IN THE SUPREME COURT OF FLORIDA

JOSHUA LEE ALTERSBERGER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC09-1426
L.T. No. CF07-00041 A-XX
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR HIGHLANDS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

KATHERINE MARIA DIAMANDIS
Assistant Attorney General
Florida Bar No. 69116
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

Appellant was indicted on February 5, 2007 by a Highlands County Grand Jury for the January 12, 2007 first degree murder of Nicholas Sottile. (V1:1-2).[1] The Public Defender's Office was appointed to represent Appellant on February 8, 2007. (V10:1338-42). The Public Defender's Office filed a motion for change of venue, and was successful in having venue transferred to Polk County. (V3:353-55; V6:704; V9:1179-80).

In December 2008, Appellant filed a number of pre-trial motions. Appellant filed a motion to declare Florida Statute Section 921.121(1) unconstitutional, and to bar the use of hearsay at the penalty phase proceeding. (V2:167-170). Appellant filed motions to declare Florida's capital sentencing procedure constitutionally invalid based upon Ring v. Arizona, 536 U.S. 584 (2002). (V2:173-213). Appellant filed a motion to declare Florida Statute Section 921.121(2) & (3), and the corresponding jury instructions unconstitutional. (V2:214-31). Additionally Appellant filed a motion to declare the cold, calculated and premeditated aggravating circumstance unconstitutional and to exclude the use of victim impact

[1] Citations to the record on appeal will be referred to by the appropriate volume number followed by the page number (V__:__). Appellant was also charged with possession of a firearm by a delinquent, a charge the State would later nolle prosequi. (V8:997).

evidence. (V2:246-76, 281-98). The trial court heard arguments on Appellant's motions on December 19, 2008. (V9:1095-1113, 1119-23, 1129-31, 1134-40). The trial court entered a written order denying Appellant's motions on January 23, 2009. (V3:339-40).[2]

Appellant sought to dismiss his trial counsel and a Nelson[3] inquiry was held on March 11, 2009. (V10:1249-64). The grounds of Appellant's motion were: (1) because the victim was an employee of the State of Florida and the Office of the Public Defender is an agency of the State of Florida, a conflict of interest exists; (2) Appellant felt pressured to enter a plea; and (3) Appellant did not receive discovery materials. (V6:725-27). The trial court found there was no conflict of interest, and that counsel was neither ineffective nor incompetent. (V10:1261-64). The court explained to Appellant he could choose to represent himself or continue with counsel. (V10:1264). Appellant indicated he wished to continue being represented by his current counsel, the Office of the Public Defender. (V10:1264).

On March 13, 2009 Appellant informed the trial court he wished to enter a plea. (V12:1534). There was not any

[2] Prior to the penalty phase, Appellant made a motion to renew these motions which was denied by the trial court. (V6:766-69).
[3] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

negotiation as to Appellant's sentence as the State was still seeking the death penalty. (V12:1535). However, the State and Appellant's counsel agreed as a result of Appellant's guilty plea the State would limit its presentation of evidence during the penalty phase. (V6:730; V12:1534-35). Specifically, the State agreed to limit its evidence to the following: (1) the testimony of Quentin Kinder; (2) the testimony of Peron Merise; (3) a stipulation regarding the emergency medical efforts and the cause of death; (4) the testimony of Trooper Finnerman and/or Trooper Spencer; (5) Trooper Sottile's Florida Highway Patrol photograph; and (6) victim impact evidence pursuant to Fla. Stat. §921.141(7). (V6:730). Furthermore, the State agreed to forego the prosecution of the possession of a firearm by a delinquent offense as Appellant was pleading "straight up" to first degree murder. (V12:1537).

Appellant pleaded guilty to the charge of first degree murder. (V12:1537). The trial court informed Appellant that by entering a plea he was giving up a number of rights. As the trial court went through each right Appellant was foregoing, Appellant indicated he understood the rights he was waiving by his plea. (V12:1537-41). Specifically, the trial court informed Appellant he was giving up the right to a jury trial to determine his guilt or innocence; and the right to call

witnesses on his behalf and confront those witnesses called against him. (V12:1537, 1541). The trial court informed Appellant he was giving up the right to an attorney through the guilt phase proceeding, and after pleading guilty his case would proceed to the penalty phase where evidence would be introduced to a jury concerning aggravating circumstances and mitigating factors. (V12:1537-39).[4]

The trial court informed Appellant there were only two possible penalties—life without the possibility of parole and the death sentence, and Appellant indicated he understood. (V12:1538). The trial court informed Appellant that by entering a plea, the very least that would occur is that he would be sentenced to life without the possibility of parole. (V12:1539). The trial court asked Appellant if he understood, and Appellant indicated he did. (V12:1539). The trial court explained that it would be up to the jury to make a recommendation as to the death sentence, that he would have to give their recommendation great weight, and Appellant indicated he understood. (V12:1539).

The trial court asked Appellant if anyone promised or threatened him into entering a plea, and Appellant responded,

[4] The trial court informed Appellant he would have his counsel during the penalty phase proceeding, and he would have the right then to call witnesses on his behalf and confront those called against him. (V12:1538, 1541).

"[n]o, sir." (V12:1539-40). The trial court reminded Appellant of his recent attempt to dismiss his attorneys, and his allegation therein that he was being pressured into entering a plea. (V12:1540). Appellant indicated he remembered. (V12:1540). The trial court then asked, "as we stand here now, do you feel like you've been pressured into making this decision or is it a decision you made after being fully advised by your lawyers that this is in your best interest?" (V12:1541). Appellant responded, "I'm fully advised it's in my best interest." (V12:1541). The trial court then queried, "[d]o you feel like your lawyers, though, at this point, have forced you or pressured you or twisted your arm to get you to do this?" (V12:1541). Appellant answered, "[n]o, sir." (V12:1541). The trial court asked Appellant if his plea was being entered "freely and voluntarily" and Appellant responded, "[y]es, sir." (V12:1542). Appellant indicated he was not under the influence of any drugs, alcohol, or medication and he was not suffering from any kind of mental illness that would impair his understanding of what he was doing. (V12:1541-42).

The State recited a factual basis for Appellant's plea:

> Your Honor, State's prepared to show that on the date contained in the indictment, which is the 12th day of January, 2007, in the afternoon hours, Nicolas Sattile [sic] was a Florida Highway Patrolman in uniform, in a marked unit, working traffic, made a traffic stop on the Defendant and his passenger.

> The Defendant told the passenger that he was going to shoot the trooper. The passenger ran. Trooper Sattile [sic] approached the car. While at the driver window, the Defendant produced a small semiautomatic handgun, shot Trooper Sattile [sic] one time, fled the scene. Trooper Sattile [sic] died of his injuries.

(V12:1543).

The trial court found there was a factual basis for the plea, that Appellant's plea was entered into freely and voluntarily and that Appellant had ample opportunity to discuss his decision with his trial counsel. (V12:1543-45).[5] Then Appellant's counsel asked Appellant why he was choosing to enter a guilty plea, and Appellant indicated, "[b]ecause this whole time, it's been hard on me, you know, and as well as the family. You know, I just feel that it's time for me to man up and take care of my responsibilities." (V12:1544). The trial court then asked Appellant again if had enough time to consult with his trial counsel, to which Appellant responded he had. (V12:1544). The trial court also asked Appellant again if his plea was based on the advice of his trial counsel. (V12:1544). Appellant responded, "[y]es, sir. But it was my opinion. It was my choice. And I made that choice." (V12:1544). Appellant was adjudicated guilty of first degree murder and the trial court

[5] Appellant confirmed it was a "several day process." (V12:1544).

reserved sentencing until after the penalty phase. (V12:1545-46).

The penalty phase took place from March 30 through April 2, 2009. (V19; V20; V21; V22; V23; V24). In accordance with the State and Appellant's "Agreement Regarding Plea" the State's penalty phase evidence consisted of the following: (1) the testimony of Quentin Kinder; (2) the testimony of Peron Merise; (3) a stipulation regarding the emergency medical efforts and the cause of death; (4) the testimony of Trooper Finnerman and Trooper Spencer; (5) Trooper Sottile's Florida Highway Patrol photograph; and (6) victim impact evidence pursuant to Fla. Stat. §921.141(7). (V6:730).

State's Penalty Phase Case:

On January 12, 2007 at approximately 11:00 a.m. Appellant began his day at Quentin Kinder's Sebring home where he played video games and drank a cup of alcohol mixed with coca-cola. (V19:860-64, 877).[6] Appellant and Kinder later went to Golden Corral in Lake Placid as Appellant was attempting to meet a female acquaintance. (V19:865-66). She was not at the restaurant and Appellant and Kinder did not stay there long.

[6] Kinder testified on direct examination that Appellant could walk and talk okay though he was "buzzing" a little bit from the alcohol. (V19:866). On cross-examination, Kinder testified Appellant was drunk when they left his home and that "buzzing" means getting drunk. (V19:878, 880).

(V19:685-66). Appellant was driving a light brown Toyota Camry. (V19:863, 904).

After leaving the Golden Corral, the two stopped at a convenience store where Appellant purchased a cigar. (V19:866-67). As they were leaving the convenience store, Appellant and Kinder saw a police officer in a marked patrol car at a stop light. (V19/867). Upon seeing the officer, Appellant announced "you better not stop me or I'm going to shoot you." (V19:867).

Appellant then got on the highway and began driving back to Sebring. (V19:867-68). According to Kinder at this time, Appellant was driving okay and was not swerving in and out of traffic. (V19:868). They then saw a Florida Highway Patrol vehicle. (V19:868). When asked how Appellant was driving when they saw the highway patrolman, Kinder testified Appellant began changing lanes, and had to maneuver to avoid an accident. (V19:868-69). Florida Highway Patrol Sergeant Nick Sottile noticed Appellant's poor driving. (V19:868, 962).[7]

Kinder saw Sergeant Sottile turn his vehicle around and told Appellant, who responded by saying "he was about to push it." (V19:869). Kinder guessed this meant "just driving to leave him or something." (V19:869). Sergeant Sottile pulled

[7] Upon cross-examination, Kinder testified that Appellant was swerving prior to seeing Sergeant Sottile, but said he was not driving like he was drunk. (V19:885).

his marked patrol car behind Appellant. (V19:869, 962). Once Sottile activated his lights, Appellant began to pull over. (V19:887). Kinder, who was wanted in Georgia for a probation violation, told Appellant he was going to run. (V19:870). Appellant responded back to Kinder by telling him he was "going to shoot the police." (V19:870, 887). Kinder told Appellant not to do it, and then got out and ran into an orange grove. (V19:870). Sergeant Sottile was still inside his patrol vehicle when Kinder began running. (V19:871). Kinder did not see a gun in Appellant's vehicle and did not hear Appellant shoot Sergeant Sottile. (V19:871).[8] Kinder was not promised anything for his testimony. (V19:898).

At approximately 3:00 p.m. Peron Merise was driving a tractor trailer on Highway 27. (V19:902-03). Appellant cut him off, and he pulled his tractor trailer off the roadway. (V19:903-05). Merise could see Appellant stop and Sergeant Sottile pull in behind him. (V19:905). He observed Kinder jump out and run once Appellant stopped. (V19:905-06). According to Corporal Edward Finnerman, Sergeant Sottile had radioed for routine back-up, indicating he had someone running into the

[8] Kinder hid in the orange groves overnight until his father called him on his cell phone and told him to come out and put his hands up. (V19:871-73). Kinder was taken into custody and cooperated with law enforcement offering a statement of what transpired. (V19:873).

orange groves on a traffic stop. (V19:963-64).[9] Corporal Finnerman was only a mile away and began heading to Sottile's location. (V19:964). Merise got out of his truck but Sergeant Sottile told him to go back to his truck. (V19:905-06). Merise went back to his tractor trailer where he observed the murder unfold. (V19:906).

Sergeant Sottile approached Appellant's car with his hand on his pistol; and Appellant had placed his hands up. (V19:906).[10] Merise could not hear what Sergeant Sottile asked of Appellant, but testified Sottile appeared to have gotten comfortable and took his hand off his weapon. (V19:906-07). At this point, Appellant's hands came down and he produced a gun and pointed it at Sergeant Sottile who was standing "real close" to Appellant's driver's side car door. (V19:907). In response, Sottile put his hands up, and tried to back away. (V19:907-08). Merise then saw "fire" coming from Appellant's gun and saw Sergeant Sottile get hit and fall to the ground. (V19:907). As Sottile lay on the roadway, Appellant pointed his gun at Sottile's head, and continued to squeeze the trigger, however,

[9] Finnerman identified a photograph of Sergeant Sottile that was entered into evidence as State's Exhibit #1. (V19:962-63).
[10] Sergeant Sottile was in uniform and on duty, and at the time he encountered Appellant was working overtime as part of the Statewide Overtime Action Response program. (V19:961).

as Merise testified "there was no more fire coming out." (V19:908, 909-10, 919).

Appellant quickly took off driving northbound on Highway 27. (V19:910-11). Merise testified Appellant's gun appeared to be a semiautomatic weapon. (V19:921). Merise identified Appellant in a photo line-up and in court. (V19:915-16).

As Corporal Finnerman was on his way to provide back-up for Sergeant Sottile, Sottile radioed "10-24. I have been shot. 10-24. I have been shot." (V19:964). Finnerman testified a 10-24 is a call to "[s]end all the help you can." (V19:964). Trooper Jay Spencer also heard Sottile's radio calls and testified that Corporal Finnerman was ahead of him, and they sped off with their lights and sirens as fast as they could to reach Sottile. (V19:965; V20:977).

At the murder scene, civilians had stopped to help. (V19:917-18, 964-65). When Finnerman arrived he found Sergeant Sottile on his back on the side of the roadway. (V19:965). His eyes were closed and he was unresponsive, his head cradled by a civilian who had stopped to render aid. (V19:965-66; V20:977). Trooper Jay Spencer arrived seconds after Corporal Finnerman. (V19:966; V20:976). People at the scene gave Corporal Finnerman a description of Appellant's vehicle, and he asked Spencer to stay with Sergeant Sottile while he sped off in search of

Appellant. (V19:966; V20:977). Finnerman drove up the highway checking parking lots and any place he could think of to locate Appellant. (V19:966). Finnerman was unable to locate Appellant, and returned to the murder scene. (V19:966-67). The following day Appellant was apprehended at his home. (V19:968).

Trooper Spencer called Sottile's name several times, but he failed to respond. (V20:977). Spencer started basic CPR procedures. (V20:977).[11] Spencer testified the gun shot had entered Sottile's neck, an area that would not have been protected by a bulletproof vest. (V20:978). A stipulation regarding efforts to revive Sergeant Sottile, and his cause of death was read to the jury. (V6:770-71; V20:982-84). The details included the following:

- emergency medical services arrived on the scene at 3:30 p.m.
- Sottile was found lying on his back, unconscious in respiratory arrest
- his lips had begun to turn blue, he was pale, and felt cool to the touch
- paramedics administered ventilation and chest compressions at the scene, and as he was transported to a nearby hospital

[11] Prior to joining the Florida Highway Patrol, Spencer was a Navy Hospital Corpsman for twenty years. (V20:975-76).

- a physician at the hospital administered various means to revive Sergeant Sottile to no avail, and he was pronounced dead at 4:51 p.m. without regaining consciousness

- an autopsy revealed Sottile had a single penetrating gunshot in the upper left chest, the .25 caliber bullet had perforated the left subclavian artery and thoracic vertabra

- Sergeant Sottile died as a result of internal bleeding from a perforated artery

(V6:770-71; V20:982-84).

Despite agreeing to the introduction of victim impact evidence, prior to its presentation, Appellant argued to exclude the evidence. (V19:924-932). The trial court disagreed and allowed the State to present the victim impact statements of Sergeant Sottile's family. (V19:934-55).[12]

The victim impact statements of Sergeant Sottile's father Phillip, daughter Heather, son Nicholas, and wife Elizabeth were read to the jury. (V20:990-1027). Phillip Sottile was unable to read his statement due to a medical condition that impaired his voice so his son James read his statement. (V19:942-43; V20:990-92).[13] Phillip's statement consisted of three paragraphs, and during the brief reading both Phillip and his

[12] The State was limited to presenting four victim impact evidence statements. (V19:936-55). Fellow Florida Highway Patrol Troopers' and Sergeant's Sottile's pastor's statements would not be presented. (V19:936-940).

[13] Prior to the reading of the statement, Appellant's counsel stated there was no objection to this procedure. (V19:943).

son cried. (V20:991-92). Thereafter, Appellant moved for a mistrial which the trial court denied. (V20:993-95).

Due to Appellant's concerns about the remaining family members becoming emotional while offering their statements, Heather Sottile first presented her statement outside the presence of the jury. (V20:993-1004). The trial court noted with the exceptions of some very minor hiccups, she did quite well and allowed her to present her statement before the jury. (V20:1004-13). Nicholas Sottile and Elizabeth Sottile's victim impact statements concluded the State's presentation of its evidence. (V20:1013-27).

Appellant's Penalty Phase Case:

Rosalie Altersberger, Appellant's mother, testified Appellant's father was African-American and she was considered to be the "black sheep" of the family because Appellant was biracial. (V21:1037-38, 1048). Nevertheless, Appellant had a great relationship with his grandfather, a retired police officer (V21:1049-50, 1066). Rosalie described Appellant as his grandfather's "little helper." (V21:1066). When he passed away Appellant became angry and withdrawn. (V21:1063-66).

Rosalie testified Appellant was smart, excelled in school, and was tested and placed in the gifted program studying above his grade level. (V21:1064, 1070). While Rosalie indicated

Appellant was fascinated by fire and exhibited anger, she was never afraid of him, sought counseling for him and expressed that she loved him very much. (V21:1073-74, 1091-93).

Rosalie's half-sister Mitzi first saw Appellant when he was seven years old. (V21:1106, 1113). She was driving with Rosalie and Appellant from Florida to Illinois for Appellant's grandfather's funeral and she recalled Appellant was very upset. (V21:1113-14).

Sharon Johnson and Virginia Belcher worked in the Hardee County Health care system and encountered Appellant with his mother when he was three to five years of age. (V21:1120-23, 1130-34). Both women testified Rosalie was not affectionate toward Appellant. (V21:1125, 1136). Johnson and Belcher contacted Appellant's trial counsel after Johnson saw a newspaper article reporting Appellant admitted guilt and was "going to trial for the Life or Death." (V21:1124, 1139-40).

Brenda Morrison and Berthenia Jeffries-Morrow taught Appellant as a fifth grader. (V21:1141-43, 1159, 1161, 1163). His school was in rural South Carolina and the economic level of the community was very poor. (V21:1159, 1167). Appellant's teachers testified his appearance was "unkept" and his clothes were not clean. (V21:1147, 1154, 1164, 1167). Appellant behaved the majority of the time, and was described as very

smart, and a great student. (V21:1145, 1166, 1170).

Paula Ortez, a friend of Appellant's mother, testified Rosalie was a working parent who in her in opinion did not have good control over Appellant. (V21:1172, 1175, 1180-81). Ortez described Appellant as book smart from a very early age. (V21:1181).

Appellant's penalty phase case concluded with the calling of two expert witnesses: Harry Krop, a licensed clinical psychologist, and Ruben Gur, a neuropsychologist. (V22:1224-25, 1306-07).

Krop was asked to conduct a clinical evaluation of Appellant to assess his psychological profile from birth to the present day. (V22:1232). Krop met with Appellant two times, interviewed him and conducted neuropsychological testing which he sent to Gur for his review (V22:1233, 1237-38). Krop did not talk to Appellant about the crime. (V22:1278).

Krop reviewed Appellant's medical records, mental health records, school records, and juvenile criminal records. (V22:1236-37). Krop interviewed Appellant's mother and other family members but did not contact doctors who performed mental health evaluations of Appellant. (V22:1237, 1284-85).

Based on his assessment of Appellant, Krop's opinion was that Appellant suffered emotional deprivation during his life,

had a deficient amount of nurturing during his formative years, lacked a strong support system, and suffered from low self esteem. (V22:1273-75). Furthermore, Krop believed Appellant was extremely immature for his age and appeared to have adjustment problems throughout his life. (V22:1274-76). Krop testified that "most" men Appellant's age have brains that have not fully developed, and "that results in impulsivity and problems with planning, sometimes acting out." (V22:1272-73).

During cross-examination, Krop testified in 2005, while in the juvenile justice system, Appellant attended boot camp, obtained his GED, and received counseling. (V22:1281-82). While Krop testified regarding a 1992 car accident where Appellant hit his head on a car seat, there was no evidence that Appellant suffered any head or brain injury. (V22:1287-89). Krop testified Appellant's IQ is 103. (V22:1285-86). Krop did not relate any of his findings or opinions to the murder nor did Krop opine that either of the statutory mental health mitigators applied in Appellant's case.

Ruben Gur never met Appellant but received the data from Krop's examination to assist him. (V22:1322). While Gur testified that Appellant fell within the norms on most of the testing administered, he indicated the testing suggested damage in the area of the brain that bridges the orbital frontal lobe

and the anterior temporal lobe. (V22:1342-43, 1353).

Gur recommended Appellant undergo an MRI, and the results indicated Appellant's orbital frontal region was below normal size and his amygdala (part of the temporal region) was below normal size. (V22:1358-59). Gur testified that in general people with a small frontal lobe and small amygdala fly off the handle easily and go into rage attacks. (V22:1381).

Upon cross-examination, Gur revealed he did not know the specifics of the crime Appellant committed and he was not trying to relate his findings to the murder. (V22:1396). After Gur's testimony, Appellant and the State rested their cases. (V22:1414). Appellant chose not to testify. (V23:1423-24).

On April 2, 2009 the State and Appellant made their closing arguments to the jury. (V24:1485-1573). After the trial court instructed the jury, the jury exited the court room at 1:05 p.m. (V24:1573-85). By 3:20 p.m. the jury had reached its verdict. (V24:1587). A majority of the jury by a vote of nine to three recommended that Appellant be sentenced to death. (V6:765; V24:1587).

A Spencer[14] hearing took place on May 8, and May 22, 2009. Appellant presented the testimony of Nancy Cobb, an investigator with the Public Defender's Office. (V11:1503). Cobb testified

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

regarding the speed limits from the Golden Corral restaurant to where a memorial was placed for Sergeant Sottile on Highway 27. (V11:1506-13). The memorial was 3.9 miles away from the restaurant and the speed limit at that point was 65 miles per hour. (V11:1513). Appellant also presented the testimony of J.L. Kindrick and Valerie James, drivers on the roadway who testified they saw Appellant speeding, and driving in and out of traffic. (V10:1278, 1281-82; V11:1520-22). Lastly, Appellant introduced the deposition of Paula Camp which trial counsel indicated established Appellant bought a gun in October. (V11:1501, 1528).[15]

After Appellant concluded his presentation of evidence, the trial court heard argument on Appellant's Motion to Bar Execution by Lethal Injection. (V7:877-82; V10:1288-93). The trial court took Appellant's Motion under advisement. (V10:1294). The trial court then heard argument from Appellant in favor of a life sentence, and from the State urging the imposition of the death penalty. (V10:1295-31).[16] Sentencing was set for June 15, 2009. (V10:1336).

The trial court gave the jury's recommendation great weight, and sentenced Appellant to death. (V8:979-96; V9:1228-

[15] Kinder's testimony was that Appellant had talked about having a gun on him the weeks prior to the murder. (V19:876-77).
[16] Appellant and the State had also submitted sentencing memorandums. (V7:901-70; V8:971-78).

47). In doing so, the trial court found the following aggravating circumstances and gave them each "great" weight: (1) the victim of the capital felony was a law enforcement officer engaged in the lawful performance of his official duties, and (2) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (V8:980-85).

The trial court found the following statutory mitigating circumstances but only gave them "slight" weight: (1) the age of the Defendant at the time of the crime, and (2) the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (V8:985-88). The trial court gave the second circumstance slight weight "because neither of the mental health experts gave the opinion that the Defendant's brain deficiencies, or the Defendant's impaired psychological development, were related to the murder or Trooper Sotille [sic]." (V8:988).[17]

[17] The trial court found six non-statutory mental health mitigating circumstances assigning them slight weight individually, but moderate weight collectively, and merged them into the sole mental health statutory mitigator. (V8:988, 990-91). These non-statutory circumstances were: (1) Defendant did not fully develop emotionally, (2) Defendant did not fully develop cognitively, (3) Defendant has brain deficiencies that reduce his capacity to control impulse behavior, (4) Defendant had brain deficiencies that reduce his capacity to make reasoned

Additionally, the trial court found the following non-statutory mitigating circumstances: the offense was committed in an unsophisticated manner (very, very slight weight), Defendant was under the influence of alcohol at the time of the murder (little weight),[18] history of substance abuse (very slight weight), dysfunctional family and home environment (moderate weight), Defendant loves his family and is valued by his family (very slight weight), Defendant loved his grandfather, who was the Defendant's only positive role model and he was devastated by his death (very slight weight), Defendant was the object of racial discrimination from within his own family (little weight), good behavior throughout court proceedings (very slight weight), and Defendant pled guilty and took responsibility for the offense (little weight). (V8:989-993).

The trial found the Defendant failed to prove the two following non-statutory mitigating circumstances: (1) the Defendant acted impulsively at the time of the murder, and (2) the Defendant had no control over his personality development.

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decisions, (5) Defendant suffered significant emotional depravation while he was growing up that adversely affected his psychological development, and (6) Defendant's dysfunctional family life prevented healthy psychological development. (V8:988, 990-91).

[18] The trial court found from the evidence presented, the extent to which the Defendant was under the influence was "unclear." (V8:990).

(V8:989, 992). With regard to the Defendant acting impulsively, the trial court stated the following:

> Both mental health experts opined that people with the Defendant's mental deficiencies generally lack impulse control. However, neither expert was willing to connect that to the murder of Trooper Sotille [sic]. This Court previously found that the Defendant had a prearranged design to shoot and kill a police officer.
>
> Therefore, this Court finds this mitigating circumstance was not proven.

(V8:989).

In sum, the trial court found the aggravating circumstances "far outweigh" the mitigating circumstances, and that either aggravating circumstance "standing alone would outweigh all of the mitigating circumstances." (V8:995). Accordingly, Appellant was sentenced to death for the murder of Sergeant Nicholas Sottile. (V8:996).[19]

After Appellant's death sentence was announced Appellant indicated he wanted to withdraw his guilty plea. (V9:1245-46). The following day, the trial court granted the Public Defender's motion to withdraw and appointed conflict counsel. (V8:1028). Appellant's new counsel filed a Motion to Withdraw Guilty Plea primarily alleging Appellant was misled and manipulated into pleading guilty. (V8:1031-32, 1051-52). A hearing was held on Appellant's motion wherein Appellant testified on his own

[19] After Appellant's sentencing, Appellant's Motion to Bar Execution by Lethal Injection was denied. (V7:900; V8:1246-47).

behalf, and the State presented the testimony of Appellant's trial counsel. (V12:1562-1637).[20]

The trial court denied Appellant's motion, stating:

> The Court finds that the Defendant entered his plea knowingly, freely, and voluntarily. The Court does not find that his plea was a result of scare tactics and manipulation of his emotions by his counsel. It is clear that the Defendant in agreement with his attorneys made a tactical decision that it was in his best interest in the hopes of obtaining a life sentence to enter a plea of guilty and proceed directly to the penalty phase. It was fully explained to the defendant at the plea colloquy what the consequences were of entering a guilty plea and what constitutional rights he was giving up by entering a plea. It is likely that the decision to enter a guilty plea was a difficult decision for the Defendant to make, but the decision was ultimately made by the Defendant knowingly and without coercion. The Defendant has not shown a manifest injustice requiring correction to support the withdrawal of his guilty plea.

(V8:1057-58).

Appellant now appeals to this Court seeking relief.

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[20] The trial court's summary of the testimony included the fact Appellant acknowledged trial counsel never guaranteed he would get a life sentence if he entered a plea; and that both of his public defenders' testimony revealed no threats or promises were made to Appellant. (V8:1055-56). Also, trial counsel believed Appellant could fare better as the State agreed not to introduce certain evidence that could "aggravate" the case and make a life sentence much more difficult. (V8:1055-56). Among this evidence were admissions Appellant made at a party to twenty different witnesses, some of whom did not even know him. (V12:1613-15, 1629). For example, Appellant admitted he told Kinder he was going to shoot the trooper, bragged about the murder and mocked the trooper gurgling on the ground. (V9:1164-65).

SUMMARY OF THE ARGUMENT

Issue I: In his first issue, Appellant attempts to raise as error the denial of a number of pretrial motions. Appellant failed to sufficiently brief any of his claims and therefore each claim should be deemed waived. Notwithstanding, Appellant's motions were properly denied as this Court has decided the issues raised adversely to him.

Issue II: The trial court properly found that Appellant committed the murder in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Appellant announced his pre-planned statement of intent to murder a police officer, he lulled the officer into a false sense of security, and shot the officer as the officer attempted to retreat. Further, Appellant's death sentence is proportionate to other capital cases where Appellant's sentence is supported by two aggravators which were afforded great weight and the mitigation was weak.

Issue III: While Appellant does not challenge the sufficiency of his plea, the record contains competent, substantial evidence exhibiting Appellant's plea was knowingly, intelligently, and voluntarily made. The trial court informed Appellant of the rights he was foregoing, of the consequences of entering a plea, and properly found Appellant's plea was voluntary.

ARGUMENT

ISSUE I

APPELLANT'S ISSUE RELATING TO HIS PRETRIAL MOTIONS HAS BEEN WAIVED; NOTWITHSTANDING, APPELLANT'S PRETRIAL MOTIONS WERE WITHOUT MERIT AND PROPERLY DENIED BY THE TRIAL COURT.

In his first issue, Appellant attempts to raise as error the denial of a number of pretrial motions regarding penalty phase issues. This Court has repeatedly decided these issues adversely to him. As such, Appellant's pretrial motions were completely nonmeritorious, and properly denied. Furthermore, Appellant has failed to sufficiently brief any of his claims and therefore each claim should be deemed waived.[21] Nevertheless, the State will address each claim in turn demonstrating why relief is not warranted in any circumstance.

As to the sufficiency of Appellant's pleading, this Court has made clear that the "purpose of an appellate brief is to present arguments in support of the points on appeal." Doorbal v. State, 983 So. 2d 464, 482 (Fla. 2008); Duest v. State, 555

[21] While Appellant appears to acknowledge his arguments are without merit as this Court has decided each issue he raises adversely to him, he has not clearly indicated he is raising these issues solely for purposes of preservation purposes. Appellant's Initial Brief at pp. 13-16; Sireci v. State, 773 So. 2d 34, 41 (Fla. 2000) (noting issues which are being raised solely for purposes of preserving an error should be so designated as such "by grouping these claims under an appropriately entitled heading and providing a description of the substance").

So. 2d 849, 852 (Fla. 1990). Thus, this Court has required appellants to present arguments that explain why the lower court erred in its rulings. See Shere v. State, 742 So. 2d 215, 217 n.6 (Fla. 1999). Merely referring to the arguments presented below is insufficient to meet the burden of presenting an argument on appeal. Doorbal, 983 So. 2d at 482; Duest, 555 So. 2d at 852. Moreover, the arguments must be presented in more than a cursory fashion. See Doorbal, 983 So. 2d at 482; Bryant v. State, 901 So. 2d 810, 827-28 (Fla. 2005); Cooper v. State, 856 So. 2d 969, 977 n.7 (Fla. 2003); Reeves v. Crosby, 837 So. 2d 396, 398 (Fla. 2003); Lawrence v. State, 831 So. 2d 121, 133 (Fla. 2002). When an issue is not sufficiently briefed, it is considered waived. Doorbal, 983 So. 2d at 482; Bryant, 901 So. 2d at 827-28; Duest, 555 So. 2d at 852. Given that Appellant's presentation of the issue regarding his pretrial motions is conclusory and merely refers to arguments presented below, the issue should be deemed waived. Notwithstanding, the State will address each of Appellant's claims.

Constitutionality of Florida Statute Section 921.141(1):

Appellant asserted below that Fla. Stat. §921.141(1) was unconstitutional under the Confrontation Clause, and he sought

to bar hearsay evidence during his penalty phase proceeding.[22] After a hearing, Appellant's motion was properly denied. First, there is nothing in Fla. Stat. §921.121(1) that denies Appellant the right to confront any witnesses against him. See Lowe v. State, 2 So. 3d 21, 45 (Fla. 2008). Furthermore, this Court has held the admission of hearsay testimony during the penalty phase proceeding is not unconstitutional. Chandler v. State, 534 So. 2d 701 (Fla. 1988) (holding Fla. Stat. §921.121(1) to be constitutional); see also Perez v. State, 919 So. 2d 347, 368-69 (Fla. 2005) (rejecting claim penalty phase proceeding is constitutionally inadequate because hearsay evidence is admissible). Appellant is not entitled to any relief.

Ring Claims:

Appellant sought below to have Florida's capital sentencing scheme declared unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). Appellant advances two Ring arguments to this Court: (1) the sentencing scheme is "flawed because the jury does not make specific findings of fact and therefore the assigned judge must impose a life sentence despite an advisory verdict of death", and (2) "a defendant cannot be sentenced to death unless the jury unanimously determines the existence of

[22] All of Appellant's pretrial motion claims involve purely legal issues, thus appellate review is *de novo*. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

all factors that render the defendant eligible to receive a death sentence." Appellant's Initial Brief at p. 14. After a hearing, Appellant's motion was properly denied.

This Court has repeatedly rejected challenges to Florida's capital sentencing scheme under Ring. See Ault v. State, 53 So. 3d 175, 206 (Fla. 2010) (noting continued rejection of Ring challenges); see also Abdool v. State, 53 So. 3d 208, 228 (2010) (recognizing this Court has rejected argument to revisit its opinions in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), and find Florida's sentencing scheme unconstitutional). Moreover, this Court has directly rejected the claim that Ring requires a jury to make findings of fact necessary to determine eligibility for the death penalty. See Ault, 53 So. 3d at 206; Zommer v. State, 31 So. 3d 733, 752-53 (Fla. 2010); Merck v. State, 975 So. 2d 1054, 1067 (Fla. 2007). Likewise, this Court has directly rejected the argument the jury must reach a unanimous decision on the aggravating circumstances. See Abdool, 53 So. 3d at 228; Zommer, 31 So. 3d at 752-53. The trial court properly denied Appellant's Ring motions, and therefore Appellant is not entitled to any relief.

Constitutionality of Florida Statute Section 921.141(2) & (3):

Appellant filed a motion below asserting that Fla. Stat. §921.141 (2) & (3) and related jury instructions were unconstitutional. The crux of Appellant's motion appears to have been that the standard jury instructions shift the burden of proof to the defendant to show why death is not the appropriate sentence. (V9:1119-20). After a hearing, Appellant's motion was properly denied.

Appellant recognizes this Court has upheld the constitutionality of Fla. Stat. §921.141(2) & (3) and related jury instructions in Johnson v. State, 969 So. 2d 938, 961-62 (Fla. 2007). Appellant offers this Court no argument to retreat from its holding in Johnson. This Court has consistently held the standard jury instructions do not unconstitutionally shift the burden of proof. Peterson v. State, 2 So. 3d 146, 160 (Fla. 2009); Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005); Randolph v. State, 853 So. 2d 1051, 1067 (Fla. 2003); Asay v. Moore, 828 So. 2d 985, 993 (Fla. 2002). Appellant is not entitled to any relief.

Constitutionality of Cold, Calculated, and Premeditated Aggravator:

Appellant notes he "attacked the CCP aggravator on constitutional grounds." Appellant's Initial Brief at p. 15.

After a hearing, Appellant's motion was properly denied. Appellant offers no legal argument here, but recognizes this Court has repeatedly upheld the constitutionality of this aggravator citing Klokoc v. State, 589 So. 2d 219, 222 (1991).

Appellant has offered this Court no reason to retreat from its holding in Klokoc. Indeed, this Court has relied upon Klokoc in rejecting constitutional challenges to the CCP aggravator. See Card v. State, 803 So. 2d 613, 628 n. 16 (Fla. 2001); Fotopoulos v. State, 608 So. 2d 784, 794 (Fla. 1992). Appellant is not entitled to any relief.

Victim Impact Evidence:

Appellant challenged below the constitutionality of Florida Statute Section 921.141(7) which permits the introduction of victim impact evidence. (V2:281-98). After a hearing, Appellant's motion was properly denied.

In Payne v. Tennessee, 501 U.S. 808, 827 (1991) the United States Supreme Court held "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such

evidence differently than other relevant evidence is treated." Subsequently, the Florida legislature enacted Fla. Stat. §921.141(7).

This Court has squarely rejected constitutional challenges to Fla. Stat. §921.141(7). See Maxwell v. State, 657 So. 2d 1157 (1995) (upholding constitutionality of statute); see also Windom v. State, 656 So. 2d 432, 438 (Fla. 1995)("We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators . . . or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case."). Appellant is not entitled to any relief.

Lethal Injection:

Lastly, Appellant notes his Motion to Bar Execution by Lethal Injection. Appellant's Initial Brief at p. 15. Appellant recognizes his claim had been repeatedly denied by this Court. After a hearing, Appellant's motion was properly denied.

Indeed, this Court has upheld the constitutionality of Florida's lethal injection protocol. See Tompkins v. State, 994 So. 2d 1072 (Fla. 2008); Henyard v. State, 992 So. 2d 120 (Fla. 2008); Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007); Schwab v. State, 969 So. 2d 318 (Fla. 2007); see also Sims v. State, 754 So. 2d 657 (Fla. 2000) (addressing constitutionality of lethal injection and delegation claim). Appellant is not entitled to any relief.

ISSUE II

THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, AND APPELLANT'S DEATH SENTENCE IS PROPORTIONATE.

In his second issue, Appellant asserts that the trial court erred in finding that the murder was committed in a cold, calculated, and premeditated manner. He further asserts that once the CCP aggravating circumstance is stricken, this Court should reverse his death sentence as being disproportionate. Contrary to Appellant's position, the trial court properly found the existence of the CCP aggravating circumstance, and his death sentence is proportionate to other capital cases.

Appellant's argument centers around the faulty premise that the State proved the murder was committed in a cold, calculated, and premeditated manner by circumstantial evidence. Appellant's Initial Brief at pp. 17-19. Appellant then offers his reasonable hypotheses negating the trial court's CCP finding.

However, the CCP aggravating circumstance is supported by Appellant's own words and actions. Appellant's case is not one where evidence of premeditation is "susceptible to . . . divergent interpretations." Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1994). Here, the evidence regarding Appellant's thought processes and actions was supplied by the direct

testimony of Quentin Kinder and Peron Merise. Furthermore, Appellant's hypotheses do not negate the trial court's finding of CCP, are flawed, and should be rejected.

In considering Appellant's claim, this Court's function is to review the record to determine whether the trial court applied the right rule of law in finding the CCP aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997). In the instant case, the trial court's findings are supported by competent substantial evidence and the correct rule of law was applied. Accordingly, this Court must affirm the lower court's application of the CCP aggravating factor. Willacy, 696 So. 2d at 695-96; see also Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) (duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence); Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990) (noting that this Court will not substitute its judgment for that of trial court when there is a legal basis to support finding an aggravating factor). In this case, competent, substantial evidence supports the trial court's finding of CCP. As the trial court noted, the CCP aggravating circumstance "was proven beyond a reasonable doubt." (V8:985).

In order to establish a murder was cold, calculated, and premeditated (CCP), the State must show that the murder was (1) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (2) the product of a careful plan or prearranged design; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. Buzia v. State, 926 So. 2d 1203, 1214 (Fla. 2006). In the instant case, the trial court analyzed each of these factors, and competent, substantial evidence supports his findings. In support of its finding of CCP, the trial court stated:

> **The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.**
>
> In support of this aggravating circumstance, the State called Quentin Kinder, who was a passenger in the vehicle driven by the Defendant, Joshua Altersberger, and Peron Merise, a truck driver, who witnessed the traffic stop and the murder.
>
> Mr. Kinder testified that he came from Georgia to Florida in January, 2007, because he was "running from the law." Mr. Kinder had violated his probation in Georgia and had an outstanding arrest warrant. He came to Sebring, Florida, because his father and a half-brother and sister lived in Sebring. Mr. Kinder met Joshua Altersberger through a mutual friend. He said Mr. Altersberger came over to the friend's house on a routine basis to "chill and play video games." Mr. Kinder said that Mr. Altersberger came over to the house early on January 12, 2007, about 11:00 a.m., and he was playing a video game called "Scar Face." It is known as a "first person shooter game." He explained that you pretend to be somebody in the game and you

shoot at other people.

Mr. Kinder testified that Mr. Altersberger often drank E&J Brandy, and he saw him drink a cup of brandy that morning. In cross-examination, he said Mr. Altersberger was “buzzing a little bit.” He was asked by defense counsel, “Now when you guys left the house, by that time Josh was already drunk, is that true?” His answer was “yes sir.”

Mr. Kinder testified that some time in the afternoon, he and Joshua Altersberger left the house in Mr. Altersberger’s car to go to Lake Placid. They first went to the Golden Corral looking for a female that worked there, but she was not working. After leaving the restaurant, they stopped at a convenience store. **As they were starting to leave the store, a deputy sheriff, driving a marked patrol car, drove by the store. Kinder testified that when Mr. Altersberger saw the deputy he said, ‘You better not stop me or I’m going to shoot you.”**

Mr. Kinder and Mr. Altersberger drove north toward Sebring on Highway 27, a four lane divided highway. Mr. Kinder said Mr. Altersberger was swerving in and out of traffic. Another car switched over into their lane, and Mr. Altersberger swerved over to avoid hitting the other car. According to Mr. Kinder, a State Trooper, who was traveling in the opposite direction made a u-turn and turned on his blue lights. Mr. Kinder said that his plan was to run when Mr. Altersberger stopped the car because he had a warrant in Georgia. When Mr. Kinder told Mr. Altersberger that the trooper had turned around, he first said, I’m going to “push it.” According to Mr. Kinder, that meant “run.” Mr. Kinder said “man don’t do that.” **When the trooper got behind their vehicle and put his lights on, Mr. Altersberger pulled over. As he was pulling over to the side of the road, Mr. Altersberger said “I’m going to shoot him.”** As soon as the car stopped, Mr. Kinder ran into a nearby orange grove. He testified that he never saw the gun that day and did not witness the shooting. He spent the night in the grove and the next morning turned himself into the police who were still in the area.

Peron Merise testified that he was driving a tractor trailer truck north on Highway 27, just out of

Lake Placid, on January 12, 2007, around 3:00 p.m. He said that a car cut right in front of his truck, and he almost hit the car. At that point, he saw a State Trooper coming behind him with his emergency lights on. After the Altersberger vehicle stopped, Mr. Merise pulled over and parked his truck behind the patrol car. As soon as the car came to a stop, he observed the passenger "just jump out and run." Mr. Merise said that he started to get out of his truck, but the trooper came back to him and told him to stay in his vehicle. He said his "Peterbilt Semi is fairly high up off the ground," thus giving him a clear view of what happened. **Mr. Merise said that when the trooper "approached the car he had his hand on his pistol." He then observed the driver of the car "with his hands up.""I don't know what the trooper asked him, but for a few seconds, the trooper looked like he got comfortable.""He had his hand off the gun." Mr. Merise then saw the driver put his hands down. He said "about a few seconds later, the driver pulled a gun, and all I can see was fire coming out of that gun." He said at that time, he saw the trooper was hit and went down. He said just before he was shot, the trooper backed up a little and "had his hands up." After the trooper was on the ground, Mr. Merise saw the driver "pointing the gun at the trooper's head and keep squeezing the gun.""But at that time, no more fire was coming out..."**

The Defendant, Joshua Altersberger, began the day of January 12, 2007, by drinking brandy and playing video games. The game "Scar Face" was known as a "first person shooter game" where you shoot at people. After leaving the apartment, Altersberger and Kinder stopped at a convenience store where they saw a deputy sheriff drive by. **After seeing the deputy sheriff, Mr. Altersberger said "you better not stop me or I'm going to shoot you." When Trooper Sotille [sic] stopped Joshua Altersberger, he told the passenger, "I'm going to shoot him," and as soon as the trooper became "comfortable," he carried out that threat. It is clear from the record that he intended to kill the trooper, because after the trooper went down, Mr. Altersberger pointed the gun at his head and continued to pull the trigger.**

For the Cold Calculated and Premeditated Aggravating Circumstance to be sustained, the State must prove beyond a reasonable doubt that (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage; (2) the defendant has a careful plan or prearranged design to commit the murder before the fatal incident; (3) the defendant exhibited heightened premeditation; and (4) the murder was committed with no pretext of legal or moral justification. Welch v. State, 992 So.2d 206 (Fla. 2008).

This Court is aware that "the facts supporting cold, calculated, and premeditated must focus on the manner in which the crime was executed, e.g., advance procurement of a weapon, lack of provocation, killing carried out as a matter of course." Looney v. State, 803 So.2d 656, 678 (Fla. 2001) (quoting Rodriguez v. State, 753 So.2d 29, 48 (Fla. 2000)). It is clear from the testimony in this case that the Defendant had a prearranged design to shoot a police officer. **He calmly stated when he saw the deputy sheriff earlier on the day of the murder that, if he tried to stop him, he would shoot him. After some time had passed, he was stopped by Trooper Sotille [sic] and he again, calmly stated, "I'm going to shoot him". He then produced a firearm that was evidently hidden in the vehicle because the passenger had not seen it previously and, after a short encounter with the trooper, without provocation, he in fact shot and killed him. There was no testimony that the Defendant had been acting in an emotional frenzy, panic or fit of rage. As it relates to a plan or prearranged design to commit the murder, the evidence also shows that when approached by the trooper for a traffic violation, the Defendant raised his hands. According to the witness, when it appeared the trooper was comfortable, the Defendant lowered his hands, produced a weapon, and shot the trooper. Furthermore, after producing the weapon, the witness indicated that the trooper took a step back and raised his hands and the Defendant shot him nonetheless.** Additionally, the State must show a heightened level of premeditation to commit the killing. An unnecessary, execution type killing, is the type of killing for which this aggravating circumstance was intended. Chamberlain v.

> State, 881 So.2d 1087 (Fla. 2004) The Florida Supreme Court has previously found that the heightened premeditation required to sustain this aggravating circumstance is one where the Defendant has the opportunity to leave the scene but, instead, commits the murder. Salazar v. State, 991 So.2d 364, 377 (Fla. 2009) (quoting Alston, 723 So.2d 148, 162 (Fla. 1998)). **Here, he could have attempted to disarm the trooper when the trooper took a step back and raised his hands. Instead, he shot him. He then pointed the gun at the trooper's head and continued pulling the trigger.**
>
> The final element of cold, calculated, and premeditated is a lack of legal or moral justification. **In this case, there is not even a pretense of legal or moral justification for the killing of an unknown law enforcement officer performing his normal duties. At the time of the murder, the Defendant, Joshua Altersberger, was simply being stopped for a traffic violation.** He had not been placed under arrest or even removed from his vehicle. Finally, the attempt to fire additional shots at close range shows heightened premeditation. Rodriguez v. State, 753 So.2d 29, 48 (Fla. 2000). **Thus, the Court finds that based on the totality of the circumstances, this aggravating circumstance was proven beyond a reasonable doubt and assigns it great weight.** Chamberlain v. State, 881 So.2d 1087 (Fla. 2004).

(V8:981-85)(emphasis supplied).

The trial judge properly concluded the murder was committed in a cold, calculated and premeditated manner. Cold, calculated, premeditated murder can be indicated by the circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988).

In the instant case, Appellant announced his intent to murder a law enforcement officer. As noted by the trial court, when he saw a law enforcement officer Appellant announced, "You better not stop me or I'm going to shoot you." Appellant later got on the highway and proceeded to drive in a haphazard manner, drawing attention to himself. At this point, Sergeant Sottile while on duty in his marked patrol vehicle, pulled Appellant over. With a law enforcement officer behind him, Appellant had his mark and then announced his intent again: "I'm going to shoot him."

Appellant's plan to murder would not come to fruition without his purposeful cunningness, deceit, and feigned compliance. As Sottile approached Appellant's vehicle Appellant placed his hands up, appearing to be compliant. Sottile had his hand on his firearm, but after speaking to Appellant Sottile appeared to have gotten comfortable. Sottile then took his hand off his gun.

Appellant had lured Sottile into his trap. Appellant now produced his weapon. Sottile attempted to retreat, placing his hands up. However, Appellant shot him nevertheless, and even after Sottile fell to the ground Appellant pointed his gun at the dying trooper's head and continued to squeeze the trigger.

This Court has upheld the application of the CCP aggravating factor under strikingly similar circumstances. In Griffin v. State, 639 So. 2d 966, 971-972 (Fla. 1994), this Court held the murder of a police officer was cold, calculated and premeditated where the defendant had considered and planned the fact if he was stopped he would shoot the officer. In Griffin, as in the instant case, the defendant announced his intent to shoot a police officer if he was pulled over on **two** occasions. In Griffin, as in the instant case, the defendant carried out his plan and shot and killed a police officer when he pulled him over. Cf. Jackson v. State, 498 So. 2d 406, 412 (Fla. 1986) (CCP aggravator upheld in police officer murder case where defendant devised method to catch officer off guard, and made no attempt to disarm him or escape).[23]

Additionally, this Court has upheld the finding of the CCP aggravating circumstance where a defendant had opportunity to reflect upon his actions and abort any intent to kill. See Looney v. State, 803 So. 2d 656, 678-679 (Fla. 2001) (cold and

[23] Appellant's reliance on Hardy v. State, 716 So. 2d 761 (1998) is misplaced. In Hardy this Court struck the CCP aggravator where Hardy made a very general statement several weeks prior to the murder in reference to what he would do if he was involved in a situation similar to Rodney King, who was beaten by police officers. Further, in Hardy this Court stated "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." Hardy, 716 So. 2d at 766. (emphasis supplied). There was no panic in the instant case.

calculated elements supported by the calm and deliberate nature of defendant's actions, where defendant discussed his intent to kill, and where the victims were not able to offer any resistance); Alston v. State, 723 So. 2d 148, 162 (Fla. 1998) (heightened premeditation element supported where defendant had the opportunity to leave the victim unharmed but instead commits murder); see also Ibar v. State, 938 So. 2d 451, 473 (Fla. 2006) (CCP found where defendant had ample time to reflect on actions and leave the scene without committing the murder); Lynch v. State, 841 So. 2d 362, 372 (Fla. 2003) (CCP found where defendant had time to coldly and calmly decide to kill); Jones v. State, 440 So. 2d 570, 577-578 (Fla. 1983) (CCP found where defendant murdered police officer without provocation and without notice).

Here, Appellant had the opportunity to reflect on his actions while he was being pulled over to what would have amounted to a simple traffic violation, he had the opportunity to reflect upon his actions while Sergeant Sottile approached his vehicle, he had the opportunity to reflect upon his actions while he sat in his vehicle hands raised, and lastly he had the opportunity to reflect upon his actions when he pointed his weapon at Sottile and Sottile attempted to retreat. There was certainly time for reflection and Appellant had the opportunity

to drive away from the traffic stop and abort his plan. Presented with a compliant, retreating victim, offering no resistance or threat Appellant could have simply driven away and caused no harm. However, it was at this moment Appellant without provocation murdered Sergeant Sottile.

Finally, the murder was committed with no pretense of moral or legal justification. There is no excuse, justification or defense to the senseless murder of Sergeant Sottile. See Walls v. State, 641 So. 2d 381, 388 (Fla. 1994). The direct evidence constitutes competent, substantial evidence supporting the trial court's finding of CCP. Accordingly, this Court should affirm the lower court's finding of CCP.

Appellant's arguments do not negate the trial court's finding of CCP, are flawed, and should be rejected. Appellant argues that the killing of Sergeant Sottile was impulsive and spontaneous. He further argues that he did not seek out Sergeant Sottile, rather it was Sottile who sought him out. Appellant's Initial Brief at pp. 17-19.

First, the assertion that a law enforcement performing his duties "sought" out his murderer by conducting a routine traffic stop is patently ridiculous and should be rejected. Second, while both mental health experts opined that people with Appellant's mental deficiencies generally lack impulse control,

neither expert connected any mental deficiencies to the murder of Sergeant Sottile. (V8:989). While Appellant attempts to argue Dr. Gur's testimony negates CCP, Gur's testimony reveals he "really did not know the specifics" of the murder, and he was not trying to relate his findings to the murder. (V22:1396). Appellant's Initial Brief at pp. 18-19. There is no evidence Appellant's act was impulsive or spontaneous.[24] As demonstrated by Appellant's words and actions this murder was the product of a prearranged plan and was not committed in a rage, panic or frenzy.

To the extent Appellant argues any mental deficiency or brain abnormality negates a finding of CCP, this Court has held a defendant can be "emotionally and mentally disturbed or suffer from mental illness" but still have the ability to commit a murder that is CCP. Evans v. State, 800 So. 2d 182, 193 (Fla. 2001); see also Gill v. State, 14 So. 3d 946, 962-963 (Fla. 2009) (rejecting argument mental disabilities which included untreatable brain malformation rendered defendant incapable of committing murder that was CCP where no evidence was presented connecting mental disabilities to murder).

[24] The trial court rejected the non-statutory mitigator that the Defendant acted impulsively at the time of the murder and noted its finding that "Defendant had a prearranged design to shoot and kill a police officer." (V8:989).

To the extent Appellant may assert his drug use negates a finding of CCP, this Court has recognized that this factor may be applied to a chronic drug user, where no evidence is presented that the drug use destroyed the defendant's ability to plan.[25] Guardado v. State, 965 So. 2d 108, 117 (Fla. 2007); see also Suggs v. State, 644 So. 2d 64, 70 (Fla. 1994) (CCP established despite trial court finding that capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired where defendant had been drinking at time of incident).

Lastly, Appellant does not challenge the proportionality of his sentence as a separate issue, does not provide any meaningful argument regarding proportionality, and does not cite a single case that is comparable to his. However, the State recognizes that this Court is required to address the proportionality of each death sentence on direct appeal. Green v. State, 907 So. 2d 489, 503 (Fla. 2005). As such, the State will address this issue.

The State's notes Appellant's assertion that his death sentence in disproportionate "once CCP is stricken," as "the CCP

[25] The trial court found it was "unclear" from the evidence the extent to which Appellant was under the influence of alcohol on the day of the murder. (V8:989-90).

aggravator is one of the weightiest aggravators in Florida's statutory sentencing scheme." Appellant's Initial Brief at p. 16. The State submits that Appellant's sentence is proportionate where, as detailed above, the trial court's finding of CCP was proper.

This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999). This Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6, 12 (Fla. 1999).

This Court has previously stated that the CCP aggravating circumstance is one of the weightiest aggravating circumstances set out in Florida's statutory sentencing scheme. See Morton v. State, 995 So. 2d 233, 243 (Fla. 2008); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Here, the CCP aggravator and

aggravator that the "**victim of the capital felony was a law enforcement officer engaged in the lawful performance of his official duties**" were found and afforded **great weight**. (V8:980-85). When these two aggravators are compared to the slight mitigation found, it is clear that Appellant's death sentence is proportionate.

The trial court found two statutory mitigating circumstances, but only afforded them "slight" weight: (1) age of the Defendant at the time of the crime, and (2) the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (V8:985-88). As the trial court explained, the second circumstance was afforded slight weight "because neither of the mental health experts gave the opinion that the Defendant's brain deficiencies, or the Defendant's impaired psychological development, were related to the murder or Trooper Sotille [sic]." (V8:988). Additionally, while the trial court found nine non-statutory mitigating circumstances, the mitigation was weak.[26] Notably, the trial court found **the**

[26] The offense was committed in an unsophisticated manner (very, very slight weight), Defendant was under the influence of alcohol at the time of the murder (little weight), history of substance abuse (very slight weight), dysfunctional family and home environment (moderate weight), Defendant loves his family and is valued by his family (very slight weight), Defendant loved his grandfather, who was the Defendant's only positive

aggravating circumstances far outweigh the mitigating circumstances, and that either aggravating circumstance standing alone would outweigh all of the mitigating circumstances. (V8:995).

This Court has affirmed other death sentences in comparable cases. Wheeler v. State, 4 So. 3d 599, 612-613 (Fla. 2009) (murder of law enforcement officer, aggravator CCP (great weight), combined avoid arrest aggravator (great weight) compared to both mental health mitigators (some weight), and eleven non-statutory mitigating circumstances (minimal to some weight)); Bailey v. State, 998 So. 2d 545, 551-554 (Fla. 2008) (murder of law enforcement officer after traffic stop, prior felony on probation aggravator (great weight), avoid arrest aggravator (great weight) compared to mitigating circumstance of young age (very little weight) and eight non-statutory mitigating circumstances (little weight)); Kearse v. State, 770 So. 2d 1119, 1134-35 (2000) (two aggravating factors: committed during a robbery and avoid arrest/hinder law enforcement/murder of a law enforcement officer compared to age mitigator and non-statutory mitigating circumstances of acceptable behavior at

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role model and he was devastated by his death (very slight weight), Defendant was the object of racial discrimination from within his own family (little weight), good behavior throughout court proceedings (very slight weight), and Defendant pled guilty and took responsibility for the offense (little weight). (V8:989-993).

trial and difficult childhood that resulted in psychological and emotional problems); Griffin v. State, 639 So. 2d 966 (1994) (murder of law enforcement officer after traffic stop, prior violent felony aggravator, during commission of burglary aggravator, avoid arrest aggravator, and CCP aggravator compared to mitigating circumstances of age, remorse, traumatic childhood, and learning disability); see also Singleton v. State, 783 So. 2d 970, 979 (Fla. 2001) (finding sentence proportional where two aggravators found (HAC and prior violent felony) compared to statutory mitigation (age and both mental mitigators), and several non-statutory mitigating circumstances, including that the defendant was under the influence of alcohol and other possible medications at the time of the offense); Burns v. State, 699 So. 2d 646, 648-651 (Fla. 1997) (where defendant shot and killed a police officer after a traffic stop and one aggravator (comprised of three merged factors) supported the death sentence when compared to two statutory mitigators of reduced weight and numerous non-statutory mitigating circumstances). Appellant's sentence is supported by two aggravating circumstances. The mitigation urged was weak. Appellant's sentence is proportionate.

Assuming arguendo, this Court struck the CCP aggravator, this Court should affirm Appellant's death sentence as

Appellant's case is one where there would be a single weighty aggravator versus very little in mitigation. In LaMarca v. State, 785 So. 2d 1209, 1216-17 (Fla. 2001), this Court discussed single aggravator cases and noted that it has vacated death sentences in single aggravator cases where there is **substantial mitigation** or when the **single aggravating circumstance is weak**. The instant case would not fall into either of these categories. The mitigation in this case is weak. Moreover, the victim of the capital felony was a law enforcement officer engaged in the lawful performance of his official duties aggravator was afforded great weight. See also Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (upholding death sentence in single aggravator case where prior violent felony was weighty and mitigation was assigned little weight by trial court); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (death sentence upheld on proportionality grounds where single aggravator of HAC given "enormous" weight versus statutory mental mitigators), reversed on other grounds, 826 So. 2d 968 (Fla. 2002). Appellant's sentence is proportionate.

ISSUE III

SUFFICIENCY OF PLEA

Appellant does not challenge the validity of his guilty plea. However, in all cases where the death penalty has been imposed, this Court reviews the record to determine whether the evidence is sufficient to support the murder conviction. Fla. R. App. P. 9.142(a)(6). In Winkles v. State, 894 So. 2d 842, 847 (Fla. 2005), this Court explained:

> "[W]hen a defendant has pled guilty to the charges resulting in a penalty of death, this Court's review shifts to the knowing, intelligent, and voluntary nature of that plea." Lynch v. State, 841 So.2d 362, 375 (Fla.2003); see Koenig v. State, 597 So.2d 256, 257 n. 2 (Fla. 1992) (stating that where a death-sentenced defendant pled guilty, "[i]n order to review the judgment of conviction ..., we must review the propriety of [the defendant's] plea, since it is the plea which formed the basis for his conviction"). "Proper review requires this Court to scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily." Ocha v. State, 826 So.2d 956, 965 (Fla. 2002).

In the instant case, the record contains competent, substantial evidence exhibiting Appellant's plea was knowingly, intelligently, and voluntarily made. The trial court informed Appellant of the rights he was foregoing, of the consequences of entering a plea, and properly found Appellant's plea was voluntary.

The trial court informed Appellant he was giving up the right to a jury trial to determine his guilt or innocence; and the right to call witnesses on his behalf and confront those witnesses called against him. (V12:1537, 1541). The trial court informed Appellant he was giving up the right to an attorney through the guilt phase proceeding, and after pleading guilty his case would proceed to the penalty phase where evidence would be introduced to a jury concerning aggravating circumstances and mitigating factors. (V12:1537-39).[27]

The trial court informed Appellant there were only two possible penalties – life without the possibility of parole and the death sentence. (V12:1538). The trial court informed Appellant that by entering a plea, the very least that would occur is that he would be sentenced to life without the possibility of parole. (V12:1539). The trial court explained that it would be up to the jury to make a recommendation as to the death sentence, and that he would have to give their recommendation great weight. (V12:1539). Appellant indicated the he understood the rights he was waiving and the penalties he was facing. (V12:1537-39).

[27] The trial court informed Appellant he would have his counsel during the penalty phase proceeding, and he would have the right then to call witnesses on his behalf and confront those called against him. (V12:1538, 1541).

Further, Appellant indicated no person had promised or threatened him into entering a plea. (V12:1539-40). The trial court specifically asked, "as we stand here now, do you feel like you've been pressured into making this decision or is it a decision you made after being fully advised by your lawyers that this is in your best interest?" (V12:1541). Appellant responded, "I'm fully advised it's in my best interest." (V12:1541). The trial court then queried, "[d]o you feel like your lawyers, though, at this point, have forced you or pressured you or twisted your arm to get you to do this?" (V12:1541). Appellant answered, "[n]o, sir." (V12:1541). The trial court asked Appellant if his plea was being entered "freely and voluntarily" and Appellant responded, "[y]es, sir." (V12:1542). Appellant indicated he was not under the influence of any drugs, alcohol, or medication and he was not suffering from any kind of mental illness that would impair his understanding of what he was doing. (V12:1541-42).

The trial court found there was a factual basis for Appellant's plea, that Appellant's plea was entered into freely and voluntarily and that Appellant had ample opportunity to discuss his decision with trial counsel. (V12:1543-45). Additionally, Appellant confirmed while his plea was based upon trial counsel's advice, the decision to plea was **his** choice.

(V12:1544).

The trial court properly informed Appellant of the rights he was foregoing, and of the consequences of his plea. It is clear Appellant knowingly and voluntarily entered his plea, and the trial court properly accepted it. Brant v. State, 21 So. 3d 1276, 1288-89 (Fla. 2009); Winkles, 894 So. 2d at 847. Additionally, in its order denying Appellant's motion to withdraw guilty plea, the trial court found that Appellant was in agreement with his attorneys and made "a tactical decision that it was in his best interest in the hopes of obtaining a life sentence to enter a guilty plea. . ." (V8:1057-58). See Tanzi v. State, 964 So. 2d 106, 121 (Fla. 2007) (finding plea knowing and voluntary where defendant understood consequences of plea, understood he could still face death penalty, was not coerced or promised anything, and trial court found in order denying motion to withdraw plea defendant elected to follow strategy recommended by trial counsel).

CONCLUSION

In conclusion, the State respectfully requests that this Honorable Court AFFIRM Appellant's conviction and sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to John Thor White, Esquire, Assistant Regional Counsel, 15500 Lightwave Drive, Suite 107, Clearwater, Florida 33760, this 13th day of May, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

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KATHERINE MARIA DIAMANDIS
Assistant Attorney General
Florida Bar No. 69116
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE