IN THE SUPREME COURT OF FLORIDA

ROBERT BAILEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC07-748

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Bailey." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

> "XXXII 193": p.193 of volume XXXII of the 34-volume record on appeal; where a typed page number and a stamped page number appear on the same page, the clerk's stamped number is used;
>
> "DE 7"; "SE 17": Defense Exhibit number 7 and State Exhibit number 17, respectively; "Penalty/SE 3A" indicates State's Exhibit number 3A admitted during the penalty phase;
>
> "IB 26": p.26 of the Initial Brief dated as served February 12, 2008.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

Quotations within this brief contain obscene language. If this is offensive, the State apologizes, but the words are submitted here as the **declarent** stated them.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case Timeline.

Easter, 3/27/05, about 10:30pm	The victim, Sergeant Kevin Kight, of the Panama City Beach Police Department (E.g., XXXI 48), murdered (E.g., XXXI 35-36, 66-74; XXXII 123);
3/28/05, morning	Bailey arrested (XXXIII 257-63, 290-93);
4/14/05	Bailey indicted, charging as COUNT I Murder in the First Degree with a Firearm and as COUNT II Resisting Officer with Violence (I 58-59);
5/5/05-2007	Extensive pre-trial discovery and motions (E.g., I-XVII; XIX-XXII);
1/17/07	Competency Hearing (XXIII);
2/12/07-2/13/07	Jury selection (XXIV-XXVII);
2/14/07-2/15/07	Guilt phase of jury trial: Opening statements, evidence, closing arguments (XXXI-XXXIV);
2/15/07	Jury returned guilty verdict on both counts as charged (XXXIV 478-79; XVIII 3388);
2/16/07	Penalty phase of jury trial: Opening statements, evidence, closing arguments (XXVIII);
2/16/07	Jury recommended death sentence by vote of 11 to 1 (XXVIII 4758-60; XVIII 3404);
3/15/07	Spencer hearing (XXIX);
4/2/07	Prosecution and defense submitted sentencing memoranda (XVIII 3469-76);
4/11/07	Circuit Court Judge Overstreet imposed death sentence, finding two aggravating circumstances, rejecting two statutory mental mitigators, and finding a number of other mitigating circumstances (XXX; XVIII 3481-99; written order, attached).

The Murder.

Basic facts of the Murder.

On Easter Sunday, March 27, 2005, (E.g., XXXI 35-36; XXXII 123) at 10:20pm (XXXIV 376), Sgt. Kevin Kight, Panama City Beach Police Dept. (E.g., XXXI 48; XXXII 109-111; XXXIV 358), stopped the white Dodge Durango that Bailey was driving to give him a traffic ticket for blocking busy Spring Break traffic at Panama City Beach (XXXI 36-41, 55-60, 63-64, 67-70, 82-88; XXXII 117, 120, 163, 183-87). Bailey's friend, D'Tori Crawford, was in the front passenger seat; he knew Bailey as "Saint." (XXXII 161, 163, 178-187)

Sgt. Kight obtained Bailey's identification and returned to his marked police vehicle, which was behind the Durango. (XXXI 86-88, 92-93, 117-18; XXXIV 362-64; XXXII 187-89, 220) Bailey told Crawford something about a parole violation,[1] that he was not going back to prison, and that he would "do whatever he had to not to go back." (XXXII 187, 188, 191)

Bailey was shaking. (XXXII 221) At Bailey's request, at 10:26 pm (XXXIII 329, XXXIV 377) Crawford speed-dialed Bailey's girlfriend and handed the cell phone to Bailey (XXXII 191-92). Crawford overheard Bailey tell the girlfriend that he was "going to pop this cop if he tried to arrest him." (XXXII 192-93; see also "*** If I have to, I'm going to pop

[1] Details of the parole violation were provided in the jury penalty phase. (See Penalty-phase Court Exhibit #1; XXVIII 4559-60, 4567-72; see also XVIII 3482-83)

him *** I'm about to pop this cop ***," XXXII 228-30).[2] Bailey got off the phone and then retrieved a nine millimeter pistol (E.g., XXXIII 242) from under the driver's seat and placed it under his leg (XXXII 193). Crawford, fearing for his life, saw that Sgt. Kight was looking down and not looking their way, exited the vehicle, and ran away. (XXXII 194-95)

Through his police radio, Sgt. Kight discovered that Bailey's driver's license was suspended and re-approached Bailey's Durango. As the Sergeant pulled out his handcuffs (XXXI 71-72, 80; XXXIII 242,245-46; XXXIV 366-67), leaned towards Bailey, and placed his hand on Bailey's driver's door, Bailey fired three shots at the Sergeant (XXXI 42, 45-46, 58, 61-64, 93-94, 102-103; XXXII 201). Two of the gunshots struck Sgt. Kight in the upper chest. (XXXI 43; XXXIV 390-91; SE 25B) The other bullet shattered the window glass of a van that was passing by and that was occupied by Jarrod Schalk and Stacy Harrison. (XXXI 67-68, 71, 73-74, 75-76, 81-82; XXXIII 246-47, 249) Immediately after the gunshots, at 10:30pm, Sgt. Kight radioed to the dispatcher that he had been shot. (XXXI 49; XXXIV 377)

Bailey fled the scene in the Durango (XXXI 62-64, 94), abandoned the Durango (XXXI 95-100), jumped in the back of a pick-up truck with Corey Lawson, showed Lawson a gun in his waistband by lifting up his shirt, and said, "I just popped a cop" (XXXII 135-36). Lawson testified that Bailey laid down in the back of the pick-up truck and pulled a towel over his head. (XXXII 158) Bailey said that "he couldn't go get his car 'cause I'm

[2] Cell phone records corroborated Crawford. (See XXXIII 328-29; SE 23)

sure the cops had already taken it." (XXXII 145) Bailey told Lawson that if he (Bailey) gets caught, he is going to jail for life. Bailey said "they tried to arrest him and then he shot the cop and took off"; Bailey said that "the only way they were going to catch him is if they killed him." (XXXII 142) At Bailey's direction, they took him to the Sweet Dreams Bar (XXXII 139-40), where Bailey rendezvoused with his friends and stated that he thought he had shot the officer two or three times, that he thinks the officer is dead, and that he did not mean to do it (XXXII 200-202, 210, 225-26).

When they heard the gunshots or Sgt. Kight state over the radio that he had been shot, other officers raced to assist Sgt. Kight, but attempts at the scene to save his life failed. (XXXI 42-44, 49-51, 94-95; XXXII 123-27, 129-32)

The next morning, when officers approached Bailey, he was "trying to jerk something out or shove something into his pants." He was "tugging at it pretty good." (XXXIII 258, 288) After handcuffing Bailey, they located a nine millimeter semi-automatic pistol stuck in the front of the waistband of Bailey's pants. (XXXIII 258-63, 292-93) The nine millimeter pistol recovered from Bailey's waistband was the murder weapon. (See XXXIII 317-18) After he was cuffed and they had proceeded around a building, Bailey asked if the officer was all right. (XXXIII 288)

The victim, Sgt. Kevin Kight, was 34 years old when Bailey killed him. (XXXIV 389) The Medical Examiner testified that Sgt. Kight sustained two gunshot wounds to his upper chest. (XXXIV 390-91; see SE 25B) The wounds

were two to two and one-half inches apart. (XXXIV 392, 394-95, 396) There was "stippling or powder tatooing" on the victim's chin and neck, indicating that the end of the gun barrel was within about 18 to 24[3] inches of Sgt. Kight's face. (XXXIV 393-94) Witnesses to the shooting demonstrated the distance for the jury. (XXXI 61, 73) [**ISSUE II** (IB 37) targets the prosecutor's argument to the jury regarding this testimony.] The first projectile went on a downward, front-to-back track through the descending aorta and damaged part of the vertebral column. The track was consistent with Sgt. Kight leaning over or with the gun shooting from a position relatively higher than Sgt. Kight's body. (XXXIV 397-98) The second projectile also went on a downward path, and it went through the pulmonary artery, liver, and kidney. (Id. at 399-400) The victim lost consciousness soon after he called on the radio. (Id. at 402) Each wound was fatal. (Id. at 404)

The two bullets recovered from Sgt. Kight's body were hollow points (XXXIII 317-19), and they were fired from SE 11 (XXXIII 310, 317-18), the nine millimeter pistol located in Bailey's waistband when he was arrested (XXXIII 262-63, 299).[4] Shell casings recovered at the location of the

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[3] There appears to be a typographical error in the transcript, which records the testimony as "within about 18 to 124 inches" (XXXIV 393-94). The Medical Examiner illustrated the distance for the jury (XXXIV 394), and defense counsel's (XXXIV 450-51) and the prosecutor's (XXXIV 442) closing arguments referenced the distance as 18 to 24 inches.

[4] The third expended bullet (SE 21, XXXIII 250-52) was recovered from the van that Schalk occupied, but it did not maintain its outer layer, and the expert was unable to identify a firearm as firing it. (XXXIII 316-17)

shooting (SE 8A, XXXIII 242-43) and in the white Dodge Durango (SE 8B, XXXIII 303-304) were also fired from that same nine millimeter pistol (XXXIII 313-16).

Additional evidence regarding the Murder.

In the first week of June 2006, correctional personnel recovered poems Bailey wrote (XXXIV 407-410) about his view of circumstances surrounding his murder of Sgt. Kevin Kight. In one of them, Bailey wrote:[5]

> Don't take shit from anyone
> Cock back my fucking gun
> put a bullet in the chamber
> hollow point for my anger
> cop pulled me over 'cause I'm
> [illegible, strikethrough]
> little did he know he … [illegible] himself
> [illegible, strikethrough]
> what the fuck was he thankin
> For two days str8 I've been drankin
> Bust that led left ~~his ass~~ [strikethrough in original] him stankin
> [illegible, strikethrough]
> Smash the gas and hit the beach
> cops … coming fast and filling the streets
> Gotta run and Gotta hide
> Keep my gun but ditch the ride
> jumped in a cab got me a lift
> Found my … brother at the bar drinking a … fifth
> After I told him what I did
> I tried to explain it's time we hid
> He went to the bar and bought a drink
> I seen a cop car and started to think

[5] Quotations within this brief contain obscene language; they are submitted here as the **declarent** stated them.

Oh, my God I gotta flea
All these cops, their after me
How the fuck could this be
less than five months I've been free
Prison or Jail, I'll not see
Gotta run and Gotta hide
Stick … to the plan, find a ride [arrows to & from the next line]
Must leave the bar and go outside

Call my girl I need you now
Come get my ass, I don't care how
rent a car that sounds great
Now 18 hours I must wait

(SE 27. Witness published to jury at XXXIV 411)[6]

In addition to D'Tori Crawford, Bailey's friend, testifying concerning the traffic stop and Bailey's comments concerning not returning to prison, his (Bailey's) intent to "pop a cop," Bailey readying the pistol by placing it under his leg, and, later that evening, his admission that he thought he

[6] In another poem, Bailey wrote:
They wanna know
what the fuck I was thinking when I was out their on the block
when I drove to Florida and killed a fuckin cop
to live a life full of sin
~~when it led me to doing life in the pen~~ [strikethrough in original]
when I was facing life in the pen
What the fuck I was thinkin What the fuck I was thinkin
they wanna know
so now … here I am trying to tell them as best I can
at age 8 is when my life began … getting out of hand
all started
I was out there on the streets with nothing to do
(SE 27. Witness published to jury at XXXIV 410-11; several initial letters at beginning of lines cut-off and interpolated)

shot the officer two or three times and killed him, Crawford also testified about their trip from the Chicago area to Pensacola then to Panama City in the white Dodge Durango that Bailey's grandfather had rented (XXXII 161-74). John Braz (known as "LT") was with Bailey (known as "Saint"), who drove most of the way, and Crawford. (XXXII 160-64) Crawford said that on the way to Pensacola, the three of them consumed a "blunt" and a 12-pack of Corona beer; they also bought more beer on the way; Bailey drank about five or six of the beers. (XXXII 164-66, 213-14) Bailey had a gun with him and used a pistol's magazine clip to open beers. (XXXII 167-68) Crawford slept for about six or seven hours of the trip. (XXXII 169) They drank more while driving to Panama City. (XXXII 215) Bailey was able to drive "okay" from Pensacola to Panama City. (XXXII 173-74) On March 27, 2005 at 4:39pm, they checked into a motel in Panama City, and Bailey might have gotten "a mixed drink or something in a cup." (XXXII 172-73) They had a "few more drinks over there." (XXXII 216)

They ended up at the Sweet Dreams bar, where Bailey had no problem backing into a parking space. (XXXII 179) After waiting outside awhile, Crawford entered the bar and saw Bailey either drinking or on the phone. (XXXII 179-80) When Crawford bought a pitcher of beer, he did not recall Bailey drinking any because he believed that Bailey had his own drink. (XXXII 180-81) Bailey suggested that they ride around and "probably pick up some girls or something," according to Crawford. (XXXII 181) Crawford and Bailey went out to the Durango while "LT" remained in the bar. Crawford and

Bailey sat there in the backed-in Durango and watched everyone as they passed by. (XXXII 181)

Bailey suggested that they leave the bar. At the time, Crawford said Bailey was not drunk and was not sober. Crawford testified that Bailey had not been stumbling around nor did Bailey have trouble walking. Bailey was acting like Crawford, and Crawford felt like he (Crawford) could have driven the car okay. (XXXII 182-83) Bailey cranked up the Durango, turned left, and, shortly thereafter, in heavy, bumper-to-bumper traffic, they encountered some girls walking on the right side of the road (XXXII 183, 218). Crawford rolled down his window, obtained their names, information that they were from Wisconsin, like him, and programmed their phone number into his cell phone. (XXXII 183-84) At this point Crawford noticed that traffic had cleared in front of them, and Sgt. Kight conducted the traffic stop by putting on his blue lights. (XXXII at 185-86) The officer was in uniform (XXXII 190), and Sgt. Kight's vehicle was a pick-up truck with lettering indicating Panama City Beach Police (See, e.g., SE 6A; XXXI 85; XXXIII 244-45).

Crawford testified that Bailey said that he (Bailey) was "basically pretty scared." When Bailey gave the officer what Crawford thought was Bailey's license, Bailey was nervous (XXXII 220), but he did not fumble for his license. (Id. at 187) The officer indicated that he would be right back and walked away; Bailey then told Crawford that he did not have a license, and this is when Bailey said "he wasn't going back to prison and something about a parole violation or something like that." (Id. 187) Bailey said

they were going to arrest him and that "he's not going to go that easy." (Id. at 188) Bailey reiterated that he had a parole violation and stated "What the fuck is about to happen to me." (Id. at 189)

Crawford's testimony continued:

> Q Now, you said that you were telling him just be cool or just calm down?
>
> A Right.
>
> Q What words did you use to say that?
>
> A Said 'chill out, chill out, man.'
>
> Q How did he react?
>
> A At this point he had told me to call his girlfriend for him.
>
> Q At any point had he told you where he was not going before he talked to his girlfriend?
>
> A He had told me a few times that he wasn't going back to prison and he was basically going to do whatever he had to do not to go back is basically what I got out of the conversation.
>
> Q And then he said call his girlfriend?
>
> A Call his girlfriend.
>
> Q Now, did he give you anything to call his girlfriend?
>
> A He handed me his cell phone.
>
> Q Did you call his girlfriend?
>
> A Yes, sir.
>
> Q How did you do that?
>
> A I remembered it being a speed dial, I just pressed talk twice.
>
> ***
>
> Q When it started ringing what did you do with the phone?
>
> A I handed him the phone.
>
> Q What was he doing during this time?
>
> A Pretty much panicking, I guess. He was trying to tell her that he was being pulled over and he was going to need her to pick him up.

Q While he was talking to her what else did he tell her what he was about to do?

A Yes, sir.

Q Tell us what you heard the defendant tell his girlfriend on the phone that night?

A I just remember him saying that he was going to pop this cop if he tried to arrest him.

Q D'Tori, when you heard him say that what went through your mind?

A I was, I mean, I wasn't sure if he was serious or not but I had pretty much looked at him and seen that in his face, his face was red, he had tears in his eyes, it didn't look like he was playing. Didn't look like he was playing.

Q So he told his girlfriend, let me see if I understand this, he had been pulled over by a, did he say 'officer' or 'cop'?

A He said 'a cop.'

Q Been pulled over by a cop. Did he tell her he thought he was going to be arrested?

A Yes, sir.

Q And he said if he tries to arrest me I'm going to pop this cop?

A Yes, sir.

Q And then he wanted her to come get him?

A Yes, sir.

Q All right, do you remember anything else in this conversation? Or was that pretty much what you remember?

A That's pretty much, pretty much the end of it.

Q Now, when he gets off the phone what, if anything, do you see him do?

A I seen him grab the gun from up under the seat.

Q This gun that you've identified for us today?

A Yes, sir.

Q Where was that gun?

A Up under the driver's seat.

Q And he reached down and got it with what hand?

A With his right hand.

Q Tell us what he did with that gun then?

A He put it up under his right leg.

(XXXII 190-93) Shortly thereafter, as narrated above, Crawford looked in the rearview mirror, saw that the officer was not looking their way, exited the vehicle, and ran away. (XXXII 194-95)

After Bailey and then Crawford rendezvoused at the Sweet Dreams Bar with their friend, John Braz ("LT"), (XXXII 145, 199-200) they returned to their motel, where Bailey argued with Braz regarding whether he should ditch his gun and bullets. "LT was telling him to throw the stuff off the balcony." (XXXII 203-204) Bailey emptied a box of bullets in the motel room into his pocket. (XXXII 204)

Two civilian eyewitnesses, while mired in slow moving Spring Break beach traffic, saw the shooting and identified Bailey in the courtroom. Hillary Chaffer saw the traffic stop. (XXXI 56-57) She continued:

> The next thing I noticed he [Bailey] kept looking in his rearview mirrors and he started to pull forward while the police officer was looking down. And the cop looked up and he slams on his brakes. And so he stopped and the police officer goes to get out of his truck. He walks over, he puts his right hand on his gun, then he moves it over to the handcuffs, puts his left hand on the door. As he goes to take out his handcuffs he gets shot. And at that point I was facing forward starting to drive. I heard the two gun shots. As I turn around, heard the third, then him pull back in, his hand pulled back in and he drove off.

(XXXI 58; see also when braking, Bailey was "studying his rear view mirrors," Id. at 63) She saw a gun in Bailey's hand. (Id.) She said she could see Bailey's face, and he looked very pale, clammy, very scared. (Id. at 56-57, 59) On cross-examination, she indicated that "he was just a

little more pale than he is now but it was almost a grayish color." (Id. at 65) She identified Bailey in the courtroom. (XXXI 64)

Jarod Schalk, a passenger in a nearby van, (XXXI 67) also saw Bailey's face and identified Bailey in the courtroom (XXXI 69-70, 78). He indicated that Bailey "looked really mean, really mad and upset." (XXXI 71) Schalk described the shooting:

> … [A]s we were driving by I looked up and I saw the officer, he was up against the, next to the Durango and he had his right hand by his cuffs and he had his cuffs in his hand. So that, that's what took my attention to the situation and I said to the girl next to me, I said, 'hey look, Stac, we're going to see an arrest.' And we were traveling as that happened so I was behind him when that happened. And as he, as the officer reached for the door we were just about parallel and I was looking to my right just watching. And as soon as that happened I looked and I saw the man's face and it just looked really mean, really mad and upset. And I noticed that. And then all of a sudden he reached across and pointed the gun and as he was, as he was pushing it out, as it was being pushed out I saw the fire from the end of the barrel on the first shot and I ducked as soon as I saw that, I took cover and went down. And I heard a couple of more shots and I heard glass breaking, which was, which ended up being the van that I was in. *** And I'm not sure exactly where he went. He took off and we took off and we went, wrapped around into the Burger King and parked and I saw, as we were driving off I looked in the mirror and I could see the officer was down. And so as, when we pulled around I got out to go help and see if he needed anything, any help. ***

(XXXI 70-72)

On February 15, 2007, the jury found Bailey guilty as charged of Murder in the First Degree with a Firearm and of Resisting an Officer with Violence. (XXXIV 478-79; XVIII 3388)

Penalty-Phase Evidence.

On February 16, 2007, the trial court conducted the evidentiary penalty phase in front of the jury. (XXVIII) Without objection, the State moved that all guilt-phase testimony and exhibits be considered in the penalty

phase. (XXVIII 4567) In the penalty phase, exhibits were introduced concerning Bailey's prior conviction and the probation rules that Bailey had signed in 2004, and the defense entered into a related stipulation. (XXVIII 4559-60) The defense introduced into evidence the report of Dr. Gregory Prichard. (DE 7, XXVIII 4656)

The State introduced evidence of Bailey's December 2005 recorded telephone call to John Braz ("LT"), who had accompanied Bailey and Crawford to Pensacola and Panama City, but who was not in the white Dodge Durango when Bailey killed Sgt. Kight. In the December 2005 telephone conversation, Bailey discussed faking mental illness:

> Braz: Hello?
>
> Amtel: This is a collect call from (inaudible) from a corrections facility, using Amtel, this call may be recorded. To accept the call dial zero, thank you for using Amtel.
>
> Bailey: What's up?
>
> ***
>
> Bailey: They're saying I'm mildly retarded and that I might be crazy.
>
> Braz: Yeah?
>
> Bailey: Yeah, they're talking about sending me to the nut house.
>
> Braz: That's a positive.
>
> Bailey: Yeah, I know it brother, I'm working on it.
>
> Braz: The problem is they will evaluate you.
>
> Bailey: Yeah, they got another psychiatrist coming to see me again, you know, it's all good though, so if you start getting some letters and stuff that sound kind of weird, don't mind them, I was talking about how I was from the [future] and shit in one of my letters.

Braz: Yeah.

***

Bailey: I told my lawyer, I told my lawyer straight up, I said my boy, Braz ain't locked up, he out on bail right now. *** I said, well, he said, if you go to the nuthouse, you ain't gonna to have to worry about it anyway, or if they find you mildly retarded, then you ain't gonna have to worry about it anyway, because they can't, they can't try me if they find me mildly retarded or crazy.

Amtel: One minute remaining.

Braz: Yeah, but the problem is, you'll go to the nuthouse for the rest of your life man.

Bailey: Nah brother, … you ain't understanding. You go to the nut house for five years, brother, if they don't find you competent within five years, after five years they find you, they legally find you not guilty by reason of insanity and then you stay in the nut house and if you ever get better after that five years, they let you go home, boy.

Braz: For real?

Bailey: Yeah. I ain't no rookie when it comes to this shit brother.

Amtel: Twenty seconds remaining.

Bailey: I'm playing all my little cards brother, don't even trip, I'm trying to make sure that happens, man. I hope you, you know, you need to do something, too, brother start talking to walls.

Braz: Huh?

Bailey: Start talking to the walls and shit, brother.

(Penalty/SE 3A; Transcript pp. 1, 4, 7; played for the jury at XXVIII 4721-32; see also sentencing order quoting it at XVIII 3491; conversation played and transcribed at competency hearing at XXIII 3847-56)[7]

The State called as its first penalty-phase witness Carl Safford, a Wisconsin probation and parole agent, (XXVIII 4568) who testified that on March 27, 2005, Bailey was on felony parole, which would not have terminated until July 17, 2009. (XXVIII 4572) On March 9, 2005, Safford placed Bailey on home detention, which meant that Bailey was "not to step outside of his residence," and obtained a "warrant or apprehension request later that same day." (XXVIII 4571-72)

The defense then called Dr. Larry Kubiak, a psychologist, as a witness.[8] (XXVIII 4573) He tested and observed Bailey on October 28, 2005, for about four and one-half hours. (XXVIII 4574-76, 4588-4616) He also testified concerning records he reviewed. (XXVIII 4576-88) Bailey's DOB is July 15, 1982. (XXVIII 4579) Dr. Kubiak discussed prior-record references to a diagnosis of attention deficit hyperactivity disorder ("ADHD"). (XXVIII 4578-79, 4582-87, 4596) He tendered various diagnoses, including significant brain damage, post-traumatic stress disorder, paranoid delusional disorder (such as a belief that law enforcement is "out to get

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[7] The three transcripts of this telephone call varied slightly, but the Court has the CD containing the actual telephone call (Penalty/SE 3A).

[8] The State abbreviates its summary of Kubiak's testimony because the trial judge, in his sentencing order, discredited much of it and accredited a number of views from Dr. Prichard and Dr. McClaren that conflicted with Kubiak's. (See ISSUE I discussion infra)

me"), and "anti-social, negativistic and schizotypal." (XXVIII 4617-23) Dr. Kubiak "gave him bipolar disorder by history." (XXVIII 4618) He discussed Dr. Jill Rowan's testing of Bailey using the "Wechsler Adult Intelligence Scale, Third Edition," resulting in "a full scale IQ of 65; which would be consistent with a mild mental retardation range." (XXVIII 4579-81)

Kubiak opined that the two mental mitigators applied: extreme emotional disturbance and incapacity to appreciate criminality or conform conduct. (XXVIII 4621-22)

On cross-examination, Dr. Kubiak admitted that he had not read any of the law enforcement's reports in this case, and he did not know when or where the crime occurred, he did not know who accompanied Bailey before and during the crime, and he did not know the victim's name. He did not ask Bailey what he remembered about this case. (XXVIII 4624-25) He said he does not need to know anything else to make his diagnosis. (XXVIII 4655)

Dr. Kubiak indicated that knowing more about the circumstances of this murder and circumstances surrounding the murder would not change his opinion of Bailey's mental condition. (XXVIII 4652)

Kubiak said he had not listened to the recording of Bailey's telephone conversation with his (Bailey's) friend, John Braz, but he reviewed a transcript of it. Kubiak testified that Bailey's statements to Braz about faking mental illness and retardation do not change his opinion on anything. (XXVIII 4650-51)

Bailey scored in the average range in about 25% of the tests that Kubiak administered to Bailey. (XXVIII 4631)

Kubiak explained Bailey's Rorscharch (inkblots) test results and that some of the results were "ordinary" or popular, which is a "good thing." (XXVIII 4635-43)

Kubiak discussed the absence of a prior mental retardation diagnosis in school records and prison records. (XXVIII 4625-26) He testified that Dr. Rowan had not assessed the adaptive functioning component of mental retardation (XXVIII 4627) and neither did he (XXVIII 4628). Rowan did not "give a formal diagnosis" of mental retardation. (XXVIII 4628) Kubiak was also unable to support the prior-to-age-18 prong of mental retardation. (XXVIII 4629)

Dr. Kubiak admitted that Bailey's "response style" could have been caused by being in jail or being charged with the first degree murder of a police officer. (XXVIII 4634) Similarly, Kubiak stated that Bailey's post-traumatic stress could have been caused from shooting a police officer, running away, getting apprehended, almost getting shot, then facing trial. Kubiak did not know when Bailey acquired post-traumatic stress or what caused it. (XXVIII 4647)

Concerning brain damage, Kubiak acknowledged that Bailey's test results are worse than someone 70 or 80 years old who has Alzheimer's. (XXVIII 4645-46)

Prior to coming to Florida, Bailey had never been previously diagnosed with bipolar disorder, and Kubiak did not diagnose him as such. (XXVIII 4626-27, 4647-48)

Dr. Kubiak admitted that Bailey's test scores and Kubiak's opinions all assumed that Bailey was trying his best. (XXVIII 4634) Kubiak testified about some indication of malingering, but he said that it was not enough to invalidate the test. (XXVIII 4631-32, 4635, 4635-36) However, he acknowledged that "the response he gave on the Mallon [Clinical Multiaxial Inventory, Third Edition, XXVIII 4632] indicates a broad tendency to magnify the level of experienced illnesses" (XXVIII 4634).

Kubiak's report also noted that an analysis of Bailey's Rorschach tests "could suggest malingering a mood disorder, especially if there's no history of previous psychological disturbance or mental health treatment," but the report then appears to rely upon Bailey's self-report: "although in this case he claims he has been diagnosed and treated for bipolar disorder in the past." (XXVIII 4644) Kubiak admitted that he could not find in the records where Bailey had been previously diagnosed and treated for bipolar disorder. (XXVIII 4644)

Dr. Kubiak discussed Bailey's memory malingering scores of 30, 35, and 30, compared with, generally, "scores of less than 45 … [being] suggestive of tendencies towards malingering." Kubiak opined that, in light of Bailey's other scores, these malingering scores are "more suggestive" of "significant neuropsychological impairment and damage." (XXVIII 4645)

Kubiak assumed that the prison "psych ward" is a "little cushier" than general population. (XXVIII 4626)

Dr. Kubiak "definitely" agreed that Bailey has anti-social personality disorder. (XXVIII 4648)

The defense produced no more evidence for the penalty-phase jury.

In rebuttal, the State called the following as witnesses: Nancy Huttelmaier, from Milwaukee, Wisconsin, one of Bailey's former school teachers (XXVIII 4657-78); Dr. Gregory Prichard, a clinical psychologist (XXVIII 4679-4700); Dr. Harry McClaren, a forensic psychologist (XXVIII 4702-13); and, Randy Squire, an investigator for Corrections Corporation of America (XXVIII 4713-33).

Nancy Huttelmaier taught Bailey as a special education student in Milwaukee, Wisconsin. (XXVIII 4657-58) Bailey enrolled in 1999. (XXVIII 4659) He was not referred as "an exceptional education student." (XXVIII 4668-69) When Bailey arrived in the program, he was assessed with a reading level at grade 12.9 and a math level at grade 7.1. (XXVIII 4659-60) In January 2000, Bailey obtained his GED, and she detailed his passing test scores. (XXVIII 4661-66) She described Bailey's class ranking. (XXVIII 4671-72)

She observed a pattern in Bailey's school grades:

> Well, his attendance, when I looked at whatever he was absent from school, the final grade was lower, nonexistent. When he attended school and there was no absences, his grades were actually in the B and C range.

(XXVIII 4670) She indicated that at "Lad Lake," Bailey improved his reading level two grade levels in six months. (XXVIII 4673) In 1998, Bailey's vocabulary was tested at 8.5 and his reading level tested at 11.2. (XXVIII 4674) She detailed some of Bailey's other scores:

> [H]is scores are at least of an average student or a little better. Um, Algebra C; Biology C ; Career Studies C; English 10, that would be tenth grade English, B+; um, I believe, LEAP, it's a program

> possibly for at risk students may be, B; Phy Ed B; and U.S. history was incomplete.

(XXVIII 4675)

She saw nothing of Bailey that would indicate that he had severe brain damage, and she saw nothing that would suggest that he was mentally retarded. (XXVIII 4675-76) She had "never" known anyone who was mentally retarded and passed the GED test. (XXVIII 4676)

Dr. Gregory Prichard, a clinical psychologist, testified that, in January 2007, he assessed Bailey at Union Correctional Institution and that he had previously reviewed Florida and Wisconsin correctional records, mental health records, police reports, including for this murder case, various transcripts, including the transcript of Bailey's telephone conversation from the jail, and Bailey's GED records. (XXVIII 4682-83, 4683-84) Dr. Prichard's IQ test yielded a full-scale score of 75, and even though it was not in the retarded range, he did not think that Bailey was performing at his best. (XXVIII 4683) Dr. Prichard concluded that Bailey is "obviously … not mentally retarded" and "[i]n fact, not even close to it, more like average intellectually like most of us in this courtroom … ." (XXVIII 4684) He thought that as a 10 or 11 year old, Bailey did have "ADHD" and needed Ritalin then. (XXVIII 4699)

Dr. Prichard diagnosed Bailey "as polysubstance dependence …, just meaning he uses a lot of drugs, a lot of different kinds of drugs, has for a long time," and "with anti social personality disorder." (XXVIII 4684) Prichard said he would have liked to have done some more things in evaluating Bailey, which were not essential in his diagnosis, but after

Bailey talked with Prichard for two and one-half hours, Bailey terminated the interview. (XXVIII 4684) Prichard explained anti-social personality disorder as being criminally minded and using any means to an end and elaborated. (XXVIII 4684-86)

Dr. Prichard related anti-social personality disorder to various events in Bailey's life, including the following analysis of Bailey's murder of Sgt. Kight:

> Mr. Bailey is driving the car with a friend there and a police officer is going to pull him over and this is when the anti social personality disorder thinking, or criminal mindedness kicks in with somebody like Mr. Bailey, because again, remember, the idea of the anti social personality disorder is to preserve self, I want to make sure nothing happens to me in any means necessary to make sure nothing happens to me and to avoid what I don't want. So when the police officer is going to pull him over, that kicks in the anti social thinking for Mr. Bailey so what we see is … the offense behavior, okay, we see the offense behavior in the sense that, ought oh, I have been pulled over. *** [H]e's not misperceiving what's going on, he's perceiving very well what's going on because we know that he's already engaged in criminal conduct, he's left the State of Wisconsin under supervision, which he knows was against the law, that's criminal conduct, he's driving a vehicle with a suspended license, which he's aware of, he's driving while drinking, and he has a handgun. Those are all criminal, that's all criminal conduct that anti socials typically do and then when the police officer[] is going to pull him over, um, the idea is Mr. Bailey does not want to get caught and return to prison. And again that's not an unrealistic perception, that's exactly what would have happened in all likelihood when the police officer discovered there's a suspended license and the other criminal conduct that was being engaged in, he realistically perceived what was going on, so then in the anti social's mind, I don't want to do that, I don't want to be caught and go back to prison, how am I going to avoid it, what am I gonna have to do to avoid it and basically has a conversation with the other person in the car saying that, you know, I will do anything not to go back to prison, I am not going back to prison. Um, gives the police officer his license and registration. The police officer goes back to the car, obviously going to check him on the computer like he always does. So what does Mr. Bailey do, he gets a gun in position by taking it from the floorboard and putting it under his leg, he makes a call to his girlfriend already planning, planning his escape,

> having the idea of what he's going to do or have to do, may have to do to avoid apprehension, says, listen, girlfriend, you may have to come get me, I am not going back to prison and I may have to pop a cop. So what you have is you don't have any duress, you don't have any unrealistic perception, you have a very realistic perception from Mr. Bailey and a very anti social orientation how Mr. Bailey is going to avoid being apprehended and plan his escape, so that's when that behavior kicks in. And then we, we know what happened after that, and the offense that actually took place so we talked about basically the preoffense and the offense and th[e]n post offense, gets out of the truck, does not bother driving that truck anymore because they know the license tag, um, gets in another vehicle to get around, um, again calls his girlfriend, all this cover up behavior to avoid being detected. So none of that speaks to any kind of duress, any kind of misperception of reality, any kind of distortion of what's actually going on. What it speaks to is his anti social personality disorder orientation, and the fact I don't want to get caught, I am gonna do whatever I can to not get caught, and then I am gonna try to get away and that's what we see in the preoffense, offense, and post offense behavior.

(XXVIII 4687-90)

Dr. Prichard also tied Bailey's anti-social personality disorder to his malingering[9] and pointed to the recording of Bailey's December 2005 telephone call to John Braz (excerpted supra) as "valuable data" indicating Bailey's malingering effort to appear crazy and mentally retarded. (XXVIII 4690-91) All of Dr. Kubiak's testing must be considered as "suspect." (XXVIII 4691)

If Dr. Kubiak's "global assessment of functioning" ("GAF") were accurate, Bailey would probably have been institutionalized because he would not be able to function independently. In contrast, Dr. Prichard

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[9] The trial court's pre-trial court order concerning mental retardation and competency relied on, inter alia, Dr. Prichard's characterization of Bailey as a "sophisticated malingerer." (See XVI 3056)

assessed Bailey's GAF at 78, which "means that there aren't any real serious symptoms present." (XXVIII 4699-4700)

Dr. Prichard analyzed Bailey's poem in SE 27 (quoted supra) and explained how it fit with his diagnosis of anti-social personality disorder, characterizing the poem as showing "major callousness," no remorse, and nobody else matters to Bailey. (XXVIII 4693-94)

Bailey's appearance to witnesses as scared, pale, and red was probably an indication of Bailey being concerned about what will happen to him if he is caught. Bailey has likely been able to fake symptoms to prison officials to obtain drugs. (XXVIII 4695, 4697-98)

Dr. Prichard rejected both mental mitigators of extreme emotional disturbance and substantial impairment and explained his reasoning. (XXVIII 4692-93)

Dr. Harry McClaren, a forensic psychologist, testified that he met with Bailey four times in 2005 and 2006 and administered multiple tests to him. He spent 10 to 11 hours with Bailey. He also reviewed investigative reports from Florida and Wisconsin and institutional medical records and "interviewed … people that have known Mr. Bailey either as teachers, family, … mental health professionals or others that worked in his care and treatment, … at different places he's resided." (XXVIII 4703-4704, 4711-12)

Dr. McClaren diagnosed Bailey as having a history of ADHD and as having polysubstance dependence, anti-social personality disorder, and borderline personality disorder. (XXVIII 4712)

Dr. McClaren rejected both mental mitigators of extreme emotional disturbance and substantial impairment and explained his reasoning. Dr. McClaren, like Dr. Prichard, emphasized and recounted the details of the events surrounding the murder. (XXVIII 4705-4707) He also indicated that Bailey's telephone conversation with his friend, John Braz, (excerpted supra) "absolutely" played a part in his opinion. (XXVIII 4707-4708)

McClaren said that Bailey's appearance as pale, upset, teary-eyed were within "normal human experience," not extreme emotional disturbance, not limited intellect, and not severe brain damage. (XXVIII 4709-4710)

Randy Squire, an investigator for Corrections Corporation of America, was the State's final witness at the evidentiary portion of the penalty phase. He authenticated SE 3A, a CD which was played for the jury (XXVIII 4713-33) and which is part of this Court's record on appeal. It contains Bailey's December 2005 telephone call to John Braz, excerpted supra and referenced by Dr. Prichard and by Dr. McClaren. In it, Bailey announces his intent to fake mental retardation and being crazy.

The jury recommended the death penalty by a vote of 11 to 1. (XXVIII 4758-60; XVIII 3404). After a Spencer hearing (XXIX) and after the parties submitted sentencing memoranda (XVIII 3469-76), Circuit Court Judge Overstreet provided an extensive order sentencing Bailey to death (XXX; XVIII 3481-99, attached).

The Circuit Court Judge found the following aggravators and weighed them as indicated:

> The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community

control or probation, based upon a Wisconsin conviction of Armed Burglary and Taking a Vehicle Without Consent and surrounding circumstances, "given great weight" (XVIII 3482-83); and,

The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, based upon a detailed narrative of the events of Bailey's murder of Sgt. Kevin Kight, given "great weight" (XVIII 3483-85).

The trial court provided extensive reasoning for rejecting the following statutory mitigators:[10]

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the trial court including, for example, quotes (also excerpted supra) from Bailey's December 2005 telephone conversation with John Braz concerning faking mental retardation and mental illness (XVIII 3485-92); and,

The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance, the trial court including, for example, a discussion of the facts of the murder and Dr. McClaren's testimony (XVIII 3492-94).

The trial court's order repeatedly criticized Dr. Kubiak's testimony as unreliable. For example, Kubiak had failed to review the critically important evidence surrounding Bailey's murder of Sgt. Kight, which the trial court listed, concluding that these are the "actions of a person who had the capacity to carefully and deliberately contemplate and weigh each of his actions as well as the consequences associated therewith." (XVIII 3489-90) The order also highlighted that "Dr. Kubiak would not recede from his opinion that his diagnostic results were valid even though he knew the

[10] The trial court, after conducting an extensive pre-trial evidentiary hearing concerning mental retardation and competency (XXIII), also wrote an extensive order (XVI 3054-3059), which overlaps the penalty-phase evidence and findings.

defendant had been telephonically recorded while he discussed with his friend, Braz, his efforts to feign severe cognitive impairment." (XVIII 3490) The trial court's order quoted from that conversation (recorded on Penalty/SE 3A and excerpted supra). (XVIII 3491) The order continued by criticizing Kubiak as "stubbornly adher[ing] to his opinions at trial," which were divorced from "any factual basis" and the facts of the crime. (XVIII 3492; see also XVIII 3493-94)

The trial court found the following statutory mitigator:

> The defendant was 22 years old at the time of the crime. DOB: July 15, 1982

However, the trial court reasoned that it was entitled to "very little weight." (XVIII 3495)

The trial court found the following non-statutory mitigation and provided reasoning for giving each of them "little weight":

> 1. Bailey's non-retardation-level low IQ, but offset by, for example, Dr. Prichard's finding that Bailey's scores underestimated his true intellectual capacity (XVIII 3495);
>
> 2. Bailey's history of mental health problems, noting ADHD diagnosed at age 11 (XVIII 3495-96);
>
> 3. Bailey's troubled youth, prior diagnoses, and prescriptions (XVIII 3496);
>
> 4. Crawford's testimony that, within 24 hours of the murder, Bailey had consumed many beers, smoked some marijuana, and consumed mixed drinks, and Bailey was not sober, but offset by other evidence showing, for example, Bailey's ability to drive, walk, recollect the events of the murder, and attempt to conceal his crime (XVIII 3496, 3494);
>
> 5. Came from broken home; history of substance abuse; very little financial assistance and employment history (XVIII 3496-97);
>
> 6. Poor student but promoted with failing grades (XVIII 3497);

7. When he was arrested, Bailey asking about Sgt. Kight's condition, but offset by Dr. Prichard's testimony and the lack of any other indication of any concern for the victim (XVIII 3497-98); and,

8. Bailey's adherence to courtroom decorum (XVIII 3498).

The trial court found that the "aggravating circumstances outweigh the mitigating circumstances for the murder of Sergeant Kevin Kight" and sentenced Bailey to death. [**ISSUE I** claims that this sentence was disproportionate]

SUMMARY OF ARGUMENT

In the midst of heavy Spring Break traffic at Panama City Beach, on Easter Sunday, March 27, 2005 at about 10:30pm, Bailey gunned down Sgt. Kevin Kight as the Sergeant conducted a traffic stop of the rented Durango that Bailey was driving.

Bailey knew he was wanted for a Wisconsin parole violation for Armed Burglary, for which he had been released from prison only about five months prior to the traffic stop. While the Sergeant was checking Bailey's ID by calling it in to dispatch, Bailey told his friend in the Durango that he wasn't going back to prison and then told his girlfriend on his cell phone that he would "pop the cop" if the "cop" tries to arrest him. Bailey readied his nine millimeter semi-automatic pistol by moving it from under the seat to under his leg. Sgt. Kight returned to Bailey's Durango, grabbed his handcuffs, and reached for Bailey's vehicle door, when Bailey fired at him three times with the pistol, hitting the Sergeant twice in the upper chest, killing him. Bailey raced off in the Durango, abandoned it, hid in the back of a pick-up truck, said he had "popped a cop," and intimidated the pick-up's occupants to take him where he directed by displaying his

gun. Bailey rendezvoused with his friends and confirmed that he had shot an officer two or three times and he thought he killed him. The next day Bailey was arrested as he tugged at the murder weapon in his waistband.

Subsequently, through cold and callous poems, Bailey narrated several of the events surrounding his murder of the officer and, in a recorded phone call, told his friend that he intended to fake being mentally retarded and crazy. However, Bailey failed to deceive all the mental health experts and failed to deceive the jury, which recommended death 11 to 1, and failed to deceive the trial judge, who wrote an extensive sentencing order (copy attached).

The trial judge's sentencing order and supporting evidence justify the death sentence in this case and belie **ISSUE I**'s claim that it is disproportionate. Bailey's murder of the officer performing his duty to arrest Bailey and Bailey's parolee/parole-violator posture, each attributed "great weight," more than offset the weak mitigation, given "very little" and "little" weight.

In **ISSUE II**, Bailey contests a number of arguments the prosecutor made. However, his claims are unpreserved and he has failed to satisfy his burden of showing fundamental error.

As Bailey properly concedes, Bailey's **ISSUE III** Ring claim has been resolved against his position many times.

ARGUMENT

ISSUE I: HAS APPELLANT DEMONSTRATED THAT THE DEATH SENTENCE IS DISPROPORTIONATE? (RESTATED)

Introduction and Overview.

With an 11-to-1 jury recommendation of death (XXVIII 4758-60; XVIII 3404); no statutory mental mitigation (XVIII 3485-94); only "very little weight" afforded to the age mitigator (XVIII 3494-95); only "little weight" for several non-statutory mitigators (XVIII 3495-98); "great weight" attributed to Bailey's parole status for Armed Burglary and Taking a Vehicle Without Consent (XVIII 3482-83); and, with "great weight" attributed to Bailey purposely killing Sgt. Kevin Kight to avoid or prevent a lawful arrest or to effect an escape from custody, Bailey's ISSUE I (IB 26-34) contends that the trial court's imposition of the death sentence is disproportionate. The State responds that the trial court's well-reasoned sentencing order (attached to this brief) provides more than sufficient justification for the death sentence in this case.

Bailey's Initial Brief (IB 28) purports to rely upon the trial court's findings of mitigating circumstances, but Bailey ignores the trial court's weighing of each of them as meriting "little weight" and the sentencing order's sound reasoning supporting such a minimal weight.[11]

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[11] Because Bailey's ISSUE I does not attack the trial court's penalty-phase findings concerning each of the aggravators and mitigators, the State does not explicitly focus on showing how the trial court's order was supported by competent and substantial evidence. However, much of the discussion in this brief does support the findings.

The State disputes the theme that runs through Bailey's characterization (IB 26-28) of the guilt-phase and penalty-phase evidence. Bailey is quick to seize snippets from the record concerning his supposed impulsive, panicky, shaky, and pale posture. He overlooks the overriding cold-calculating reality that permeated Bailey's thinking and memory and that illustrated his criminal mind. Bailey had served a number of years in prison in Wisconsin for Armed Burglary (See, e.g., XXXII 187, 189; XVI 3013, 3038),[12] and, having been released from prison in October 2004 (XXVIII 4570-72; XVIII 3482; XVI 3013, 3040) and only a few weeks prior to this Murder his Wisconsin parole officer having limited him to the confines of his home (XXVIII 4570-72; XVI 3008-3011), and also having a suspended driver's license (E.g., XXXII 117, 189), Bailey knew that Sgt. Kight was in the process of closing down his freedom (See, e.g., XXXI 187, 189, 192-93).

The type of "impulsive," "panicked," "shaking, and "pale" (IB 27-33) that Bailey demonstrated to some witnesses in the evening of Easter Sunday 2005 was reflected in his statements that essentially he would do whatever it takes to avoid going back to prison (See XXXII 187, 188, 191) and that he intended to "pop this cop if he tried to arrest him." (XXXII 192-93; see also "*** If I have to, I'm going to pop him *** I'm about to pop this cop ***," XXXII 228-30). Bailey's mindset was reflected in his re-positioning his nine millimeter semi-automatic pistol from under the seat to under his

[12] In addition to the offenses for which he was on parole, Bailey was no stranger to the Wisconsin criminal justice system. (See, e.g., XVIII 3412-15)

leg (XXXII 193). It was reflected in his firing three shots at Sgt. Kight (XXXI 42, 45-46, 58-64, 93-94, 102-103; XXXII 201), with two of the bullets striking him in the upper chest and killing him (XXXIV 390-404; location of bullet wounds shown in SE 25B photo of victim). It was reflected in his fleeing from the scene (XXXI 62-64, 94) and abandoning the rented Durango (XXXI 95-100), concealing himself by laying down under a towel or blanket in the back of a pick-up truck (XXXII 158) that was passing-by (XXXII 135-36), and maintaining his deadly weapon in his waistband and displaying it to intimidate others to drive him to return to his friends at the Sweet Dreams bar (XXXII 135-37, 139-40, 152-54). Bailey's mindset was reflected in his continuing attempt to manipulate events surrounding the murder by faking mental retardation and mental illness, as established through his recorded telephone call to Braz (excerpted with full cites supra; Penalty/SE 3A) and through his malingered test scores (See especially Dr. Prichard's testimony, summarized in Facts supra).

As Dr. Prichard observed, Bailey's appearances to witnesses as scared, pale, and red were probably indications of Bailey being concerned about what will happen to him if he is caught. (XXVIII 4695) And, as McClaren observed, Bailey's appearance as pale, upset, and teary-eyed were within "normal human experience." (XXVIII 4709-4710)

Further, Bailey ignores the testimony of Schalk, a passenger in a nearby van, (XXXI 67) who saw Bailey's face and indicated that Bailey "looked really mean, really mad and upset." (XXXI 71)

Bailey tenders his drinking and lack of sleep (IB 26), but whatever the number and nature of drinks that Bailey imbibed and whatever sleep he had lost, he was able to drive adequately, walk fine, talk fine, (See XXXII 182-85; XXXII 135-47, 151-54, 178) back the Durango into a parking space (XXXII 178-79), appreciate that Sgt. Kight would arrest him and appreciate why (See XXXII 187-94; SE 27), and several times recount for others what he had done. Bailey told Lawson that he had "popped a cop" (XXXII 136, 142-43) and told Crawford and Braz that he had shot an officer two or three times and that he thought he had killed him (XXXII 200-202); although at times crassly phrased, Bailey was accurate on all points. In Dr. Prichard's words, Bailey was "perceiving very well" (XXVIII 4687-88). Bailey had "very realistic perception … and a very anti social orientation how … to avoid being apprehended and plan his escape." (XXVIII 4689)

Bailey's poem (SE 27), as quoted supra, when juxtaposed with the trial guilt-phase evidence, also reveals his ability to callously recall the events surrounding his murder of Sgt. Kevin Kight: the victim pulled Bailey over ["cop pulled me over"]; Bailey resisted the officer ["Don't take shit from anyone"] by shooting him twice with hollow point projectiles ["hollow point for my anger *** Bust that led left his ass … him stankin "]; after shooting the officer, Bailey fled in the vehicle ["Smash the gas and hit the beach … Gotta run and Gotta hide"] and then abandoned it, but he kept the murder weapon ["Keep my gun but ditch the ride"]; numerous officers were attempting to find him ["cops coming fast and filling the streets ... All these cops, their after me"]; his plan was not to be caught and not to

be incarcerated ["Prison or Jail, I'll not see"]; he called his girlfriend for help ["Call my girl I need you now …"]; and, after shooting Sgt. Kight, Bailey rendezvoused with his friends at a bar and told them that he shot the officer two or three times ["Found my brother at the bar drinking a fifth ... After I told him what I did"]. (See "The Murder" section in Statement of the Case and Facts supra)

Bailey's poem also confirmed his acute awareness of the status of his parole: "less than five months I've been free," an accurate assessment since he was paroled in October 2004 (See Penalty-phase Court Exhibit #1; XXVIII 4567-72; XVIII 3482-83; XVI 3013, 3040) and he killed Sgt. Kight in March 2005 (E.g., XXXI 35-36; XXXII 123).

Bailey (IB 27) contends that his statements that he intended to "pop a cop" did not really mean that he intended to kill anyone. The facts belie such a strained interpretation. Before he shot the officer, Bailey said he "wasn't going back to prison" (XXXII 187) and intended to "pop this cop if he tried to arrest him" (XXXII 192-93, 228-30). He then re-positioned his nine millimeter semi-automatic pistol from under the seat to under his leg (XXXII 193), and after he shot the officer twice, he said "I just popped a cop" (XXXII 135-36), then moments later he said he thought he had shot the officer two or three times and killed him (XXXII 200-202, 210, 227). Further, the act of shooting someone in the chest is the use of **deadly** force in a **deadly** manner, with or without medical testimony regarding the degree of lethality of precise location of the entry wound and angle. Here,

Bailey used lethal force three times, with two of the instances causing fatal wounds.

Therefore, the facts also belie Bailey's (IB 27) reliance on "normally" "nonfatal location"[13] of the two bullet wounds to the officer's chest, as if he somehow surgically chose where to shoot Sgt. Kight so he would not die as he fired at the officer three times. In fact, Bailey stuck the gun out of his vehicle window and fired at the part of Sgt. Kight's torso that was closest to Bailey and that was angled towards Bailey. No matter how Bailey "spins" the shooting, he directed deadly force times-three at the officer.

Bailey (IB 28) indicates that there was "some dispute" concerning the severity of his mental condition. The trial court resolved that dispute against Bailey. Through a well-reasoned order (attached), the trial court rejected each of the statutory mental mitigators that Bailey submitted. (See also summary of penalty-phase evidence and findings supra)

Bailey (IB 28) summarily lists the non-statutory mitigation that the trial court found, but he overlooks the fact-grounded "little weight" that the trial court attached to each of them. The State now discusses each mitigating and aggravating circumstance that the trial court found and weighed. Their totality supports the death sentence as proportionate in this case.

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[13] Thus, Bailey has not challenged the sufficiency of the evidence for murder.

Age Mitigator.

Bailey (See IB 26-27) does not discuss the mitigator of his 22-year-old age[14] that the trial court found and gave "very little weight," but Bailey (IB 30, 33) relies upon age and youth in discussing the case law. Bailey does not address the trial court's fact-grounded reasoning:

> The defendant was 22 years old when he killed Sergeant Kight. Before this tragic event, he had fathered a child; successfully obtained GED and HSED certificates; had been described as verbally accomplished, astute, and a good conversationalist; had been employed in the past as a house painter and a pizza maker. There was no evidence during these proceedings which reasonably established that the defendant was suffering from any significant emotional immaturity due to his age. The court finds this circumstance to exist but, in light of the aggravating circumstances, gives this circumstance very little weight. See: Scull v. State, 533 So.2d 1137 (Fla. 1988).

(XVIII 3494-95)

Non-Statutory Mitigation.

1. Low IQ (little weight). (XVIII 3495)

Bailey (IB 28) simply lists some IQ scores, but there are many facts that qualify those raw scores.

As the trial court explained, even Dr. Prichard's test scores, including a full-scale IQ score of 75 (XXVIII 4683), were "likely an underestimation of his [Bailey's] true intellectual potential." (XVIII 3495; see also XXVIII 4683-84) Further, earlier in the sentencing order, the trial court had also relied upon the following evidence concerning Bailey's intelligence:

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[14] More precisely, Bailey (DOB 7/15/82, E.g., I 7, 103) was nearly 23-years-old at the time of the murder.

1. ***Dr. Prichard believes that because of the defendant's behavior while taking the WAIS III test, the IQ score was an underestimation of his true intellectual functioning. At trial Dr. Prichard testified that the defendant was not mentally retarded, but to the contrary, was of average intellect.

2. The defendant reached developmental milestones at expected ages and was walking and talking at the age of 8 or 9 months.

3. The defendant was assessed in 1994 at the Milwaukee County Mental Health Complex at the age of 11. He was judged to have "average intelligence."

4. The defendant obtained a certificate for his General Education Development (GED) and completed the further requirements to complete his High School Equivalency diploma (HSED) in the year 2000.

5. *** Mrs. Hardesty interviewed the defendant on four occasions since his incarceration there. She described the defendant to be a person who was very accomplished verbally; astute; a good conversationalist; a person who comprehended well. ***

6. According to Dr. Prichard's report in evidence, medical records from Union Correctional Institution reflect that the defendant underwent an initial psychological assessment, wherein it was reported the defendant's concentration and abstract thinking were adequate.

(XVIII 3488-89)

Further, as argued above and as the trial court points out when rejecting the substantial impairment statutory mitigator, the facts surrounding the murder undermine Bailey's claim to intellectual impairment. As the trial court put it:

(l) The defendant knew he was in violation of his parole.

(2) The defendant logically and correctly concluded that Sergeant Kight would run a record check on the identification card and determine he had no valid driver's license and likely determine he was in violation of his parole.

(3) The defendant knew he would go back to prison for life if arrested and deliberately planned to 'pop a cop' if an arrest was attempted.

(4) The defendant weighed his options for almost ten minutes and elected to kill Sergeant Kight.

(5) The defendant was able to plan and execute his escape and avoid apprehension until the next day.

(6) The defendant returned to his motel room and emptied a box of bullets into his pocket as part of his plan to avoid arrest.

(7) The defendant was able to remember and recount to his friends the events surrounding the shooting.

(8) The defendant was arrested the next day with a handgun in his pants and was able to conform his conduct to the directions of the arresting officer by showing his hands and ceasing his efforts to draw the weapon from his waistband.

(XVIII 3488-89) Moreover:

- Nancy Huttelmaier testified that initial assessments of Bailey when he entered her program placed him at grade level 12.9 for reading and 7.1 for math (XXVIII 4659-60);
- When Bailey bothered to attend school and there were no absences, his grades were in the B and C range (XXVIII 4669-70);
- At one point, Bailey improved his reading level two grade levels in six months (XXVIII 4673);
- Through his poem (Quoted supra; SE 27; Witness published to jury at XXXIV 411), Bailey demonstrated his accurate recollection of events;
- Through the recorded telephone call to Braz (Penalty/SE 3A; Quoted and additional record cites supra), Bailey disclosed his intent to fake mental retardation and mental illness.

If anything, the trial court's "little" weight of Bailey's IQ scores was a gratuity.

2. ADHD diagnosis at age 11 and additional diagnoses of Oppositional Deficit Disorder and Hyperactivity (little weight). (XVIII 3495-96)

Bailey (IB 28) summarizes this mitigator as a "history of mental problems since childhood," but the trial court's findings were very limited, as indicated in the title of this sub-section. There are references to ADHD in Bailey's records, but they are qualified by the overriding diagnosis by all three mental health experts of Bailey as having anti-social personality disorder (XXVIII 4648, 4684-94, 4712), with its implications for Bailey's self-serving manipulative nature, and the consistent opinion of Dr. Prichard that Bailey has likely been able to fake symptoms to prison officials to obtain drugs (XXVIII 4695, 4697-98).

Whatever mental condition can be attributed to Bailey, he certainly was able to callously calculate the murder of Sgt. Kight, recount it later, and attempt to manipulate the system.

3. Bailey's tenure at a juvenile facility for troubled youth, behavior improving when Ritalin was administered in 1998, prior diagnoses, and prior prescriptions (little weight). (XVIII 3496)

Bailey (IB 28) breaks this mitigator into parts and re-numbers it as "3," "4," and "5," but however one characterizes this mitigator, its "little" weight is more than justified by the facts of this murder and the evidence discussed in foregoing pages.

4. Testimony that, within 24 hours of the murder, Bailey had consumed many beers, smoked some marijuana, and consumed mixed drinks, and Bailey was not sober (little weight). (XVIII 3496)

Bailey (IB 28) renumbers this mitigator as "6" and overlooks that the trial court explicitly cross-referenced its prior discussion in which it

rejected that Bailey was actually impaired. For example, the trial court wrote:

> [T]he defendant did not appear to be so influenced by alcohol or marijuana that his driving was impaired. While D'Tori Crawford testified that the defendant was not sober, he said the defendant had no difficulty driving or walking. Crawford described the moments immediately prior to being stopped by Sergeant Kight. He said the defendant stopped his vehicle to talk to girls. *** [After Bailey shot Sgt. Kight,] [t]he defendant was able to describe to him and the defendant's girlfriend what happened earlier that evening when he killed his victim. Crawford overheard the defendant arguing with another friend about whether to get rid of the gun. He saw the defendant empty a box of bullets into his pocket.
>
> As Dr. McClaren testified, the evidence suggests that at the time of the killing, the defendant demonstrated behavior which is consistent with the normal human experience. ***

(XVIII 3494) Also, as previously discussed, Bailey wrote a crass poem detailing the events, navigated backwards into a parking space, navigated in heavy traffic, and then planned, and prepared for, Sgt. Kight's murder and attempted to escape detection and apprehension. Bailey was minimally impaired, if at all, and his voluntary consumption of alcohol and marijuana was consistent with his self-centered anti-social personality disorder.

5. Came from broken home; history of substance abuse; very little financial assistance and employment history (little weight). (XVIII 3496-97)

The trial gave this mitigator, which Bailey (IB 28) renumbers as "7," "little weight" and qualified it: "The precise length of the defendant's employment history and the precise point in time the defendant developed substance abuse problems as a youth is not completely clear." (XVIII 3497)

6. Poor student as a child but promoted with failing grades (little weight). (XVIII 3497)

Although Bailey (IB 28) does not list this mitigator, the trial court did find it, giving it "little weight" and cross-referencing its previous

discussions of Bailey's academic achievements. The trial court had discussed Dr. Prichard's analyses that included Bailey's "academic achievements" and from which he "describes the defendant as 'functioning pretty well … .'" (XVIII 3487) The trial court had also previously discussed Bailey's GED (XVIII 3488) and evidence that Bailey was "accomplished verbally; astute; a good conversationalist; a person who comprehended well." (XVIII 3489) (See also discussion of "1. Low IQ" supra)

7. When he was arrested, Bailey asked about Sgt. Kight's condition (little weight). (XVIII 3497-98)

Bailey (IB 28) does not list this mitigator. The trial court found it, but gave it "little weight" and reasoned, in part: "Clearly, no other evidence of the moments leading up to the murder of Sergeant Kight could reasonably be interpreted as demonstrating the defendant's concern for this law enforcement officer." Moreover, consistent with the theme of Dr. Prichard's testimony, Bailey tried to find out "what the consequences [were] to the officer" (XXVIII 4695, lines 4-5) because he wanted to get an idea "what's probably going to happen to him[self]" (XXVIII 4695, line 22). Further, Dr. Prichard also analyzed Bailey's poem in SE 27 (quoted supra) and explained how it fit with his diagnosis of anti-social personality disorder, characterizing the poem as showing "major callousness," no remorse, and **nobody else matters to Bailey**. (XXVIII 4693-94)

8. Bailey's adherence to courtroom decorum (little weight). (XVIII 3498).

Bailey did not act-up in the courtroom, and this mitigator was worth only "little weight."

Aggravating Circumstances.

Bailey does not discuss the aggravators as such, but instead, he attempts to dilute the aggravating circumstances with his characterizations such as "panic" and "fear," (IB 26-27) which has been discussed supra. The trial court's order contains well-reasoned and fact-grounded justifications for the two aggravators it found and gave "great weight," which the State quotes:

The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or probation (great weight). (XVIII 3482-83)

> The defendant, Robert I. Bailey and his attorneys signed a written stipulation that this aggravating circumstance had been proven beyond a reasonable doubt. This stipulation was communicated to the jury at the commencement of the penalty phase of these proceedings.
>
> Additionally, the state presented the testimony of Carl Safford, a parole officer from the Wisconsin Department of Corrections. Mr. Safford authenticated a certified judgment and sentence wherein the defendant was convicted of the felony crimes of Armed Burglary and Taking a Vehicle Without Consent. Mr. Safford also testified that he had been the defendant's parole officer since October, 2004 when he was placed on parole to end in July, 2009. Mr. Safford testified that he had given the defendant his rules and guidelines for parole and last saw the defendant around March 9, 2005 when he placed the defendant on home detention. The defendant violated his home detention by leaving his residence, after which Mr. Safford obtained a warrant for his arrest. The defendant murdered Sergeant Kevin Kight on March 27, 2005. This aggravating circumstance is given great weight by the court.

The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (great weight). (XVIII 3483-85)

> On March 27, 2005, Sergeant Kevin Kight conducted a traffic stop of the vehicle operated by the defendant. The traffic stop was for a traffic infraction. The stop occurred sometime around 10:20 p.m.. Sergeant Kight was operating a marked police vehicle and was dressed in a police uniform. Sergeant Kight first approached the defendant's vehicle and requested to see the defendant's driver's license. The defendant handed Sergeant Kight an identification card but did not have a valid driver's license. Seated next to the defendant was

D’Tori Crawford. Crawford testified that he could see Sergeant Kight was in a uniform, saw him exit his patrol vehicle with blue lights flashing and knew that Sergeant Kight was a police officer.

Sergeant Kight returned to his patrol vehicle with the identification given him by the defendant. During this time, Crawford testified that the defendant told him he did not have a valid driver’s license and made reference to a parole violation. Crawford also testified that the defendant said he wasn't going back to prison. At 10:25 p.m., Sergeant Kight conducted a driver's license check for the defendant and at 10:26 was told by a Panama City Beach Police communications officer that the defendant’s Wisconsin driver’s license was revoked. D’Tori Crawford testified that during this same period, the defendant used a cell phone to call his girlfriend in Wisconsin. During that phone call, Crawford heard the defendant say that he was going to 'Pop this Cop' if he tried to arrest him. The defendant also told his girlfriend to come get him. After the phone call, Crawford saw the defendant grab his pistol from beneath the driver’s seat and place the firearm in a ready position under his right leg. Crawford exited the vehicle and caught a ride away from the scene. Tragically, Crawford did not alert Sergeant Kight or anyone else about the defendant's plan to avoid arrest. Crawford testified that later that evening, the defendant told him he shot Sergeant Kight when Sergeant Kight returned and directed the defendant to exit the vehicle. The defendant fired three shots at Sergeant Kight at point blank range with a 9mm semi-automatic pistol. Two of the bullets struck Sergeant Kight in the upper chest area, penetrating the edge of his vest. Each bullet took a different, but equally deadly path. One bullet penetrated the descending aorta and lodged in the kidney. The other bullet pierced Sergeant Kight’s pulmonary artery lodging in his spine. The wounds left Sergeant Kight only a few remaining moments of consciousness. At 10:30:27 p.m., Sergeant Kight uttered what were likely his last words when he used his radio to call for help... '18 Panama Beach, I'm shot.'

The defendant did not remain at the scene. The defendant left Sergeant Kight mortally wounded and fled the murder scene in his vehicle. He drove his vehicle onto the beach and thereafter abandoned it not far from where Sergeant Kight lay dying. The defendant jumped into the back of a pick-up truck occupied by spring breakers. One of those occupants in the bed of the truck was witness, Corey Lawson. Lawson testified that the first thing the defendant said was 'I just popped a cop.' The defendant told the occupants to get him out of the area and secreted himself under a blanket. While fleeing the scene, the defendant told Lawson that he was wanted, and if caught, he would go to jail for life. He told Lawson that he had shot Sergeant Kight when he tried to arrest him. The defendant also told Lawson that the only way the police were going to catch him is if they killed him. The defendant was finally dropped off at a beach bar w[h]ere he

> rejoined his friend who had traveled with him to Florida. The defendant continued to avoid arrest until the next day when he was discovered and taken into custody.
>
> The court gives this aggravating circumstance great weight.

Policy Supporting Considering Murdering an Officer As Among the Most Serious Aggravators.

Notoriously underpaid, facing grave dangers such as Bailey, and part of the first-responder team, law enforcement officers merit the fullest protection of Florida's laws. The State urges this Court to consider aggravators involving the killing of an officer in the line of duty at least at the same level of seriousness as CCP, HAC, and prior violent felony. Accordingly, the Florida legislature has recognized law enforcement explicitly and implicitly in several aggravating circumstances. See Sections 921.141(5)(e),(g),(j), Fla. Stat. ("… avoiding or preventing a lawful arrest …"; "… disrupt or hinder the lawful exercise …"; "law enforcement officer engaged in the performance …").

It is judicially noticeable that law enforcement officers, like Sgt. Kight, face grave dangers to their lives from offenders like Bailey, who essentially said that he would do anything, including "popping a cop" to keep from returning to prison. For example, even in 1968, the United States Supreme Court noted the seriousness of the problem:

> American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. [FN21]
>
> FN 21. Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were

> perpetrated by knives. *See* Federal Bureau of Investigation, Uniform Crime Reports for the United States -- 1966, at 45-48, 152 and Table 51.

Terry v. Ohio, 392 U.S. 1, 23-24 (1968). The problem is unabated, as indicated in data that the FBI released May 12, 2008:

> According to preliminary statistics released today by the Federal Bureau of Investigation (FBI), 57 law enforcement officers were feloniously killed in the line of duty during 2007.

http://www.fbi.gov/pressrel/pressrel08/leoka051208.htm.

While this Court has prohibited doubling of aggravating circumstances,[15] this prohibition does not preclude recognizing these law-enforcement-related aggravators at least as serious as CCP, HAC, and prior violent felony. Accordingly, in Burns v. State, 699 So.2d 646, 650 (Fla. 1997), this Court recognized the seriousness of this aggravator:

> In the instant case, the gravity of the single merged aggravator[16] was not reduced by any particular factual circumstance. On the contrary, we agree with the trial court that this aggravator was entitled to great weight.

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[15] Here, the prosecution had listed additional aggravators that it intended to seek (XVI 3047), but it appears that aggravators were merged into the one presented in order to avoid "doubling" (See XXVIII 4560).

[16] Burns explained: "The trial judge found and merged the following three aggravators: (1) the victim was engaged in the performance of his official duties as a highway patrol trooper when murdered by Burns; (2) the murder was committed to avoid arrest or to effect an escape from the victim's custody for the crime of cocaine trafficking; and (3) the murder was committed to disrupt the lawful exercise of any governmental function by or the enforcement of laws by the victim relating to cocaine trafficking." 699 So.2d at 648. See also, Patton v. State, 878 So. 2d 368, 379 (Fla. 2004)(IAC claim based upon claim of doubling, but trial judge merged aggravators in sentencing defendant to death); Griffin v. State, 866 So.2d 1, 17 (Fla. 2003)("as long as the avoid arrest and murder of a law enforcement officer are merged into one factor there is no doubling problem").

In the next section, the State submits Burns as dispositive.

Case Law Supporting Proportionality.

Dr. Prichard's analysis of Bailey's murderous actions, block-quoted supra in the facts section "Penalty-Phase Evidence," identifies the thread running through many of the guilt and penalty phase facts: Bailey is self-serving and manipulative. He will take "any means necessary to make sure nothing happens to [him] and to avoid what [he doesn't] want." The predominant feature of Bailey's personality is not a mental illness but rather anti-social personality disorder. Under the totality of facts of this case, as discussed in this issue as well as in the "Statement of the Case and Facts" section supra, Bailey merits the death penalty. The death penalty is proportionate.

Bailey's coldly calculated killing of Sgt. Kevin Kight (as Bailey announced his intent and tactically placed his semi-automatic nine millimeter pistol under his leg) was equaled by his post-murder callousness (as he reminisced over the murder in his poem). Bailey's attempt to escape the justice of his Wisconsin parole violation was matched by his endeavor to deceive the mental health professionals; both attempts failed but both attempts are weighty facts. The facts supporting the statutorily-recognized aggravation in this case far outweigh the mitigation attenuated by Bailey's pre-murder planning and post-murder callousness and attempted manipulation of the system.

In addition to the public policy in support of the seriousness of the avoid-lawful-arrest aggravator, several cases support the death penalty here.

The State submits Burns v. State, 699 So.2d 646 (Fla. 1997), as dispositive. Here and in Burns, the defendant killed an officer while engaged in his duty. In both cases, the officer's interaction with the defendant began with stopping the defendant's motor vehicle in traffic[17] and resulted in the defendant gunning down the officer. Here and there, the facts supported multiple law-enforcement-related aggravators but they were essentially merged into one aggravator. Moreover, here the officer had determined he had grounds to arrest Bailey for driving on a suspended license, and here Bailey's motive was to avoid being returned to prison for a serious felony of Armed Burglary. Therefore, Burns was afforded the statutory mitigator of "no significant history of prior criminal activity," Id. at 648, while, in contrast, only months earlier Bailey had been released on parole for Armed Burglary and Taking a Vehicle without Consent (See XVI 3013; XXVIII 4570-71), resulting in that aggravator justifiably being given great weight. Indeed, here, Bailey had also "violated his home detention by leaving his residence" (XVIII 3482; XVI 3011; XXVIII 4571-72) In other words, when Bailey murdered Sgt. Kight, he was not only on parole but he had already violated it.

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[17] In postconviction proceedings in Burns, an ineffective-assistance-of-counsel claim alleging that the traffic stop there was pretextual was rejected. See Burns v. State, 944 So.2d 234, 244 (Fla. 2006).

Here as in Burns, no "statutory mental mitigators" were found. Both defendants were given the age mitigator, and in both cases, the judge properly gave it significantly reduced weight.

In Burns, as here, the trial judge also found nonstatutory mitigating factors. There, the non-statutory mitigators included:

> (1) Burns was one of seventeen children raised in a poor rural environment and consequently had few economic, educational, or social advantages, but despite these disadvantages, he is intelligent and became continuously employed after high school; (2) Burns contributed to his community and society, he graduated from high school, worked hard to support his family, with whom he had a loving relationship, and was honorably discharged from the military, albeit for excessive demerits after one month and seventeen days of active duty; and (3) Burns has shown some remorse, has a good prison record, behaved appropriately in court, and has demonstrated some spiritual growth. Although the trial judge found this final mitigator, he questioned whether Burns' remorse and spiritual growth were self-serving in light of the fact that Burns was never completely truthful about the details of the crime. Burns continuously maintained that the murder was an accident for which he was sorry.

Here, as in Burns, the defendant came from a disadvantaged home life, but unlike Burns, Bailey only sporadically rose above that background, when he obtained his GED and excelled at reading. Burns and Bailey appeared to feign some remorse, but Bailey's attempt was patently foiled by the recovery of his poem and his recorded intent to manipulate the system by malingering.

Burns' jury recommended death (12-0), 699 So.2d at 648, as did Bailey's jury (11-1). In both Burns and this case, the trial judge followed the jury's recommendation and imposed a sentence of death.

Here and in Burns, "the gravity of the single merged [law enforcement] aggravator was not reduced by any particular factual circumstance." 699

So.2d at 650. Instead, the aggravator was entitled to great weight. Here and in Burns, "Nor does the instant case involve any statutory mental mitigators." Id. In Burns, there was no evidence of statutory mental mitigators, and here the trial court properly rejected them and provided extensive and well-reasoned justification for the rejection, as discussed at length supra. Here, and in Burns, "the statutory mitigators that were found were afforded only minimal weight." Indeed, here, Bailey was afforded only one (age), which was given "very little weight."

In Burns, the "statutory mitigating factor[] of no significant prior criminal history" was attenuated through Burns' prior sale of cocaine, whereas here Bailey was not entitled to that mitigator and, indeed, he was wanted for a parole violation for a serious felony when he murdered Sgt. Kight.

Here and in Burns, "the circumstances … are sufficient to support the death penalty." Here and in Burns, the defendant's "contention that his death sentence is disproportionate," 699 So.2d at 651, should be rejected.

Burns discussed two cases, which provide guidance here: Reaves v. State, 639 So.2d 1 (Fla. 1994), and Armstrong v. State, 642 So.2d 730 (Fla. 1994).

Reaves, like here, involved two strong aggravators, there, previous conviction of a felony involving the use or threat of violence, and, like here, "murder was committed for the purpose of avoiding or preventing a

lawful arrest." Reaves, like here, included "relatively weak mitigation." Burns reasoned: "While *Reaves* involves an additional aggravator[18] and arguably slightly less mitigation, we find in view of the totality of the circumstances that it closely resembles the instant case." 699 So.2d at 650. Here, there is the "additional aggravator," which was given great weight, and here the mitigation was weak, weighed by the trial court in "very little" and "little" terms.

Even though Armstrong involved "three valid aggravating factors," including the "merged aggravator for avoiding arrest and murder of a law enforcement officer," "no statutory mitigation" (whereas here, the age mitiagtor is of negligible "very little" weight), its nonstatutory mitigation was weak (like here). Burns summarized Armstrong in terms applicable here: "We affirmed the death sentence where, as in the instant case, there was limited mitigating evidence and strong aggravation." 699 So.2d at 650-51.

Several additional cases provide guidance.

Franqui v. State, 804 So. 2d 1185, 1198-1199 (Fla. 2001)(split opinions on other issues), which also involved the murder of an officer, cited to Burns and Reaves and upheld the death sentence as proportionate.

Gonzalez v. State, 786 So.2d 559, 569-570 (Fla. 2001), involved killing an officer and rejected a proportionality claim:

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[18] Burns discussed Reaves striking HAC but holding that the trial court's error was "harmless in view of the two remaining strong aggravators and relatively weak mitigation," 699 So.2d at 650.

> The resentencing judge clearly outlined all his reasons for considering each factor in his sentencing order. This case is similar to *Burns v. State*, 699 So.2d 646 (Fla. 1997), where the defendant was sentenced to death for the murder of a law enforcement officer. In that case, the avoiding arrest and hindering law enforcement aggravators were found and merged. Again, only the statutory mitigator of no significant criminal history was found. Burns had fewer aggravators than Gonzalez, which were weighed against the same statutory mitigator and insignificant nonstatutory mitigation, and this Court upheld his sentence as proportionate.

Here, the statutory mitigator was weaker than Gonzalez's no significant criminal history. In Gonzalez, the nonstuatory mitigation included little weight given to "Gonzalez's brain damage, learning disability and below average intelligence; Gonzalez's remorse and cooperation with the authorities; life sentences imposed on codefendants Abreu and San Martin; and Gonzalez's good conduct in custody and potential for rehabilitation." Here, the non-statutory mitigation was even more "insignificant" than in Gonzalez. There, the trial "court found and considered three weighty aggravating circumstances," and here, two weighty aggravating circumstances were found. In both cases, the death sentence is supported.

Bailey's weak mitigation is akin to the mitigation in Watts v. State, 593 So.2d 198, 203-204 (Fla. 1992). Watts included three valid aggravators,[19] and the defense claimed a low IQ and an age of 22. Watts held that "the imposition of the death penalty upon the jury's recommendation was clearly consistent with this Court's prior decisions."

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[19] Previous convictions for an aggravated assault and an aggravated battery; committed the murder during the course of a sexual battery or while attempting to escape from it; committed the murder for financial gain. 593 So.2d at 203-204. HAC struck but harmless. Id. at 204.

593 So.2d at 204. Watts reasoned, in part, that "*Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988), is … distinguishable, because in that case the trial judge found the existence of both of the statutory mental mitigating circumstances." Here, in contrast to Fitzpatrick, it also significant that the trial judge rejected the statutory mental mitigators.

Hayes v. State, 581 So.2d 121, 126-27 (Fla. 1991), involved two aggravating factors weighed against claims of age, low intelligence, learning disabled, product of deprived environment. Like here, in Hayes, the trial court "rendered a very detailed written order elaborating its findings as to all aggravating and mitigating circumstances, including nonstatutory mitigating evidence. The trial court expressly rejected the statutory mitigating circumstances of extreme mental or emotional disturbance, ***." Id. at 126. Here, with weaker mitigation than in Hayes, "Weighing all those factors in light of the jury's recommendation of death, the [trial] court concluded that death was appropriate." Here and there, there is "no reversible error… ." Id. at 127.

Lamarca v. State, 785 So.2d 1209 (Fla. 2001)("trial court found one aggravating factor - prior convictions for violent felonies based on appellant's 1984 convictions for kidnapping and attempted sexual battery"; "nonstatutory mitigation found by the trial court included his good behavior at trial (very little weight) and appellant's history of drug and alcohol abuse and that he suffers from mental disorders (very little weight)"), analyzed other cases that involved only one aggravator and various levels of mitigation. Lamarca reasoned, "This Court has vacated

numerous death sentences where there was only one aggravating factor; however, those cases generally involved substantial mitigating circumstances." Id. at 1216. Here, like Lamarca, "the mitigation found by the trial court is less than substantial." Id. at 1216. Lamarca reasoned, "This Court has also vacated the death sentence where the sole aggravating factor is not considered weighty." Id. at 1216. There, the "the sole aggravator here [wa]s significant." Id. at 1217. Here, two aggravators were significant, and indeed, extremely serious and weighty.

Also, see Patton v. State, 878 So.2d 368, 381 (Fla. 2004)(death sentence proportionate; "resentencing court found two aggravating factors: (1) a prior violent felony conviction based on a 1975 armed robbery and the contemporaneous conviction for the armed robbery of Maxime Rhodes; and (2) hindering a governmental function and avoiding arrest, which were merged. The trial court gave great weight to each of these aggravators. The trial court found no statutory mitigating circumstances, and rejected Dr. Toomer's testimony about the mental mitigators on credibility grounds. The trial court found as nonstatutory mitigation that Patton was abused as a child and used drugs"); Henry v. State, 649 So.2d 1361 (Fla. 1994)(death sentence proportionate; two statutory mental mitigators and several nonstatutory mitigators, including "truly remorseful," "history of drug and alcohol abuse," and "Henry fell as a child and suffered some brain injury"; aggravators of previously convicted of capital felony and committed during kidnapping).

Bailey's Case Law, Inapplicable.

Bailey (IB 28-33) discusses two cases as purported support for his proportionality claim: Hardy v. State, 716 So.2d 761 (Fla. 1998), and Brown v. State, 526 So. 2d 903 (Fla. 1988). Neither of them apply here.

Bailey's comparison with Hardy relies upon several facts that the State disputes. Bailey (IB 30-31) assumes the fact that his shooting of Sgt. Kight was impulsive and panicked to a degree that is significantly mitigating, but, as discussed at length supra, he overlooks the evidence to the contrary. Bailey (IB 31) also erroneously thinks it is important that the two bullets entered the upper chest of the officer, as if somehow Bailey carefully placed the nine millimeter bullets so as not to kill the officer, which the State disputed supra. Bailey (IB 31) thinks his IQ scores are important, but he ignores his test scores as an underestimate, his malingering, and other evidence reflecting his intelligence, as discussed supra.

Unlike the Hardy's "spur-of-the-moment decision to shoot the officer," which Hardy apparently made in less than three minutes while the officer was patting down an accomplice, Bailey used ten minutes to carefully consider his situation, announce his intentions to his girlfriend through a cell phone call, and strategically ready the murder weapon under his leg. Unlike Hardy attempting to kill himself immediately after killing the officer and self-inflicting brain damage,[20] Bailey fled the scene, hid in

[20] In Hardy, "The self-inflicted gunshot wound entered the roof of

the back of a pick-up truck, intimidated others by showing his gun, acknowledged what he had done multiple times, including through his crass poem, and attempted to manipulate mental health experts by faking retardation and mental illness. In contrast, Hardy reasoned in rejecting CCP, "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." 716 So.2d at 766. Indeed, shooting oneself in the head through the roof of the mouth is not a feigned attempt. Hardy like Bailey, made a prior statement concerning killing an officer, but, unlike here, it was not directly linked to the murder in time and in situation:

> 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.

716 So.2d at 766. After striking CCP, Hardy analyzed the remaining single aggravator vis à vis the mitigation:

Hardy's mouth and exited through the top of his head. Hardy remained in a coma for several weeks and was hospitalized for over a month and a half, after which he was released to his mother, a certified RN, on house arrest. Over time, Hardy gradually regained the ability to walk and speak." 716 So. 2d at 762.

> Striking the cold, calculated, and premeditated aggravator leaves only a single aggravating factor--that the victim was a law enforcement officer engaged in the performance of his official duties. On the other hand, the trial court identified Hardy's age of eighteen at the time of the murder as a statutory mitigating factor. Additionally, the trial court gave at least some weight to the nonstatutory mitigators of Hardy's physically and emotionally abusive childhood and Hardy's attempt to punish himself with a self-inflicted gunshot to the head. The trial court gave considerable weight to the nonstatutory mitigators that Hardy now behaves well and would have no problem adapting to a prison setting. The trial court also gave considerable weight to the mitigating factor that Hardy is severely brain damaged as a result of his unsuccessful suicide attempt. The neurological experts that examined Hardy concluded that the brain damage destroyed the qualities that made Hardy human, so that Hardy was no longer the same person who killed Sergeant Hunt.

716 So.2d at 766. Here, in contrast, there are two aggravators, with each given great weight. In contrast to Hardy's 18-year age, Bailey was almost 23 years old, which was given only "very little weight." Here, there is no mitigation of "physically and emotionally abusive childhood and … [an] attempt to punish himself with a self-inflicted gunshot to the head." Here, Bailey is not "severely brain damaged as a result of his unsuccessful suicide attempt." And, unlike Hardy, Bailey is "the same person who killed [the] Sergeant," that is a self-serving manipulator.

Bailey's other case, Brown (IB 32-33), is inapplicable because it analyzed a jury override. As Burns put it when it rejected jury override cases there: "Jury override cases involve a wholly different legal principle and are thus distinguishable from the instant case." 699 So.2d at 649 n. 5 (collecting cases). Moreover, as discussed supra, the State disputes Bailey's conclusions concerning his youth and IQ, and Bailey's history and mental status were entitled only to "little weight."

In sum, Bailey's death sentence is proportionate.

ISSUE II: DID THE PROSECUTOR'S REFERENCES TO THE "COMMUNITY," "EVIL," AND TO JURORS VISUALIZING A DISTANCE CONSTITUTE FUNDAMENTAL ERROR? (RESTATED)

Bailey's Burden to Demonstrate Fundamental Error.

There was no contemporaneous objection to any of the prosecutor's comments that Issue II targets. Therefore, none of ISSUE II was preserved for appeal. See, e.g., Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings); U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995)("raise-or-waive rule prevents sandbagging").

Castor v. State, 365 So.2d 701 (Fla. 1981), is a seminal case concerning preservation. It explained the sound and long-established underlying principle:

> The requirement of a contemporaneous objection is based in practical necessity and basic fairness on the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early state of the proceedings.

Id. at 703.

Even constitutionally based appellate claims are generally subject to the principle of preservation. See Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and *Chambers* was not presented to the trial court … procedurally bars"); Frengut v. Vanderpol,

927 So.2d 148, 153 (Fla. 4th DCA 2006)("We do not address this [res judicata] issue ... not preserved").

Therefore, as Bailey (IB 35) recognizes, he bears the appellate burden of demonstrating on appeal that the comments constitute fundamental error. Crump v. State, 622 So. 2d 963, 972 (Fla. 1993), collected cases and explained the high burden that fundamental error imposes on Bailey:

> Fundamental error goes to the foundation of the case or the merits of the cause of action and can be considered on appeal without objection. *Clark v. State*, 363 So. 2d 331, 333 (Fla. 1978), *overruled on other grounds*, *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). However, we have also recognized that wide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla.), *cert. denied*, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982). The control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990), *cert. denied*, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991); *Breedlove*, 413 So. 2d at 8.

See also, e.g., Davis v. State, 461 So.2d 67, 71 (Fla. 1984)(unpreserved "comments had no significant impact on the jury's recommendation or the sentence imposed. They did not go to the foundation of the conviction or sentence").

Put another way, "For an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." Mordenti v. State, 630 So.2d 1080, 1084 (Fla. 1994), quoting State v. Johnson, 616 So.2d 1, 3 (Fla. 1993).

Therefore, "[t]he Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).

See also, e.g., Orme v. State, 896 So. 2d 725, 739 (Fla. 2005)(rejected a habeas claim that "prosecutor's comments were so egregious that they constituted fundamental error, and the issue should have been raised on appeal"; Orme has failed to demonstrate that prosecutor's comments error, much less fundamental error); Sochor v. State, 619 So.2d 285, 290 (Fla. 1993)("Fundamental error is error which goes to the foundation of the case").

As a threshold step towards establishing fundamental error, Bailey must first establish that the prosecutor's argument was improper. A prosecutor's argument is proper if it "review[s] the evidence and … explicate[s] those inferences which may reasonably be drawn from the evidence." Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985).

"Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment." Mann v. State, 603 So.2d 1141 (Fla. 1992).

Overview and Repeated Instructions and Comments about the Jury's Proper Role.

Bailey (IB 35) complains about three unpreserved prosecution arguments during the trial, claiming that the "prosecutor improperly positioned himself as a member of the jurors' community and that he represented the community's best interest"; the prosecutor "equated Bailey's coming into the community as evil entering the community"; and, "the prosecutor improperly told the jury to place themselves in the victim's position when facing the defendant at the time of the shooting." Bailey (IB 36-38) then quotes excerpts from the trial as purported support for his claim of fundamental error.

Bailey has failed to meet his burden of demonstrating fundamental error. Indeed, concerning Bailey's Golden Rule claim, defense counsel himself harnessed the same demonstration targeted on appeal.

The prosecutor did not say anything like "find him guilty because I charged him" or "find him guilty because you can trust my judgment." The prosecutor's reference to Bailey's face of "evil" did nothing to inflame jurors beyond the facts of Bailey's murder of Sgt. Kight and the evidence of a witness who described Bailey as "look[ing] really mean, really mad and upset." (XXXI 71). The prosecutor argued nothing like "feel the victim's pain."

Instead of Bailey's depiction of a jury easily distracted from its proper role, the prosecutor himself, shortly after making the comment about his position, put his role in proper context of the role of the jury: "… under our system the jury that listens to a case and determines guilt or innocence also is asked to go on and consider what the punishment should be." (XXIV 3910) He explained that the State bears the burden of proving aggravating factors beyond a reasonable doubt. (XXIV 3911) The State's burden was repeatedly hammered for the jury. (See, e.g., "under our law the defendant sits here right now innocent," XXIV 3928; "set aside any personal biases, opinions, feelings that you may have …," XXVII 4393; "Defendant … clothed with the presumption of innocence," XXVII 4461; "if … you … were to find that the State has not removed all reasonable doubt," XXVII 4466; "whether Mr. Meadows and Mr. Graham on behalf of the State presented enough evidence to convince you beyond a reasonable doubt," XXVII 4501; "render

your verdict based solely on the evidence …," XXVII 4551; "We want you here, as you promised, with a clean slate, if you will, ready to, first, afford the Defendant the presumption of innocence to which he is entitled," XXVII 4551). Thus, the jury was repeatedly reminded that the prosecutor's statements are not evidence. (See, e.g., XXXIV 423; XXVIII 4733)

Accordingly, only moments prior to the prosecutor's opening statement, the trial judge instructed the jury in accord with standard instructions:

> Now, it is your solemn responsibility to determine if the state has proved its accusations beyond a reasonable doubt against Mr. Bailey. Your verdict must be based solely on the evidence or lack of evidence and the instructions on the law that I provide you. The indictment, which is the charging instrument in this case, is not evidence and it is not to be considered by you as any proof of guilt. It is my responsibility as the judge to decide which laws apply to this case and then to explain those laws to you. It is your responsibility, as jurors, to decide what the facts of the case may be and then to apply the law that I give you to those facts. Thus, the province of the jury and the province of the court are well defined, our responsibilities do not overlap. And this is one of the fundamental principles of our system of justice.
>
> ***
>
> *** what the lawyers say during the opening statements is not evidence and it is not to be considered as such.

(XXXI 14-15)

Especially given these repeated admonitions, Bailey has substantially less faith in the jury to follow the law than the law does. See Moore v. State, 701 So. 2d 545, 551 (Fla. 1997)("judge properly instructed the jury that closing argument should not be considered as evidence in the case or as the instruction on the law. He went on to instruct the jury that the only aggravating factors it was allowed to consider were those specifically

defined by him; the judge also gave the correct instruction on mitigation").

Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982), is instructive. There, the defendant complained on appeal about several prosecutorial arguments, including improperly using the defendant's statements, plus "1) allegations of other criminal acts (rape); 2) 'vituperative' characterization (referring to Breedlove as an animal); 3) appeal to community prejudice (violence in Dade County)." In Breedlove, the prosecutor argued in the guilt-phase a fact not in evidence, that is, "He went prowling through the house to find that woman." In Breedlove, the "prosecutor characterized the killing as a "savage and brutal and vicious and animalistic attack." In Breedlove, the prosecutor argued "When we walk the streets we take our chances" and "One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home." In Breedlove, the defense counsel moved for a mistrial, but the claims on appeal were insufficient to warrant reversal. Here, the claims were unpreserved and insufficient to warrant reversal. Cf. Jones v. State, 949 So. 2d 1021, 1031-33 (Fla. 2006)(IAC claims concerning multiple prosecutor arguments).

In light of the nature of the prosecutor's comments, the defense counsel's use of one of them, the multiple jury instructions maintaining the jury's correct focus, Breedlove's guidance, as well as the compelling case against Bailey (summarized in the Facts supra), Bailey has failed to meet his burden of demonstrating fundamental error. See also Bertolotti v. State, 476 So. 2d 130, 132-133 (Fla. 1985)(prosecutor argument included,

for example, "inviting the jury to imagine the victim's final pain, terror and defenselessness," "prosecutor urged the jury to consider the message its verdict would send to the community at large"; held "the misconduct here to be so outrageous as to taint the validity of the jury's recommendation in light of the evidence of aggravation presented"); Henry v. State, 649 So. 2d 1361, 1365 (Fla. 1994)("prosecutor improperly referred to Dr. Berland as a 'hired gun' in his closing argument"; "prosecutor improperly argued that Christian was killed to eliminate a witness to Suzanne Henry's murder"; held not fundamental error); Conahan v. State, 844 So.2d 629, 641 (Fla. 2003)("Having reviewed the prosecutor's entire closing argument in light of the unobjected-to comments, none of the comments, individually or collectively, rose to the level of fundamental error. Furthermore, we conclude that the unobjected-to comments, when viewed in conjunction with the objected-to comments, did not deprive Conahan of a fair penalty phase hearing").

Nevertheless, the State now also addresses each sub-claim of this Issue.

The Prosecutor's References to Community.

Bailey (IB 35) summarizes this claim by arguing that the "prosecutor improperly positioned himself as a member of the jurors' community and that he represented the community's best interest." Bailey has failed to meet his appellate burdens.

Bailey does not argue that State Attorney Steve Meadows misrepresented a fact. To the contrary, when Mr. Meadows told some potential jurors that

he is "representing the community" (XXIV 3909), he was accurate. He was the constitutionally empowered prosecutorial representative of the Fourteenth Judicial Circuit. See, e.g., Art. 5 § 17, Fla. Const. ("state attorney shall be the prosecuting officer of all trial courts in that circuit"). Meadows' statement to the jury told the jurors what they already knew: He was, in fact, their elected State Attorney.

The prosecutor's use of "we" and "our" does not implicate any fundamental right. Indeed, the standard jury instruction references "we": "For two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share." Fla. Std. Jury Instr. (Crim.) 3.13 (emphases added).

In Cox v. State, 819 So.2d 705, 718-19 (Fla. 2002)("prosecutorial comments noted by the appellant do not, either individually or cumulatively, amount to fundamental error"), the appellant also claimed that the prosecutor improperly argued to the jury: "I stand before you again today on behalf of the decent law-abiding people of this community and this state, whom I represent." Cox rejected the claim:

> Here, the State Attorney only stated whom he represented--albeit in a somewhat grandiose manner. He certainly did not make any 'message to the community' argument.

Moreover, there, even though another prosecution argument to the jury misstated the law, "the trial court did not repeat the prosecutor's misstatements of the law during its instruction of the jury--indeed, the trial court's instructions properly informed the jury of its role under Florida law. Thus, the prosecutorial misrepresentation of the law was

harmless error, and certainly does not constitute fundamental error. ***" 819 So.2d at 717-718. A fortiori, here the prosecutor did not misstate the law and the jury was repeatedly reminded of the prosecutor's burdens versus the jury's role. There was no fundamental error.

In Breedlove, the defendant claimed on appeal about several prosecutorial arguments, including "3) appeal to community prejudice (violence in Dade County)." The "prosecutor said: 'When **we** walk the streets we take **our** chances.' In response to an objection the [trial] court said: 'Stay on the evidence in this case.' The prosecutor then said: "One place in the world where **we** ought to be free from this kind of violence, this kind of crime, is in **our** own home.' The court overruled an objection to this remark. These comments appear to reflect common knowledge and are probably the sentiments of a large number of people. They do not appear to be out of place." Similarly, here the prosecutor's references to community and his role reflected common knowledge; they were not "out of place."

Accordingly, Fennie v. State, 855 So. 2d 597, 610 (Fla. 2003), "determine[d] that Fennie has failed to establish that the prosecutor's comments run afoul of caselaw precluding the State from encouraging jurors to 'do their duty' for the community or 'send a message' through their sentencing decision." Fennie cited to Cox and reasoned that "[w]e have rejected arguments pertaining to comments similar to those which Fennie

characterizes as objectionable." Fennie concluded that the defendant had not shown fundamental error.[21]

State v. Cumbie, 380 So.2d 1031, 1034 (Fla. 1980), involved several remarks from the prosecutor. In one of them, the prosecutor's argument was much more pointed regarding representing the community: "I say to you that people who are not here are also from the community and the State represents those people, the community itself, and that community asks of you justice in this case. They ask you to return a verdict that speaks the truth; a verdict in this case that represents justice." Cumbie held, in part, while not isolating the community portion: "Initially, we find that the improper prosecutorial comment in this case did not constitute fundamental error and could have been waived by Cumbie's failure to object and to request a mistrial."

"Evil."

Bailey clams it was fundamental error for the prosecutor to argue that the face that Jerrod Schalk saw was not the face of a mean and angry man but rather a face described as evil. Immediately prior to the comment, the recording of the police radio traffic was played for the jury, compelling evidence in which the last words of the Sergeant were heard, rendering the prosecutor's argument relatively inconsequential. Moreover, the prosecutor's argument was explicitly linked to the evidence:

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[21] Bailey's first excerpted prosecution comment (IB 36, citing to XXIV 3909) was made only to potential jurors who did not sit on the trial jury. (Compare XXIV 3909 with XXXIV 478-79, XXVIII 4758-60)

> Choices. Time. Character. Those are the things I want to talk to you about in my closing argument. Hillary Chaffer, Jordan Schalk, they made tough decisions that night too. After just seeing fire come from the barrel, glass shattering, officers falling. What did Hillary Chaffer do? Did she embrace her responsibility of being a good citizen? That young lady did. She turned around and she came right back there trying to render aid. Jarrod Schalk, the same thing. A bullet has just gone through the glass. **He's seen the fire. He saw the face, a face he described as mean, angry**. I submit **evil**.
>
> Ladies and gentlemen, **by the facts and the evidence that have been presented to you over the last two days you too have seen the face of this defendant**.

Thus, Jarrod Schalk had testified in the guilt-phase:

> All right, as we were driving by I looked up and I saw the officer, he was up against the, next to the Durango and he had his right hand by his cuffs and he had his cuffs in his hand. So that, that's what took my attention to the situation and I said to the girl next to me, I said, 'hey look, Stac, we're going to see an arrest.' And we were traveling as that happened so I was behind him when that happened. And as he, as the officer reached for the door we were just about parallel and I was looking to my right just watching. And as soon as that happened **I looked and I saw the man's [Bailey's] face and it just looked really mean, really mad and upset. And I noticed that.** And then all of a sudden he reached across and pointed the gun and as he was, as he was pushing it out, as it was being pushed out I saw the fire from the end of the barrel on the first shot and I ducked as soon as I saw that, I took cover and went down. And I heard a couple of more shots and I heard glass breaking, which was, which ended up being the van that I was in.

(XXXI 71)

The State disputes Bailey's assertion (IB 38) that the "prosecutor continued his characterization of Bailey as evil" into the penalty phase when he discussed "the figurative heart of this Defendant." (XXVIII 4739) Instead of referencing Bailey as "evil," the prosecutor was properly referring to the weighing process, as reflected in the ensuing context for the argument here:

> You know, I told you throughout the week that the Defense is allowed to bring in anything they believe to be relevant, any aspect of the

> Defendant's character, record, or background. I said, let's get to the heart of the matter. Now let's get to the heart, the figurative heart of this Defendant. What is the statutory mitigation that the Court will instruct you that you can consider. Now remember when you are considering this mitigation, the first thing you need to determine is has it been reasonably established. Just because they offer it does not mean it's established.

(XXVIII 4739-40) The prosecutor then engaged in fair comments on the evidence and contended that the defense did not establish mitigators or that they were weak. (See XXVIII 4740-45) Similarly, the prosecutor's argument that this was a "cold, brutal, savage murder" (IB 38) followed up on his argument concerning the facts of the murder in which Bailey "went and shot downward, above or right near the edge of the chest of the vest, downward, in a way and in a manner that just savaged the main vessels of Kevin Kight's body." Further, the comment was explicitly linked to the aggravation introduced as evidence: "the heart of the matter is that this is a cold, brutal, savage murder committed with aggravation that I have explained." (XXVIII 4747) Earlier, the prosecutor had discussed aggravation, for example:

> The second factor, the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. At this stage is there any question, any doubt, why, why on Easter of 2005 this Defendant took his gun and held it at point blank range and fired three shots close enough to expel gunpowder to se[a]r the very flesh of Kevin Kight, why did he do that? He did that probably as best described by Dr. Prichard. Dr. Prichard in plain English said this man knew he was being arrested, he waited until the moment when that was imminent and he made the decision, he knew the consequences, he knew the results of his actions. He made a decision.

(XXVIII 4739) In other words, the comments that Bailey discusses (IB 38) as follow-ups to some sort of "evil" theme were actually valid comments upon and inferences from the evidence and the law.

Moore v. State, 820 So.2d 199, 207 (Fla. 2002), addressed an ineffective assistance of counsel claim based upon the following prosecutorial argument:

> Crime conceived in hell will not have any angels as witnesses. And, ladies and gentleman, as true as that statement is, Grand Park is hell. And **that man right there is the devil**. …
>
> Ladies and gentlemen, deals. Yes, ma'am, yes, ma'am, yes, sir, to all of you. I have dealt with [co-defendant 1] and I have dealt with [co-defendant 2]. I did that as an Assistant State Attorney. I did that the best I knew how. But, ladies and gentlemen, sometimes you have to deal with sinners **to get the devil**. And I would submit to you what the State did was we dealt with this sinner and we dealt with this sinner **to get this devil**.

Moore rejected the IAC claim and reasoned that "the two isolated references to Moore as "the devil" in this instance, although ill advised, appear to be less problematic than the pervasive and extensive conduct condemned in *Brooks* and *Urbin*." Here, there is only one "isolated reference[]" associating Bailey with "evil" and references his face as "evil" as demonstrated by the evidence that was introduced. Moore, 820 So.2d at 208 n.9, distinguished Brooks v. State, 762 So.2d 879 (Fla. 2000)(IB 38, 39) and Urbin v. State, 714 So.2d 411 (Fla. 1998)(IB 39). A fortiori, those cases do not apply here.

Moore, 820 So.2d at 208, cited to Chandler v. State, 702 So.2d 186, 191 n.5 (Fla. 1997), and Carroll v. State, 815 So.2d 601 (Fla. 2002):

> [T]his case appears to be more akin to *Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997), where this Court held that a prosecutor's isolated comments that defense counsel engaged in 'cowardly' and 'despicable' conduct and that the defendant was a 'malevolent … a brutal rapist and conscienceless murderer' was not so prejudicial as to vitiate the entire trial. *See also Carroll v. State*, 815 So. 2d 601, 2002 Fla. LEXIS 383 (Fla. Mar. 7, 2002) (finding prosecutor's isolated statements that defendant was the 'boogie man' and a

'creature that stalked the night' who 'must die' not so egregious or cumulative in scope to be error).

If terms such as "malevolent," "boogie man," "creature that stalked the night," are not grounds for reversal, then a reference to the face of "evil" does not reach to the "foundation of the case" to constitute fundamental error.

In Hannon v. State, 941 So. 2d 1109, 1143 (Fla. 2006), the appellant-defendant "assert[ed] that trial counsel's failure to object to the following argument made by the State during closing argument was unreasonable: '[S]ometimes you need to make a deal with a sinner in order to get the devil. That's what we did in this case. Ron Richardson did wrong. He was a sinner. We dealt with him to get the devil.'" Hannon, 941 So.2d at 1144, held: "Similar to *Moore*, the State's comment during closing in the instant case that they made a deal with the sinner to get the devil was not so prejudicial as to undermine our confidence in the case. Accordingly, this claim is also without merit." Here, the prosecutor's reference to Bailey's face of evil, as following up on the recorded radio traffic and as linked to a witness' description of the events of the murder and Bailey's angry face did not reach the "foundation of the case."

Mann v. State, 603 So.2d 1141 (Fla. 1992), rejected a claim that attacked the prosecutor's penalty-phase closing argument concerning defense psychologist's testimony: "She is arguing and suggesting to you on the witness stand because this man is a **child molester and a pervert**, that his actions are somehow more excusable than a person that is not a child molester and a pervert. … This is actually the best she can do."

Characterizing the defendant based upon the evidence is not a ground for reversal.

Bailey (IB 38) cites to King v. State, 623 So.2d 486, 488 (Fla. 1993), which reversed, but there, unlike here, the appellate claim was preserved: "King also argues that several comments by the prosecutor during opening and closing arguments were so improper as to constitute prosecutorial misconduct and that the trial court erred in overruling his objections to these comments." Indeed, there, unlike here, "During closing argument at the penalty phase, the prosecutor gave a **dissertation on evil** that King now argues amounted to **admonishing the jurors that 'they would be cooperating with evil and would themselves be involved in evil just like' King** if they recommended life imprisonment." Here, the claim was unpreserved, the prosecutor gave no such "dissertation," and the prosecutor did not try to condemn the jurors as linked with evil if they failed to find as he argued.

See also Gonzalez v. State, 786 So. 2d 559, 568 (Fla. 2001)(claims attacking three prosecutor arguments, including characterizing defense experts as "gullible"; "Gonzalez has failed to demonstrate that the comments either individually or collectively amount to fundamental error so as to entitle him to any relief").

Jurors Visualizing a Distance.

Bailey (IB 37) quotes the following from the prosecutor's closing argument and claims that it constitutes fundamental error:

> I ask that as you sit down in the juryroom to deliberate you do two things before you reach time to take a vote. I want you all just to put your finger 18 to 24 inches away from each other's face and see how close you are when your eyes are meeting, as his eyes met those

> eyes on an Easter night in our community and in 18 to 24 inches away firing once, twice, and three times.

(XXXIV 442)

Defense counsel not only failed to object to this argument and failed to preserve this claim, he waived this claim by using the same theme to contend that Bailey did not intend to kill the victim. Defense counsel fully participated in the enterprise of emphasizing the short distance between Bailey's face and Sgt. Kight's, and as such, waived this claim, barring it here. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So.2d 734 (Fla. 1991); Terry v. State, 668 So.2d 954, 962, 963 (Fla. 1996)("[m]ost importantly, a party may not invite error and then be heard to complain of that error on appeal"; "[b]y stipulating to allowing Demon Floyd's testimony to be used as substantive evidence, appellant waived any claim of error"); Bradford v. State, 567 So.2d 911, 915 (Fla. 1st DCA 1990) ("Whether or not resisting arrest without violence is a lesser included offense of resisting arrest with violence (when conviction for the former requires a valid underlying arrest), the parties treated it as such and waived the issue by requesting jury instructions accordingly"); Behar v. Southeast Banks Trust Co., 374 So.2d 572, 575 (Fla. 3d DCA 1979) (order "induced by stipulation of the parties. One who has contributed to alleged error will not be heard to complain on appeal"). Cf. State v. Raydo, 713 So.2d 996, 997-1000 (Fla. 1998)("trial court ultimately ruled that the State could impeach Raydo with

the nolo contendere plea in the event that he testified. After the adverse ruling, defense counsel announced that he would present no defense witnesses"; speculative harm; "Raydo failed to preserve his claim"); Brundige v. State, 595 So. 2d 276, 277 (Fla. 3d DCA 1992)(defendant's decision not to display his voice before the jury rendered the trial court's ruling unreviewable), as cited approvingly in Raydo, 713 So.2d at 998.

Defense counsel's cross-examination of the medical examiner stressed the same fact that the prosecutor requested the jurors to visualize:

> Q Doctor, as I understand your testimony both of the wounds were just below the collar bone or the clavicle, is that accurate?
>
> A Yes.
>
> Q It was the direction that the bullets took that caused the severe trauma that you've described here, is that a fair statement, as opposed to the location of the entry wound?
>
> A That is correct, yes, it is.
>
> Q For instance, one wouldn't think normally that entry wounds just below the clavicle would be fatal?
>
> A If it's a straight shot where it just comes in and goes straight through to the back, you would not think that would be as fatal.

(XXXIV 404-405) Defense counsel explicitly hammered the theme in his final closing argument:

> *** You did not hear I'm going to kill, you've never heard that. You've heard I'm going to pop this cop.
>
> The testimony is, and the demonstration was, if you will recall and it was that chair, this chair will suffice, that seated in this chair was the driver, Mr. Bailey. The state attorney stood over and what he was showing us through the medical examiner, among others, is how close the face of Kevin Kight was to the face of Mr. Bailey, 18 to 24 inches, face to face, eye to eye.

And then the state suggests face to face, eye to eye Mr. Bailey is going to shoot to kill with the intent to kill Officer Kight. And he shot him in the shoulder twice, 18 inches from his face and he shot him in the shoulder twice.

An act by a depraved mind, indifferent to human life. And you're going to see that in your jury instructions. Mr. Meadows read that to you from second degree murder. Not because I said so or I'm arguing that. But the court is going to instruct you that that's the law, that's the charge. Dr. Siebert testified stippling on the chin was consistent with the gun being very close. See, not only does the bullet project out of the barrel but gunpowder residue does too. And in the event the witnesses are accurate when they say that the gun came over, you will recall the witnesses in the cars going by testifying to that, two young boys testified to that. If that is true and we're 18 inches apart, face to face, with the intent to premeditatedly kill someone, he shoots him in the face.

*** The location of the wounds ordinarily wouldn't be fatal, it was the direction. And you will recall the demonstration, again in that chair which the state attorney is seated right now, the one I have will have to do.

Mr. Meadows leans down, which would cause that angle, or the gun was high. And he talked about that. The doctor said ordinarily, ordinarily two shots to this location would not be fatal. But they're imminently dangerous, evidencing a depraved mind.

(XXXIV 450-52) He resumed this theme at the end of his argument:

*** Every witness that took the stand said that, 18 inches, face to face, pop, pop, pop.

That's what happened. How do we know this? Every witness who took the stand, the medical evidence, the stippling on the face tells us that what I am telling you right now is what happened. Looked him right in the eye and shot him right in the shoulder and that's what happened.

***

And the court is going to tell you that this is a country of laws that we cannot allow, and we talked about this on Monday, we cannot allow that anger and that sympathy to in anyway affect the decision we make about what we have heard in here. And it is going to take more courage than most can muster to say the demonstration I've seen, the medical evidence I've heard, the witnesses that I've heard tell me that this was not a premeditated act, 18 inches face to face and a shot in the shoulder is not premeditated murder. It is not. When one asks hours later, how's the cop, how's the cop. Make no mistake, it

> wasn't an accident because none of the evidence tells us that. It was a shot to the shoulder from 18 inches. That's what it was.
>
> See, you know too much right now to let emotion, anger, if you're willing to do that which you told us you would do, get in the way of doing justice. Follow the law, follow the truth and then and only then can you reach the right verdict and the only right verdict is the one that the proof and justice demand. And I thank you.

(Id. at 454-56)

Thus, as in Breedlove, 413 So.2d at 7, the prosecutor's "remarks … were no worse than, and possibly not as harmful as, defense counsel's remarks concerning the Gibsons' statements."

Moreover, because defense counsel used and stressed what the prosecutor requested the jurors to visualize, defense counsel rendered any error non-fundamental and certainly harmless. The prosecutor's argument could not have by itself reached "the foundation of the case" to Bailey's detriment when Bailey's own counsel stressed the same short distance.

However, the State does not concede that the prosecutor's visualization was error at all, even without the defense relying upon it. Hutchinson v. State, 882 So.2d 943, 954 (Fla. 2004), explained the gravamen of the Golden Rule principle and rejected that claim:

> A 'golden rule' argument asks the jurors to place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative. *See Pagan v. State*, 830 So.2d 792, 812-13 (Fla. 2002).

Here, the prosecutor's imagery was tendered only to show the short distance between the faces of Bailey and Sgt. Kight. The prosecutor said nothing to suggest that the jurors should feel the victim's pain. The prosecutor's argument on the short distance stressed that Bailey must have intended to

kill Sgt. Kight, whereas defense counsel used the same short distance to argue against an intent to kill. Neither violated the Golden Rule.

In McDonald v. State, 743 So.2d 501, 505 (Fla. 1999), where the prosecutor argued to the jury "We all filled up our bath tub before *** Listen to water as it filled up," "the comments appear to be more of an attempt to describe the heinousness of the crime than a request to the jury to consider what the victim must have felt." Here, the prosecutor was merely attempting to elicit a visualization of the distance between the Bailey and Sgt. Kight. Unlike McDonald, he was not "com[ing] perilously close to a golden rule violation." In any event, the comment did not constitute a ground for reversal in McDonald; it should not here.

Contrasting the prosecutor's argument here with Garron v. State, 528 So. 2d 353, 358-359 (Fla. 1988)(IB 39), illustrates why the one here does not violate the purpose of the Golden Rule Prohibition:

> You can just imagine the pain this young girl was going through as she was laying there on the ground dying . . . . Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired.

No such invocation of pain imagery was used here.

As mentioned supra, Bailey cites Brooks v. State, 762 So.2d 879, 900 (Fla. 2000) (IB 38, 39) and Urbin v. State, 714 So.2d 411 (Fla. 1998)(IB 39), but the totality of the facts in each of those cases does not resemble the totality of the facts here. The following is only one portion of the prosecutorial comments that Brooks held to be improper:

> Brooks next argues that the prosecutor impermissibly inflamed the passions and prejudices of the jury with elements of emotion and

> fear. We agree. For example, in this case, the prosecutor used the word 'executed' or 'executing' at least six times; in *Urbin*, the prosecutor impermissibly used those terms at least nine times. *See* 714 So.2d at 420 n. 9. Additionally, in this case, the prosecutor characterized Brooks and Brown as persons of 'true deep-seated, violent character'; 'people of longstanding violence'; 'they commit violent, brutal crimes of violence'; 'it's a character of violence'; 'both of these defendants are men of longstanding violence, deep-seated violence, vicious violence, brutal violence, hard violence … those defendants are violent to the core, violent in every atom of their body.'

Moreover, in Brooks, there was a contemporaneous objection to some of the prosecutor's arguments, whereas here there was no objection.

Brooks, 762 So.2d at 900-901, engaged in additional discussion of Urbin, 714 So.2d 411, where unlike here:

> [T]he prosecutor cast the defendant as showing his 'true, violent, and brutal and vicious character', as a 'cold-blooded killer, a ruthless killer': exhibiting "deepseeded [sic] violence. It's vicious violence. It's brutal violence"; and that Urbin was "violent to the core, violent in every atom of his body." 714 So. 2d at 420 n.9. Regarding the comments in *Urbin*, we stated, "Plainly, these are not isolated comments of the type we have deemed harmless in other cases, but rather are akin to the dehumanizing comments we found improper in *Bonifay v. State*, 680 So. 2d 413, 418 n.10 (Fla. 1996)." 714 So. 2d at 420 n.9.
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> In *Urbin*, the prosecutor concluded his argument by stating: 'If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks on September 1, 1995, and that was none.' … Here, the prosecutor concluded his argument as follows: 'I'm going to ask you not to show mercy or pity to these defendants. What mercy or pity did they show Darryl Jenkins that night? But if you are tempted to show the defendants mercy or pity, I'm going to ask you to show them the same mercy, the same pity that they showed Darryl Jenkins on August 28, 1996, and that is none.'

In conclusion, Bailey has failed to show that any and all of the comments targeted in ISSUE II rise to the level of fundamental error.

ISSUE III: WHETHER FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL PURSUANT TO RING V. ARIZONA, 536 U.S. 584 (2002). (RESTATED).

Bailey (IB 40-41) correctly concedes that well-settled precedent controls opposite to his claim in this issue, and the State asserts that this issue should be rejected for that reason. See also, e.g., Lebron v. State, slip op. SC06-138, 2008 Fla. LEXIS 756 (Fla. May 1, 2008); Merck v. State, 975 So. 2d 1054, 1067 (Fla. 2007); Overton v. State, 976 So. 2d 536 (Fla. 2007).

Moreover, in addition to the murder of Sgt. Kight, here, the jury explicitly found Bailey guilty of the felony of Resisting an Officer with Violence (XXXIV 478-79; XVIII 3388), also rendering Ring inapplicable. See, e.g., Frances v. State, 970 So.2d 806, 823 (Fla. 2007)("unanimous jury found Frances guilty beyond a reasonable doubt of two counts of premeditated murder and one count of robbery, thereby satisfying the mandates of the United States and Florida Constitutions"), citing Kimbrough v. State, 886 So.2d 965, 984 (Fla. 2004); Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003); Grim v. State, 841 So. 2d 455, 465 (Fla. 2003)("aggravating circumstances which were present in this case included multiple convictions for prior violent felonies and a **contemporaneous felony** of a sexual battery, both of which were found unanimously by a jury").

SUFFICIENCY OF THE EVIDENCE FOR FIRST DEGREE MURDER. (ADDED)

The State adds this section because this Court conducts an independent review of sufficiency of evidence.

In determining the sufficiency of all the evidence, it is viewed so that "every conclusion favorable to [the verdict] that a jury might fairly and reasonably infer from the evidence," Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). See also, e.g., Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("fact that the evidence is contradictory does not warrant a judgment of acquittal since ...").

Here, the evidence of guilt was overwhelming. During Sgt. Kevin Kight's traffic stop of the white Durrango that Bailey was driving, parolee Bailey stated that he was not going back to prison and that he would "do whatever he had to not to go back."[22] While Sgt. Kight was at the police vehicle running Bailey's ID, D'Tori Crawford testified that Bailey called his (Bailey's) girlfriend and said that that he was "going to pop this cop if he tried to arrest him." Cell phone records corroborated Crawford. Bailey then readied the murder weapon, a nine millimeter semi-automatic pistol, by moving it from under his seat to under his leg. Minutes later, Bailey shot three times at Sgt. Kight as the Sergeant attempted to arrest Bailey, striking the Sergeant twice in the upper chest at the upper edge of his vest. Two eyewitnesses, who were mired in traffic but otherwise passing by at the time, saw the officer approach Bailey with handcuffs in hand and identified Bailey as the shooter. As Bailey fled the murder scene, Bailey

[22] The State has provided detailed record cites to these facts in the sections supra entitled "The Murder" in the Statement of the Case and Facts and in the discussion of Issue I.

admitted to Corey Lawson that he "just popped a cop" and tried to hide under a towel or blanket in the back of a pick-up truck. A little later that evening, Bailey admitted to his friends that he shot the officer two or three times and thought that the officer was dead.

Bailey displayed the murder weapon to Lawson to assure himself a ride back to the bar where his (Bailey's) friends had been earlier that evening, and the next day, as the police were approaching Bailey, he was caught tugging at the murder weapon in his waistband. Bailey even wrote poems about killing the officer.

In sum, a witness testified about Bailey's intent to do anything and everything, including "popping" a "cop," to avoid arrest and avoid going back to prison. Eyewitnesses observed Bailey's use of deadly force against Sgt. Bailey three times as the Sergeant tried to arrest Bailey. Eyewitnesses saw Bailey attempt to avoid capture, including his threatening display of the murder weapon. Bailey was caught the next day in possession of the murder weapon. And, Bailey confessed multiple times after shooting the officer.

Any of Bailey's confessions alone renders the evidence sufficient. Meyers v. State, 704 So. 2d 1368, 1370 (Fla. 1997) ("Because confessions are direct evidence, the circumstantial evidence standard does not apply …"); Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988) ("We disagree that the case was circumstantial, since Hyzer and others testified that Hardwick had confessed to the murder or told others of his plans in advance of the

killing. A confession of committing a crime is direct, not circumstantial, evidence of that crime").

The evidence of guilt was much more than sufficient.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on May 19, 2008: W.C McLain, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee FL 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted, served, and certified,
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IN THE SUPREME COURT OF FLORIDA

ROBERT BAILEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC07-748

APPENDIX TO
ANSWER BRIEF OF APPELLEE

Judgment and Sentence Order. (XVIII 3481-3499)