IN THE SUPREME COURT OF FLORIDA

ALWIN C. TUMBLIN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-2111
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For St. Lucie County
[Criminal Division].

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TABLE OF CONTENTS

CONTENTS **PAGE**

AUTHORITIES CITED

FLORIDA STATUTES

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA RULES OF APPELLATE PROCEDURE

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

An indictment charged Alwin C. Tumblin, appellant, and his co-defendant, Anthony Mayes, with first degree murder and armed robbery. R1 1-3. (Appellant was also charged with possession of a firearm by convicted felon, but that offense was severed and eventually nolle prossed. R27 4006.) Mayes pled guilty to the lesser included offenses of second degree murder and attempted robbery, and he agreed to testify against appellant. T80 4652. Appellant proceeded to jury trial.

Appellant's first trial ended in mistrial because of a state discovery violation. T44 418; T56 1952. At his second trial, a jury convicted him of first degree murder and armed robbery, R15 2254-55, and recommended a death sentence by a 12-0 vote. R16 2324. The court entered judgment and sentence, including a death sentence for the murder. R27 3996-4001; R28 4007-56. He appeals.

The victim, Jimmy Johns, owned Jimmy's Auto Clinic in Ft. Pierce. T37 3808. He employed Patricia Sanders (his stepdaughter), and two mechanics. T73 3809. On May 24, 2004, Sanders and the mechanics went to lunch, leaving Johns alone at the shop. T73 3811-12. When the mechanics returned shortly before one, they found Johns's body in a service bay. T73 3841-43. He had been shot in the head at close–but not contact–range. T81 4864-66, 4870.

Elizabeth Hobson, who worked across the street, heard a shot at 12:50 and saw Johns lying on the floor of his garage. T73 3911-12. Two men left the shop;

the younger man[1] had a white or yellow towel in his hand; he looked at Hobson, and ran into the neighborhood. T73 3912-13, 3915-16. A minute later the other man got into a yellow car that looked like a retired taxicab. T73 3913. Hobson had her manager call 911. T73 3914.

Susan Ooley saw a yellow taxicab-like car parked near the shop in an area where cars don't usually park. T73 3896. The yellow car left, and Ooley saw a man running away. T73 3896. The man who ran away was short, stocky, and wearing a plaid button-up shirt. T73 3897.

Jason Vega drove past Johns's shop and saw police out front. T73 3918. He stopped and asked what happened. T73 3918. Officers told him Johns had been killed and they were looking for a yellow taxicab-like car. T73 3918.

Vega drove around the area and saw a yellow Buick that he thought fit the description. T73 3919. He called 911 and reported the tag number. T73 3920. A police helicopter came overhead, and Vega left the area. T73 3928.

The helicopter pilot, Wade Hatcher, also saw a yellow taxicab-like car; but it was parked behind a house on 14th Street, and he dispatched officers to that location. T73 3936. When officers stopped the yellow Buick that Vega was following, Hatcher returned to 14th Street. T73 3936.

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[1] Co-defendant Mayes was 23 at the time of the offense; appellant was 27. T80 4651; T86 5344; R27 3977.

Officer Dwight Toombs stopped the yellow Buick. T74 3949-50. There were three people in the car. T74 3950-51. Rhonda Tumblin (appellant's half-sister, hereafter referred to as "Rhonda") was driving. T74 3950-51. Officer Toombs got Rhonda's home address–it was on 14th Street–and he let them go. T74 3951. But a short time later, Officer Toombs heard the same address over the radio–this was the address at which Hatcher had seen the other yellow taxicab-like car. T74 3954.

Ten to fifteen minutes later, Officer Toombs saw Rhonda turn into an Amoco station, and he stopped the car again. T74 3955. The other two people in the car were appellant and Theresa York. T77 4287. The three were taken to the police department. T77 4288.

Ooley was taken to the Amoco station and asked if she could identify the car Rhonda was driving; she said it was *not* the car she had seen leave the shop. T73 3898. Next she was taken to Rhonda's house on 14th Street, where she identified the car parked behind the house as the yellow taxicab-like car that she had seen leave the shop. T73 3903-04.

Officer Sally Hurley was the officer initially dispatched to Rhonda's house on 14th Street. T76 4159-60. The yellow taxicab-like car was in the backyard. T76 4160. Officer Hurley touched the hood: it was hotter than the rest of the car, suggesting that it had been driven recently. T76 4161.

Officer Kathleen Murphy arrived at about the same time as Hurley. T76 4166. She put up crime scene tape and watched the house while officers obtained a search warrant. T76 4168-69. Witnesses told her that a black female named Nickie had just jumped out of the window and fled. T76 4169. Murphy reported this to 911. T76 4169.

In the back bedroom of the house, officers found a .32 caliber revolver under some clothes on a chair; and under a pillow on the bed were four Remington-Peters bullets. T74 3984-85; T76 4268-69, 4271. The firearms examiner testified that the bullet retrieved from Johns's body was fired from the revolver found in Rhonda's house, and that the empty Remington-Peters cartridge found at the garage was ejected from it. T74 3998-4008, 4014-15, 4025; T81 4855-58.[2] He also said that there was a problem with the revolver: the cylinder does not stay closed, and so the examiner, when he test-fired the gun, held the cylinder in place to make sure that the chamber was lined up. T81 4842, 4860.

The black female seen fleeing from Rhonda's house was Jean Nicole Ruth and she testified for the State. T76 4171. Known as "Nickie," she lived next door to Rhonda. T76 4173. At the time of her testimony, she had been convicted of one felony and one crime of dishonesty, and she was on probation. T76 4172-73.

[2] There was also an unspent Remington Peters bullet found at the scene. T74 4008; T77 4289.

According to Ruth, appellant's girlfriend is Theresa York; and appellant and York used the yellow taxicab-like car (a Grand Marquis) that was parked behind Rhonda's house. T76 4175-76. Ruth owned the yellow Buick; this was the car that Rhonda, appellant, and York were stopped in. T76 4175.

A few days before Johns was killed, Ruth heard appellant (known as "Man") tell York on the phone to bring some clothes and his "piece," i.e., gun. T76 4178.

On the morning of May 24, 2004, Ruth went next door to Rhonda's house, and Rhonda, Mayes (known as "Head"), and appellant were there. T76 4176. Ruth and Rhonda smoked marijuana; Mayes also may have. T76 4177.

Appellant and York left in the Grand Marquis, and they returned with food. T76 4179. At some point, appellant and Mayes went to the back of the house, and then left in the Grand Marquis. T76 4180-81.

Appellant returned to the house alone. T76 4181. He drove up quickly, left the car running, and told York to park it; she parked the car behind the house. T76 4182. Appellant was sweating and acted like something was wrong. T76 4182. He said, "The cracker dead and Head ran." T76 4183. (Later, the prosecutor changed the quote and asked Ruth, "Do you see the person in the courtroom who said, 'I shot the cracker and Head ran'?" T76 4194. She answered, "Yes," and pointed to appellant. T76 4194.)

Ruth testified that when appellant went down the hall, it sounded like he dropped something. T76 4183. And when he came back, he was "just looking crazy, pretty much." T76 4184. He had money as well as papers and envelopes.[3] T76 4185-86. York and Rhonda opened the envelopes, ripped them up, and took them outside. T76 4185-86. Ruth thought Rhonda burned the checks in a pan that she had taken outside with her. T76 4228-29, 4234.

Rhonda asked Ruth if she could use the yellow Buick and Ruth agreed. T76 4187. Appellant said that he needed the car to look for Mayes. T76 4191. While Ruth was in the bathroom, Rhonda, York, and appellant left. T76 4191.

Ruth saw the police at the house later; because she had a warrant for her arrest, she fled through the side window. T76 4193.

Ruth testified that she violated her probation. T76 4195. She said that she had been upset at the prospect of jail for this violation, but the net result of it was an extension of probation for a few months. T76 4195. She acknowledged that when she gave a statement at the county jail on July 7, 2004, a detective said he would help her if she gave him the information that he needed. T76 4198.

[3] Sanders testified that Johns usually had four to five hundred dollars in his pocket. T73 3809. Sanders also testified that she had set out the mail for pickup; it was put on a clip in the office. She later learned that this mail–mostly bills–had not been delivered. T73 3810-11.

On cross-examination, Ruth revealed that she had "just got shot," needed her medicine, and was hurting. T76 4201. Defense counsel approached the bench and expressed surprise at this testimony (at T76 4201):

> MR. AKINS [defense counsel]: What is this?
> MS. PARK [prosecutor]: She was shot.
> MR. AKINS: So was somebody going to tell somebody about it?
> MS. PARK: Well, it had nothing to do with this.
> MR. AKINS: Your Honor, I move for mistrial.

The jury was excused, and the trial court questioned Ruth. T76 4201. She said she had been taking hydrocodone and needed another dose because she was in pain. T76 4202. She left the courtroom to take the hydrocodone. T76 4208. As discussed more fully in Point III, the trial court eventually denied appellant's motion for mistrial. T76 4218.

Rhonda testified for the state. She had twice been convicted of a felony. T78 4462. She said appellant and York spent the night before the murder at her house and that they slept in the bedroom in which the gun and bullets were later found. T78 4494; T76 4268-69, 4271. Rhonda said she had previously seen appellant with this gun on May 8, 2004, at a party for her father. T79 4627. She acknowledged that she told Detective Coleman on July 2, 2004, that she had never seen the gun before. T79 4634.

On the morning of the offense, Ruth and Mayes came over. T78 4467. Rhonda, Ruth, and Mayes smoked marijuana. T78 4474. At one point, York made a phone call and appellant said she was talking too much. T78 4481.

York and appellant left for about 45 minutes. T78 4487. Rhonda went down the street to see a Haitian friend who gave her $100 for her daughter's eighth grade graduation dance. T78 4487.

Appellant and Mayes left in the Grand Marquis (the taxicab-like car). T78 4487. Meanwhile, Rhonda went to a liquor store to cash child support checks. T78 4490-91. When she returned, she saw York had envelopes. T78 4493. York got a pan and went outside. T78 4494. Rhonda identified in a photograph the pan that York went outside with; the pan had burnt papers in it. T78 4506.

Rhonda left in Ruth's car to go to her aunt's house. T78 4495. She first stopped at a store to get transmission fluid; after that, she picked up appellant and York who were walking on Orange Avenue. T78 4495.[4]

In the car, appellant was nervous and jittery; there were numerous police officers around and a helicopter overhead. T78 4498, 4500. According to Rhonda, appellant said, "The cracker must be dead." T78 4500. At one point, Rhonda started to stop at a gas station and appellant hit the back of her seat and said, "Don't stop. Keep going. Why you stopping?" T79 4605-06.

[4] In this regard, Rhonda's testimony differs from Ruth's. Ruth said appellant, Rhonda, and York left in her car while she was in the bathroom. T76 4191.

Rhonda testified that she was stopped by the police the first time at her aunt's house. T78 4499. She was stopped the second time at the gas station; appellant and York were taken into custody. T78 4500.

Rhonda was taken to the police department and she spoke to detectives. T78 4503. When she was interviewed, she didn't tell the detectives that appellant was her brother; she referred to appellant by his nickname and to York as "that girl." T78 4506-07, 4528. She told the police that she didn't know the pregnant woman who ran out of her house (though she knew it was Ruth); and she told the police that she didn't know whose car was parked behind her house. T79 4591, 4584. She said that she was less than forthcoming because she was scared. T78 4506-07.

Rhonda testified that she had approximately $270 with her when she was stopped by police. T79 4578. She said that she received $100 from her Haitian friend and $174 from child support checks, and said she did not try to hide the fact that she had money. T79 4578, 4607. She acknowledged that she had received an eviction notice the day of the robbery and that the next day she paid the rent (with, she said, her mother's help). T78 4464-65; T79 4576.

Anthony Mayes testified that he was 23 when Johns was killed. T80 4651. He is a convicted felon. T80 4651-52. He was arrested July 9, 2004, and charged with first degree murder and armed robbery of Johns. He agreed to plead guilty to

second degree murder and attempted robbery, testify truthfully, and receive a maximum sentence of 20 years in state prison. T80 4652.

On May 24, 2004, Mayes went to Rhonda's house. Mayes was living on the street at the time, and sometimes he slept in a car in front of Rhonda's house. T80 4654. Appellant and York also stayed at Rhonda's from time to time. T80 4654. Appellant and York both drove the Grand Marquis, though York drove it more than appellant. T80 4655-56.

Mayes, appellant, York, Rhonda, and Ruth were at the house. T80 4657. Appellant asked York to call Walmart about bullets, and she made a call. T80 4657. Appellant and York left. T80 4658.

When appellant returned, he spoke to Mayes at the back of the house, "boosting" him to do the robbery, which they had discussed before. T80 4659. Mayes said he agreed to be the lookout and he was to get $300. T80 4660. Appellant didn't tell him who would be robbed or where it would occur. *Id*.

Appellant and Mayes left the house between 11 and 12. T80 4660. Appellant was wearing a black T-shirt with a white T-shirt underneath it; blue jean shorts with black sneakers; and a black baseball cap. T80 4660. Mayes was wearing a plaid, button-down shirt with black shorts. T80 4661.

Appellant drove the Grand Marquis; he had a gun and he put it under the seat. T80 4661. Mayes testified that appellant said, "he was gonna kill everybody that exists as if whoever is in there." T80 4662.

Appellant pulled up to the auto shop, and they both went inside. T80 4662-63. Neither had a mask. T80 4662. Johns was on the phone. T80 4663. Appellant asked about a car part, and then he asked Johns where the money was. T80 4663-65. Johns took the money out of his pocket and appellant took it. T80 4665.

After taking the money, appellant reached into his back pocket and took out the gun. T80 4665. Mayes said appellant put the gun, which was wrapped in a white rag, to Johns's head, said, "what you think about this?" and then shot him, and Johns fell bleeding. T80 4666-67. As Mayes ran away he saw appellant heading toward the office. T80 4666.

On cross-examination, Mayes testified that he was charged with first degree murder and armed robbery and that he understood that he could be sentenced to life imprisonment on either offense. T80 4671-72. He was also charged in a separate case with failure to register as a sex offender for which he could receive five years in prison. T80 3671-72. He understood that if he testified differently than the prosecutor expected, the plea agreement would be rescinded. T80 4675.

Mayes admitted that his trial testimony about the rag around the gun was the first time he had mentioned this: he did not mention it in his deposition or any prior

statement. T80 4676. He acknowledged that in his August 30 statement he said that appellant stated, "that if anybody resists him, resists over there, I'm gonna kill them." T80 4709. Asked if he decided to change "resists" to "exists," Mayes said that he didn't know what either word meant.[5] T80 4710.

Leona Fair, the Fort Pierce Walmart Manager, pulled a receipt from May 24, 2004, that showed that someone with the date of birth of November 11, 1981, purchased .32 caliber Remington ammunition, and that there were no other sales of Remington ammunition that day. T80 4744, 4750-51, 4757. Theresa York's driving record was admitted into evidence, and it showed that her date of birth is November 11, 1981. T80 4773.

Lieutenant Dennis Smith, a 19 year veteran of the St. Lucie County Sheriff's Office, testified that Mayes was a suspect and that on July 9, 2004, he went to Mayes's grandmother's house looking for him. T80 4775-77. Mayes wasn't there, but Lieutenant Smith, who was with Investigator Hamrick and an ATF agent, saw Mayes on 13th and D Street. T80 4777. Smith handcuffed Mayes. T80 4777.

Mayes started talking, and he only wanted to talk to Lieutenant Smith. T80 4777-78. Smith interviewed him before Investigator Hamrick took his taped statement. T80 4779. Smith explained: "And Mr. -- Mr. Mayes kept wanting to talk, so he was Mirandized, and I -- I kind of let him talk and hit the highlights of

[5] Mayes testified that he was "SLD." T80 4710. In closing argument, the prosecutor interpreted this to mean "slow learning deficit." T83 5037.

what he had to say. I did not want to get into a lot of details because I'm not the case agent, and I wanted him to do all that with the case agent." T80 4779.

When the State asked Smith what Mayes told him, defense counsel made a hearsay objection. T80 4780. The State argued that the defense cross examination of Mayes implied that "the reason Mayes gave a statement was because Dennis Smith told him what to say at the beginning of that interview."[6] T80 4780.

Defense counsel argued that he was merely putting before the jury what actually happened: in Mayes's presence, Smith told Investigator Hamrick and Detective Coleman what Mayes had told him. T80 4780. Counsel further argued that there was no suggestion of recent fabrication as Mayes had been "consistently fabricating ... throughout the entire course of the investigation." T80 4780. The court overruled the objection, and Smith's testimony continued (at T80 4781-82):

> Q. Lieutenant, go ahead, what did Mr. Mayes tell you?
> A. He told me about being at a house, I believe, on 14th Street earlier in the day, the day of the homicide with the subject he referred to as Man. He told me that Man was -- he used the term "boosting". I understood that to mean encouraging, persuading him to go do a robbery with Man. That Man and his girlfriend went to Wal-Mart to get a box of ammunition, that they called there first. That Man promised him $300 from the proceeds of the robbery. That he told him that -- that Man told him that if the victim bucked, meaning if he resists or bucked up, that he was gonna cap him. And --
> Q. Go ahead.

[6] The cross-examination of Mayes that the state was referring to is at T80 4677-78, and is discussed in Point I.

A. And that they went to do the robbery. That he saw Man shoot the victim in the head, told us approximately how far away he was when that occurred.
Q. How far away who was?
A. Mayes. How far away -- he told us approximately how far away Mayes was and how far away from the victim Man was when he fired the shot.
Q. How close did he say Man was to the victim when he shot him?
A. As I recall, he -- he -- very close. I think he said he may have even stuck the gun to his head.
Q. Did you then recount that -- or summarize that statement that he gave you to Detective Coleman and Investigator Hamrick when they returned?
A. Yes.
Q. Did you -- when you recounted his version, did you add anything or suggest anything he should say in the future?
A. Only -- no -- nothing in particular that he should say. I did assure Detective Coleman in front of Mayes that I felt like Mayes would -- would tell him the truth.

When Smith testified that "I did assure Detective Coleman in front of Mayes that I felt like Mayes would -- would tell him the truth," defense counsel asked to approach the bench. T80 4781. At side bar, he objected to the opinion testimony of a law enforcement officer as to the truth or veracity of a witness. T80 4782. The court sustained the objection and agreed to give a curative instruction. T80 4783. Defense counsel accepted a curative instruction but asserted that a curative instruction would not be sufficient. T80 4782. He also moved for a mistrial, citing *Acosta v. State*, 798 So.2d 809 (Fla. 4th DCA 2001). The court reserved ruling on the mistrial until it had read *Acosta*, and told the jury that it was "granting the

motion to strike the witness's last response." T80 4784. It eventually denied the mistrial as discussed more fully in Point II. T82 4963.

Penalty Phase

In the penalty phase of jury proceedings, the state introduced into evidence five judgments of conviction: throwing or shooting a deadly missile into a dwelling, building, or conveyance, in violation of section 790.19, Florida Statute (case no. 96-425); battery on detention staff (case no. 96-438); attempted robbery (case no. 98-2374); battery on a law enforcement officer and aggravated assault (case no. 98-4234); and two counts of battery on a law enforcement officer (case no. 98-4507). T85 5262-78;R28 4017. The state presented further evidence of the attempted robbery (case no. 98-2374), and the two counts of battery on a law enforcement officer (case no. 98-4507). T85 5273, 5289.

Franklin Sloan was the victim of the attempted robbery. He said that on June 19, 1998, he was followed home by three men in a Cadillac. T85 5242-43. He had just gotten out of his truck when one of these men got inside his truck and the other man–appellant–confronted him. T85 5245. Appellant pulled a gun and demanded his keys and money. T85 5247. Sloan refused, and he yelled at the other man to get out of his truck. T85 5247. Appellant hit Sloan in the face with the gun. T85 5248. Sloan "reared back" and appellant stepped back and fired the gun. T85 5248. Sloan ducked and was not hit, but the bullet went through his house. T85 5249.

William Camp and Dan O'Brien testified about the battery on a law enforcement charges in case no. 98-4507. Camp said he was a correctional deputy at the St. Lucie County Jail in 1998. T85 5279. On November 18, 1998, appellant was an inmate, and, according to Camp, he was jumping up and down on the bars of his cell. T85 5280. Appellant calmed down, but when Camp and Lieutenant O'Brien went inside the cell, appellant started to strike O'Brien about the shoulders and head. T85 5280. Camp tried to grab his arm and restrain him, and "somewhere during the restraining" Camp suffered a broken rib, which never healed properly. T85 5280. Camp said he had "no idea" which exact blow broke his rib. T85 5281.

O'Brien said that on the date in question appellant was rattling the bars of his cell. T85 5282. He and Sergeant Perry went in the cell to handcuff appellant. T85 5283. O'Brien reached for appellant's left hand, and he assumed that Perry would grab appellant's right hand; but Perry didn't, and appellant hit O'Brien in the face two or three times. *Id*. O'Brien was not injured, however. T85 5283-84.

After Patricia Sanders and Shirley Morgan, Johns's stepdaughters, read victim impact statements, the state rested. T85 5292-95.

Defense counsel told the court that he was calling only one witness, Dr. Riordan, a psychologist and neuropsychologist. T86 5305. He said he had "discussed and planned to call Mr. Tumblin's mother and his sister, but pursuant to his [appellant's] wishes we have elected not to do so. That strategic decision was

made exclusively based on his wishes." T86 5305. The court confirmed with appellant that he told counsel not to call his mother and sister as witnesses and this was his "personal preference." R 86 5305-08.

Dr. Riordan met appellant five times. T86 5316. He reviewed appellant's school, jail, and DOC records, as well as his records at New Horizons Community Mental Health Center. T86 5317. Dr. Riordan learned that appellant entered the juvenile justice system at age nine and that he was in that system all through his childhood. T86 5333-34. Appellant's mother told Dr. Riordan that appellant was exhibiting significant behavioral problems at age eight. T86 5384.

Appellant was angry and emotionally disturbed for much of his developmental years. T86 5324. But his school, jail, and mental health records revealed no consistent diagnosis. T86 5334-35. He was prescribed various medications: Ativan, which is used to treat anxiety disorder; Haldol, which is prescribed for schizophrenia; and Prolixin, also prescribed for schizophrenia and other severe mental disturbances. T86 5334-35. His brother had a mental illness, and another family member was diagnosed with bipolar disorder. T86 5340.

Appellant went to school until the 10th grade, but his grades were poor throughout, and he was only promoted administratively (i.e., the promotions were not based on merit); he was labeled emotionally handicapped and learning disabled. T86 5341-43. He received special education classes, most of which he

failed. T86 5337. At one point he went to Woodlands Academy, a school designed for behaviorally disordered students. T86 5343.

Dr. Riordan performed the Wechsler Adult Intelligence Test and appellant scored 81. T86 5379. Department of Corrections records showed a similar score of 82. T86 5379. This IQ falls within the borderline intellectual range, according to the DSM-IV-TR Manual.[7] T86 5336-37, 5405. At New Horizons Community Mental Health Center, appellant was assessed to have mentally retarded intellectual functioning. T86 5337.

Appellant attempted suicide several times and four of these attempts were documented. T86 5329. In prison, he hanged himself and was unconscious when he was discovered. T86 5330, 5404.

In 1992 when appellant was about 14, he was in a car accident and received a serious head injury. T86 5344-46.[8] He was in and out of consciousness, but then he had a seizure and was in a coma for two days; after the coma he had seizures for which he still takes seizure medicine. T86 5345-46. Dr. Riordan said that appellant

[7] On cross-examination, Dr. Riordan testified that the Wechsler scale put this score in the below average range; but on redirect, Dr. Riordan testified that in the psychological community, the DSM-IV-TR is used and that appellant's score in that manual is considered "borderline intellectual range." T86 5380-81; 5404-05.

[8] Appellant stated that this accident was in 1995 when he was riding on top of a car; but jail records, which Dr. Riordan relied upon, showed that the accident occurred in 1992, and that appellant was ejected through the windshield. T86 5383-84.

told him he had been hit in the head during fights and some of these resulted in unconsciousness. T86 5346.

Given this history of head trauma, Dr. Riordan did a neuropsychological evaluation. T86 5346.[9] He administered the Halstead-Reitan extended battery of tests. T86 5347-48. Appellant's scores fell within the brain damaged range. T86 5348-49. Moreover, the groove pegboard test showed frontal lobe brain damage, and the frontal lobe is that part of the brain that controls impulses. T86 5350-51.

Dr. Riordan diagnosed appellant as having cognitive disorder as a result of his brain injuries, injuries caused by both the accident and seizures. T86 5349, 5384. Appellant's cognitive disorder and his frontal lobe brain damage impair his ability to control his impulses. T86 5399.

A cognitive disorder requires specialized treatment. T86 5359-60. But Dr. Riordan testified that appellant had previously been misdiagnosed, and that he had not received the proper medicine, which is psychostimulants. T86 5349-52. Because of his head injury, appellant should not have been prescribed Prolixin, as it is contraindicated in the event of head trauma or brain injury. T86 5335. Also, Ativan should not be prescribed for suicidal and depressed patients like appellant. T86 5336. And Prozac and Paxil is contraindicated for persons with seizure disorder. T86 5355.

[9] As noted above, Dr. Riordan is also a neuropsychologist. T86 5305.

Dr. Riordan told the jury about appellant's family life. Appellant has two brothers, two sisters, and other half siblings. T86 5318. Appellant's father and mother separated when he was five, and he didn't see his father much until he was a teenager. T86 5319. Appellant's father did not support the family financially or emotionally; and appellant told Dr. Riordan that his father physically abused his mother and the children, usually after he had been drinking alcohol, which his father abused. T86 5321.

Appellant was the second oldest child, and he was often left to supervise the younger siblings because his mother worked two jobs to support the family. T86 5319. There was an abnormal amount of violence among the siblings. T86 5320, 5325. When appellant was a teenager, he and his brother dug a hole; when appellant was in the hole, appellant's brother set him on fire, and laughed at him. T86 5322, 5325. HRS investigated, but no action was taken. T86 5323-24.

Appellant used alcohol, cocaine, and marijuana during his teenage years; he did this to make himself feel better emotionally, and as a form of self-medication. T86 5328. Poor academic skills and trouble at school added to his depression. T86 5336-37.

Appellant has two daughters, ages eight and two. T86 5338. He has kept in contact and supported his children. T86 5338. He has also supported children not his own (Theresa York's children). T86 5339. He took the children to parks and

shopping; he bought them ice cream, and took them fishing. T86 5339. Dr. Riordan said family members corroborated this. T86 5339.

Notwithstanding appellant's dysfunctional family life, his family relationships were close. T86 5332. Appellant and his mother also reported that appellant would help others without expecting to be paid. T86 5332.

In rebuttal, Dr. Landrum, a psychologist, testified for the state. Dr. Landrum reviewed Dr. Riordan's report and raw testing data, as well as appellant's jail and medical records. T87 5432-34, 5463. Dr. Landrum interviewed appellant for 30 to 45 minutes the day before he testified. T86 5434.

Dr. Landrum agreed that appellant had a dysfunctional, deprived childhood; that he has been in trouble since he was eight or nine; and that he suffered a head injury in a car accident when he was 14 or 15. T87 5435, 5437-38. But Dr. Landrum testified that he did not attribute appellant's criminal behavior to a cognitive disorder because it did not rise "to the point of being a dementia, for example, or Alzheimer's or delirium, that is more of a diffuse sort of general disorder that is nonspecific." T87 5436. Dr. Landrum saw in appellant "impulse control disorder" and "conduct disorder." T87 5456. Dr. Landrum said, however, that given the limited amount of time he had to spend with appellant, these were "impressions" and not diagnoses. T87 5456.

Dr. Landrum asked appellant whether he was abused as a child; appellant said that his mother abused him, not his father, as Dr. Riordan had reported. T86 5435. Appellant denied that he had been rendered unconscious by blows to the head. T86 5438.

Dr. Landrum also testified that, based on his review of appellant's jail records and the notes they contained, he thought that some of appellant's suicide attempts were not genuine; that appellant had an ulterior motive, like being moved from his cell. T5439-42; 5460-61.

Dr. Landrum acknowledged that he is not a neuropsychologist and has no expertise in that field. T87 5460. He also acknowledged that he didn't review appellant's DOC records or DOC medical records and therefore his evaluation is incomplete. T87 5466. Again, he explained that he was not making a diagnosis, but rather he was giving a "diagnostic impression." T87 5460, 5466.

Spencer Hearing

At the Spencer hearing, the defense presented no additional evidence. T88 5547-51. The prosecutor read to the trial court letters written by Mr. Johns's wife and granddaughter. T88 5554-58. The trial court read into the record letters written by Mr. Johns's mechanics and his stepdaughter. T88 5559-62. Patricia Sanders was present and made a statement. T88 5565-69.

Sentencing Order

In sentencing appellant to death, the court found in aggravation that appellant had previously been convicted of the violent felonies of throwing or shooting a deadly missile, battery on detention staff, attempted robbery, three counts of battery on a law enforcement officer, and aggravated assault, to which factor it gave great weight; it merged two other circumstances and gave them great weight as a single circumstance: that appellant committed the murder while engaged in a robbery and committed it for pecuniary gain; finally, the court found in aggravation that the murder was committed in a cold, calculated, and premeditated manner, without pretense of moral or legal justification, to which factor it gave great weight. R28 4017-31.

As to mental mitigation, the court found that appellant had below average intelligence, brain injury, behavioral disorders characterized by anti-social and impulsive conduct, and that he has exhibited suicidal behavior. R28 4040-45. But the court noted that there was "no evidence to indicate that the robbery and murder of Jimmy Johns was the result of diminished intellectual capacity, any specific psychological disorder (or symptom), impaired ability to control impulses or suicidal ideation prevailing at the time of the murder." R28 4045.[10] It gave this mitigation little weight. *Id*.

[10] As discussed in Point V, the court made this point several times. R28 4043-44.

Similarly, the court found that the fact that appellant's mental condition had previously been misdiagnosed was not mitigating under the facts of this case because Dr. Riordan did not "opine how, if at all, these mistreatments resulted in any long-term effects; or whether they had any bearing upon the Defendant's actions on May 24, 2004." R28 4044.

The court found in mitigation that appellant came from a dysfunctional family characterized by neglect and abuse, that he was raised in an impoverished environment with no decent father figure for emotional support and guidance. T28 4039-40. The court gave this mitigating circumstance some weight. R28 4040.

The court found in mitigation that appellant was well-behaved during trial and court proceedings (little weight), and that he loves his mother, sister Keisha, and his children, and that they love him in return (little weight). R28 4048-49.

The court found no evidence to support the statutory mitigating circumstance that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and no evidence to support the non-statutory mitigating circumstance that the defendant did not intend to kill the victim. R28 4031-33, 4036.

The court did not find in mitigation that appellant was under the influence of marijuana or stress at the time of the offense, that a life sentence would protect

society from any potential threat, or that appellant's execution would adversely effect his children and brother. R28 4038-39, 4049-53.

The court refused to consider in mitigation the fact that the victim's body was not sexually molested, tortured, dismembered or disfigured in any way, or that the murder was not especially torturous or cruel. R28 4037-38.

The court stated that it would not conduct a proportionality review other than to compare the sentences of appellant and Mayes. R28 4053. The court found that a death sentence for appellant would not be disproportionate to Mayes's sentence because "Anthony Mayes agreed to testify truthfully in the trial of Alwin Tumblin. Under these circumstances, the sentences imposed on Alwin Tumblin and Anthony Mayes cannot be considered disproportionate." R28 4053 (c.o.).

SUMMARY OF THE ARGUMENT

Point I. The state introduced into evidence Anthony Mayes's prior consistent statement to rebut an alleged charge of recent fabrication. But this was error because appellant did not charge that Mayes's account was *recently* fabricated; appellant charged that Mayes's account was fabricated from the start.

Point II. Lieutenant Smith testified that he told another officer that he thought that Mayes would tell him the truth. The trial court should have declared a mistrial after this improper bolstering of the state's most important witness.

Point III. The state failed to disclose that Jean Nicole Ruth had recently been shot and that she was taking hydrocodone at the time of her testimony. This is a discovery violation. The trial court's failure to hold a *Richardson* inquiry is reversible error.

Point IV. The trial court found that the homicide was committed in a cold, calculated, and premeditated manner. But the evidence showed that the killing was an impulsive act, and that it was not done in a cold, calculated manner, and with heightened premeditation.

Point V. There was unrefuted evidence that appellant suffers from brain damage and borderline intellectual functioning. Yet the trial court made no finding relative to brain damage, and it rejected borderline intellectual functioning (finding instead that appellant has below average intelligence). Moreover, the trial court considered the mental mitigation evidence in terms of whether the criminal act was attributable to the mental mitigation. The Supreme Court, however, has flatly rejected such a view of mitigation.

Point VI. The death penalty is disproportionate. This crime does not fall within the category of both most aggravated and least mitigated of murders.

Point VII. The trial court allowed appellant to choose the witnesses to call at penalty phase. This was error because the court failed to make sure that appellant knew the consequences of performing this core function of his lawyers.

Point VIII. In its sentencing order, the trial court did not properly evaluate admissible hearsay evidence admitted at penalty phase.

Point IX. The trial court erred in allowing the state to introduce as victim impact evidence that Johns's wife suffered strokes after the offense. This is not evidence of the victim's uniqueness; nor is it evidence of the loss to the community's members.

Point X. The trial court erred in submitting to the jury as an aggravating circumstance offenses that were not prior violent felonies, which must be life-threatening crimes. Battery on a law enforcement officer, shooting into a dwelling, and aggravated assault are not life-threatening crimes *per se*, nor were they shown to be life-threatening in this case.

Point XI. This Court should hold that *Ring v. Arizona* applies in Florida, and that it requires a jury's unanimous conclusion that a particular aggravator applies. A new penalty phase hearing should be held.

ARGUMENT

POINT I THE TRIAL COURT ERRED IN LETTING LIEUTENANT SMITH, A SENIOR POLICE OFFICER, TESTIFY TO ANTHONY MAYES'S PRIOR CONSISTENT STATEMENT.

Anthony Mayes testified as an eyewitness to the murder: he said he saw appellant rob Johns, put a gun to his head, and murder him. His testimony would eliminate any viable defense if believed. He was the state's main witness, but his

testimony was impeached by his record and his obvious motive to shift blame from himself. Hence, the defense argued that Mayes had a motive to lie starting from the moment the crime occurred. Counsel said in opening statement that "All three people that testify in this case as actual witnesses to the event *have a reason to testify the way they're testifying*, whether it be helping to destroy fruits of the crime, i.e. the bills and the envelopes that you'll hear about, *or actually being at the scene of the crime as in the case of Anthony Mayes."* T73 3805-06 (e.s.). Thus, the defense did not make a claim of recent fabrication.

When Mayes testified, the state elicited testimony about his plea agreement: plead guilty to second degree murder and attempted robbery, testify truthfully, and be sentenced to a maximum of 20 years in prison. T80 4652.

On cross-examination, counsel questioned Mayes further about his plea agreement. T80 4671-73. Counsel also questioned him about the taped statement he gave to Investigator Hamrick (at T80 4677-78):

> Q. Mr. Mayes, you recall that recorded statement that you gave to Investigator Hamrick?
> A. Do I what, sir?
> Q. Do you remember giving the statement to Investigator Hamrick?
> A. Yes, sir.
> Q. And you had an opportunity to review that?
> A. Yes, sir.
> Q. In fact, it was given to you probably as part of your discovery in your criminal case, was it not?
> A. Yes, sir.
> Q. And you -- you recall that prior to you ever saying a word on tape to Investigator Hamrick, that Lieutenant Dennis Smith, One Man

> Gang, in front of you, summarized for Investigator Hamrick what you were about to say to Investigator Hamrick?
> A. No, sir.
> Q. Do you recall that?
> A. Yes, sir.
> Q. Okay. And it went something like Dennis Smith saying to -- in front of you, this, this and this happened, and you said, "Uh-Huh"; is that correct?
> A. Yes, sir.
> Q. And then Investigator Hamrick proceeded at that time to take a -- a taped statement where you regurgitated the same things that Lieutenant Smith had just gone over. Is that the way your taped statement went?
> A. Yes, sir.

This testimony led the state to contend that Mayes's statement to Lieutenant Smith, a 19 year veteran of the Sheriff's Department, was admissible as a prior consistent statement. T80 4775, 4780. When the state asked Smith what Mayes told him, counsel made a hearsay objection. T80 4780. The State argued that Mayes's statement was admissible because defense counsel's cross examination of Mayes implied that "the reason Mayes gave a statement was because Dennis Smith told him what to say at the beginning of that interview." T80 4780. Defense counsel replied that he had merely put before the jury what actually happened: Lieutenant Smith, in the presence of Mayes, told Investigator Hamrick what Mayes had told him. T80 4780. Defense counsel further argued that there was no suggestion of recent fabrication as Mayes had been "consistently fabricating ... throughout the entire course of the investigation." T80 4780. The trial court overruled the objection, and Smith's testimony continued (at T80 4781-82):

Q. Lieutenant, go ahead, what did Mr. Mayes tell you?
A. He told me about being at a house, I believe, on 14th Street earlier in the day, the day of the homicide with the subject he referred to as Man. He told me that Man was -- he used the term "boosting". I understood that to mean encouraging, persuading him to go do a robbery with Man. That Man and his girlfriend went to Wal-Mart to get a box of ammunition, that they called there first. That Man promised him $300 from the proceeds of the robbery. That he told him that -- that Man told him that if the victim bucked, meaning if he resists or bucked up, that he was gonna cap him. And --
Q. Go ahead.
A. And that they went to do the robbery. That he saw Man shoot the victim in the head, told us approximately how far away he was when that occurred.
Q. How far away who was?
A. Mayes. How far away -- he told us approximately how far away Mayes was and how far away from the victim Man was when he fired the shot.
Q. How close did he say Man was to the victim when he shot him?
A. As I recall, he -- he -- very close. I think he said he may have even stuck the gun to his head.
Q. Did you then recount that -- or summarize that statement that he gave you to Detective Coleman and Investigator Hamrick when they returned?
A. Yes.
Q. Did you -- when you recounted his version, did you add anything or suggest anything he should say in the future?
A. Only -- no -- nothing in particular that he should say. I did assure Detective Coleman in front of Mayes that I felt like Mayes would -- would tell him the truth.

The court erred in letting the state introduce Mayes's prior consistent statement to Lieutenant Smith, since the defense did not make a claim of recent fabrication. Smith's testimony bolstered the testimony of the state's main witness, and the state cannot show that the erroneous admission of this evidence was harmless beyond a reasonable doubt.

This Court reviews evidentiary decisions for an abuse of discretion, but a judge's discretion "is limited by the rules of evidence and by the principles of stare decisis." *McDuffie v. State*, 970 So.2d 312, 326 (Fla. 2007). Evidentiary rulings involving questions of law are reviewed *de novo*. *See Linn v. Fossum*, 946 So.2d 1032, 1036 (Fla. 2006). At bar, the evidence was admitted contrary to well-established law, so that the judge erred or abused his discretion.

A witness's prior consistent statement is hearsay that may not be admitted to corroborate the witness's trial testimony. *Parker v. State*, 476 So.2d 134, 137 (Fla. 1985). "The danger in admitting a prior consistent statement in evidence is that the statement might acquire added credibility when it is repeated by a more trustworthy witness." *Monday v. State*, 792 So.2d 1278, 1280 (Fla. 1st DCA 2001).

Under section 90.801(2)(b), Florida Statutes, a prior consistent statement is admissible nonhearsay evidence if the witness testifies at trial and the statement is "offered to rebut an express or implied charge against the [witness] of improper influence, motive, or recent fabrication." *Id*. Such a statement must be made before the existence of a reason to falsify arose. *Quiles v. State*, 523 So.2d 1261, 1263 (Fla. 2d DCA 1988). A statement is inadmissible if the prior consistent statement was made after the witness's motive to lie arose. *Jackson v. State*, 498 So.2d 906, 910 (Fla. 1986).

As counsel told the trial court: he was not asserting that Mayes had recently fabricated his account; he was asserting that all of Mayes's accounts were fabricated because Mayes's reason or motive to falsify–that is, his reason to shift the blame to appellant–began immediately after the offense and *before* he spoke to Smith. Indeed, "a practically irrebutable presumption arises when a statement is made to an investigating officer that the witness involved in the crime had time and opportunity to fabricate before giving the statement." *Keffer v. State*, 687 So.2d 256, 258 (Fla. 2d DCA 1996). Since Mayes's motive to falsify and shift the blame to appellant existed before the statement to Smith, that statement was inadmissible as a prior consistent statement.

Reversible error occurred at bar under *Peterson v. State*, 874 So.2d 14 (Fla. 4th DCA 2004). Peterson was charged with attempted murder of Antwan Smith, who testified that Peterson fired shots at him. Peterson contended that Smith was falsely accusing him in order to move in on Peterson's girlfriend, "Luscious." Over defense hearsay objection, Hamrick testified that Smith said "Bobo" (Peterson) shot at him. The Fourth District held that this was reversible error because the defense claimed "consistent fabrication" rather than recent fabrication (*Id.*):

> Appellant contends that he did not impeach Smith's testimony based on a charge of recent fabrication, but on a claim of consistent fabrication from the start. He points out that Smith's motive to falsely identify him as the shooter to Detective Hamrick existed when Smith made the prior statement to the officer. Thus, he argues, Smith's prior

> consistent statement to Detective Hamrick was not offered to rebut a charge of recent fabrication. [C.o.]
>
> We agree with appellant that the trial court erred in admitting Detective Hamrick's testimony that the victim identified appellant as the shooter, because the victim's statement did not qualify as a prior consistent statement to rebut a charge of recent fabrication.

As in *Peterson*, the defense here was not recent fabrication, but consistent fabrication. Accordingly, it was error to admit Mayes's prior consistent statement under section 90.801(2)(b), Florida Statutes.

Moreover, as in *Peterson*, the error was not harmless. "In this case, where the victim's credibility was at the heart of the trial and there was no physical, corroborative evidence against appellant, we cannot say that the error was harmless beyond a reasonable doubt." *Peterson*, 874 So.2d at 17 (citation omitted). Like the witness in *Peterson*, Mayes was the state's most important witness, as the trial court explained when it discussed the *Acosta* issue (see Point II; T81 4823-24):

> THE COURT: Well, in all due respect, isn't it a little bit more -- let me see if I can put this gently. Other than Anthony Mayes, is there any evidence that Alwin Tumblin shot Jimmy Johns? The answer is no, it's all circumstantial and nobody puts him on the scene, nobody sees what happened, nobody saw him with a gun that day, nobody said he drove over there that day. Everything that places him at that scene and committing that murder comes from Anthony Mayes. Now the other stuff is all circumstantial but there's nobody else that supports that. I mean that actually comes out with that as direct evidence, right?

Since Mayes was the state's key witness it was harmful to put a "cloak of credibility" on his testimony by introducing his prior consistent statement through

Lieutenant Smith, "a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible...." *Peterson*, 874 So.2d at 17, quoting *Kendrick v. State*, 632 So.2d 279 (Fla. 4th DCA 1994). Appellee will not be able to show that the error was harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So.2d 1126, 1138 (Fla. 1986). A new trial should be ordered.

Moreover, appellee must show that the error was not separately prejudicial as to penalty. An error harmless as to guilt may be harmful as to penalty. *Gonzalez v. State*, 700 So.2d 1217 (Fla. 1997) (codefendant's confession harmless as to guilt, but prejudicial as to penalty); *Burns v. State*, 609 So.2d 600, 607 (Fla. 1992) (evidence harmless as to guilt, but prejudicial as to penalty). As the trial court noted, without Mayes's testimony–testimony that was erroneously bolstered by Lieutenant Smith–there was little evidence that appellant shot Mr. Johns.

The trial court's ruling denied appellant due process and a fair trial and penalty proceeding under the Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 9 and 16, of the Florida Constitution.

POINT II THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN LIEUTENANT SMITH TESTIFIED THAT HE TOLD ANOTHER OFFICER THAT ANTHONY MAYES "WOULD TELL HIM THE TRUTH".

As explained in Point I, Lieutenant Smith was allowed to tell the jury what Anthony Mayes told him about the offense. Smith also testified that after he spoke

to Mayes he summarized Mayes's version of events for Detective Coleman and Investigator Hamrick. T80 4781-82. Smith was then asked (at T80 4782):

> Q. Did you -- when you recounted his version, did you add anything or suggest anything he should say in the future?
> A. Only -- no -- nothing in particular that he should say. I did assure Detective Coleman in front of Mayes that I felt like Mayes would -- would tell him the truth.

Defense counsel asked to approach the bench. T80 4782. At side bar, he objected to the opinion testimony of a law enforcement officer as to the truth or veracity of a witness. T80 4782. The trial court sustained the objection and agreed to give a curative instruction. T80 4783. While defense counsel accepted a curative instruction, he also asserted that it would not be sufficient, and moved for a mistrial under *Acosta v. State*, 798 So.2d 809 (Fla. 4th DCA 2001). T80 4782. The court reserved ruling on the mistrial motion, and told the jury that it was "granting the motion to strike the witness's last response." T80 4784.

After Smith testified, the court and counsel discussed *Acosta* at length. T80 4796-4803. When the state argued that Mayes was not the only witness against appellant and that there was other evidence of his guilt, the court pointed out that other than Mayes there was no evidence that appellant shot Johns. T81 4823-24. The trial court reserved ruling. T81 4834-35.

After the state rested, the parties revisited the *Acosta* issue. T81 4885. The state cited *Lubin v. State*, 754 So.2d 141, 143 (Fla. 4th DCA 2000), for the

proposition that "where the defendant rejects the trial court's offer to cure the effect of the inadmissible testimony, a mistrial should not be granted except in the extreme case where the comment is 'so prejudicial as to vitiate the entire trial.'" T81 4939. It argued that Smith's testimony did not vitiate the entire trial because, it claimed, appellant had admitted to Ruth that he shot Johns. T81 4956-57. The court stated that it may have overlooked that (T81 4957):

> THE COURT: And I certainly was not meaning to undermine the integrity of the State's case, but I --and even the statements, even the confession, if you want to call it that, the statement, "I killed the cracker," I must say I forgot that. I remember him saying the cracker was dead, and I do have a lot of notes on the case, I did not recall him saying, "I killed the cracker," and that was -- that was with Ms. Ruth?
>
> MS. PARK: Jean Nicole Ruth.
>
> THE COURT: But when I looked at the case of *Acosta*, it was apparent to me that the Court was very concerned that the whole case turned on the credibility of one witness and then somebody commented on that credibility and that guy wore a badge. And I was likening that to this case where the only person -- the only -- the only witness to the murder and robbery is this witness. Although there is that remark that I apparently have not recalled.

The court said that it would think about the issue and rule on Monday. T81 4959.

On Monday, the court denied the motion for mistrial T82 4963. It stated that *Acosta* applied harmless error analysis, but that that standard did not apply at bar because the court sustained the objection. T82 4971. It said that in voir dire each juror agreed to treat police officers like any other witness and not give their testimony more weight. T82 4972.

The court said that, because Lieutenant Smith had a street name ("One Man Gang"), and testified wearing a Polo shirt that may or may not have had an agency insignia on it, his opinion of another witness's veracity might not have as much weight as another police officer's opinion. T81 4973-74.

The court distinguished *Acosta*, saying that in *Acosta* the objection was overruled resulting in the improper testimony, whereas the objection at bar was sustained and the testimony was stricken. T 81 4975. And the court compared the facts of the two cases. T81 4975. In *Acosta*, the witness whose credibility was bolstered by the police officer was a key state witness and uncharged accomplice. T81 4976. Here the court found that Mayes was charged, and there was substantial evidence of appellant's guilt other than Mayes's testimony, including, the court stated, an admission to Ruth that "I killed the cracker. Head ran." T81 4980. The court found that the "improper comment of Lieutenant Smith when considered with the totality of the evidence in this case, that it is not so prejudicial as to deny this Defendant a fair trial." T81 4982.

The parties agreed to a curative instruction, and the trial court instructed the jury (T81 4998-99):

> THE COURT: Good morning, ladies and gentlemen. I hope you all had a nice holiday yesterday with your families. At this time I'm going to give you an instruction which I would ask you all to pay attention to. You are hereby instructed that the believability or credibility of all witnesses testifying in this case is within the exclusive province of the jury. Please disregard any suggestion to the contrary.

A ruling on a motion for mistrial is reviewed under an abuse of discretion standard. *England v. State*, 940 So.2d 389, 402 (Fla. 2006). "A trial court ruling constitutes an abuse of discretion if it is based 'on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Johnson v. State*, 969 So.2d 938, 949 (Fla. 2007), quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The court abused its discretion because it based its ruling on an erroneous reading of *Acosta* and of the facts, and because its ruling was contrary to logic.

In *Acosta*, *supra*, the defendant was one of three people alleged to have forged and cashed a check. 798 So.2d at 809. The issue at the trial was who forged the check.

One of the others involved, Sarah Riley, testified against Acosta, and a handwriting expert said that handwriting on the check was probably Acosta's, although there were some dissimilarities that could not be accounted for. *Id*. at 810. Asked by defense counsel what happened to Riley's handwriting samples, the expert said that he was only provided samples from Acosta. *Id*. at 809. The state then recalled the lead detective to ask him why handwriting samples had not been taken from Riley. *Id*. Over defense objection, the detective answered: "Up until that point, everything Sarah Riley told me appeared to be truthful." *Id*. Acosta moved for a mistrial, but the judge denied the motion, instead instructing the jury to disregard the comment. *Id*.

The Fourth District found error, and wrote (798 So.2d at 810):

> It is clearly error for one witness to testify as to the credibility of another witness. *Boatwright v. State*, 452 So. 2d 666, 668 (Fla. 4th DCA 1984) ("It is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness."). It is especially harmful where the vouching witness is a police officer because of the great weight afforded an officer's testimony. *Page v. State*, 733 So. 2d 1079 (Fla. 4th DCA 1999).

The court ordered a new trial, writing: "Because Riley's testimony was crucial and the defense's main emphasis was on her lack of credibility, we cannot agree with the State that the error was harmless or that it was cured by the instruction. We therefore reverse and remand for a new trial." *Id*. at 810.

Acosta cited *Page v. State*, 733 So.2d 1079 (Fla. 4th DCA 1999), in which the court found that it was error for a detective to testify that everything a key state witness, an informant, did for the police "was very trustworthy and reliable." Quoting *Boatwright v. State*, 452 So.2d 666, 668 (Fla. 4th DCA 1984), the court wrote at page 1081:

> It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. *Barnes v. State*, 93 So.2d 863 (Fla.1957). Thus, it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness.

At bar, the court should have granted a mistrial under *Acosta* since Mayes's testimony was crucial and the defense's main emphasis was on his lack of credibility. The court abused its discretion in denying the motion based in large

part on "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Johnson*, *supra*.

First, the court misread *Acosta*. It thought the judge in that case had overruled the objection resulting in the improper testimony. T 81 4975. In fact, although the trial court overruled the defense objection in *Acosta*, it ruled the witness's answer improper and gave a curative instruction. *Acosta*, 798 So.2d at 809. Nonetheless, the Fourth District held that given the importance of the witness and the gravity of the error, a curative instruction was insufficient and a new trial should have been ordered.

Second, the trial court erred as to the facts in the case before it. It relied on an erroneous factual view that each prospective juror agreed in voir dire to treat police officers like any other witness and not give their testimony more weight. T82 4972. In fact, police officer credibility was touched upon once with a juror who knew some officers, T67 3044, and once with a juror who had a run-in with a police officer. T69 3397. In his voir dire, defense counsel asked: "Is that a problem for anybody that some law enforcement agency arrested Mr. Tumblin? Does that mean anything as far as his presumption of innocence?" T72 3682.

Third, the trial court noted that, unlike the witness in *Acosta*, Mayes was charged, and there was substantial evidence of appellant's guilt other than Mayes's testimony, including, the court stated, an admission to Ruth that "I killed the

cracker. Head ran." T81 4980. Neither logic nor the facts support the court's conclusion.

It was not logical to say that the fact that Mayes was charged in this episode makes the improper bolstering less harmful. Because of his plea bargain, jurors might have discounted, if not disregarded, his testimony–until, that is, Lieutenant Smith vouched for his credibility. Second, there can be no question that Mayes was the key state witness, and the court's initial impression of the importance of Mayes as a witness is still an accurate one ("Other than Anthony Mayes, is there any evidence that Alwin Tumblin shot Jimmy Johns? The answer is no...." T81 4823.).

Regarding appellant's admissions, Ruth testified that appellant said, "The cracker dead and Head ran." T76 4183. But later the state changed appellant's statement and asked, "Do you see the person in the courtroom who said, 'I shot the cracker and Head ran'?" T76 4194. Ms. Ruth answered, "Yes," and pointed to appellant. T76 4194. Thus, the admission that the trial court relied upon in denying the motion for mistrial was less than explicit, as the court later realized when it brought this subject up *sua sponte* during closing argument when the parties were discussing a defense objection to the state's closing argument on another subject (at T83 5064; e.s.):

> THE COURT: There's another issue here that's -- if that's the objection. I mean, I hesitate to do this, if that is the objectionable, then you know, the testimony of what's her name, Nickie –

MS. PARK: Jean Nicole Ruth.

> THE COURT: Jean Nicole Ruth, *she didn't actually say that Nickie [sic–appellant] said, "I killed the cracker." She said, "The cracker's dead, Head ran."* But on Redirect [sic-direct] you asked him, "Did you see the man in the courtroom who said 'I killed the cracker, Head ran.'"

As in *Acosta*, given the importance of Mayes as a witness, and the gravity of the error in bolstering his credibility by Lieutenant Smith, an officer of high rank and great experience, a new trial should be ordered. The trial court's ruling denied appellant due process and a fair trial and penalty proceeding under the Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 9 and 16, of the Florida Constitution.

POINT III THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO CONDUCT A *RICHARDSON* HEARING AFTER THE STATE FAILED TO DISCLOSE THAT JEAN NICOLE RUTH HAD RECENTLY BEEN SHOT AND WAS TAKING HYDROCODONE.

Both the public defender and special public defender filed notice of discovery and demand for exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). R1 29-30, 49-50. Yet the state failed to disclose that Jean Nicole Ruth had recently been the victim of a shooting and was taking hydrocodone at the time of her testimony. Because of this discovery violation and because the trial court failed to hold a *Richardson*[11] inquiry, a new trial should be ordered.

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

During her cross-examination, Ruth revealed that she had "just got shot," needed her medicine, and was in pain. T76 4201. Defense counsel approached the bench and expressed surprise at this testimony (at T76 4201):

> MR. AKINS [defense counsel]: What is this?
> MS. PARK [prosecutor]: She was shot.
> MR. AKINS: So was somebody going to tell somebody about it?
> MS. PARK: Well, it had nothing to do with this.
> MR. AKINS: Your Honor, I move for mistrial.

The jury was excused, and the trial court questioned Ruth. She stated that she has been taking hydrocodone and needs another dose because she is in pain. T76 4202. Ruth left the courtroom to take the hydrocodone. T76 4208.

Defense counsel stated that he was moving for mistrial because he was unaware that "Ms. Ruth was going to show up today under the influence of any sort of medication or that she had been a victim of some gunshot...." T76 4204. Counsel also stated that it appeared that Ms. Ruth was trying to elicit sympathy from the jury. T76 4202.

The court did not think that the failure to inform counsel about this amounted to "official misconduct" and this would just be an area that counsel could inquire into. T76 4206. Counsel stated that he would need a continuance to

have a doctor find out whether Ruth is mentally competent to testify given the medication she was taking.[12] T76 4206-07.

The prosecutor stated that she had known about the shooting for two weeks, but that she didn't think there was any obligation to disclose it because it was unrelated to this case. T76 4207-08. Counsel stated that a witness's competence to testify is a matter subject to disclosure, and the judge agreed. T76 4208. The judge also expressed his exasperation with the state: "I don't want anymore surprises in this case, okay. If you know something, tell them.... I mean this is ridiculous. We're playing hide the ball here all day long." T76 4208-09.

Ruth was brought back into the courtroom, and she was examined by the court and counsel. T76 4209. She testified that she was shot in the leg on May 21 (she was testifying June 12) but the bullet traveled to her stomach, and that this had required surgery. T76 4213.

With Ruth's permission, the trial court read from her prescription bottle. T76 4209. She was prescribed one 750 milligram tablet of hydrocodone every four hours as needed. T76 4209. Ruth testified, however, that she was taking only half a tablet. T76 4209-10. She had just taken a half-tablet (it was 3:25 PM), and she had taken a half-tablet at about nine that morning. T76 4210. Defense counsel stated

[12] Defense counsel told the trial court that hydrocodone is a Schedule I controlled substance (T76 4207), but it is actually a Schedule II or a Schedule III controlled substance depending upon the amount. § 893.03(2)(a)1(j), (3)(c)(3)-(4), Fla. Stat.

that he didn't know what this dosage meant, whether it's a "high dose, low dose, medium dose[,]" nor did he know what effect it has on her competency to testify. T76 4212-13.

Ruth told the court that when she was examined by counsel she had understood the questions posed, and that she now feels fine and is able to testify. T76 4210-11, 4213-14. She testified that she told the state that morning that she was on medication. T76 4216.

The trial court denied the motion for mistrial, finding Ruth competent and capable to testify. T76 4218.

The case law indicates that a judge's failure to conduct a proper *Richardson* hearing is *per se* error of the sort that receives *de novo* review. The cases say the judge "is required to make an adequate inquiry." *See, e.g.*, *Felton v. State*, 812 So.2d 525, 526 (Fla. 2d DCA 2002). They say the judge "must conduct a *Richardson* hearing." *See, e.g. Acosta v. State*, 856 So.2d 1143, 1144 (Fla. 4th DCA 2003); *Stimus v. State*, 886 So.2d 996, 997 (Fla. 5th DCA 2004) (quoting *Acosta* and emphasizing word "must"). The lower court's discretion arises only after it has conducted a proper *Richardson* hearing:

> While the trial court has discretion to determine whether a discovery violation would result in harm or prejudice to the defendant, "the court's discretion can be properly exercised *only after the court has made an adequate inquiry into all of the surrounding circumstances*."

Acosta, 856 So.2d at 1144 (quoting *Barrett v. State*, 649 So.2d 219, 221-22 (Fla. 1994); emphasis in *Acosta*).

In general, Florida's criminal discovery rules are "designed to prevent surprise" and "facilitate a truthful fact-finding process." *Scipio v. State*, 928 So.2d 1138, 1144 (Fla. 2006). This Court has "repeatedly emphasized not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context." *Id*. To that end, the state has a continuing duty to disclose evidence of even "debatable exculpatory value." *Perdomo v. State*, 565 So.2d 1375, 1377 (Fla. 2d DCA 1990); Fla. R. Crim. P. 3.220(j) (prosecutor has continuing duty to disclose).

Rule 3.220(b)(4) requires disclosure of evidence that tends to negate the defendant's guilt. The rule is similar to, but broader than, *Brady*. It does not require a strict showing that the evidence negates guilt. *Cf. Perdomo*, 565 So. 2d at 1376 ("While the reports were of debatable exculpatory value, appellant should have had benefit of the information contained within them."); *Giles v. State*, 916 So.2d 55, 58 (Fla. 2d DCA 2005) ("Although the information does not appear to fit any of the other categories listed in rule 3.220(b)(1), it could constitute exculpatory information, whose disclosure is required by rule 3.220(b)(4)."); *Snelgrove v. State*, 921 So.2d 560, 568, text and n. 15 (Fla. 2005) (differentiating between prejudice under *Brady* and prejudice for discovery violation). Committee Notes to

the 1972 amendment to Rule 3.220 say it "provides for automatic disclosures (avoiding judicial labor) by the prosecutor to the defense of almost everything within the prosecutor's knowledge...."

Upon learning of a potential discovery violation the trial court has an obligation to conduct a *Richardson* hearing. *Snelgrove*, 921 So.2d at 567. Moreover, the trial court's obligation is affirmative and a hearing must be conducted even where the party does not specifically request a hearing or mention *Richardson*. *Brown v. State*, 640 So.2d 106, 107 (Fla. 4th DCA 1994) ("[N]o magic words exist to trigger the requirement that the trial court conduct a *Richardson* hearing."); *Rath v. State*, 627 So.2d 24, 25 (Fla. 5th DCA 1993) (rejecting argument that defense had to specifically request *Richardson* inquiry); *C.D.B. v. State*, 662 So.2d 738, 741 (Fla. 1st DCA 1995) (same); *Copeland v. State*, 566 So.2d 856, 858 (Fla. 1st DCA 1990) ("There are no exact 'magic words' or phrases which must be used by the defense in order to necessitate the inquiry but only the fact that a discovery request has not been met.").

Under *Richardson*, the trial court is required to make an adequate inquiry into all the circumstances, including whether the violation was inadvertent or wilful, trivial or substantial, and whether noncompliance with the rule has prejudiced the ability of the opposing party to properly prepare for trial. *Richardson*, 246 So.2d at 775.

In *Tarrant v. State*, 668 So.2d 223, 225 (Fla. 4th DCA 1996), the trial court held a *Richardson* inquiry, but the Fourth District held that the inquiry was inadequate. *Id*. The trial court in *Tarrant* did not make a formal finding on the record whether there was a discovery violation, nor did the trial court make findings as to whether the violation was trivial or substantial, willful or inadvertent, and what, if any impact the discovery violation had on the defendant's ability to prepare for trial. *Id*. The district court reversed for new trial.

Likewise, in *Mobley v. State*, 705 So.2d 609 (Fla. 4th DCA 1997), the court held that the trial court's *Richardson* inquiry was inadequate. There the defendant was charged with aggravated battery. On the morning of trial, the state disclosed a new witness. The judge made an inquiry, but the district court ruled the inquiry inadequate because the judge did not determine whether there was a discovery violation and failed to find whether such a violation was trivial and whether it was inadvertent. *Mobley*, 705 So.2d at 610-11.

Here, the trial court's inquiry was inadequate. The court did not make a formal finding on the record whether there was a discovery violation; the court did not make findings as to whether the violation was trivial or substantial, wilful or inadvertent, and what, if any impact the discovery violation had on appellant's ability to prepare for trial. In short, the court's investigation "did not even

approximate the full inquiry that Richardson requires." *Barrett v. State*, 649 So.2d 219, 222 (Fla. 1994).

Finally, the error was harmful. In *Scipio*, this court re-emphasized that "the question of 'prejudice' in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder but rather upon its impact on the defendant's ability to prepare for trial." *Scipio*, 928 So.2d at 1149 (quoting *Smith v. State*, 500 So.2d 125, 126 (Fla. 1986)). Thus, the issue of procedural prejudice "does not focus on whether the discovery violation would have made a difference in the verdict." *Scipio*, 928 So.2d at 1149. Instead, the issue is whether there is a reasonable possibility that the discovery violation materially hindered the defendant's trial preparation or strategy. *Id*. at 1150.

As the beneficiary of the error, the state must meet an "extraordinarily high" standard for showing lack of procedural prejudice, and the appellate court must reverse unless it can say beyond a reasonable doubt that the defense was not procedurally prejudiced. *Cox v. State*, 819 So.2d 705, 712 (Fla. 2002). Thus, the state bears a "heavy burden" as to prejudice. *Scipio*, 928 So.2d at 1150.

The state cannot meet that burden in this case. First, no formal *Richardson* inquiry was held; and as this court reasoned in *Smith*, 500 So.2d at 126, "[o]ne cannot determine whether the state's transgression of the discovery rules has prejudiced the defendant (or has been harmless) without giving the defendant the

opportunity to speak to the question." *See also Mobley*, 705 So.2d at 611 ("[H]armful error is presumed from the failure to conduct an adequate *Richardson* hearing....."). Moreover, "[w]here no *Richardson* hearing is held, a criminal defendant may be deemed 'procedurally prejudiced' on theories the defense was not afforded an explicit opportunity to assert in the trial court...." *Hall v. State*, 738 So.2d 374, 378 (Fla. 1st DCA 1999).

Second, even without the proper inquiry, the procedural prejudice is apparent on the face of the record. Had defense counsel been aware of the shooting, he could have moved *in limine* to make sure that Ruth did not mention it at trial. Even though Ruth testified that appellant had nothing to do with the shooting, the jury might have been skeptical and found it more than coincidental that an important state witness was shot a few weeks before appellant's trial. After all, the jury was instructed that they "may believe or disbelieve all or any part of the evidence or the testimony of any witness." T83 5118 (quoting Fla. Std. Jury Instr. (Crim.) 3.9). On the other hand, defense counsel, had the state not hidden this development from him, might have considered whether to make use of it by pointing out to the jury that Ruth may bear some bias or animus towards appellant–who was, after all, on trial for shooting someone–because she was now a shooting victim herself.

The procedural prejudice stemming from Ruth's hydrocodone use is even more glaring. A witness's drug use is admissible for the purpose of impeachment in three situations: first, if it can be shown that the witness was using drugs at or about the time of the incident which is the subject of the witness's testimony; second, *if it can be shown that the witness is using drugs or at or about the time of the testimony itself*; or, third if it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember, and recount. *Edwards v. State*, 548 So.2d 656, 658 (Fla. 1989); *see also Felton v. State*, 949 So.2d 342, 344 (Fla. 4th DCA 2007) (witness's methadone use admissible).

Here, Ruth's drug use would have been admissible impeachment evidence because she was taking the drug at the time of her testimony. But defense counsel was unaware that she was using drugs at the time of her testimony until the middle of his cross-examination. And as defense counsel stated, he doesn't know whether the amount of hydrocodone Ruth was taking was a "high dose, low dose, medium dose[,]" nor does he know what effect it had on her competency to testify. T76 4212-13. Had he been given notice that an important state witness was taking hydrocodone, he might have been able to find out.

Furthermore, there is as much danger in Ruth taking too little hydrocodone as in taking too much (and she was taking half the prescribed amount). One important facet of her testimony will demonstrate this. Ruth testified that when

appellant returned to the house, he said, "The cracker dead and Head ran." T76 4183. Later, however, the prosecutor changed the quote and asked Ruth, "Do you see the person in the courtroom who said, 'I shot the cracker and Head ran'?" T76 4194. Ruth answered, "Yes," and pointed to appellant. T76 4194. But these answers were given when she was in pain and needed more hydrocodone. Given the pain that Ruth was in, she may not have had either the fortitude or mental clarity to take issue with the inaccurate wording of the prosecutor's question; indeed, she may have considered her testimony a painful chore to be gotten through as quickly as possible and let the inaccuracy stand. Although *Scipio* reminds us that the issue of harm in the discovery violation context is one of procedural prejudice, not substantive prejudice, this example shows that this case has elements of both. A new trial should be ordered. The trial court's ruling denied appellant due process and a fair trial and penalty proceeding under the Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 9 and 16, of the Florida Constitution.

POINT IV THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The trial court found the aggravating circumstance that the crime was committed in a "cold, calculated and premeditated" manner (CCP). R28 4025-31. The jury was also instructed on CCP. This was error.

In *Williams v. State*, 967 So.2d 735, 764 (Fla. 2007), this court established the following standard of review for a trial court's ruling on an aggravating factor:

> The standard of review for a trial court's ruling on an aggravating factor is whether competent, substantial evidence supports the trial court's finding. *See Conde v. State*, 860 So.2d at 953. This Court has concluded that "competent substantial evidence" is tantamount to "legally sufficient evidence" and "[i]n criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt." *Almeida v. State*, 748 So.2d 922, 932 & n. 20 (Fla.1999) (quoting *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla.1981)).

Under this standard, this Court should strike CCP at bar.

This Court has established a four-part test to determine whether the CCP aggravating factor is justified: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) the defendant must have had no pretense of moral or legal justification. *See Evans v. State*, 800 So.2d 182, 192 (Fla. 2001).

Cold

Even if a killing is calculated, to be CCP it must be cold. *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992) (although killing was clearly calculated it was not the result of "calm and cool reflection" and thus not cold). Appellant's

actions after the murder belie a finding that the killing was "cold," i.e., that it was "the product of cool and calm reflection." After the murder appellant drove up quickly to Rhonda's house, left the car running, and told York to park it. T76 4182. According to Ruth, appellant was sweating and acted like something was wrong. T76 4182. This is not the way one would act after a killing done with "calm and cool reflection." And later in the car with Rhonda, appellant was nervous and jittery; there were numerous police officers in the area and a helicopter overhead; appellant said, "The cracker must be dead." T78 4998, 4500. Again this is not how one would act, nor what one would say, after a killing done with "calm and cool reflection." *See Hardy v. State*, 716 So.2d 761, 766 (Fla. 1998) (Hardy's suicide attempt after the murder was "not an action characteristic of someone who reflected on his decision to extinguish the life of another."); *compare Williamson v. State*, 961 So.2d 229, 238 (Fla. 2007) ("cold" manner of murder was evidenced by defendant's statements after murder "reflecting that he was disappointed that it took so much effort to kill the decedent."). Rather, this evidence shows that the killing was a "spontaneous act taken without reflection."[13] *Hamblen v. State*, 527 So.2d 800, 805 (Fla. 1988).

[13] It should be noted that the jury had a question about the coldness element, asking: "What is the definition of 'cold'[?]" "Is it calm in the sense of without stress[?]" "Is this the legal definition, 'product of cool and calm reflection[?]" R16 2311; T87 5530. Without objection, the trial court referred the jury to the definitions in the written jury instructions. T87 5534.

Calculated

In *Rogers v. State*, 511 So.2d 526, 533 (Fla.1987), *cert. denied*, 484 U.S. 1020 (1988), this Court defined the "calculated" element of CCP as follows:

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. *See Tatzel v. State*, 356 So.2d 787, 789 (Fla.1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out ... to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our holding in *Herring v. State*, 446 So.2d 1049, 1057 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question.

Thus, under the rule established in *Rogers*, the state must prove beyond a reasonable doubt that the defendant had a careful plan or prearranged design to kill before the criminal episode began.

In finding that the killing was "calculated" the court relied on evidence showing appellant's preparation and planning of the robbery. R28 4028-29. But as discussed below, this shows little more than that a "calculated" robbery occurred, which is insufficient. *See Castro v. State*, 644 So.2d 987, 991 (Fla. 1994) ("While

the record reflects that Castro planned to rob Scott, it does not show the careful design and heightened premeditation necessary to find that the murder was committed in a cold, calculated, and premeditated manner.").

The court also heavily relied on appellant's statement, as Mayes first presented it in direct examination, that "he was gonna kill everybody that exists as if whoever is in there." T80 4662. Mayes acknowledged, however, that in his August 30 statement he said that appellant stated "that if anybody resists him, resists over there, I'm gonna kill them." T80 4709. And Mayes was questioned further. Asked if he decided to change "resists" to "exists," Mayes answered that he didn't know what either word meant.[14] T80 4710.

With this further testimony, the evidentiary force of Mayes's testimony on this point collapses. For example, in *Fiske v. State*, 366 So.2d 423, 424 (Fla. 1978), this Court rejected the state's argument that Fiske's statement to law enforcement officers showed his knowledge of a controlled substance because the statement was "ambiguous and susceptible of innocent explanation as well as being indicative of criminal knowledge." *Id*. This Court held that that ambiguity had to be resolved in favor of the accused. *Id*.

Similarly, in *Holmon v. State*, 603 So.2d 111 (Fla. 4th DCA 1992), disapproved on other grounds, *State v. Green*, 667 So.2d 756 (Fla. 1995), Holmon

[14] Mayes explained that he was "SLD." T80 4710. In closing argument, the prosecutor interpreted this to mean "slow learning deficit." T83 5037.

was convicted of shooting into an occupied vehicle as an aider and abettor based on the theory that he encouraged or requested his codefendant to shoot. On direct, the state's main witness testified that he thought he heard Holmon say, "shoot him, shoot him." But on cross-examination, the witness acknowledged that he had previously testified that Holmon might have said, "*don't* shoot, *don't* shoot him." The district court reversed the conviction on the ground that "[t]his significant inconsistency in the only evidence to support the charges against appellant renders this evidence legally insufficient." 603 So.2d at 111-12.

Likewise, in *Coleman v. State*, 592 So.2d 300 (Fla. 2d DCA 1991), the charge was burglary and the issue was whether Coleman had the homeowner's consent to enter. The district court reversed the conviction because it found the homeowner's "testimony sufficiently ambiguous on the subject of consent to preclude a conviction for burglary." *Coleman*, 592 So.2d at 302.

These cases alone preclude a fact-finder from assuming that the more inculpatory version of appellant's statement is the correct one. But there was additional evidence that appellant said "resists." The state introduced into evidence Mayes's statement to Lieutenant Smith as a prior consistent statement under section 90.801(2)(b), Florida Statute (see Point I). In that statement, Mayes said that appellant told him "that if the victim bucked, meaning if he resists or bucked up, that he was gonna cap him." T80 4781-82. Unlike Mayes's August 30

statement, which was only impeachment evidence, *see Pearce v. State*, 961 So.2d 561, 564 (Fla. 2004), this statement is *substantive evidence*. *Jenkins v. State*, 547 So.2d 1017, 1020 (Fla. 1st DCA 1989) (under section 90.801(2)(b), prior consistent statements are not hearsay and can be used as substantive evidence).

With this substantive evidence, this case is like *Beber v. State*, 887 So.2d 1248 (Fla. 2004), *State v. Moore*, 485 So.2d 1279 (Fla. 1986), and *State v. Green*, 667 So.2d 756 (Fla. 1995), cases in which this Court overturned convictions that were supported solely by prior statements admitted as substantive evidence that contradicted trial testimony.

Clearly there is no competent, substantial evidence that appellant said that "he was gonna kill everybody that exists" when: 1) the witness who claims that appellant said "exists" acknowledged that he previously stated that appellant said "resists" and that he doesn't know what either word means, and, 2) the state introduced substantive evidence under section 90.801(2)(b) that appellant said that he was going to kill anyone who *resists*. Thus, if any version of appellant's statement is accepted, it must be the kill-anyone-who-resists statement.

But Mr. Johns did not resist the robbery; therefore, the evidence shows that appellant's shooting of him was done impulsively. An impulsive killing is, of course, the opposite of a calculated one. *Almeida v. State*, 748 So.2d 922, 933 (Fla. 1999) (holding that trial court erred in finding CCP when facts and circumstances

reflected impulsive killing). A trial court errs in finding CCP if there is a reasonable hypothesis that negates the aggravating factor. *Geralds v. State*, 601 So.2d 1157, 1163 (Fla. 1992); *Mahn v. State*, 714 So.2d 391, 398 (Fla. 1998). Here there is a reasonable hypothesis that the shooting was an impulsive—not calculated—act.

For example, in *Guzman v. State*, 721 So.2d 1155, 1157 (Fla. 1998), Guzman said that the victim "would be easy to rob because he was always drunk and usually had money." He also stated that if he ever robbed anybody, he "'would have to kill them' because 'a dead witness can't talk.'" *Id*. Guzman robbed the victim and killed him with a samurai sword. This court struck CCP (*id*. at 1162; e.s.):

> We must conclude that the evidence in the record does not support the trial judge's finding that the murder was cold, calculated, and premeditated. Witnesses Cronin and Rogers testified that Guzman stated that he was taking money from Colvin's motel room when his intoxicated victim awoke and began to sit up in bed. Guzman confessed that he used the samurai sword that was in the room to murder Colvin. Thus, the undisputed testimony of the only witnesses to the events immediately surrounding the murder reflect the view that the murder was neither calculated nor committed with heightened premeditation. **Rather, the testimony reveals that the murder was an extemporaneous action intended to eliminate a potential witness to the theft.**

Similarly, in *Hardy*, *supra*, 716 So.2d at 765, Hardy stated that "[i]f it ever came down to me and a cop, it was the cop." Hardy, who was in possession of a

concealed firearm, killed a sheriff's deputy who was searching him and about to find the concealed weapon. *Id*. at 766. This Court struck CCP (*id*.):

> Hardy knew the officer would find the gun, and it appears that he made a spur-of-the-moment decision to shoot the officer. Moreover, immediately following the shooting, Hardy attempted to take his own life. Suicide is not an action characteristic of someone who reflected on his decision to extinguish the life of another. Accordingly, it is just as likely that Hardy panicked and shot the officer as it is that his actions were the result of calm and cool reflection.
>
> In finding the murder was calculated, the trial court relied primarily on the prior statement made by Hardy. This was a very general statement made several weeks before the murder in reference to what Hardy would do if he were involved in a situation similar to that of Rodney King, who was beaten by police officers. We cannot construe this as sufficient evidence of a cold, calculated, and premeditated plan regarding what Hardy would do if he were ever confronted by a police officer under the circumstances of the present case.

Finally, this Court struck CCP in *Young v. State*, 579 So.2d 721 (Fla. 1991), despite the defendant's statement that if anyone pointed a gun or shot at him he would shoot back. The facts were (722-23):

> In the early hours of August 31, 1986, Young, twenty years old, picked up three juvenile acquaintances, and the quartet decided to steal a car. Young drove to his home and got a sawed-off shotgun. In response to his companions' questioning taking the gun with them, Young told them that if anyone pointed a gun or shot at him he would shoot back. They found a car they liked in a condominium parking lot in Jupiter, broke into it, and broke the steering column in their attempt to steal it. When they heard someone coming out of one of the apartments, they returned to Young's car. The victim, armed with a handgun, and his son approached Young's car. The victim ordered Young and his companions out of the car and told his son to call the authorities. Young got out of the car, taking the shotgun with him, and lay on the ground.

> Young's theory of defense at trial was self-defense, but trial testimony conflicted about whether Young or the victim shot first. Three of the victim's neighbors testified that they were familiar with firearms and that the first and last shots came from a shotgun with pistol shots in between. An off-duty state trooper working nearby as a security guard also testified that shotgun blasts preceded and followed the pistol shots. Two of Young's companions testified that the victim shot first.
>
> The victim suffered separate wounds, to the chest and the lower abdomen, from two separate shotgun blasts. An x-ray showed ninety-seven shotgun pellets in his body. The medical examiner testified that both wounds were potentially lethal, but that the chest wound was "devastating."
>
> After his arrest, Young claimed that one of his companions shot the victim. When confronted with his companions' statements that he did the shooting, however, Young changed his story and admitted that he shot the victim, but claimed self-defense. … .

This court struck CCP: "Although sufficient to support a conviction of premeditated murder, the evidence does not rise to the level needed to support finding the aggravating factor of cold, calculated, and premeditated." *Id*. at 724. *See also Clark v. State*, 609 So.2d 513, 515 (Fla. 1992)(no CCP even though "evidence establishes that Clark decided to murder Carter at some point during the drive [to scene of offense]."); *Perry v. State*, 801 So.2d 78, 91-92 (Fla. 2001) ("Perry's statement about being able to kill someone with a knife by cutting the jugular vein was not relevant to proving the cold, calculated, and premeditated (CCP) aggravating circumstance"; quoting and following *Hardy*).

Here, the other evidence relied up by the trial court to establish the calculated element was the manner of killing itself, and the "advance procurement

of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course." R28 4027 (borrowing language from *Swafford v. State*, 533 So.2d 270, 277 (Fla. 1997)).

Advance procurement of a weapon is not a factor here because weapons are procured in advance of every armed robbery. *See Lawrence v. State*, 614 So.2d 1092, 1095 (Fla. 1993) ("The evidence does not support finding the murder to have been committed in a cold, calculated, and premeditated manner. Lawrence intended to rob the store and to that end procured a handgun. The state, however, failed to present sufficient evidence of the heightened premeditation needed to support finding this aggravator."). Moreover, that part of *Swafford* relied upon by the trial court appears to be dicta as there is no indication in the opinion that Swafford procured a weapon in advance; there was evidence, however–and this is the reason CCP was upheld–that Swafford's modus operandi, as evidenced by *Williams* Rule evidence of an aborted attempt at this, was to kidnap women, rape them, and then shoot them in the head in order to eliminate them as witnesses.

The killing in this case was not "calculated" as that term is defined in *Rogers* ("[t]o plan the nature of beforehand: think out ... to design, prepare or adapt by forethought or careful plan.").

Heightened Premeditation

For the "heightened premeditation" element of CCP, the court again relied on appellant's "gonna kill anyone that exists" statement: appellant "drove to Jimmy's Auto Clinic with Anthony Mayes proclaiming that he would commit murder in the process...." R28 4029. Appellant "had no intentions of leaving any survivors as further evidenced by his statement to Anthony Mayes moments before the robbery and murder [footnote: ". . . gonna kill anyone that exists . . ."]." R28 4030. As explained above, the evidence that appellant said "exists" rather than "resists" is legally insufficient.

The trial court also relied on appellant's failure to conceal his identity and his use of a distinctive car. R28 4029. But appellant submits that lack of concealment is just as consistent with lack of careful planning or low intelligence as it is with CCP. Inarguably, robberies, burglaries, murders, and other crimes are committed everyday by persons who are not masked. Moreover, the car used wasn't that distinctive; after all, Mr. Vega followed a car that he thought was the car used but was not (by coincidence appellant was riding in it).

There is no heightened premeditation here. In *Castro v. State*, 644 So.2d 987 (Fla. 1994), this Court held there was no heightened premeditation in a case where the evidence showed a careful plan to rob rather than to kill. Deciding he needed a car, Castro encountered Austin Scott, and struck up a conversation. He left on the pretext of getting some money, but instead, he got a knife from a nearby apartment.

Returning, he persuaded Scott not to leave, and they drank a beer. Scott tried to leave again, and Castro "grabbed Scott by the throat and squeezed so hard that blood came out of Scott's mouth." As his victim struggled, Castro said, "Hey, man, you've lost. Dig it?" He then got the knife and stabbed Scott repeatedly. Having fulfilled his plan, he took Scott's car. *Id*. at 989. This Court struck CCP because the evidence showed a plan to rob, but not a careful design and heightened premeditation to kill:

> This aggravating factor requires "a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder." **While the record reflects that Castro planned to rob Scott, it does not show the careful design and heightened premeditation necessary to find that the murder was committed in a cold, calculated, and premeditated manner.** Although this aggravating factor does not apply, three other aggravating factors support the death penalty and there is a weak case for mitigation. Thus, any error is harmless beyond a reasonable doubt, … and the trial court did not err in instructing the jury on this factor.

Id. at 991 (e.s.; footnote and citations omitted).

"While 'heightened premeditation' may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of 'premeditation over and above what is required for unaggravated first-degree murder.'" *Perry v. State*, 801 So.2d 78, 92 n.15 (Fla. 2001) (citation and internal quotations omitted). The state failed to prove heightened premeditation.

> **<u>This Court has struck CCP in cases involving greater coldness, calculation and premeditation.</u>**

As noted above, the trial court relied upon the manner of killing in finding CCP. But this Court has struck CCP in cases involving greater coldness, calculation and premeditation than at bar, and it should strike the circumstance at bar. For example, in *Power v. State*, 605 So.2d 856 (Fla. 1992), Power armed himself with a gun, went to the home of a small 12 year-old girl who was waiting for a ride to school, waited while the terrified girl had her ride leave without her, abducted her, beat her, anally and vaginally assaulted her, hog-tied and double gagged her, and then stabbed her and let her bleed to death over 10 to 20 minutes, "casually" walked away eating her school lunch, and, when he encountered an armed deputy, robbed the deputy of his weapon and briefly spoke with the deputy before fleeing. *Id*. at 858-60, 863-64. He left no fingerprints at the scene and had a pair of gloves when arrested several days later. *Id*. at 859-60. The murder occurred on October 6, 1987, *id*. at 858, and the judge found that he had announced the intent to commit such a murder two weeks before, on September 23, 1987. *Id*. at 864. This Court struck CCP. *Id*.

In *Wyatt v. State*, 641 So.2d 1336 (Fla. 1994) (*Wyatt I*), two escaped convicts from North Carolina armed themselves with guns and entered a pizzeria. One stayed in front while Wyatt had the manager (William Edwards) open the safe. William's wife Frances and another employee (Bornoosh) were locked in the bathroom. Taking the money, Wyatt raped Frances, then shot all three. *Id*. at 1338.

They "were subjected to at least twenty minutes of abuse prior to their deaths." *Id*. at 1340. After seeing his wife raped, William

> begged for his life and stated that he and Frances, his wife, had a two-year-old daughter at home. Wyatt shot him in the chest. Upon seeing her husband shot, Frances Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Having witnessed the shooting of his co-workers, Michael Bornoosh started to pray. Wyatt put his gun to Bornoosh's ear and before he pulled the trigger told him to listen real close to hear the bullet coming. When Wyatt realized William Edwards was still alive he went back and shot him in the head.

Id. at 1340-41. This Court struck CCP. *Id*.

In *Wyatt v. State*, 641 So.2d 355 (Fla. 1994) (*Wyatt II*), after committing the crimes in *Wyatt I* as part of a "crime spree throughout Florida," *Id*. at 357, Wyatt abducted a woman from a bar near Tampa and drove her across the state to Indian River County, where he shot her in the head and left her body in a ditch. *Id*. at 357-58. He explained to a cell mate that he killed her "to see her die." *Id*. at 359. This Court struck CCP for reasons similar to those in *Wyatt I*. *Wyatt II* at 359.

In *Thompson v. State*, 619 So.2d 261 (Fla. 1993), Thompson and another man deliberately and slowly tortured and beat a girl to death. This Court quoted the facts from a prior opinion in the case:

> Thompson, Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only $25 after telling the others that she thought she could get $200 or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began hitting her in the

> face. Surace then forced her to undress, after which the appellant Thompson began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage, who apparently feared equivalent treatment had she tried to leave the motel room.

Id. at 263. This Court struck CCP. *Id*. at 266:

In *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), the case on which *Thompson* relied, Hamblen apparently murdered a woman in Texas and then drove a rental car to Florida where he decided to commit a robbery to pay the rental fee. He robbed a store clerk, made her disrobe in a dressing room and then shot her (accidentally, he claimed). As he was taking her to another part of the store, she pressed a silent alarm, and Hamblen became angry. He took her back to the dressing room and murdered her with a single shot at close range to the head. *Id*. at 801. This Court struck CCP writing at page 805 (c.o.):

> In the instant case, the evidence does not indicate that Hamblen had a conscious intention of killing Ms. Edwards when he decided to rob the Sensual Woman. It was only after he became angered because Ms. Edwards pressed the alarm button that he decided to kill her. Unlike those cases in which robbery victims have been transported to other locations and killed some time later, … Hamblen's conduct was more

> akin to a spontaneous act taken without reflection. While the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation and calculation required to support this aggravating circumstance. Notwithstanding, we are convinced that the elimination of this aggravating circumstance would not have resulted in Hamblen's receiving a life sentence.

The facts at bar do not show more coldness, calculation, and premeditation than the facts in the foregoing cases. They do not show the level of calm coldness, calculation, and premeditation involved when Power went into the home, waited while the terrified girl turned away a potential rescuer saying their lives were in danger, then abducted, bound, gagged, raped and stabbed her out of a premeditated design that she bleed to death. They do not show the level involved in *Wyatt I* when Wyatt shot a man begging in front of his wife, then shot the wife, then shot a clerk, saying he could hear the bullet coming, and then went back to finish the first man off. Nor do the facts at bar compare with Wyatt's actions in *Wyatt II* when, after having already murdered three people, he abducted a woman across the state and shot her in a ditch just "to see her die." The case at bar does not show the slow, careful torturing of a girl with lighted cigarettes and brutal sexual assaults with pieces of furniture such as occurred in Thompson's case. The sentence violates the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new penalty phase and resentencing.

POINT V THE TRIAL COURT FAILED TO PROPERLY FIND AND EVALUATE APPELLANT'S MENTAL MITIGATION EVIDENCE.

Defense counsel asked the trial court to find and weigh as mitigation five aspects of appellant's mental condition: 1) appellant suffers from brain damage, and, in particular, frontal lobe damage, which is the area of the brain that controls impulses; 2) appellant's IQ falls within the borderline intellectual range; 3) appellant has cognitive disorder; 4) throughout his life, appellant's mental condition has been misdiagnosed; and 5) appellant suffers from suicidal tendencies and has made numerous suicide attempts. R27 3913-15.[15]

As discussed more fully below, most of appellant's mental mitigation evidence was undisputed; yet the trial court failed to find unrefuted evidence that appellant suffers from brain damage and a borderline intellectual range. In addition, the trial court found that appellant's cognitive disorder and misdiagnosis were "non-issues relative to sentencing." R28 4044. More fundamentally, the trial court erroneously considered appellant's mental health evidence in the context of whether there was a nexus between appellant's mental health and the crimes.

This Court has defined a mitigating circumstance as "any aspect of a defendant's character or record and any of the circumstances of the offense that

[15] In defense counsel's sentencing memorandum, the heading lists three aspects of appellant's mental mitigation (borderline intellectual functioning, cognitive disorder, and suicidal), but the body of the memorandum addresses the five aspects listed above. R27 3913-15.

reasonably may serve as a basis for imposing a sentence less than death." *Crook v. State*, 813 So.2d 68, 74 (Fla. 2002) (quoting *Campbell v. State*, 571 So.2d 415, 419 n.4 (Fla. 1990); internal quotation marks omitted). The basic principles for finding and weighing mitigation were outlined in *Coday v. State*, 946 So.2d 988, 1003 (Fla. 2006):

> A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection. Even expert opinion evidence may be rejected if that evidence cannot be reconciled with the other evidence in the case. Finally, even where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case.

The trial court erred when it failed to find from unrefuted evidence that appellant suffers from brain damage.

"Clearly, the existence of brain damage is a significant mitigating factor that trial courts should consider in deciding whether a death sentence is appropriate in a particular case." *Crook*, 813 So.2d at 75. Here, there is unrefuted evidence that appellant suffers from brain damage; yet the trial court failed to find this important mitigating factor.

Appellant has had behavioral problems since age eight. T86 5384. At age nine, when most children are entering the fourth grade, appellant entered the juvenile justice system. T86 5333-34. When he was about 14, he was in a car

accident and received a serious head injury. T86 5344-46. Appellant was in a coma for two days; after the coma he had seizures (which can also damage the brain), and he still takes seizure medicine. T86 5345-46.

Given appellant's history of head trauma, Dr. Riordan, a neuropsychologist, did a neuropsychological evaluation. T86 5346. Dr. Riordan administered the Halstead-Reitan extended battery of tests. T86 5347-48. Appellant's scores on these tests fell within the brain damaged range. T86 5348-49. Moreover, the groove pegboard test showed frontal lobe brain damage, and the frontal lobe is that part of the brain that controls impulses. T86 5350-51.

The court discussed much of this evidence in its order, and it found that appellant sustained an adolescent head or brain injury. R28 4042-43. But the court did not make a finding about the most important aspect of this evidence: whether appellant suffers from brain damage, and, specifically, frontal lobe damage. The court did note that "no competent clinical medical evidence was introduced or presented for consideration by the jury or this Court to determine whether, or the extent to which the Defendant sustained organic brain damage." R28 4042 (emphasis in original). But the court did not find that, because of the lack of "clinical medical evidence," appellant's brain damage was not proved. Certainly, there was no testimony that "clinical medical evidence" is needed in order to make a finding of brain damage. It should be noted that Dr. Landrum, the state's expert,

is not a neuropsychologist, and he did not (and probably could not) say that the tests Dr. Riordan performed were inadequate or insufficient, or that the conclusions he reached from them were incorrect. In short, there is no evidence that Dr. Riordan could not have drawn the conclusions that he did from his testing and analysis.

The trial court found that appellant suffered a "head injury" (R28 4042) or "adolescent brain injury" (R28 4045), but it makes no finding on whether appellant suffers from brain damage, and, specifically, frontal lobe brain damage. This was error because the evidence that appellant suffers from brain damage and frontal lobe brain damage was unrefuted. *Crook*, 813 So.2d at 75 (holding that the trial court erred in rejecting uncontroverted evidence of Crook's brain damage, and remanding for resentencing).

The trial court erred in rejecting unrefuted evidence of borderline intellectual functioning.

"Evidence of significantly impaired intellectual functioning is obviously evidence that 'might serve as a basis for a sentence less than death.'" *Tennard v. Dretke*, 542 U.S. 287, 288 (2004) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); internal quotation marks omitted). *See also Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (noting that where the defendant had an IQ of 79, "his diminished mental capacities ... augment his mitigation case"). The evidence that appellant suffered from borderline intellectual functioning was unrefuted. The trial court,

however, erroneously found that appellant had only "below average intelligence." R28 4042, 4045.

Dr. Riordan performed the Wechsler Adult Intelligence Test and appellant scored 81. T86 5379. Department of Corrections records showed a similar score of 82. T86 5379. Dr. Riordan testified that this IQ falls within the borderline intellectual range. T86 5336-37, 5405. On cross-examination, Dr. Riordan testified that the Wechsler scale put this score in the below average range; but on redirect, Dr. Riordan testified that in the psychological community, the DSM-IV-TR is used and that appellant's IQ score in that manual is considered "borderline intellectual range." T86 5380-81; 5404-05.

In its order, the trial court found that appellant had "below average intelligence" but that he did not have "borderline intellectual functioning" (R28 4041-42 (e.s.)):

> Dr. Riordan met with the Defendant on several occasions and administered psychological tests to him, including the Wechsler Adult Intelligence test which indicated that Alwin Tumblin had a full-scale I.Q. score of 81. Dr. Riordan also testified that this was consistent with a previous test administered by the Department of Corrections that indicated an I.Q. score of 82. Dr. Riordan testified that this score would be considered "below average" intelligence under the Wechsler Adult Intelligence Test Scale, Third Edition. According to Dr. Riordan, those scores would not be considered "borderline" or "retarded". This refutes the records that Dr. Riordan referred to from New Horizons where the Defendant was assessed to have "mentally retarded" intellectually functioning. Dr. Riordan also testified that the Defendant's I.Q. scores fell within the "borderline intellectual range," according to the DSM-IV-TR Manual. Dr. Riordan did not read or

> testify to the DSM-IV-TR Manual's definition or description of "Borderline Intellectual Range" other than I.Q. scoring.
>
> **The Court is reasonably convinced that, at the time of the homicide, the Defendant had below average intelligence; but that he did not have borderline intellectual functioning. The manner in which he carried out his plan to commit a robbery and murder contradicts any suggestion that the Defendant had "borderline intellectual functioning," which implies that he was barely able to function intellectually.**

The trial court erred in rejecting Dr. Riordan's testimony that appellant had "borderline intellectual functioning." Although it is true that "[e]ven expert opinion evidence may be rejected if that evidence cannot be reconciled with the other evidence in the case," *Coday*, 946 So.2d at 1003, the trial court's reasons for rejecting Dr. Riordan's opinion are not valid.

First, Dr. Riordan's testimony that appellant's score of 81 places him in the borderline intellectual functioning range using the DSM-IV-TR Manual as the appropriate source is unrefuted.[16] Indeed, this court, after summarizing an expert's testimony in this area, said that "[b]orderline intellectual functioning is defined as a score between 70 and 84...." *Johnston v. State*, 960 So.2d 757, 759 (Fla. 2006); *see also Burger v. Kemp*, 483 U.S. 776, 779 (1987) (noting that petitioner "had an IQ of 82 and functioned at the level of a 12-year-old child."). Second, the trial court

[16] *See* American Psychiatric Association, *Diagnostic and Statistical Manual* (text rev. 4th ed.2000) at 48 ("Borderline Intellectual Functioning (see p. 740) describes an IQ range that is higher than that for Mental Retardation (generally 71-84)."), at 740 ("This category [Borderline Intellectual Functioning] can be used when the focus of clinical attention is associated with borderline intellectual functioning, that is, an IQ in the 71-84 range.").

cannot rely on the manner in which appellant carried out the robbery and murder to justify its finding. No evidence was presented that this unsophisticated robbery necessarily required more intelligence than that possessed by someone classified as having "borderline intellectual functioning." The trial court erred in not finding borderline intellectual functioning.

The trial court applied a test to the mental mitigation evidence rejected by the Supreme Court.

The trial court erroneously considered appellant's mental health evidence in the context of whether there was a nexus, or cause and effect relationship, between appellant's mental health and the crimes. For example, after noting that Dr. Riordan found that appellant has cognitive disorder and frontal lobe brain damage, and that these conditions impair his ability to control his impulses, the court stated: "Importantly, there is no evidence in this case, including the expert testimony of Dr. Riordan, that Alwin Tumblin shot Jimmy Johns in the head on May 24, 2004 ending his life because Mr. Tumblin was unable to control his impulses; because he had a cognitive disorder or because he was brain damaged." R28 4044.

The court returned to this theme when it discussed Dr. Riordan's testimony that appellant's cognitive disorder had never been properly diagnosed and therefore not properly treated (R28 4044; e.s.):

> Regardless, Dr. Riordan did not articulate how this [misdiagnosis] compromised the Defendant's clinical condition; **or what bearing, if any, such compromise had on the events of May 24, 2004.**

> Similarly, Dr. Riordan testified that Alwin Tumblin was mistreated with medications contra-indicated for his diagnosed (or mis-diagnosed) conditions. However, he did not opine how, if at all, these mistreatments resulted in any long-term effects; **or whether they had any bearing upon the Defendant's actions on May 24, 2004. As such, the Court considers these as non-issues relative to sentencing. State differently, the Court is not reasonably convinced that these factors are mitigating under the facts of this case.**

The trial court even applied a nexus test to appellant's suicidal behavior: "[T]he Court is reasonably convinced that the Defendant has exhibited suicidal behavior during his life; **although there is no evidence to indicate that the Defendant was suicidal on or about May 24, 2004; or that it contributed in any way to the killing of Jimmy Johns."** R28 4044 (e.s.).

Finally, the trial court made all these points again in its summary of the mental mitigation evidence (R28 4045; e.s.):

> In summary, the Court is reasonably convinced that the Defendant has below average intelligence; that he suffers from behavioral disorders characterized by anti-social and impulsive conduct; **that an adolescent brain injury may have caused or contributed to some; but, certainly not all, of his anti-social behaviors since that injury**; and that the Defendant has exhibited suicidal behavior. Accordingly, this Court is reasonably convinced that this non-statutory mitigating factor has been established. **However, there is no evidence to indicate that the robbery and murder of Jimmy Johns was the result of diminished intellectual capacity, any specific psychological disorder (or symptom), impaired ability to control impulses or suicidal ideation prevailing at the time of this murder.** To the contrary, the entire plan, preparation and execution of the robbery and murder of Jimmy Johns indicates that these crimes were the product of a coherent plan which was methodically carried out with intentional and non-impulsive

> behavior on the part of the Defendant. The facts of this case do not strongly support the notion that this mitigating circumstance significantly reduces Alwyn Tumblin's degree of culpability for the murder of Jimmy Johns, taking into account the totality of the Defendant's life and character. This Court gives this mitigating circumstance little weight.

As a preliminary matter, if appellant has brain damage, and, in particular, frontal lobe brain damage (and the evidence is unrefuted that he does), then that would explain (but not justify) the killing. Appellant said before the robbery that he would kill anyone who resists the robbery (appellant argues in Point IV that this version of appellant's statement must be accepted). Mr. Johns did not resist the robbery, and so it appears that appellant's shooting of him was done impulsively. If appellant's impulsive behavior is the result of his frontal lobe brain damage, then this murder was attributable at least in part to something over which appellant had no control.[17] Thus, even using the trial court's analysis, there is evidence that the killing was the "result" of appellant's brain damage.

[17] In *Crook*, an expert explained that people with frontal lobe brain damage "often lose control over their own behavior and are prone to certain types of 'rage' attacks as the frontal lobe works as a 'braking mechanism for human behavior[,]'" and that "one of the major characteristics of a 'rage' attack is that 'the intensity of violence appears to have no relationship with the inciting event.'" *Crook*, 813 So.2d at 71. Moreover, the expert explained, people with frontal lobe brain damage "will fly into rage at the drop of hat. They may be provoked, although the provocation may be so minor that it's difficult for an observer to establish a relationship." *Id*. Crook's background, it should be noted, is strikingly similar to appellant's: "Crook had a history of sustained brain trauma, learning disabilities, severe behavioral problems, alcohol and drug abuse, parental neglect, and socioeconomic deprivation." *Id*. at 70.

Again, this is not a legal justification or excuse, but mitigation is "not limited to evidence that provides justification or excuse for the act." *Asay v. Moore*, 828 So.2d 985, 990 (Fla. 2002), citing *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982). In *Eddings*, defense counsel presented testimony at the penalty phase that addressed the defendant's "troubled youth," including his lack of parental supervision, "excessive physical punishment," and his resulting emotional disturbance. However, the trial judge decided that he was prohibited "by law" from considering it as mitigation. Specifically, the trial judge refused to consider testimony about the defendant's abusive family history as mitigation because, although it "was 'useful in explaining' his behavior ... it did not 'excuse' the behavior." 455 U.S. at 113.

The Supreme Court rejected this narrow view of mitigation. The defendant's troubled youth and abusive family history did not have to "suggest an absence of responsibility for the crime of murder" in order to be "a relevant mitigating factor of great weight." *Id*. at 116.

In *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), the Supreme Court further explained the meaning and purpose of mitigation. In that case, the court reviewed the Texas death penalty procedure of asking the jury to consider two "special issues" in deciding on the sentence: whether the killing was deliberate, and whether the defendant would be a continuing threat to society. The Court held that

this method was unconstitutional because it did not allow the jury to give effect to mitigating evidence beyond the scope of those questions. 492 U.S. at 322. The Court said that the presentation of mitigation evidence is not enough; the sentencer must be able to give effect to it (*id*. at 319):

> Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. *Hitchcock v. Dugger*, *supra*. Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson*, 428 U.S., at 304, 305, 96 S.Ct., at 2991, 2992. "Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, *supra*, 479 U.S., at 545, 107 S.Ct., at 841 (O'CONNOR, J., concurring) (emphasis in original).

In the case at bar, the trial judge did not give effect to appellant's mental mitigation evidence because he considered the mental mitigation in terms of whether there is a nexus, or cause and effect, between appellant's mental health and the crime. In *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam), the Court addressed whether it is appropriate for a reviewing court to evaluate mitigating evidence in this fashion.

In *Tennard* and *Smith*, the Supreme Court reviewed the Fifth Circuit's approach to claims brought under *Penry v. Lynaugh*, *supra*. In *Tennard*, the defendant contended that the "special issues" procedure had not allowed the jury to give mitigating effect to his low IQ. The Fifth Circuit, however, required

mitigation evidence to be "constitutionally relevant," that is, the evidence must show a "uniquely severe permanent handicap with which the defendant was burdened through no fault of his own," and that "the criminal act was attributable to this severe permanent condition." *Tennard*, 542 U.S. at 283 (internal quotation marks, and citation omitted). Applying this test, the Fifth Circuit rejected Tennard's *Penry* claim "because his low IQ evidence bore no nexus to the crime…." *Tennard*, 542 U.S. at 84.

The Supreme Court flatly rejected this view of mitigation: "The Fifth Circuit's test has no foundation in the decisions of this Court." *Id*. The Court disapproved of both prongs of the test, and it had this to say about the requirement that the crime be "attributable" to the defendant's mental deficiency (542 U.S. at 287 (e.s.)):

> **The Fifth Circuit was likewise wrong to have refused to consider the debatability of the *Penry* question on the ground that Tennard had not adduced evidence that his crime was attributable to his low IQ.** In *Atkins v. Virginia*, 536 U.S., at 316, 122 S.Ct. 2242, we explained that **impaired intellectual functioning is inherently mitigating**: "[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal." Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. **Equally, we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence-and thus that the *Penry* question need not even be asked-unless the defendant also establishes a nexus to the crime.**

The Court also stated that "[e]vidence of significantly impaired intellectual functioning is obviously evidence that might serve as a basis for a sentence less than death." 542 U.S. at 288 (internal quotation marks, and citations omitted), and that "[i]mpaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately." *Id.*

Here, the trial court used the wrong standard in evaluating the mental mitigation evidence because it does not appear that the court recognized that "impaired intellectual functioning is inherently mitigating," *id.* at 287, or that it has "mitigating dimension beyond the impact it has on the individual's ability to act deliberately," *id.* at 288. Instead, the court evaluated the evidence in terms of whether there was a nexus, or cause and effect relationship, between appellant's mental health and the crime. This is error under *Tennard* and *Smith*. *See State v. Payne*, Nos. 28589, 32389 (Idaho June 18, 2008), at 23 (citing *Tennard* and *Smith*, court held that trial court did not properly weigh mental mitigation evidence because it considered it in context of whether there was nexus between Payne's mental health and crimes).

In the case at bar, the trial court failed to give effect to "inherently mitigating" evidence. And unless this evidence is given effect, we cannot "be sure that the sentencer has treated the defendant as a 'uniquely individual human

bein[g]' and has made a reliable determination that death is the appropriate sentence." *Penry*, 492 U.S. at 319 (citation omitted).

Because the trial court used the wrong standard in evaluating the mental mitigation evidence, because it failed to find the unrefuted evidence of brain damage, and because it rejected the unrefuted evidence of borderline intellectual functioning, this Court should vacate the death sentence and remand for resentencing. *Crook*, 813 So.2d at 74-78 (vacating death sentence and remanding for reconsideration by trial judge because trial judge erred in rejecting uncontroverted evidence of brain damage and borderline mental retardation); *Huckaby v. State*, 343 So.2d 29, 33-34 (Fla. 1977) (vacating death sentence where trial court completely ignored evidence of mental mitigation partially on the basis that the defendant understood the difference between right and wrong).

The trial court's erroneous evaluation of mitigating evidence and rejection of mitigating evidence denied appellant due process and a fair reliable sentencing. Fla Const. Art. I, §§9 and 17; U.S. Const. Amend V, VI, VIII, XIV.

POINT VI THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." *Fitzpatrick v. State*, 527 So.2d 809, 811 (Fla. 1988). This court summarized proportionality review as a consideration of the "totality of circumstances in a case," and, due to the finality

and uniqueness of death as a punishment, "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So.2d 954, 956 (Fla. 1996). And in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), this Court made it clear that like cases would be treated alike and that results would not vary based on discretion (283 So. 2d at 10 (e.s.):

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die this court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia, Supra* [408 U.S. 238 (1972)], can be controlled and channeled until **the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.**

Under this Court's proportionality analysis, the death penalty is reserved for the "most aggravated" and "least mitigated" of murders:

> [O]ur inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of **both** (1) the most aggravated, **and** (2) the least mitigated of murders.

Almeida v. State, 748 So.2d 922, 933 (Fla. 1999) (e.s.) (footnote omitted); *see also Cooper v. State*, 739 So.2d 82, 85 (Fla. 1999).

This murder is not both the most aggravated and least mitigated of murders. As discussed in Point IV, the CCP aggravator does not apply in this case. And there is substantial mitigation. As discussed in Point V, there is unrefuted evidence

that appellant suffers from frontal lobe brain damage and borderline intellectual functioning, both of which are compelling mitigation. *Woods v. State*, 733 So.2d 980, 992 (Fla. 1999) (holding death sentence disproportionate and finding significant defendant's "borderline intellectual functioning due to an IQ of only seventy-seven."); *Green v. State*, 975 So.2d 1081, 1088 (Fla. 2008) ("We have consistently recognized such [mental health] mitigation as among the most compelling."); *Tennard v. Dretke*, 542 U.S. 287, 288 (2004) ("Evidence of significantly impaired intellectual functioning is obviously evidence that 'might serve as a basis for a sentence less than death.'" quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); internal quotation marks omitted).

Moreover, appellant's prior crimes, as well as this murder, are consistent with the mitigating factor of brain damage resulting from poor impulse control. Brain damage and frontal lobe brain damage were recognized as important mitigation in *Crook v. State*, 813 So.2d 68 (Fla. 2002) (*Crook I*). In that case, Crook was convicted of murder, robbery, and sexual battery in the brutal slaying of a bar owner. *Id*. at 69. Crook had frontal lobe brain damage, and an expert explained that people with frontal lobe brain damage "often lose control over their own behavior and are prone to certain types of 'rage' attacks as the frontal lobe works as a 'braking mechanism for human behavior[,]'" and that "one of the major characteristics of a 'rage' attack is that 'the intensity of violence appears to have no

relationship with the inciting event.'" *Crook*, 813 So.2d at 71. Moreover, the expert explained, people with frontal lobe brain damage "will fly into rage at the drop of hat. They may be provoked, although the provocation may be so minor that it's difficult for an observer to establish a relationship." *Id*.

Crook's background, it should be noted, is strikingly similar to appellant's: "Crook had a history of sustained brain trauma, learning disabilities, severe behavioral problems, alcohol and drug abuse, parental neglect, and socioeconomic deprivation." *Id*. at 70. Appellant has a history of brain trauma: at age 14 he received a serious head injury that put him in a coma for two days and caused him to have seizures for which he still takes medicine. In school, appellant was labeled emotionally handicapped and learning disabled; and he failed most of his special education classes. Appellant has had behavioral problems since age eight; and at age nine, when most children are beginning the fourth grade, he entered the juvenile justice system. Appellant has a history of alcohol and drug abuse, and a history of parental neglect and socioeconomic deprivation. Appellant's father left the family when he was young; and because his mother had to work long hours to support the family, he often had to care for his younger siblings.[18] "[D]efendants

[18] "Poor parents who cannot manage to somehow shoulder the enormous additional burdens that poverty places on them may be unable to properly nurture and care for their children, forcing the children prematurely out of childhood and into more adult roles and responsibilities." Craig Haney, *Evolving Standards of*

who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

In *Crook I*, this Court remanded for the trial court to reconsider the mental mitigation. On remand the trial court reimposed the death sentence on a finding of three aggravators: murder was committed in the course of a sexual battery, and for pecuniary gain, and was heinous, atrocious, and cruel. *Crook v. State*, 908 So.2d 350, 355 (Fla. 2005) (*Crook II*). This court held that death was disproportionate given Crook's background and mental mitigation. Id. at 358-59.

Moreover, this Court has found death disproportionate in cases with less mitigation. In *Terry v. State*, 668 So. 2d 954 (Fla. 1996), Terry and Floyd were riding around looking for a place to rob. They came to a gas station where the Francos worked. Floyd held Mr. Franco at gunpoint while Terry dealt with Mrs. Franco in a different room. Terry shot and killed Mrs. Franco. Aggravating circumstances included prior violent felony, during the course of a felony, and pecuniary gain (merged). The mitigation was minimal: good family man, poverty, emotional and developmental deprivation in childhood. This Court held that death was disproportionate.

Decency: Advancing the Nature and Logic of Capital Mitigation, 36 Hofstra L. Rev. 835, 866 (2008).

In *Johnson v. State*, 720 So.2d 232, 238 (Fla. 1998), death was disproportionate where Johnson was convicted of first degree murder, attempted first degree murder, robbery, attempted robbery, and burglary. Two aggravating circumstances were present: four prior violent felonies and during the course of a felony. The evidence showed that Johnson shot the victim three times in the house then moved the victim to the porch and, without provocation, stood over him and shot him five or six more times. 720 So. 2d at 236. The cumulative effect of the wounds caused death. *Id*. The circumstances in this case are less egregious that in *Johnson*.

Furthermore, Johnson had less mitigation than in this case. Johnson's mitigation was "he was 22 years old, troubled childhood; had young daughter, was respectful to parents and neighbors; obtained a GED, was previously employed, voluntarily surrendered to police." In *Johnson*, death was deemed disproportionate.

In *Thompson v. State*, 647 So.2d 824 (Fla. 1994), the defendant was convicted of killing a subway sandwich shop owner, by a single shot to the head, during a robbery. The trial court found three aggravators: during the courses of a robbery; witness elimination; and CCP. The avoid arrest aggravator was reversed because it was not known what occurred during the shooting. Death was found disproportionate with mitigation showing Thompson was a good parent, was

honorably discharged from the Navy, was a good prisoner, had artistic skills, and had been employed. The instant case has more mitigation.

Finally, although the mitigator about equally culpable co-defendant was rejected, the treatment of Mayes cannot be totally ignored when considering proportionality. Appellant's death sentence is disproportionate to co-defendant Anthony Mayes's 20-year sentence. The death penalty is disproportionate when an equally culpable co-perpetrator receives a *life sentence*. *Ray v. State*, 755 So.2d 604, 611 (Fla. 2000). Even if Mayes is less, not equally, culpable, Mayes didn't receive a life sentence: his plea bargain called for a maximum sentence of 20 years. Therefore, a death sentence for appellant is not *proportional* to a 20-year sentence for codefendant Mayes.

Appellant's death sentence should be vacated and remanded for imposition of a life sentence.

POINT VII THE TRIAL COURT REVERSIBLY ERRED WHEN IT ALLOWED APPELLANT TO CHOOSE PENALTY PHASE WITNESSES, A CORE FUNCTION OF AN ATTORNEY.

At the penalty phase, defense counsel told the trial court that he was calling only Dr. Riordan. T86 5305. Defense counsel said that he had "previously discussed and planned to call Mr. Tumblin's mother and his sister, but pursuant to his [appellant's] wishes we have elected not to do so. That strategic decision was

made exclusively based on his wishes." T86 5305. The trial court asked appellant about this (at T86 5305-08):

> THE COURT: … All right. Mr. Tumblin, you're still under oath. I have a few more questions to ask you about that. You just heard Mr. Smith, your attorney, explain to me that -- that he and Mr. Akins, your attorneys, would like -- would have liked to call during this penalty phase of the proceedings your mother, Brenda Tumblin, and your sister -- is it Keisha?
> MR. SMITH: Yes.
> THE COURT: Keisha Tumblin. Do you understand that?
> THE DEFENDANT: (Nods head).
> THE COURT: Yes?
> THE DEFENDANT: Yes, sir.
> THE COURT: Are they available to testify if you wanted them to be here?
> THE DEFENDANT: Yes, sir.
> THE COURT: Have you instructed your attorneys that you do not wish to have your mother or your sister called to testify during these penalty proceedings?
> THE DEFENDANT: Yes, sir.
> THE COURT: I don't want to ask you why you didn't do that, but I want to make sure that you have made the decision not to have your mother or sister called to testify because that is your personal preference; is that correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: All right.
> MR. SMITH: And I think that's sufficient, Judge. I just wanted that much on the record.

By allowing appellant to decide which witnesses to present at penalty phase, the trial court was allowing appellant to perform the core function of a lawyer; or, in this regard, to act as his own counsel. The trial court did not conduct a proper colloquy to determine that appellant's decision was knowing and voluntary under *Boyd v. State*, 910 So.2d 167, 189-90 (Fla. 2005). Because appellant was waiving

the assistance of counsel, the standard of review should be *de novo*. *United States v. Kimball*, 291 F.3d 726, 730 (11th Cir. 2002).

The Supreme Court has recognized that because "[e]ven the intelligent and educated layman … lacks both the skill and knowledge adequately to prepare his defense, … [h]e requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932) . And, the Court noted, "[i]f that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id*. *See also Gonzalez v. United States*, 128 S.Ct. 1765, 1770 (2008) ("The presentation of a criminal defense can be a mystifying process even for well-informed laypersons. This is one of the reasons for the right to counsel.").

Thus, a criminal defendant has the right to the assistance of counsel at all critical stages of the proceedings against him under the Sixth and Fourteenth Amendments to the United States Constitution, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), and article I, section 16 of the Florida Constitution. "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). *See also Indiana v. Edwards*, 128 S.Ct. 2379, 2387 (2008) (allowing self-representation by a defendant who lacks the mental capacity to conduct his defense "undercuts the most basic of the Constitution's criminal law objectives, providing

a fair trial."). Sentencing and penalty phase are critical stages at which the right to the assistance of counsel attaches. *Mempa v. Rhay*, 389 U.S. 128 (1967); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Jackson v. State*, 983 So.2d 562, 575 (Fla. 2008).

When represented by counsel, a criminal defendant retains authority to make only fundamental decisions concerning his or her case, i.e., whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). *But see Gonzalez v. United States*, 128 S.Ct. at 1773-74 (Scalia, J., concurring) ("[E]xcept for one line of precedent, no decision of this Court holds that, as a constitutional matter, a defendant must personally waive certain of his 'fundamental' rights—which typically are identified as the rights to trial, jury, and counsel. The exceptional line of precedent involves the right to counsel." citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

But witness selection is *not* one of these fundamental decisions; rather, it is one of the non-fundamental decisions within the control of trial counsel. *Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir.1991) ("The decision as to which witnesses to call is an aspect of trial tactics that is normally entrusted to counsel."). *See also New York v. Hill*, 528 U.S. 110, 114-15 (2000)("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must—have—full

authority to manage the conduct of the trial." quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). The ABA Standards for Criminal Justice provides:

> In general, the power of decision in matters of trial strategy and tactics rests with the lawyer, after consultation with the client when such consultation is, in the lawyer's judgment, both feasible and appropriate. **The lawyer should determine which witnesses should be called on behalf of the defendant.…**
>
> **Some decisions, especially those involving which witnesses to call, can be anticipated sufficiently so that counsel can ordinarily consult with the client concerning them. Because these decisions require the skill, training, and experience of the advocate, the power of decision on them should rest with the lawyer.** The lawyer should seek to maintain a professional relationship at all stages while maintaining the ultimate choice and responsibility for the strategic and tactical decisions in the case.

ABA Standards for Criminal Justice 4-5.2, commentary, at 201-202 (3d ed.1993) (e.s.).

Nonetheless, in *Boyd*, 910 So.2d at 189-90, this Court held that a defendant may control the presentation of evidence at the penalty phase as long as that decision is "knowing" and "voluntary." This Court did not spell out what constitutes a "knowing" and "voluntary" decision to control mitigation evidence. However, in *Boyd* the judge held a pre-trial hearing on Boyd's competency regarding his desire to "waive penalty phase proceedings," 910 So.2d at 186-87; "the trial judge inquired about the mitigation issue several times," *id*. at 188; and at the start of the penalty phase defense counsel moved to withdraw because of Boyd's desire to waive mitigation and the "judge interviewed Boyd on the issue of

what mitigation was to be presented and determined that he *understood the potential consequences of his decision*, that his decision was deliberate, and that he made the decision freely and voluntarily". *Id*. at 187-88 (e.s.).

Similarly, under *Faretta v. California*, 422 U.S. 806, 807 (1975), a criminal defendant has the "right to proceed without counsel when he voluntarily and intelligently elects to do so." A voluntary and intelligent waiver of counsel requires that the defendant "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id*. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

Moreover, if a trial court allows a defendant to perform some portion of his defense, some "core function" of a lawyer, then a *Faretta* inquiry is required. *Brooks v. State*, 703So. 2d 504 (Fla. 1st DCA 1997). For example, in *Madison v. State*, 948 So.2d 975, 976 (Fla. 1st DCA 2007), the trial court appointed Madison co-counsel and allowed him to "argue a pretrial motion and present lengthy arguments at sentencing that essentially constituted requests for post-trial relief." The trial court did this without conducting a *Faretta* inquiry and without advising the defendant of the dangers of self-representation. *Id*. The first district reversed the conviction, stating that "the fact that Appellant argued only pretrial and post-trial motions does not alter the requirements of our precedent." *Id*.

A defendant who is allowed to choose witnesses for penalty phase should know that he or she is performing one of the core functions of a lawyer; and that by assuming this role, he or she is waiving the right to counsel on a matter that calls for the skill and training of a lawyer. Thus, a defendant who is going to decide what evidence to present at penalty phase should know the dangers and disadvantages of representing oneself in this regard, as well as the advantages of having counsel make these decisions. "While the Constitution does not force a lawyer upon a defendant, it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 87-88 (2004) (citations and internal quotation marks omitted).

The judge in *Boyd* made sure that Boyd understood the potential consequences of his decision. But here the trial court established only that it was appellant's "personal preference" not to call his mother and sister as witnesses. (The court did not, for example, explain that it might give his mother's and sister's hearsay accounts less credence (see Point VIII).) Given the stage of the proceeding, appellant's intellectual deficits, and the gravity of the situation, this colloquy was insufficient. *See Iowa v. Tovar*, 541 U.S. at 88 (2004) ("The information a defendant must possess in order to make an intelligent election [on whether to proceed *pro se*], our decisions indicate, will depend on a range of case-

specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." (c.o)).

Allowing appellant to choose penalty phase witnesses denied him the effective assistance of counsel, due process, and a fair penalty proceeding under the Sixth, Eighth, and Fourteenth Amendments, and article I, sections 9 and 16, of the Florida Constitution. This Court should reverse appellant's sentence and remand for a new penalty phase.

POINT VIII THE TRIAL COURT DID NOT PROPERLY EVALUATE ADMISSIBLE HEARSAY EVIDENCE ADMITTED AT PENALTY PHASE.

As noted in Point VII, defense counsel wanted to call appellant's mother and sister as witnesses at penalty phase, but the trial court allowed appellant to decide not to call them. Thus, only Dr. Riordan testified at penalty phase. He testified regarding appellant's brain damage and mental health history, as well as family and social history. Dr. Riordan obtained most of his knowledge of appellant's family and social history from speaking to appellant and his mother and sister, which he then related to the jury.

Hearsay is admissible at penalty phase. § 921.141(1), Fla. Stat. Indeed, in *Green v. Georgia*, 442 U.S. 95, 97 (1979), the Supreme Court held that the exclusion of exculpatory hearsay evidence denied the defendant a fair trial as to punishment. In its sentencing order, however, the trial court did not properly

evaluate hearsay as admissible evidence. Although the court stated that it would "independently determine the existence of such mitigation under the 'reasonably convinced' standard[,]" the court also said "it is difficult to be reasonably convinced of the establishment of facts that are entirely presented as hearsay testimony through an expert witness." R28 4034-35. The court's view of the evidence did not allow it to properly evaluate whether mitigation was established or the weight to be given it. This denied appellant due process and a fair sentencing hearing under the Eighth and Fourteenth Amendments to the United States Constitution.

<u>POINT IX</u> THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO VICTIM IMPACT EVIDENCE THAT THE VICTIM'S WIFE SUFFERED A STROKE AFTER THE MURDER.

Defense counsel objected to the victim impact evidence given by Mr. Johns's stepdaughters, Ms. Sanders and Ms. Morgan, who testified that Mrs. Johns suffered two strokes after the murder and that she is now cared for by Ms. Sanders and Ms. Morgan. T85 5204-06, 5293-94. The trial court overruled the objection. Like other evidentiary rulings, this Court reviews this decision for an abuse of discretion—a discretion "limited by the rules of evidence and by the principles of stare decisis." *McDuffie v. State*, 970 So.2d 312, 326 (Fla. 2007).

Section 921.141(7), Florida Statute, provides that victim impact 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." Evidence that Mrs. Johns had suffered strokes was erroneously admitted because this is not evidence of the victim's uniqueness; nor is it evidence of the loss to the community's members by the victim's death. *See Windom v. State*, 656 So.2d 432, 438 (Fla. 1995) ("Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7)."). Instead, this evidence appealed to the sympathy and emotions of the jurors; and in a capital sentencing proceeding the decision should be "based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

Appellant was deprived of his right to a fair penalty proceeding on the basis of improper evidence under the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. The error was not harmless beyond a reasonable doubt, and this Court should order a new trial.

POINT X THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY AS AN AGGRAVATING CIRCUMSTANCE OFFENSES THAT WERE NOT PRIOR VIOLENT FELONIES.

The state relied on the aggravating circumstance that appellant had previously been convicted of a "felony involving the use or threat of violence to the person." § 921.141(5)(b), Fla. Stat. To that end, the state introduced into

evidence at the penalty phase five judgments of conviction: throwing or shooting a deadly missile into a dwelling, building, or conveyance, in violation of section 790.19, Fla Stat.; battery on detention staff; attempted robbery; battery on a law enforcement officer and aggravated assault; and two counts of battery on a law enforcement officer. T85 5262-78; R16 2266-2307; R28 4017. The state presented further evidence of the attempted robbery and the two counts of battery on a law enforcement officer. T85 5273, 5289.

With the exception of the attempted robbery, it was error to submit these felonies to the jury as prior violent felonies under section 921.141(5)(b), Fla. Stat. This is because the "finding of a prior violent felony conviction aggravator only attached 'to life-threatening crimes in which the perpetrator comes in direct contact with a human victim.'" *Mahn v. State*, 714 So.2d 391, 399 (Fla. 1998). But battery on a law enforcement officer, aggravated assault, and throwing or shooting a deadly missile into a dwelling, building, or conveyance are not life-threatening crimes *per se*, nor were they shown to be life-threatening in this case. Moreover, it was error for the judge to instruct the jury that "the crimes of attempted robbery, shooting deadly missile, aggravated assault, battery on a law enforcement officer, and battery on a detention or commitment facility staff are felonies involving the use of violence to another person." T87 5518. *Johnson v. State*, 465 So.2d 499, 505 (Fla. 1985).

This evidence was not harmless beyond a reasonable doubt. Its introduction violates Florida law and the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

POINT XI THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED SPECIAL VERDICT FORM AND INSTRUCTIONS FOR AGGRAVATORS.

Defense counsel argued that, under *Ring v. Arizona*, 536 U.S. 584 (2002), special instructions and verdict form should be given that require the jury to unanimously find aggravating circumstances beyond a reasonable doubt. R2 151-55, 193, 202-03. The trial court denied counsel's request. T85 5213. The instructions and advisory verdict given in this case did not require all of the jurors, or even a majority of the jurors, to find the same aggravating circumstance beyond a reasonable doubt. R16 2324; T87 5517-23. This was error. (Appellant concedes that this Court has rejected the argument presented here. *State v. Steele*, 921 So.2d 538 (Fla. 2005).)

A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. *See Johnson v. Louisiana*, 406 U.S. 356 (1972). And "[a]s a state constitutional matter, a criminal conviction requires a unanimous verdict in Florida." *Robinson v. State*, 881 So.2d 29, 30 (Fla. 1st DCA 2004). Moreover, under the Sixth Amendment, a "judge's authority to sentence derives wholly from the jury's verdict." *Blakely v. Washington*, 542 U.S. 296, 306

(2004); *see also Ring*, *supra*. The advisory verdict in this case does not authorize the death penalty under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, or article 1, section 16 of the Florida Constitution. This Court should hold that *Ring* applies in Florida, and that it requires a jury's unanimous conclusion that a particular aggravator applies. A new penalty phase hearing should be held.

CONCLUSION

This Court should reverse the judgment and sentence and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of September, 2008.

_____
Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2), this___ day of September, 2008.

_____
Paul E. Petillo
Assistant Public Defender