up camera equipment in Nicole's home. Images from video clips captured on June 5, 2011, at 11:22 p.m., and June 6, 2011, at 7:30 a.m., obtained from the camera aimed at the red couch indicated that, between those two times, the lower couch cushion had been moved approximately 2.31 inches. Appellant admitted entering the home during that time to obtain items he claimed he needed. There was no impermissible stacking of inferences here that were found in *Wright*. Rather there was DNA evidence linking Bush to the crime scene in conjunction with his statement that he was not at home at the time of the murder.

Additionally, the State presented evidence that prior to his murder of Nicole the Appellant was broke. He had not been employed for some period of time, he was struggling to pay his rent, his bank accounts were nearly empty, and he had been asking friends and family for money. Prior to her death, Nicole was trying to finalize the divorce between her and Appellant, which would have likely resulted in a child support obligation for Appellant, making his financial situation even worse. The jury also heard that Bush was the primary beneficiary of a life insurance policy that Nicole had taken out at work, and he stood to gain over

$815,000 in the event of her death. During a recorded telephone call to the life insurance insurer, wherein Bush was attempting to make a claim on the policies following Nicole's death, he made statements reflecting his knowledge prior to Nicole's murder that he was the beneficiary on the policies.

Stefanie Whittington, the crime scene technician from the St. Johns County Sheriff's Office, testified regarding a projectile that was found in the wall behind Nicole's bed. Dr. Giles, the medical examiner, testified when he conducted the autopsy, he found bullet fragments in Nicole's skull. Those were removed from her body and sent to FDLE for forensic examination. Peter Lardizabal, the firearms expert, testified that he examined these projectiles and the fragments that were found by crime scene investigators at Nicole's house. He testified that although the pieces were insufficient to compare to a specific firearm, in his opinion, the remnants "almost certainly" were from a .22 long rifle, a rimfire caliber design. This is significant when compared to what was found on Appellant's computer.

Det. Tice testified that on June 1, at 2:20 p.m., he and Det. Hines went to Appellant's home to retrieve his computers. Appellant initially only gave his desktop to Tice and Hines claiming the laptop was "out for repair" but agreed to bring it to the Sheriff's Office later that day. After receiving the laptop later that day, Sergeant Steven Gazdick made a copy of the hard drive and Det. Kevin Kier conducted the forensic examination of the contents. Kier said at the time he

examined the laptop it contained a Toshiba hard drive. Although there was no functioning operating system on the hard drive, Kier was able to locate remnants of some files in the deleted/unallocated area—all dated June 1, 2011, at 3:02 p.m. That indicated that someone had attempted a reinstall of the operating system that afternoon, immediately after detectives left the home.

Corporal Eugene Tolbert testified that on August 30, 2011, he obtained a search warrant for Bush's Dell laptop which was executed at Sharon Bennett's home. On September 1, a subsequent search warrant was obtained for another forensic examination of the computer. On September 6, Kier re-examined Appellant's laptop and discovered that the Toshiba hard drive had been replaced with a Seagate hard drive. The computer was now a functioning one and the results of the forensic examination were remarkable. The State's evidence showed that the computer that was owned by Bush was conducting searches **on how to build a .22 caliber suppressor and a homemade suppresser**, and that this was not an accidental search.

An examination of the Seagate hard drive from Appellant's computer had internet searches containing the words "How to make a homemade silencer/suppressor" conducted on **January 8, 2011**, and **January 11, 2011**. On **January 19, 2011**, an internet search was conducted using the search word "silencer." On **January 22, 2011**, a search query using the words "build a .22

caliber suppressor" was found. The State also presented testimony from Sharon Bennett that around **January 1, 2011** she voiced concerns about their relationship to Bush. She conveyed to Appellant that he needed to get divorced and that he had a time limit in which to accomplish that. Otherwise, she did not want to pursue the relationship anymore. These searches were made relative in time to Bennett's ultimatum. The State was able to establish the conception of Appellant's plot to murder Nicole through this evidence.

The jury heard from Stefanie Whittington, who testified about locating bloody shoeprints at the bottom of the stairs, in Nicole's bedroom. Lynn Ernst, the FDLE footwear impression examiner, testified that in comparing Appellant's shoes, powder test impressions, and inked impressions, the evidence revealed that the right shoe from each of Appellant's pair of shoes matched the five areas of value found on the wood planks. Finally, the jury heard inconsistent statements from the Appellant regarding his whereabouts at the time of the murder. Appellant initially told police he had left briefly to check gas prices, then changed his story claiming he went to check on another girlfriend. What was reliable, was his statement that he was away from his home and unaccounted for, two hours the morning of the murder.

If this Court were to determine, arguendo, that the evidence of guilt is wholly circumstantial, his claim should still be denied because the evidence

offered at trial in support of the jury's verdicts was sufficient to satisfy even the higher standard of review applicable to such cases. “[W]hen there is an inconsistency between the defendant's theory of innocence and the evidence, ... the question is one for the finder of fact to resolve and the motion for judgment of acquittal must be denied.” *Durousseau v. State,* 55 So.3d 543, 557 (Fla. 2010). Appellant’s theory of defense lacks believability.

Appellant argues that it was, in fact, Nicole who turned the alarm system off; that she had got up that morning, as she sometimes would do, and then turned the alarm system off, took the garbage out to the curb, and upon re-entering her home is when all of this occurred. Appellant’s theory of innocence is not consistent with the facts in evidence. Nicole was found by first responders wearing only her bra and panties. This is not the attire that you would wear to take your garbage to the curb. Also, very important was the pillow. The pillow, as seen from the photographs and the actual pillow in evidence, had three perfectly aligned holes. Dr. Giles testified that as he was conducting an examination of the bullet wounds, he found fuzzy material in one of the bullet wound tracks, fuzzy material that came from the pillow in this case, indicating that the pillow was pressed up against her head when the gun was fired. Nicole was sleeping in her bed at the time of the assault. The perpetrator was inside the home and in her bedroom when the attack occurred. Furthermore, Nicole was asleep in her bed when she was assailed. That

was why she was unable to see her attacker and was only able to distinguish between female and male from the struggle that ensued when asked by first responders as to who her assailant was.

The perpetrator also had access to the home through the alarm system code and key. Although there was an attempt to stage the scene as a burglary evidenced by Nicole's computer and jewelry being found hidden underneath the bedroom dresser, the State presented evidence there were no signs of a burglary or forced entry. What the jury did hear was that the Appellant admitted to police that he knew the code to get into Nicole's garage and knew where the "hide-a-key" was hidden. Equally important is the fact that the murder occurred at around 5:47 a.m., and that it was possible for Defendant to commit these crimes and get home by 7:00 a.m. to take the kids to school. In sum, the evidence outlined above was sufficient to justify denial of the motion for judgment of acquittal. Bush cannot overcome the evidence supporting the verdict.

Based on a review of the evidence presented in this case, a "rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Gregory v. State*, 118 So.3d 770, 785 (Fla. 2013). Thus, this Honorable Court should conclude that there was sufficient evidence to support Bush's conviction and affirm his sentence of death.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENSE MOTION FOR A *RICHARDSON* HEARING AFTER DETERMINING NO DISCOVERY VIOLATION HAD OCCURRED.

Appellant first claims the Court failed to find a discovery violation when DNA analyst Emily Martin testified during the State's direct examination that *if* her results were processed today, she would not have used the DNA results from the blue towel for inclusion or exclusion, and that the court further erred by not conducting a *Richardson*[22] hearing. However, Appellant's argument is without merit.

A reviewing court must utilize an abuse of discretion standard in considering the propriety of a trial court's determination regarding an alleged discovery violation. *See State v. Evans*, 770 So. 2d 1174, 1177–78 (Fla. 2000). A *Richardson* inquiry is necessary only when there is a discovery violation and an objection based on the alleged violation. *Richardson v. State,* 246 So. 2d 771, 774 (Fla. 1971). Appellant seems to argue that any time a witness changes his testimony a discovery violation occurs. However, this is not consistent with the law. In *Bush v. State*, 461 So. 2d 936, 937-38 (Fla. 2000), this Court held that a change in testimony generally will not support a discovery violation. While this Court did clarify this holding in *State v. Evans*, 770 So. 2d 1174, 1182 (Fla. 2000), this Court

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[22] *Richardson v. State,* 246 So. 2d 771, 774 (Fla. 1971).

made clear that it was simply clarifying that *Bush* did not apply when the State knew that a witness would materially change her testimony and did not disclose the change. Similarly, in *Scipio v. State*, 928 So. 2d 1138, 1142 n.2 (Fla. 2006), this Court stated that *Evans* had merely qualified the holding of *Bush* and added an additional qualification regarding people who were being called as defense witnesses. In fact, this Court has recognized that *Bush* still controls when the alleged change in testimony did not result in a material difference and the questions to which the witness responded were different. *State v. McFadden*, 50 So. 3d 1131, 1133-34 (Fla. 2010).

Appellant's reliance on *Scipio* is misplaced. In concluding that a discovery violation had occurred, this Court explained the "State's calculated failure to inform the defense of the important and dramatic change in testimony of the medical examiner's investigator" violated the prosecutor's duty to "not strike 'foul' blows." *Scipio v. State*, 928 So. 2d 1138,1146 (Fla. 2006). That case does not apply if there is no discovery violation which warrants conducting a *Richardson* hearing. Here, in arguing that the State had committed a discovery violation, Appellant points to little more than the fact that Ms. Martin had testified on direct that "our testing kit has changed where we're looking at more areas on the DNA molecule now and our reporting has changed quite a bit". She further testified that if it had been reported today, "she would not have used them for

inclusion or exclusion". Of greater importance, the DNA results Martin had relied on excluded Appellant as a contributor under the old as well as the new process.

Thus, as opposed to a "mistake" made by the medical examiner who clearly saw the same picture and determined the object to now be a pager rather than a pistol, Ms. Martin's testimony does not constitute a change akin to the material change in testimony in *Scipio*. Given these circumstances, the trial court did not abuse its discretion in finding that Appellant had failed to establish the State had committed a discovery violation. Moreover, both *Evans* and *Scipio* relied heavily on the continuing duty to provide updated information when the party became aware of the new information. *Scipio*, 928 So. 2d at 1141-43; *Evans*, 770 So. 2d at 1178-79. As a result, a showing that the State was aware of the change in testimony and did not timely disclose it has also been required. *Consalvo v. State*, 697 So. 2d 805, 812-13 (Fla. 1996); *Swanson v. State*, 823 So. 2d 281, 283 (Fla. 5th DCA 2002). Appellant presented nothing to show that the State was aware of a change in testimony and the counsel for the State asserted that he did not believe there was a change and that no new testing had been done.

Even if there was a discovery violation requiring a full *Richardson* hearing, while the trial court did not conduct a formal *Richardson* hearing, it did inquire from both sides. When a trial court is informed that there has been a discovery violation, it is required to conduct an inquiry into the circumstances of the

discovery violation that covers, at least, whether the violation was willful or inadvertent and trivial or substantial and whether the trial preparation or strategy of the party that did not receive the discovery was adversely affected. *Richardson v. State*, 246 So. 2d 771, 775 (Fla. 1971). Where the record shows that the trial court did receive information on these issues, the inquiry regarding the discovery violation will be considered adequate. *State v. Hall*, 509 So. 2d 1093 (Fla. 1987). Based on its discussion with the parties, the trial court concluded that the change was trivial and did not prejudice Appellant. There was no indication that the State's actions were willful, that the change was "material," or that the change "materially hindered" Appellant's trial preparation. Given these circumstances, the trial court conducted an adequate inquiry regarding the alleged discovery violation. *Hall*, 509 So. 2d at 1097.

If this Court determines that a *Richardson* hearing should have been held, any error is harmless. "In determining whether a *Richardson* violation is harmless, [we] must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense." *Pomeranz v. State*, 703 So. 2d 465 (Fla. 1997). A defendant is procedurally prejudiced if there is a reasonable probability the defendant's trial preparation or strategy would have been materially different had the violation not occurred. *Id*. The evidence shows that the defense's trial preparation or strategy would not have been different since Martin still

testified that the defendant was excluded from that profile, and when asked by the trial court how the defense was prejudiced, there was no specific answer. Appellant's argument now, that had the change in Martin's evidence been revealed before trial the defense could have hired its own analyst to test the DNA, is disingenuous. Additionally, during cross-examination, defense counsel explicitly asked Martin if the tests that were run back in 2011 and 2012 were unreliable, to which she answered in the negative. Martin further went on to testify that she would have sworn under oath to the results back then as she was doing now. The trial court correctly determined that there was no basis for a *Richardson* hearing and there is no basis for a new trial.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO INTRODUCE NICOLE'S STATEMENT AS A DYING DECLARATION.

The dying declaration exception recognizes the extraordinary nature of the dying person's ability to speak to the circumstances that placed her in that grave position, and quite possibly to identify the perpetrator and ensure that the one who commits murder is held accountable.[23] Appellant asserts that the trial court abused

[23] See § 90.804(2)(b), Fla. Stat. (requiring an unavailable declarant's reasonable belief "that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believed to be impending death or the circumstances surrounding impending death.").

its discretion in denying his request to introduce Nicole's first statement as to the whereabouts of her children as a dying declaration. However, the trial court did not abuse its discretion in admitting these statements.[24]

This Court has held that statements are admissible as dying declarations where the statements were made by a declarant who believed that his death was imminent and inevitable and concerned the cause of the declarant's death. *Williams v. State*, 967 So. 2d 735, 749 (Fla. 2007). Only statements which concern the cause of what the declarant believes is to be his or her impending death or the circumstances surrounding the impending death are admissible. No other statements are admissible under the exception. *See Sealey v. State*, 89 Fla. 439, 444, 105 So. 137, 139 (1925) (In proving dying declarations only such statements should be received as evidence as relate to what actually transpired, who were the actors, the position of persons, what was said by the parties, what were the instruments used, who used them and how, and like matters, excluding, if possible, everything except what relates to the res gestae).

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[24] A trial judge's ruling on the admissibility of evidence will not be disturbed absent a clear abuse of that discretion. *Valle v. State*, 70 So.3d 530, 546 (Fla. 2011). The court's discretion is abused if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007). The sufficiency and propriety of the predicate for a dying declaration is a mixed question of the law and fact, and a trial court's determination of the issue will not be disturbed unless clearly erroneous. *Teffeteller v. State*, 439 So. 2d 840 (Fla. 1983).

During the hearing on the defense motion in limine to determine admissibility of an exculpatory dying declaration, the State argued that the statement “I don’t know” met the three-prong test of admissibility as a dying declaration but opposed admission of “they were with their father”. (R5013-17). The State argued that the statement was merely in response to questions by first responders as to the location of her children. After seeing evidence that children lived in the home, the question was asked out of concern for their well-being. The trial court agreed, finding that Nicole’s statement that the boys were with their father neither related to the cause or circumstances of her impending death.

Appellant contends that the first statement establishes the significance of the second statement in that it shows Nicole was fully conscious and capable of memory at the time she spoke. Nevertheless, the trial testimony shows Deputy Harris was the first to respond to Nicole’s home. He stated that Nicole was injured and asking for help. Although she didn’t know who her attacker was, she always referred to her attacker as a male. Nicole was able to tell him she was shot in the head. Paramedic Michelle Grant testified that she responded to Nicole’s home and that Nicole was able to answer some questions, including that somebody shot her but did not know who. There is no argument that Nicole was answering questions appropriately. Clearly, there was ample evidence to establish that Nicole was cognizant of her situation, without introducing inadmissible hearsay evidence. Nor

is this a relevancy argument as Appellant proposes. It is a dying declaration analysis which Appellant has failed to meet.

Even if it were error, such error was harmless beyond a reasonable doubt as the excluded evidence came in through other witnesses. Likewise, the exclusion of the statement in no way inhibited Appellant's theory of defense that an unknown assailant came into the garage door as Nicole was taking the trash out to the curb. Bush's ability to argue that Nicole was awake and had the ability to see her male assailant was never precluded. This claim must be denied.

POINT IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF LAW ENFORCEMENT OFFICERS AND APPELLANT'S PROPOSED LIMITING INSTRUCTION FOR THOSE OPINIONS.

Appellant first argues that the trial court impermissibly allowed the jury to hear officers say that the locator on Appellant's phone was turned off just before the murder and turned back on just afterward; that through advanced digital manipulation the officers saw Appellant on camera reaching into the couch where the bat was concealed; and that police always first suspect the spouse. The trial court reasonably exercised its broad discretion in admitting the testimony. *Smith v. State*, 28 So. 3d 838, 869 (Fla. 2009); *Salazar v. State*, 991 So. 2d 364, 373 (Fla. 2008).

While Appellant takes issue with what the jurors heard, this Court has recognized that a jury may hear an interrogating detective's statements about a crime when they provoke a relevant response from the defendant being questioned. For example, confronting a defendant with a codefendant's statements may properly be used "as provocation" to observe a defendant's reactions. *See Jackson v. State,* 18 So.3d 1016, 1031–32 (Fla. 2009). Such statements may be heard by the jury to "give context to the interview." *McWatters v. State,* 36 So.3d 613 (Fla. 2010). When placed in "their proper context," an interrogating detective's statements to a suspect could be understood by a "rational jury" to be "techniques" used by law enforcement officers to secure confessions. *Id.* at 637 (*quoting Worden v. State,* 603 So. 2d 581, 583 (Fla. 2d DCA 1992)).

Contrary to Appellant's allegations, nothing said by Detective Tice in the instant case compares with the firm statements of opinion, assertions of guilt, and prejudicial statements made during the police interview in *Jackson v. State,* 107 So.3d 328 (Fla. 2012). In *Jackson*, this Court held:

> Indeed, after the court read the jury a standard jury instruction regarding the videotaped conversations, the jury heard the investigating officers' repeated personal opinions and proclamations of knowledge of Jackson's guilt and his veracity. The following illustrate some of the most problematic and prejudicial assertions made by the detectives:
>
> > (1) "the only question I have is: Why did you kill her"; (2) "I know you did it. You used a fire extinguisher. I know you did

> it"; (3) "No. I'm saying something that you did do and you know in your heart you did it"; (4) "There's no doubt in my mind you did it, okay? There's no doubt"; (5) "You have no explanation of how you could have come inside her other than being there raping her and then consequently she dies"; (6) "Well now we're—you're putting us—you in a position where we're not—we don't have any answers for anybody other than 100 percent without a shadow of a doubt you killed Andrea Boyer and you raped her"; and (7) "Michael, you went to the clinic. You brutally raped this girl and you hit her multiple times in the head with a fire extinguisher. You left her there bleeding, half dressed for an employee to find her....".

Jackson v. State, 107 So.3d 328, 341 (Fla. 2012)

Not everything a detective says to a defendant during a recorded interrogation is unfairly prejudicial under 90.403. Law enforcement officers use many techniques to secure confessions and the methods used here were indicative of that. *Worden v. State,* 603 So. 2d 581, 583 (Fla. 2d DCA 1992). This case is more in line with the facts in *Kines v. State*, 239 So.3d 208, 210 (Fla. 1st DCA 2018), in that Detective Tice did not repeatedly state his opinion that Appellant was guilty of murder or accuse him of lying. He did, however, point out discrepancies in Appellant's answers and warned Appellant that he knew the answers to many of the questions he was asking. On most instances, Tice was looking for clarification. The statements Appellant takes issue with were not offered for the truth of the matter asserted, but rather used by the officer to gauge Appellant's reaction to them. *McWatters v. State*, 36 So.3d 613, 638 (Fla. 2010).

Essentially, as Detective Tice is confronting Bush with this evidence, admittedly bluffing a little bit of it, the defendant's story begins to evolve in a way that is inculpatory.

Next, Appellant argues that his right to a fair trial was violated by the court's refusal to allow his proposed limiting instruction. A party seeking reversal due to a trial court denial of non-standard jury instructions bears the appellate burden of establishing "a palpable abuse of that court's discretion." *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985). To meet his burden of showing error on appeal, Appellant must show that his proposed special instruction was supported by the evidence, not adequately covered by the other instructions, and a correct statement of the law and not misleading or confusing. Appellants jury instruction[25] not only adequately addressed the issue of opinion testimony, but the trial court took the additional precaution of giving the limited instruction to the jury each time a recording was played.

Application of the harmless error test requires an examination of the entire record by the appellate court including a close examination of the permissible

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[25] The court read to the jury Florida Standard Jury Instruction 2.8, which states, "The interview may contain opinions and statements of law enforcement officers to the defendant. These opinions and statements are pertinent only to explain the reactions and responses they elicit. You are not to consider these opinions and statements by the police officer as true, but only to establish the context of the defendant's reactions and responses." (R272-73, R349-350, R846-847).

evidence on which the jury could have legitimately relied. *DiGuilio v. State,* 491 So. 2d 1129, 1135 (Fla. 1986). Accordingly, any error did not reach down into the validity of the trial to the extent that a guilty verdict could not have been obtained without assistance of the alleged error. *See Sheppard v. State*, 151 So.3d 1154, 1165–68 (Fla. 2014) (holding that admission of the murder defendant's videotaped statement did not amount to fundamental error, even though some of the detective's comments were improper statements of belief that the defendant was lying and that he was either the shooter or driver, where the admission of the videotape did not reach down into the validity of the trial itself to the extent that a guilty verdict could not have been obtained without assistance of the videotape). Here, the recorded statement—which did not contain any admission of guilt by Bush—was minor in comparison to the State's case against him. *Fitzpatrick v. State*, 900 So. 2d 495, 517 (Fla. 2005) (*quoting Jones v. State,* 748 So.2d 1012, 1022 (Fla.1999)). Given the DNA evidence linking Bush to the murder weapon and the implausibility of his explanation for the DNA evidence, there is no reasonable possibility that the recording cemented the jury's decision to convict Appellant of murder.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING A PHOTOGRAPHIC EXHIBIT.

Investigator's installed cameras in the victim's residence following the processing of the crime scene. Appellant claims the trial court abused its discretion in allowing the State to introduce two images depicting still frames obtained from the motion sensing camera. Appellant asserts that the images in question were altered in some fashion. However, the juxtaposition of the still images as depicted do not amount to an alteration or enhancement to what was originally visible. The images constitute "true representations" of the couch on both the evening of June 5, 2011 and the morning of June 6, 2011. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997).

The case relied upon by the Appellant in support of his claim addresses the admissibility of photographs or video recordings that have been somewhat altered or enhanced. Such reliance is misplaced since the still images the State introduced were unaltered. The State's forensic video specialist was able to compare the pixelation of two still images of the couch wherein the video camera captured the couch from the same frame of reference on both the evening of June 5, 2011 and the morning of June 6, 2011. The forensic video specialist noted displacement of the couch cushion where the baseball bat had been hidden. The forensic video

specialist prepared a DVD containing the two still images he used in his comparison. The DVD depicts the still image of the red couch from the evening of June 5, 2011, then quickly shifts to the still image of the red couch from the following morning. The image of the red couch taken on the evening of June 5, 2011, is clearly marked with a date and time stamp indicating the still image was obtained at 23:22:22 p.m. The image of the red couch taken on the morning of June 6, 2011, is clearly marked with a date and time stamp indicating that still image was obtained at 07:30:40 a.m.

Demonstrative exhibits to aid the jury's understanding may be utilized when relevant to the issues in the case, but only if the exhibits constitute an accurate and reasonable reproduction of the object involved. *Brown v. State*, 550 So.2d 527, 528 (Fla. 1st DCA 1989) *rev. denied,* 560 So. 2d 232 (Fla. 1990). Contrary to Appellant’s position, the immediate shift from the image obtained on the evening of June 5, 2011 to the image obtained on the morning of June 6, 2011 does not present a danger of misleading or confusing the jury into perceiving the two still images as depicting real-time movement. Accordingly, Appellant’s claim should be denied.

<u>POINT VI</u>

THE TRIAL COURT DID NOT ERR IN DENYING THE SPECIAL REQUESTED JURY INSTRUCTION ON SPOILATION OF EVIDENCE.

Appellant argues that an adverse inference instruction should have been read to the jury in relation to the “lost” undergarment the victim was wearing at the time of the murder, notably titled “Special Jury Instruction-Inference of Exculpatory Evidence-Lost Underwear”. A party seeking reversal due to a trial court denial of non-standard jury instructions bears the appellate burden of establishing "a palpable abuse of that court's discretion." *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985). To meet his burden of showing error on appeal, Appellant must show that his proposed special instruction was supported by the evidence, not adequately covered by the other instructions, and a correct statement of the law and not misleading or confusing. Appellant has not only failed to meet all the prerequisites for establishing error; he has failed to meet each of them.

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Supreme Court held that the State's failure to preserve semen samples and clothing did not violate the Due Process Clause of the Fourteenth Amendment because the defendant could not show "bad faith" on the State's part. Under *Youngblood*, bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant. *Youngblood* explained that the "presence or absence of bad faith . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 57. Moreover, under *Youngblood* and this Court's precedent, the determination of bad faith does not turn on whether law

enforcement officers followed established procedures. Instead, bad faith exists only when law enforcement officers intentionally destroy evidence they believe would exonerate a defendant. *See Youngblood*, 488 U.S. at 57.

But, the Due Process Clause requires a different result when dealing with the failure of the State to preserve evidentiary material of which no more can be said then that it could have been subjected to tests, the results of which might have exonerated the defendant. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). Evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and thus cannot form the basis of a claim of bad faith destruction of evidence. *See id*. at 57 (rejecting a due process claim based on the government's failure to preserve evidence "of which no more can be said then that it could have been subjected to tests, the results of which might have exonerated the defendant"); *Merck v. State*, 664 So. 2d 939, 942 (Fla. 1995) (holding that the defendant failed to show bad faith in a police detective's failure to preserve a pair of pants found at a crime scene, because the detective believed they did not have evidentiary value).

During the discovery process it was discovered that the victim's undergarments were never collected from the hospital and hence never tested for the presence of DNA. There were no facts in evidence to support an inference that the underwear was lost or that it contained any exculpatory evidence. In fact, the

trial testimony indicated that a sexual assault kit was administered to the victim which concluded that there was no seminal fluid present. (TT816-17, 819, 821). Appellant has not shown that victim's undergarments from the murder scene would exonerate him, or that police officers ever believed it might.

The trial court did not err when it denied Appellant's request for the special jury instruction regarding the victim's undergarments. There were no facts to support the inference that the underwear was lost and or destroyed, or that it contained any exculpatory evidence that would have exonerated the Appellant. Neither could it be argued that the absence of such an instruction would lead to the risk of jury confusion. The trial court correctly determined that there was no basis for the requested adverse-inference instruction and Appellant's claim should be denied.

POINT VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PREVENTED APPELLANT FROM MAKING BASELESS AND STACKED INFERENCES DURING CLOSING ARGUMENT.

Appellant next argues improper limitation of closing argument by counsel. The trial court did not abuse its discretion when it prevented Appellant from stating during closing argument that detectives had gone undercover to induce Appellant to apply for an insurance payout. The purpose of closing argument is to help the jury understand the issues presented in a case by applying the evidence to the

applicable law." *Goodrich v. State*, 854 So. 2d 663, 664 (Fla. 3d DCA 2003). However, a trial court has broad discretion to determine proper argument and restrict an attorney from making any comment not based on law or evidence, and an appellate court will not overturn the trial court's decision unless there is an abuse of discretion. *See King v. State*, 130 So. 3d 676, 687-88 (Fla. 2013).

Appellant's claim that the trial court improperly interfered with his right to argue inferences from the evidence is meritless. Appellant argues that he was entitled to rebut the State's theory of financial motive by arguing as part of his theory of defense that Bush did not know he was the beneficiary to Nicole's insurance policy proceeds prior to or on the date of her murder. However, Appellant's counsel sought to argue to the jury that the unknown caller who contacted him in the middle of July to tell him he should investigate Nicole's life insurance policy might have been prompted by detectives who needed a financial motive to make their case against him.

This Court grants attorneys "wide latitude to argue to the jury during closing argument." *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). Within this authority is the right to use inferences to advance a party's case. Id. However, to be reasonable, "the inference drawn from admitted or proven facts must logically flow from the facts so admitted. An illogical or unreasonable inference does not have the force of evidence" and will not be admissible. *Miller v. State*, 75 So. 2d 312,

315-16 (Fla. 1954). It is also improper for counsel to urge a jury to consider facts not in evidence. *Patrick v. State*, 104 So.3d 1046, 1065 (Fla. 2012). This Court has explained that '[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 . . . nonrecord evidence.'" *Evans v. State*, 177 So. 3d 1219, 1237 (Fla. 2015) (*quoting Ruiz*, 743 So. 2d at 4). Notably, a court will find no conclusive evidence to support a claim of guilt where a party stacks multiple inferences on top of one another to prove the crime charged did not happen. *See Graham v. State*, 748 So. 2d 1071, 1072 (Fla. 4th DCA 1999) (*citing I.F.T. v. State*, 629 So. 2d 179 (Fla. 2d DCA 1993)). Here, the trial court similarly did not abuse its discretion when it restricted Appellant from impermissibly stacking inferences to absolve himself of guilt. In this case, Appellant attempted to argue facts that were not supported by any reasonable inference from the evidence. In fact, during a recorded telephone call to the life insurance insurer, wherein Bush was attempting to make a claim on the policies following Nicole's death, he made statements reflecting his knowledge prior to Nicole's murder that he was the beneficiary on the policies.

Furthermore, Appellant's reliance on the decisions in *Jean v. State*, 27 So. 3d 784 (Fla. 3d DCA 2010), and *Hendrickson v. State*, 851 So.2d 808 (Fla. 2d DCA 2003) to support his assertion that the State's objection should not have been

sustained is misplaced. Both of those cases dealt with limitations on defense counsel's arguments on a valid theory of defense. Motive is not an element of first degree murder. *Belcher v. State*, 961 So. 2d 239, 249 (Fla. 2007) (*citing Norton v. State*, 709 So. 2d 87, 92 (Fla. 1997), *see Andres v. State*, No. SC15-1095, 2018 WL 4496567, at *13 (Fla. Sept. 20, 2018) (by attempting to argue that if the jury had questions as to Andres' motive to commit the crime, they could not find Andres guilty of the crime because there is a reasonable doubt as to whether he committed the crime, defense counsel improperly characterized motive as an element of first-degree murder).

Accordingly, the remarks were improper, the objections were properly sustained, and no abuse of discretion has been shown. Thus, the trial court did not abuse its discretion when it restricted Appellant from making and stacking these baseless inferences. Moreover, any possible error would be harmless in this case, given the strength of the evidence establishing Appellant's guilt. This Court must deny Appellant's claim.

POINT VIII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S PROPOSED PENALTY PHASE JURY INSTRUCTIONS.

The trial court has wide discretion in instructing the jury, and the decision to give or refuse to give a particular jury instruction is reviewed under the abuse of discretion standard. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997). All the

requested instructions were either adequately covered by the standard instructions, misstate the law, or were not supported by the evidence. The trial court, therefore, did not err in denying them.

A. The Sentencing "Recommendation"

Appellant argues that the reference to the term "recommend" in the presence of the jury was misleading. This Court has long recognized that the jury's penalty phase decision is advisory, and the trial judge makes the final sentencing determination. *Combs v. State,* 525 So. 2d 853, 855-58 (Fla. 1988) (rejecting a claim that the jury's role was impermissibly minimized by being advised that their role was advisory). Even under the current death penalty statute, the jury's final unanimous recommendation of death is still an "advisory" decision as the judge is free to disagree with the jury's recommendation of death and sentence a defendant to a life sentence. To establish a *Caldwell* violation, the jury must be misled "as to its role in the sentencing process in a way that allows the jury to feel less responsibility than it should for the sentencing decision." *Dugger v. Adams,* 489 U.S. 401, 407 (1989) (*quoting Darden v. Wainwright,* 477 U.S. 168, 184 n.15 (1986)).

A review of the record reveals that the trial court properly instructed the jury using the 2017 interim instructions which contained the term recommend when explaining aggravating factors. The State during its penalty phase closing referred

to the specific jury instruction as well. There was no further argument or instruction that the jury's decision was either advisory or a recommendation. *See Floyd v. State,* 850 So. 2d 383, 404 (Fla. 2002) (holding that the standard jury instruction "properly and fully apprises the jury of its role and responsibility in the penalty phase," and that the trial court's failure to instruct the jury that a judge only deviates from the jury recommendation in "rare instances" did not violate *Caldwell*).

B. The "Sympathy" And "Mercy" Instruction

Appellant asserts that precluding consideration of mercy, in the absence of a mercy instruction amounted to structural error. The standard penalty phase jury instructions proposed by the Florida Supreme Court on April 13, 2017, which included an instruction that the jury may consider "the existence of any other factors in [the defendant's] character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty," sufficiently obviated the need for a specific instruction regarding mercy or sympathy. *In re: Standard Criminal Jury Instructions in Capital Cases, Instruction* 7.11 (a), No. SCI 7-583 (Fla. April. 13, 2017); *see Downs v. Moore*, 801 So. 2d 906, 913 (Fla. 2001) (rejecting defendant's argument that the trial court should have instructed the jury that it could consider mercy during its deliberations); *Moore v. State*, 820 So. 2d 199, 210 (Fla. 2002) ("We have also held appellate

counsel is not ineffective for failing to argue that the trial court erred in refusing to give a penalty phase jury instruction that the jury could properly consider mercy during its deliberations when the court gives the standard penalty phase jury instructions and advises the jury that it can consider any other aspect of the defendant's character and any other circumstances of the offense.") This Court has rejected similar claims regarding jury instructions on the role of sympathy. *Zack v. State*, 753 So. 2d 9, 23–24 (Fla. 2000); *Hunter v. State*, 660 So. 2d 244, 253 (Fla. 1995). As such, the jury instructions given were not improper.

C. Burden Shifting Regarding Sentencing

Appellant next claims that Florida's capital sentencing statute and jury instructions are unconstitutional because they shift the burden of proof as to the weighing of aggravation and mitigation. Similar claims have consistently been rejected by this Court. *See Lebron v. State,* 982 So. 2d 649, 666 (Fla. 2008) (penalty-phase instructions do not improperly shift burden of proof to the defendant); *Barnhill v. State,* 971 So. 2d 106, 117 (Fla. 2007) (Florida's death penalty statute and jury instructions do not unconstitutionally shift the burden of proof); *Reynolds v. State,* 934 So. 2d 1128, 1151 (Fla. 2006) (rejecting claim that capital sentencing statute and instruction unconstitutionally place a higher burden on the defendant to establish that life is the appropriate penalty than is placed on the State to establish that death is appropriate). This Court has previously rejected

the same challenges to the death penalty statute and jury instructions. Appellant's claim for relief on this issue should also denied.

POINT IX

APPELLANT HAS FAILED TO ESTABLISH FUNDAMENTAL ERROR AFFECTED THE PENALTY PHASE JURY INSTRUCTIONS.

Appellant alleges that lack of clarity in the jury instructions amounts to fundamental error. However, this argument has not been preserved for appellate review. Even if Appellant's argument is considered, no relief is warranted. The jury herein was properly instructed with the current instructions approved by this Court. The jury instructions were not confusing, contradictory, or misleading. The use of the word "reasonably" did not perplex jurors to the extent they could not determine what was or was not a mitigating factor. At the end of the penalty phase, the jury found that 24 of the 34 mitigating circumstances presented by Appellant had been established by the greater weight of the evidence. Nor was the jury confused as to their role in determining mitigation. No reasonable justification for reconsideration of this issue has been offered. Appellant's claim for relief on this issue should also denied.

POINT X

THE STATE'S CLOSING ARGUMENT DOES NOT COMPEL A NEW PENALTY PHASE TRIAL.

Appellant contends that he was denied a fair penalty phase proceeding based on various comments that the prosecutor made during closing arguments in the penalty phase. Bush characterizes the comment "sympathy plays no part in" in the jury's weighing process as an incorrect statement of the law considering changes to the jury instruction; he accuses the prosecutor of improper argument that played on the jury's emotions when commenting "not fair to you"; he alleges that "who should know better the pain of being the victim" taken with "what about Nicole" improperly characterize the offered mitigating evidence as an aggravating factor; and that "voting for death is the hard, courageous choice" improperly suggested that voting for life was the wrong choice. The arguments about which Bush complains were not improper at all -- they were factual arguments based squarely on the evidence.

This Court reviews trial court rulings regarding the propriety of comments made during closing argument for an abuse of discretion. See *Salazar v. State*, 991 So. 2d 364, 377 (Fla. 2008). When no objection to a comment challenged on appeal was made below, or no motion for mistrial was made following a sustained objection, this Court reviews the issue for fundamental error. *Evans v. State*, 177 So. 3d 1219, 1234 (Fla. 2015). Accordingly, the standard of review this Court applies will vary, as several Appellant's objections were overruled, and some arguments were not properly preserved. In any event, the trial court did not abuse

its discretion, and even if the trial court overruled an improper comment, it was harmless error and does not warrant a new trial.

Appellant accuses the prosecutor of endeavoring to "denigrate" defense counsel's mitigation presentation by means of remarking that "sympathy plays no part in" the jury's weighing process in conjunction with the phrase "not fair to you". To determine whether a prosecutor has engaged in improper argument, it is necessary to evaluate the actions of the prosecutor in context rather than focus on the challenged statement in isolation. *See State v. Jones*, 867 So. 2d 398, 400 (Fla. 2004). The following comments were made by the prosecutor during penalty phase closing arguments:

> MR. JOHNSON: Sympathy plays no part in this. And it's true. The families in this particular case are victims, too. There is no question about that, but whose fault is that? Whose fault is that? It's the defendant's fault. He's the one that's placed everybody
>
> MS. PEOPLES: Objection, your Honor.
>
> MR. JOHNSON: -- in this position.
> (Simultaneous speaking.)
>
> THE COURT: Overruled.
>
> MR. JOHNSON: It is up to you to decide whether or not that is a mitigating factor and, if it is, how much weight to give it.
>
> And here's what's going on with that argument because what happens -- what invariably happens when you're thinking about the family that's damaged by his bad choices, what begins to happen in the jury

> room is you begin to think about your decision, about what that's -- how that's going to impact other people.
>
> And, again, sympathy, as the judge says, cannot be a part of this process.
>
> And what happens is it shifts the responsibility of the consequences of his decision from his shoulders to you.
>
> MR. JOHNSON: It shifts it to you, and that's not fair to you.
>
> None of you asked to be here. You received a summons from this Court to come for jury selection.
>
> And you sat through two days of lawyers asking you questions about your life to decide if you're appropriate for this jury.
>
> And you didn't ask to have to come listen to evidence of this crime and to sit here for days and weeks to listen to the evidence in this case. You didn't have a choice. So it's not fair to you to shift that burden to you.

(R7588-89)

Contextually, the statements regarding sympathy were a proper basis for argument as discussed in Point VIII of the brief. Furthermore, the State was merely explaining the juror's role in weighing the aggravators and mitigators in conjunction with the "not fair to you" statement. The prosecutor's comment in this case did not improperly express his personal belief as to Appellant's guilt, did not improperly ridicule the theory of defense, and did not engage in vitriolic or pejorative argument toward defense counsel. This is not a case like *Ruiz v. State*, 743 So. 2d 1, 5–6 (Fla. 1999), where the prosecutor's argument was improper

when she said “[t]here's no way, no stretch of the imagination because let me tell you one thing, if [the defendant] were Pinocchio, his nose would be so big none of us would be able to fit in this courtroom” (emphasis omitted); or *Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997) where the prosecutor references to defense counsel's conduct as “cowardly” and “despicable” and to the defendant as “a brutal rapist and conscienceless murderer.” Taken in context these were hardly egregious comments. These are not the sort of pervasive comments that compromise the integrity of the trial. Accordingly, the remarks were proper, the objections were properly overruled, and no abuse of discretion has been shown.

Next, Appellant claims that the prosecutor made improper comments in which he equated the mitigating circumstances with an aggravating circumstance. The prosecutor stated:

> MR. JOHNSON: You heard evidence for mitigating circumstances that the defendant was attacked as a teenager, which asks -- you should ask the question, begs the question, who should know better the pain of being the victim of senseless violence than –
>
> MS. PEOPLES: Objection, your Honor. Arguing that a mitigator is an aggravator.
>
> THE COURT: Overruled.
>
> MR. JOHNSON: Who should know better? It stands to reason that the defendant would have learned that the pain that he felt from being the victim of violence would be the same pain that someone would feel as a result of his intentional act of violence.

> Again, something for you to consider when you're weighing the weight of that mitigating circumstance. He displayed kindness to others and cared for animals.
>
> What about Nicole? How does his care for animals compare to his concern for human life?

(R7594-95)

It is improper argument to characterize the offered mitigating evidence as an aggravating factor. *See Zack v. State*, 911 So. 2d 1190, 1208 (Fla. 2005) (''The only matters that may be considered in aggravation are those set out in the death penalty statute.''). However, this Court has rejected similar claims that comments like these in the instant case are improper. *Ford v. State*, 802 So. 2d 1121, 1131–32 & n. 18 (Fla. 2001) (finding no abuse of discretion where prosecutor said testimony of defendant's family and friends ''makes the crime itself that he committed even worse''); *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997) (finding no abuse of discretion where prosecutor said of defendant's mitigation, ''[I]t may sound like mitigation, but I would submit to you that it's the most aggravating factor of all''). Appellant is not entitled to relief on this claim.

Appellant also argues that the prosecutor committed fundamental error when commenting that "voting for death is the hard, courageous choice". In determining whether fundamental error has occurred, the totality of the circumstances approach applies. *See Card v. State*, 803 So. 2d 613, 622 (Fla. 2001). The prosecutor's

comments, taken in the totality of the argument, were within the permissible bounds of advocacy. The prosecutor made the following comments:

> MR. JOHNSON: I'm asking each of you to do the hard thing, but the right thing, to have the courage to return a verdict that, yes, there are aggravating factors in this case that have been proven beyond a reasonable doubt; that, yes, those aggravating factors are sufficient to warrant imposition of the death penalty; that, yes, those aggravating factors outweigh the mitigating factors; and that, yes, the death penalty should be imposed in this case.

(R7607-08)

This Court has found related comments where the jury was asked to follow the law and decide based on the evidence to be proper argument. In *Bell v. State*, 108 So.3d 639, 649 (Fla. 2013), during the guilt phase closing argument, this Court held that the prosecutorial comment "if you feel the evidence has proved the charges beyond and to exclusion of a reasonable doubt[, then] follow the law and ... hold the defendant responsible for the crimes he committed and ... reflect so in your verdict of guilty as charged" was not error because the "the prosecutor was simply advising the jury to follow the law" (*quoting Rodriguez v. State*, 919 So. 2d 1252, 1283 (Fla. 2005)). Analogous comments are also not error in the penalty phase. For example, in *Davis v. State*, 136 So.3d 1169, 1207-08 (Fla. 2014), it was not improper in the penalty phase for the prosecutor to tell the jury that it had a "responsibility" to recommend the death penalty as long as the prosecutor informed the jury that its recommendation should be "based upon all the evidence

in this case." It was not improper for the prosecutor to argue that the jury will "determine whether this defendant will be held fully accountable for the crime that he's committed" or that "[j]ustice demands that [the jury] hold this defendant fully accountable for this murder." *Id.*

Conversely, this Court has reasoned that it is improper for the State to tell jurors that "the only proper recommendation to this court is a recommendation of death" or that the jurors have a legal duty to recommend the "appropriate punishment" of death. *See Melton v. State*, 949 So. 2d 994, 1019 (Fla. 2006). The prosecutor here did not extort the jury for a conviction or a particular sentence, rather, he merely asked the jury to follow the law and weigh the evidence. There is nothing about this prosecutorial comment that deprives the defendant of a fair and impartial trial and it is not so harmful or fundamentally tainted as to require a new penalty phase. Appellant is not entitled to relief on this claim.

POINT XI

VICTIM IMPACT TESTIMONY IS ALLOWED BY LAW AND STATUTE. THE TESTIMONY WAS NOT UNDULY PREJUDICIAL AND WAS WELL WITHIN THE BOUNDS ALLOWED. ERROR, IF ANY, WAS HARMLESS.

A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. *Kalisz v. State*, 124 So.3d 185, 211 (Fla. 2013), *cert. denied*, 134 S. Ct. 1547 (2014); *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008). As stated in *Jackson v. State,* 127 So.3d 447, 473 (Fla. 2013), permissible victim

impact statements do “not fall within one of the proscribed categories of victim impact evidence delineated in section 921.141(7). These proscribed categories are characterizations and opinions concerning (1) the crime, (2) the defendant, or (3) the appropriate sentence.” Appellant has not established, and cannot establish, an abuse of discretion in the trial court's admission of the victim impact evidence.

“Evidence of a family member's grief and suffering due to the loss of the victim is evidence of ‘the resultant loss to the community's members by the victim's death’ permitted by section 921.141(7),[26] and the admission of such evidence is consistent with the Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808 (1991).” Victim impact evidence “relating to the victim’s personal characteristics and the emotional impact of the murder on the victim’s family” is entirely proper. *Id. Payne* does not preclude the State from depicting to the jury the “life” of the human being murdered by the defendant. *Id.* at 822.

In the instant case, the trial court acted within its discretion in allowing Nicole’s mother, sister and best friend to testify regarding the resultant loss her murder had on those that knew her. *See Huggins v. State*, 889 So. 2d 743, 765 (Fla.

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[26] Section 921.141(7), Florida Statutes (2006), provides that in a capital case, once the prosecution has provided evidence of one or more aggravating factors, the prosecution may present victim impact evidence and that: Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

2004) (upholding the trial court's admission of victim impact evidence presented during the penalty phase from three witnesses -- the victim's husband, mother, and best friend -- regarding their relationship with the victim and the loss they suffered due to her murder). The evidence presented in this case was limited to the type of evidence specified in section 921.141(7), Florida Statutes. Here, the proper balance was struck between the victim's family members' right to be heard and to assist the jury in understanding the loss of Nicole, and Appellant's right to a fair trial.

This Court spells out the purpose of victim impact statements in *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008), stating, "[v]ictim impact evidence is designed to show 'each victim's uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be,'" *quoting Payne v. Tennessee*, 501 U.S. 808 (1991). The victim impact evidence presented in this case was not unnecessarily emotional or inflammatory. None of the three statements made any mention of Appellant. None asked for a specific sentence or punishment. None was overly emotional, and none made mention of revenge or retribution. None of the statements discussed the crime. Each statement merely sought to express the specific loss that individual felt.

Appellant also makes the rather enigmatic argument that the prosecutor improperly suggested that what the jurors heard from the victim's family and friends should be considered foremost over the weighing process. As the Court

stated in *Payne*, "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Payne*, 501 U.S. at 825 (*quoting Booth v. Maryland*, 482 U.S. 496 (1987)). It strains credulity at best to suggest the prosecutor argued anything improper in the face of his direct reference to the fact that the victim was "an actual human being" who had family and friends. Considering the facts of this case, it is clear beyond a reasonable doubt that the complained-of argument did not contribute to the jury's recommendation of a sentence of death. The facts of this murder speak for themselves, and no other sentence was appropriate, and no other advisory sentence would have been returned, regardless of what the prosecutor said in closing argument. There is no basis for relief.

Even if this Court were to find any error in the admission of the victim impact evidence, in combination with the statements made by the prosecutor, given the strong case in aggravation and the relatively weak case for mitigation, the error is harmless beyond a reasonable doubt. *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998). There is no reasonable possibility that the jurors advised imposition of the death penalty based on the complained-of comments. Neither did the judge impose the death penalty because of the complained-of victim impact testimony. Rather,

he imposed it because Bush met the statutory criteria. This Court should affirm the trial court's discretionary ruling.

POINT XII:

APPELLANT'S CLAIMS DO NOT CONSTITUTE CUMULATIVE ERROR.

Where a party claims he received an unfair trial because of multiple errors, even if individually harmless, a court considers whether their cumulative effect denied the party a fair trial. See *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009). However, if the reviewing court determines the claims are "individually either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *Id*. (*citing Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008)). Individually and cumulatively, Appellant's claims have no merit. None of Appellant's claims have been shown to be meritorious and without any substantive claim, this Court must affirm the lower court and jury's decision.

POINT XIII

FLORIDA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL.

Appellant argues that Florida's capital-sentencing scheme fails to suitably narrow the class of eligible persons. This Court has repeatedly rejected arguments that the statute creates a presumption of death based on a single aggravator; that it fails to narrow the persons eligible for the death sentence because of the number of statutory aggravators; and that it is applied in a vague and inconsistent manner. *See*

Miller v. State, 926 So. 2d 1243, 1259-60 (Fla. 2006) (rejecting the argument that "Florida's capital sentencing statute fails to provide a necessary standard for determining that aggravating circumstances 'outweigh' mitigating factors, does not define 'sufficient aggravating circumstances,' and does not sufficiently define each of the aggravating circumstances").

Capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision. *Tuilaepa v. California,* 512 U.S. 967, 971 (1994). In respect to the first, the "eligibility decision," precedent imposes what is commonly known as the "narrowing" requirement. The legislature may satisfy the "narrowing function ... in either of ... two ways." First, "[t]he legislature may itself *narrow the definition of capital offenses*...." *Ibid*. (emphasis added). Second, "the legislature may more broadly define capital offenses," but set forth by statute "aggravating circumstances" which will permit the "jury ... at the penalty phase" to make "findings" that will narrow the legislature's broad definition of the capital offense. *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018).

In Florida a defendant's eligibility for capital punishment is statutorily based on a factual and legal determination that there are "sufficient aggravating circumstances." This is a weighing, not a counting, process. The death penalty is appropriate if one aggravator is found and outweighs the mitigation offered. *See*

Rodgers v. State, 948 So. 2d 655, 670 (Fla. 2006) (finding a death sentence proportionate when the single aggravator is a prior second-degree murder conviction). Florida's death penalty system meets the Constitution's narrowing requirement. The trial court applied the correct rule of law in making its findings, assigning weight, and weighing the factors.

POINT XIV

APPELLANT'S SENTENCE IS PROPORTIONATE.

The death sentence is proportional in this case. Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. *Martin v. State*, 151 So.3d 1184, 1197 (Fla. 2014). This Court determines whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence. *Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003).

In analyzing proportionality, this Court's function is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge. *Phillips v. State*, 39 So.3d 296, 305 (Fla. 2010). Instead, in deciding whether death is a proportionate penalty, this Court considers the totality of the circumstances in a case and compares the case with other capital cases. *Id*. This analysis "is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). Rather, this

entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998). A comparison of this crime and its circumstances to other cases reveals that the sentence of death is warranted here.

Five aggravating circumstances, HAC, CCP, pecuniary gain, committed during the commission of burglary, and prior violent felony, were proven beyond all reasonable doubt and each was accorded great weight. The trial court additionally found twenty-four non-statutory mitigating factors ranging from moderate weight to less than slight weight: 1) subjected to chronic poverty; 2) experienced chaotic frequent changes of childhood homes and schools; 3) raised and witnessed ongoing violence in drug and crime infested neighborhoods; 4) suffered physical abuse, emotional deprivation and emotional abuse; 5) Bush's mother prostituted herself to provide shelter/food; 6) subjected to domestic violence and witnessed multiple events of domestic violence against his mother; 7) saw alcoholism first-hand; 8) suffered major trauma by being sexually molested by a juvenile; 9) was known as an outcast as a child and a teen because of his clothing and "techy/nerdy" personality; 10) worked as a teenager to support his mother and brother; 11) adults, agencies, school system, and doctors failed to intervene; 12) Bush's family never owned a car; 13) missed many school days and received poor grades in elementary school and high school, but graduated from high school and

obtained I.T. certifications ; 14) abandoned by his father, did not have a male role model; however, Bush was present in his children's lives; 15) overcame a chaotic childhood and dysfunctional family life and made achievements in his own life; provided emotional and financial support for his children, achieved good employment and education; 16) consistent periods of employment since high school; 17) strong work ethic, useful occupation and strong skill set in the area of technology; 18) Bush was crushed when his mother died and that he was not there for her; 19) Bush's aunt's death was difficult as she was his second mother; 20) Bush's family loves him; he has the capacity to form loving relationships with family and friends and has the support of his family; 21) provided mature advice to friends and family; 22) helpful to others by providing advice to live lawful lives and respect parents; 23) good qualities that include humor and caring, a good listener, able to provide sound advice; and cares about animals; 24) has a special bond with his children, loves his children and adopted children as equals; 25) volunteered in his son's classroom; 26) could continue to have a relationship with his children with a life sentence without the possibility of parole; 27) demonstrated good behavior in jail for the six years prior to his conviction; had one disciplinary report; was a non-violent and compliant inmate; had no problems with female staff; would likely function well in a controlled environment and adjust well to prison life; 28) positive influence on county inmates; 29) participated in religious

services in jail; 30) demonstrated appropriate courtroom behavior; 31) A life sentence without parole in a prison setting would protect society from Bush ; 32) likely will not engage in criminal behavior in a structured, controlled prison setting; 33) potential for rehabilitation; and 34) amenable to a productive life in prison.

Though the trial court found a substantial quantity of non-statutory mitigation, the quality of Bush' mitigation, in light of the relatively slight weight the trial court afforded such, is far outweighed by the weighty aggravation involved in this case. HAC is one of the most serious aggravators in the statutory sentencing scheme. *See, e.g., Douglas v. State*, 878 So. 2d 1246, 1262 (Fla. 2004). In *Kalisz v. State*, 124 So.3d 185, 213 (Fla. 2013) this Court noted that "the CCP aggravator is one of the most serious aggravators provided by the statutory scheme," (citing *Wright v. State*, 19 So. 3d 277, 304 (Fla. 2009)). Similarly, the prior violent felony aggravator is considered one of the weightiest aggravators. *Kalisz*, 124 So.3d 185, 213 (Fla. 2013); *Silvia v. State*, 60 So.3d 959, 974 (Fla. 2011); *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002).

This Court has consistently found a death sentence proportionate in comparable cases. A qualitative review of the totality of the circumstances in this case and a comparison between this case and other capital cases reveals that the death penalty here is proportionate. *Simpson v. State*, 3 So.3d 1135, 1148 (Fla.

2009) (upheld death sentence in a double ax murder of sleeping victims where the trial court found the following five aggravating circumstances as to both murders: (1) previously convicted of a felony and was on felony probation (stipulated to); (2) previously convicted of a felony involving the use or threat of violence to the person; (3) committed while engaged in the commission of a burglary; (4) HAC; and (5) CCP, "the trial court found no statutory mitigation as to either murder, but found several nonstatutory mitigating circumstances as to both murders ranging from assisting law enforcement in other cases to alcoholism in the family to suicide attempts."); *Beasley v. State*, 774 So. 2d 649, 674 (Fla. 2000) (upholding a sentence of death where the defendant murdered the victim by bludgeoning her in the head with a hammer and the trial court concluded "[t]he mitigating factors, while lengthy, when weighed in their totality, [do] not outweigh the aggravating circumstances. The aggravating circumstances far outweigh the mitigating circumstances presented."). The aggravating circumstances proven by the State clearly establish that the death penalty is appropriate, and the State asks this Court to affirm the sentence of death because it is proportionate.

CONCLUSION

Bush's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Nancy Ryan**,** Assistant Public Defender, ryan.nancy@pd7.org, Raymond M. Warren, Assistant Public Defender, warren.ray@pd7.org, and perkins.lorraine@pd7.org, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 on this 2nd day of November, 2018.

s/DORIS MEACHAM
OF COUNSEL

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

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ASSISTANT ATTORNEY GENERAL