IN THE SUPREME COURT OF FLORIDA

RALSTON DAVIS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC10-135
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Seventeenth Judicial Circuit of Florida
(Broward County)

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STATEMENT OF THE CASE AND FACTS

A. *Jurisdictional Statement*

Ralston Davis was charged by indictment with first degree murder of Myosha Proby (count I), Ravindra Basdeo (count II), and Carlos Jones (count III). R1 10-11. He entered a plea of not guilty by reason of insanity. R2 277-79. The jury found him guilty of all three counts. R4 606-11; T20 2493-95. The jury recommended death on count I by an 8 to 4 vote, and life imprisonment on counts II and III. R4 665-67; T25 2951. The court followed the recommendations. R5 790-806; T27 3032. The court found CCP, HAC, contemporaneous conviction of a violent felony, and commission of burglary in aggravation, and numerous mitigating circumstances, including four statutory mitigators: extreme mental or emotional disturbance, impaired capacity to appreciate the criminality of his conduct, no significant criminal history, and age at the time of the crime (Davis was 21). *Id*. Motion for new trial was denied, and sentence was imposed January 7, 2010. R5 681, 790, 807. Notice of appeal was filed January 19, 2010. R5 807.

B. *State's Case*

The state showed without question that Davis shot and killed Proby at her apartment, then went to a gas station where he killed Basdeo and Jones. Although Davis knew Proby, there was no discernible motive for her murder. Davis made vague (and at times unintelligible) statements about being on a "mission," and that

she "betray[ed] him" or "set [him] up." Davis did not know Basdeo and Jones and they were apparently killed at random.

1. *Davis jumps on top of his car and fires shots into the air at the intersection of NW 31st Avenue and Sunrise Boulevard near the Exxon station where Ravindra Basdeo and Carlos Jones are later killed.*

About 10:30 p.m. on Friday, December 2, 2005, Jerry Nicholson, who operated a rib stand at the Exxon station at NW 31st Avenue and Sunrise Boulevard in Fort Lauderdale, saw a car stop in the intersection. T9 1127. The car was blocking traffic and horns were honking. *Id*. Davis jumped out of the car, got on top of it, and started shooting into the air. T9 1127, 1135. Nicholson couldn't identify Davis, but shell casings in the intersection were identified as having been fired from Davis's gun. T9 1115-17, 1150, 1154. Nicholson called the police. T9 1129.

2. *Myosha Proby is killed in her apartment at 4331 NW 18th Street, Lauderhill.*

Shortly after Davis fired the shots in the intersection, he arrived at Myosha Proby's apartment. Hermione Harrell was at Proby's apartment T8 914, 916. Harrell was a friend of Proby and Davis (Harrell dated Davis once). T8 914. That evening Harrell and Proby watched a movie and ate dinner.[1] T9 917. Harrell was going out later so she took a shower. T9 918. When Harrell got out of the shower,

[1] Friends had also stopped by earlier, and they brought cocaine-laced marijuana, which Harrell smoked. T8 938.

Proby looked upset. *Id*. Proby told Harrell that she called Davis and that he was upset about something. *Id*. Proby called Davis and let Harrell listen in. *Id*. Harrell heard Davis yelling at someone and heard him say, "come out." *Id*. Harrell testified that Proby was mouthing words to her as she was on the phone with Davis. T8 920. Over hearsay objection, Harrell testified, "He told her, she repeated, he's going to come kill me." *Id*. (This issue is raised in Point IX.) Harrell told Proby she should call the police. T8 919. But Proby didn't call the police.

Harrell tried to call Davis, but he didn't answer. T9 920. Harrell sent him a text message, "Sorry for disturbing you, this is your homegirl Tish, call me when you get this message." *Id*. Fifteen minutes later Davis arrived. *Id*. Jason Rolle, who was at the apartment complex visiting his cousin, saw Davis park his car. T8 910. Davis left his car running and his music blasting. T8 910. (Asked if that was unusual in light of what happened, Rolle said, "I mean, if someone is coming to commit a crime, why would they blast the music[?]" *Id*.) Davis was bleeding from his nose and mouth. T8 902. Rolle said Davis looked like he had been in a fight and was angry ("he looked pissed off") T8 912. Rolle also said Davis "had a serious face, like he was in the army or something." T8 902, 906. Davis was carrying an AR-15 rifle in one hand and an extra clip in the other. T8 911. He walked upstairs to Proby's apartment and knocked on the door. T9 921.

Proby answered the door and let Davis in. T8 922, 938. Harrell said he began yelling at Proby, "You set me up, you set me up." T8 922, 938. Proby said, "That wasn't my brother." T8 923. Davis said, "I know," and then repeatedly said, "You set me up." *Id*. According to Harrell, Davis was a little unsteady on his feet and "looked like he was smoking or drinking, or on something. I've never seen him like that, even the times that I've seen him." *Id*. Harrell said Davis was acting both "like he was crazy" and like he was on something. T8 943.[2] Although Harrell was seated nearby, Davis paid no attention to her. T8 940-41.

Davis told Proby "to get the 'f' down." T8 924. Harrell testified that "[w]hen he told her to get the 'f' down, she got on her knees, she folded her arms, and he just started shooting her." *Id*. Proby collapsed. T8 925. Davis got on the coffee table and shot down on her. *Id*. Harrell ran outside and jumped over the second floor balcony as Davis continued to shoot. *Id*.

The medical examiner said Proby had 23 bullet wounds, from the back of her head, down her back, to her buttocks area. T10 1194. He said that the shot to

[2] On cross-examination, Harrell testified that Davis sold cocaine, but she'd never seen him use it; nor had she heard him speak of using it. T8 936. She didn't smell alcohol on him. T8 942.

her head was likely the first shot and that it would have killed her instantly.[3] T10 1209-11, 1215-16.

3. *Ravindra Basdeo and Carlos Jones are killed at the Exxon Gas Station at NW 31st and Sunrise.*

After the Proby shooting, Davis drove to the Exxon station. T9 1130. Nicholson's sister, Farrah Cyprien, saw a man (Davis, though she couldn't identify him) walk up to a silver car, tap on the window, and say, "Y'all don't me, y'all don't me." T8 1001, 1006. Shortly afterward she heard some shooting, followed by more shooting. T8 1001. When she returned she saw that the man in the silver car (Ravindra Basdeo) was dead.[4] T8 1001.

Christian Gaines saw Davis pull into the gas station and park his car. T11 1272. Davis got out and stood by his car for a short time; he was playing his music very loudly. T11 1273-74. Davis walked toward a car; Gaines heard angry voices or an argument, and then he heard what sounded like a gunshot. T11 1274-75. Davis then walked toward the front of the station as Carlos Jones was coming out. T11 1276-77. At this point Gaines could hear sirens. T11 1278, 1282. Gaines saw

[3] The medical examiner based his opinion on the difference in angle between the head wound and the other wounds. T10 1215-16. The state conceded in its sentencing memorandum that Proby was shot first in the head. R5 712. The court found in mitigation that Proby was rendered unconscious immediately. R5 803.

[4] The medical examiner testified that Basdeo had a single gunshot wound to the head. T10 1183.

Jones lay down and Davis shoot him.[5] T11 1277-78. Davis walked to his car and left. T11 1279. The police were arriving as Davis was leaving. T11 1280.

Gaines's girlfriend, Ebony Deadwyler, testified that Davis angrily yelled at the man in the silver car (Basdeo) and then shot him. T11 1286. After that Davis looked around the parking lot and approached Jones, who was coming out of the station. T11 1287. Jones backed up then got down on the ground. *Id*. Davis shot him. *Id*. Davis stood there for a moment, then walked to his car and left. *Id*.

John Diggs was in his truck when he saw Davis arrive. T12 Diggs was acquainted with Davis from a stabbing that occurred at Piper High School. T12 1524. Diggs knew the victim's mother, and, though Diggs did not know this, Davis was a witness to the stabbing. T12 1525.

Diggs saw Davis shoot Basdeo. T12 1509. Diggs tried to lean back in his seat so Davis would not see him, but Davis came up to him and said something to the effect of, "somebody played him out, or somebody done him wrong." T12 1511. About this time, Jones walked out of the store, apparently unaware of the shooting. *Id*. According to Diggs, Davis put his arm around Jones and told him to get on the ground or he would kill him. T12 1512. By now Diggs could hear the

[5] The medical examiner testified that Jones had gunshot wounds to his head, back, and hand. T10 1181. Both Basdeo and Jones were killed instantly. T10 1204-05.

police sirens. T12 1513, 1522. Jones got on the ground and Davis shot him. T12 1513. Davis walked to his car and sped away. T12 1517, 1524.

4. *Davis is arrested at Sunrise and the Turnpike.*

Officers Kerri Hagerty and Jeffrey Jenkins were the first officers to see Davis's car after the Exxon shootings. T10 1220; T13 1605-06. They were dispatched to a report of a man hanging out of a car waving a gun around. T10 1219; T13 1603. At Northwest 31st Avenue and Sunrise, they saw Davis heading eastbound on Sunrise and hanging out of his car. T10 1219. When they got on Sunrise, a motorist pulled up and said Davis was now heading westbound. T10 1221. They turned around and caught up with him. T10 1222.

Davis pulled into a parking lot, made a u-turn, and then drove towards their patrol car. *Id*. Jenkins put the car in reverse to avoid a collision. *Id*. Instead of leaving, Davis stopped his car and got out. *Id*. Jenkins and Haggerty ordered him to the ground at gun point. T10 1223; T13 1606. Davis ignored these commands. Instead, while looking at Hagerty, who was wearing her diamond earrings, Davis yelled, "I ain't got my fucking earrings on," which Hagerty testified was a "pretty disjointed statement." T10 1224, 1239. Davis got back in his car and fled west on Sunrise. T10 1225; T13 1607.

Davis ran a red light, went up on the sidewalk at one point, and ran cars off the road. T10 1225; T13 1619-20. At Sunrise and the Turnpike, Davis abruptly

stopped, threw the keys out the window, and opened the door. T7 851; T10 1226; T13 1607. He didn't get out, however; officers had to physically remove him. T10 1226; T13 1609. Davis struggled, and it took several officers to subdue him. T7 852. In the process, he was tasered seven times. T10 1241; T12 1539.

Davis's mother and father arrived at the scene. T13 1641; T15 1871. Davis's father asked Detective Carmody if he could speak to Davis. T15 1871. Carmody said that Davis had to be taken to the hospital but that he would call them when he got to the sheriff's office. T15 1871-72.

The AR-15 rifle and a 30-round clip were found in the car.[6] T10 1231; T13 1625-28. There was a baggy of cocaine rock in the ashtray (but nothing in the car to smoke it with). T12 1477, 1490; T13 1632-33.

5. *Davis's behavior when arrested*.

Sergeant Bigwood said Davis would "go from being somewhat compliant and quiet, to yelling, to kicking, to spitting, to back to quiet. The behavior was just kind of erratic and all over the place." T7 852. Officers Bellerose, Hagerty, and Jenkins said Davis appeared to be either under the influence of drugs or mentally

[6] Davis bought the rifle on November 30, 2005, from Randy Redick, Jr., when Redick mentioned it was for sale. T7 880; T8 885. Redick had known Davis for three years and he said Davis was polite, respectful, and not an excitable person. T8 894-95. Redick said he had never seen Davis use drugs, and that it would have been out of character for Davis to do so. Redick was very surprised when he found out what Davis had done. T8 895.

ill. T10 1229, 1241; T13 1630, 1636-37. Officer Levy said that judging by Davis's behavior it was possible he was mentally ill or psychotic. T10 1257. Davis would go from yelling and screaming to laughing. T12 1552-53. Davis both talked about God and said he was God, and yelled, "Jesus is great," or words to that effect. T12 1553-56. Officer Connor testified that Davis was rambling on in a "religious type overtone," that Davis said something to the effect that he was directed do to this and that Jesus would forgive him. T13 1643, 1650. Davis also said, "Hand me my AR-15 and a bullet and I will kill you all" and "Stand in front of me and I will put a bullet in your face." T13 1644. Officer Hagerty testified that Davis said, "Give me another bullet, bitch, I'll put it between your eyes." T10 1229-30.

Davis was taken to the hospital at 1:08 a.m. and to the Broward Sheriff's Office at 3:41 a.m. T13 1646. At the hospital Davis refused any treatment that involved puncturing his skin (shot, blood draw, stitches, etc.). T15 1882; T17 2213-14. (Davis told Carmody that he was a Rastafarian. R15 1875. Dr. Butts, the state's rebuttal witness, testified that Rastafarians will refuse medical treatment that punctures the skin. R17 2214.) Carmody said the only behavior of Davis that he found peculiar was that Davis called him "captain" and he said at one point that he was on a mission. T15 1878.

6. *Davis and his parents are secretly videotaped at the Broward Sheriff's Office.*

When lead detective Frank Ilarazza learned that Davis would be brought to the Sheriff's Office, he set up hidden audio and video equipment in one of the rooms. T13 1698, 1705. Davis was brought into the room at 3:55 a.m. T13 1699. Ilarazza had already turned on the video. T13 1699. Over defense objection, the DVD recording was introduced as state's exhibit 44 and played for the jury. T13 1700. (Davis moved to suppress the DVD. This issue is raised in Point II.) Defense counsel also objected to the jury using a state-prepared transcript (exh. 44A) while they watched the DVD (this issue is raised in Point III). The court instructed the jury that the DVD was in evidence but the transcript was not; if the transcript was inaccurate, the jury was to rely on the DVD. T13 1705-06.

The DVD begins with Davis in handcuffs; his clothes were collected, and his picture was taken. T13 1707, 1717; exh. 44: 9:10. Davis asked for water and Carmody said he would get him a big cup or a bottle. T14 1737; exh 44: 11:53. Davis said, "Refill it. You know you got to refill your vessel." *Id*. Carmody got Davis a bottle of water at 4:10 a.m. Exh 44: 17:00. Carmody left Davis alone for 15 minutes. Exh 44: 17:26-32:20. When Carmody returned, he asked Davis, "Still home, Man?" Davis said, "You know I can't go to sleep, Cap. Got to watch the watcher." T14 1738.

At 4:25 a.m. Carmody got some biographical information from Davis: he was born August 21, 1984, and was 21 years old. T14 1740; exh 44: 33:07. He

graduated from high school in 2003. T13 1742. At 4:30 a.m., Detective Ilarraza entered the room. Exh 44: 36:00. Ilarraza asked Davis where he was born (Brooklyn) and whether he knew who the President and Vice-President were (Davis did). T14 1744, 1765.

Ilarazza and Carmody left the room at 4:40 a.m.,[7] and Davis was largely left alone until his parents arrived at 6:18 a.m. T15 1780.

When Davis's parents arrived, Carmody said he was going to close the door, and he told them to knock when they wanted him. Exh 44: 1:36:37; T15 1780; ST 284. Davis's mother asked Davis if he knew who they were (Davis identified his mother but called his father the "King"). T15 1780. Asked what happened, Davis said, "God put me out there to subtract somebody." T15 1783; exh 44: 1:38:26. Davis's mother said, "God don't tell you to do that, thou shalt not kill, God don't tell you to do that, Junior."[8] T15 1783. Davis said, "Big sister (unintelligible), she betray me, so I murdered her." *Id*. Asked about the two men, Davis said, "Time for me to sit up on the thrown [sic]." T15 1784-85. Davis's parents asked him what throne. T15 1785. Davis said, "The [throne], the big, where the big king come

[7] Davis invoked his right to counsel and silence between 4:35 a.m. and 4:40 a.m., and the court ordered this portion deleted from the DVD. T11 1411. But as explained in Point I, the state did not successfully eliminate from the DVD all references to Davis's invocation of rights.

[8] Davis's parents were from Jamaica, and Davis spent some of his formative years there. On the DVD their speech is a mixture of Jamaican Patois and English.

(unintelligible), the (unintelligible) prince." T15 1785. Davis's father said, "You can't be talking to law enforcement people like that…." T15 1785; exh 44 1:40:23. When Davis continued in this vein, Davis's father asked, "Do you know who I am?" T15 1785.

Davis's father asked Davis what happened that got him arrested. T15 1786. Davis said he was on a mission. T15 1786; exh 44 1:40:00. Asked why he killed, he said, "I'm following a mission." T15 1787; exh 44 1:42:39. Asked why his face was swollen, Davis said he was fighting "some dudes." T15 1788.

Davis's mother asked him, "What you take, you take some kind of drug, Junior? You smoke? What you do?" T15 1789-90; ST 293-94; exh. 44: 1:43:55. Davis can be heard (and seen) on the DVD saying, "drugs" (as if the notion were distasteful), and then said, "Come on, Man [or mom], I don't (unintelligible)." *Id*. Davis's mother took this answer to be a denial because she then asked, "So what are you thinking?" *Id*.

When Davis asked his mother, "What kind of person do you know me to be?" this exchange followed:

> "MRS. DAVIS: Me know you to be a goodhearted boy, grow up in a church.
> "RALSTON DAVIS: Follow the scripture.
> "MRS. DAVIS: Teach, we teach you about the love of the Lord.
> "RALSTON DAVIS: Following the scripts.
> "MRS. DAVIS: That's the kind of son.
> "RALSTON DAVIS: And I follow the scripts.

"MRS. DAVIS: No, but there's a part in it that say thou shalt not kill.

"RALSTON DAVIS: So (unintelligible), David and King Solomon?

"MRS. DAVIS: No, you cannot be like them, this is not David and King Solomon time.

"RALSTON DAVIS: Of course not, this 2005.

"MRS. DAVIS: That's right. And in David and King Solomon time, them do not -- they understand they cannot do it. There's a law, there's a law that say thou shalt not kill.

"RALSTON DAVIS: (Unintelligible) the laws?

"MRS. DAVIS: The law of God.

"RALSTON DAVIS: Uh-huh. The law of God and the law (unintelligible). Anytime I (unintelligible) looking, I can tell who they is, Man, who mean me no good, Man. [T15 1790-91]

Davis's mother asked Davis why he was shooting. T15 1792. Davis answered, "How you know it's not necessary for [God]?" T15 1792; exh. 44: 1:45:50. Davis's mother said again that God said, "vengeance is mine, I will repay" T15 1794. Davis said he didn't shoot anyone. When his mother said he just said he did, Davis then denied saying that he hadn't. T15 1794-95.

Davis's mother wanted Davis to take a blood test to find out what was wrong with him. T15 1795. Davis said they wanted to take his blood at the hospital. T15 1796.

Davis said he had $2000 and that it was taken by the police. T15 1797-98. This led to a discussion about Davis getting tasered. T15 1798.

"RALSTON DAVIS: They Tase me three times for safety. If it had dawned on me, got me all -- me use to read the newspaper (unintelligible), the boys got Tased, them are dead.

"MRS. DAVIS: Uh-huh.

> "RALSTON DAVIS: 'Cause me look at the newspaper.
>
> "MRS. DAVIS: And was concerned?
>
> "RALSTON DAVIS: I look at the newspaper and it say everybody who dead from a Taser (unintelligible) cocaine abuse (unintelligible), so all of them who dead used -- they used to abuse cocaine. Foolishness. But you know what –
>
> "MRS. DAVIS: Uh-huh.
>
> "RALSTON DAVIS: -- it might be right, that's why (unintelligible), 'cause I have cocaine in my system, that's why they Tase me three times, I mean, I shake it off like this. And then -- I mean, you know something, you know how me know (unintelligible), you know how me know so right now, 'cause when me down upon the ground and they Tasing me, I mean, I start to say everything, and then me say, oh man, it's him, it's him." [T15 1798-99.[9]]

Davis said something about going crazy. T15 1799. Davis's mother said, "So what are you then, you're not mad, but you're crazy?" Davis said, "Oh, me just need to go to the house of the lord." *Id*. Davis's mother said they begged him to go to church. T15 1800. Davis's mother said, "You can't be there now, they got you." *Id*. Davis said, "Who got me? Jesus?" *Id*.

Davis asked his father if he killed anyone when he was in the army. T15 1800-01. Davis's father said he had not. T15 1801. Davis asked who he got it from, "Uncle Benny? . . . Raul?" *Id*. Davis's father asked, "Where you get what from?" *Id*. Davis said, "The instincts." *Id*.

[9] This is, of course, the court reporter's attempt at transcribing what was said. As argued in Point III, what Davis actually said, and the accuracy of the state-prepared transcript (exhibit 44A), was in dispute.

At this point, Davis's speech became disjointed and incomprehensible. He said, for example:

> "RALSTON DAVIS: But we can wear black, me wear black some nights (unintelligible). I ain't selling my soul to get here, everybody was selling (unintelligible), everybody was selling, like with gimmicks, I saw them come walking, come on, everybody think they gonna last long, you ain't gonna last long, from a burned up dollar bill with matches, it never did. I make dollar multiply, make one dollar turn into two dollar. [T15 1802]

Davis's mother said how upsetting this was and why was he doing it to them. T15 1805. Davis said he was on his mission and that he was to "wipe off some negative out there." T15 1806; exh 44: 1:56:47.

Davis's mother explained to Davis how a blood test would help find out what was wrong with him. T15 1809. Davis asked, "So you think something go wrong with me?" T15 1809.

Davis's father asked Davis why he wouldn't take a blood test. T15 1811. Davis's answer is disjointed and unintelligible:

> "RALSTON DAVIS: 'Cause I don't care who they send in. Probably the next person will come in and tell me that, tell me you have to give blood, 'cause -- please, I ain't giving nothing. (Unintelligible) take some of my -- please. Whoever takes some of my -- whoever takes some of mine need to come sit on my chair and I'll look at him in the face, he thinks I'm mad, tell him to come (unintelligible), he thinks I'm mad (unintelligible), I look at their face. He thinks I'm mad, (unintelligible). Who thinks I'm mad? Bring him, come right now, I want to tell him something in the mouth, him and I (unintelligible). I ain't getting touched with no needle. (Unintelligible). Me do the same stuff, I'm just seeing things quick,

> killer instinct, me just move like a cat, swift. I know all the gangsters, OG, Poo, Trav. [T15 1811-12.]

Davis's father asked who he was fighting. T15 1812. Davis said God knows who and "God see everything." T15 1812-13. Asked why he was fighting, Davis said he was fighting for his throne, and he continued:

> "RALSTON DAVIS: Get out the way, it's my time now, N-O-W, move to the side, time for the young man to take it over and run the whole city…. Run the whole city, live like a king forevermore, walking the path of righteousness. Yep. (Unintelligible) live for. I'm not going to (unintelligible). [T15 1814]

Davis's father said he was worried about reprisal. T15 1815. Davis said he would protect them with his AR-15. *Id*. Davis's father asked why he would have an AR-15 and, "Is that why you were talking to me the way you were talking to me, calling me a nigger in the house, a couple – few days ago?" T15 1816. Davis: "Because me have one gun?" Davis's father: "I'm asking you." Davis: "I don't think I'd use my gun on you, Dad, come on, Man." T15 1816-17.

Davis's father said the gun was made to do evil. T15 1817. Davis said, "Because me rod and me staff comfort me, that's why it's used." T15 1818.

Davis's father asked why the police would taser him. T15 1819. Davis said, "See if I'm a soul survivor." *Id*. Davis said the police told him to calm down. *Id*. Davis's father asked him why he didn't because if he had he wouldn't have gotten tasered. *Id*. Davis said, "That's what I would think. But that ain't what the process

is, you get beat first." T15 1820. Davis said he was beaten, "[b]ut I have to tell you it's been a good day." *Id*.

Davis said something about being a cold-hearted killer and yet the police wanted to laugh with him. ST 325; T15 1821.

Davis's father asked, "Are they black people?" Davis: "Who?" Davis's father: "The two people you murder." Davis said "big sister" was Bahamian. T15 1821; ST 326.

Davis's father asked Davis what his relationship with Proby was "that she could have betray you to make you murder her like that." T15 1822. Davis said, "She pretend -- she come into my life like my big sister (unintelligible), a sister real close to me. She was born the day before my birthday." *Id*.

Davis's father told Davis his family was worried about him. T15 1823. Davis said, "I'm all right, I'll get a new one, I feel like I done my job, mission complete, and if there's some more to go, pass me the AR-15 (unintelligible)." T15 1824-25.

Davis's father said, "Let me get back to this big sister thing, we want to understand." T15 1824. Davis said, "No, she just phony. I don't like phony people, fake people." Davis's father asked, "So how can she be your big sister and phony?" *Id*. Again, Davis's answer is disjointed and largely unintelligible. T15

1824-25. Davis said something that caused Mrs. Davis to ask, “Her brother beat you up?” T15 1825. Davis said:

> "RALSTON DAVIS: (Unintelligible). The same, you know, the same people me end up fight (unintelligible). I park across the street and (unintelligible), I park across the street, I watched them, and the AR-15 comes out, four of them, four. (Unintelligible) send them across the street -- … -- while me watch, straight across the street. By Sunrise Boulevard. (unintelligible). That’s the test, them OG’s, they done walked up and walked down the road already. They beat me up, but it’s all good, I feel that love, I feel the love, love, one love; black, white, Arab, Chinese, Indian, Jamaican, Haitian. [T15 1825]

Davis’s mother said they love him and always will but they don’t support what he did. T15 1825. Davis asked, “What don’t you support?” T15 1826. Davis’s mother said, “Doing what you did to your big sister, the so called big sister.” *Id*. Davis asked, “What about the Arab man?” Davis’s mother: “Arab man?” Davis: “Like Indian boy, or whatever him is.” Davis’s mother: “I don’t know about him. You didn’t tell me about him.” *Id*. Davis said:

> "RALSTON DAVIS: I follow my instinct, and he disrespect me, I swerved on 31st.
>
> "MRS. DAVIS: Yeah.
>
> "RALSTON DAVIS: Before we get behind the king, when me cut across the lane, boy disrespect me and go around me.
>
> "MRS. DAVIS: Oh yeah?
>
> "MR. DAVIS, SR.: But since when do you go –
>
> "RALSTON DAVIS: So me follow him in a gas station, me make him open his mouth.
>
> "MRS. DAVIS: Oh yeah?
>
> "RALSTON DAVIS: And then (unintelligible) people at the barbecue, barbecue shopping, and I dump in they mouth, and everyone that shot not living anymore. I murdered his ass 'cause he tried me. I be a snake out there, pure snake.

"MRS. DAVIS: Sweet Jesus. [T15 1826-27.]

Davis's father asked why he would think that someone driving would be "taking away the [throne] and you want to get back the [throne] and disrespect you?" T15 1827. Davis said:

> "RALSTON DAVIS: 'Cause I'm playing with skill, playing with goods, playing with skill, good luck it happen, follow your instinct, good luck will happen, too. Stick to the script, good luck, definitely.
>
> "MR. DAVIS, SR.: What's the script, Junior?
>
> "RALSTON DAVIS: The script? The scriptures.
>
> "MR. DAVIS, SR.: The scriptures.
>
> "RALSTON DAVIS: All the mobsters and gangsters and the saints.
>
> "MR. DAVIS, SR.: Is there any part of this script –
>
> "RALSTON DAVIS: Saints, all the saints, all the saints. Police, them are saint; the OG Gangsters, they saints; people down in New Orleans, they saints; we saints over here; down south, the black connection, saints. Police (unintelligible). You hear me? [T15 1828]

When Davis's mother began to cry, Davis comforted her and said he was following a mission. T15 1829; exh 44: 2:17:11.

When Davis's mother said they were going, Davis asked, "Are you going to take me home, back to the house of the Lord, with you?" T15 1832.

At 7:03 a.m., Detective Carmody knocked on the door and entered. T15 1833; exh 44: 2:21:11. Davis's mother said they would pray for him. T15 1834. Davis said, "Yeah, pray for me. Tell -- tell -- tell the man I did my mission, and if he got more missions for me to do, I'm ready, it's my time." *Id*.

At 7:30 a.m., Carmody explained to Davis that when he had seen his parents earlier he told them he would call them. T15 1836; exh 44 2:28. At this point, the jurors noticed there was a page missing from the transcript. T15 1837. The court told the jurors to put the transcripts down and watch the video. *Id*.

At 7:50 a.m., Ilarraza came into the room and again got Davis's biographical information. ST 342; exh 44: 2:28:43. Davis said he was born in Brooklyn, "but mentally I've been all over the world." ST 343.

The DVD ended at 9:10 a.m. when two officers arrived to take Davis to jail. T15 1839; exh 44: 2:30:34.

C. *Defense Case*

Victoria Corcoran was an emergency medical technician at the Broward County Jail and she saw Davis on December 3, 2005. T13 1589. She noted bizarre behavior and hallucinations. T13 1590; R7 82. Corcoran said Davis seemed to be talking to himself; he was giggling, and he wouldn't make eye contact. T13 1590. Corcoran assumed Davis had some sort of psychological problem; she did not think he was faking symptoms or trying to appear mentally ill. T13 1597, 1601.

Curtis Dubuque was a corrections deputy at the jail, and in early December Davis was in his unit. T15 1852. He said Davis was reciting scripture, talking to himself, and yelling and cursing. T15 1855, 1859. Dubuque thought he was mentally ill. T15 1859. Davis's behavior lasted a week and slowly changed. T15

1860. Dubuque testified, "There was something obviously -- to me there was something wrong with him." T15 1861.

Assistant Public Defender Dorothy Ferraro saw Davis in the jail on December 20 or 21, 2005. T15 1893. He was in the holding area where inmates wait to speak to their attorney. *Id*. Ferraro could not speak to Davis, however, because he was yelling gibberish and jumping up and down. T15 1893-94. Ferraro testified that Davis said something about his lawyer but it was out of context and unintelligible. T15 1894. Ferraro thought he was mentally unstable and "couldn't believe that they even brought him down." *Id*.

Davis's mother, Marcia Davis, testified about Davis's deteriorating mental condition before the killings. T16 2048. She said that on Wednesday, November 30, 2005, Davis was kicked out of the house after an argument with his father. T16 2051. At 3:00 a.m. on Thursday morning, Davis called her. She told him to come home. T16 2051. At 6:00 a.m., Davis was asleep at the kitchen table; Ms. Davis told him to go to bed. T16 2051, 2053. Later that morning, Davis came into her room and said he wanted to be a singer or a DJ for God. T16 2055. He said he was going to a music studio to do this. *Id*. Davis asked her how one knows when God is talking to you. T16 2056.

Davis also said that he had met a girl and that this girl said she would be his big sister and he would be her little brother. T16 2059.

Friday morning Davis brought his mother roses, which she thought unusual. T16 2061. While they talked, Davis got a phone call. *Id*. He said it was the girl he had met and that she was making him breakfast. *Id*. Davis said he would eat at McDonald's instead. *Id*. Ms. Davis said he continually looked behind him and she asked why he was so jumpy. T16 2064. Davis and his mother prayed together; she asked God to help him with whatever was bothering him. T16 2065. She told Davis he needed to bathe and change out of the black clothes he had been wearing. T16 2068. Davis said he first had to talk to the girl he had met. *Id*.

That evening, Ms. Davis was awakened by two young men who said they saw Davis's car pursued by police. Mr. and Mrs. Davis went to Sunrise and the Turnpike and saw Davis bleeding from the nose. T16 2074. At the police station, Davis was not acting normally. *Id*. Ms. Davis said it was not normal for him to talk of kings, thrones, and missions. *Id*. Asked about the DVD where Davis talked about being tasered and cocaine, she said he was not saying he had cocaine in his system; rather, he was saying that the police were claiming that to justify tasering him so many times T16 2079-80.

Davis's sister, Ruth Davis, also testified that before the killings Davis was nervous and fidgety and that he spoke of wanting to DJ for God. T17 2088-89.

Davis called two psychologists and a psychiatrist who testified that Davis was legally insane at the time of the offenses. Dr. Allan Ribbler, a psychologist

with a specialty in clinical neuropsychology, testified that Davis slipped into a psychotic state of hyper religiosity and auditory hallucinations of God telling him to do things. T11 1298. Davis believed he was on a mission from God. T11 1313. In Dr. Ribbler's opinion, Davis suffered from a brief psychotic episode. T11 1301-02. Ribbler said he was fairly certain this was not drug induced. T11 1306. Ribbler saw no evidence that Davis had used cocaine; moreover, Davis's recovery took longer than a drug user's recovery would. T11 1307-08.

Ribbler talked about how traumatic stressors can precipitate a psychotic episode and that that he saw two stressors here. T11 1315. Davis's friend was stabbed to death and he died in Davis's lap; Davis was scheduled to testify at the murder trial about the time of this incident. T11 1316. (John Diggs referred to this stabbing in his testimony. T12 1524.) Another stressor was his father kicking him out of the house on November 30, 2005. T11 1315.

Ribbler testified about Davis's actions before the killings. T11 1325. Davis said he felt like he had incredible energy; and he thought people were looking at him because they knew he was the chosen one. T11 1326-27. On December 2 he talked about God all day, gave to charity, and forgave a friend with whom he had had an argument. T11 1328. Davis felt like everything was in slow motion. *Id*. He felt that he had to buy a bible and that he "kept having references to King Solomon." *Id*. He said buying a watch and black gloves was part of his mission. *Id*.

Davis went with friends to a music studio. He smoked some marijuana but denied using cocaine. *Id*. Davis left but then returned to the studio. When he received a phone call, he told the people there to shut up so he could hear the call. Davis said they threw him out and beat him up. T11 1330.

Davis left his phone and keys in the studio so he jumped on top of a car and shouted at them. *Id*. They came out and threatened to shoot him. But he said he had a protected peaceful feeling so he stayed there. When they left, he went back inside and got his phone and keys. He left to retrieve his rifle. T11 1331.

Davis said he got a call from Proby and somehow this triggered in his mind that it was his mission to kill her. *Id*. He told Ribbler about firing shots into the air at 31st Avenue and Sunrise and how he killed Proby in front of Harrell so she could be a witness that he had fulfilled his mission. T11 1335.

After he killed Proby, Davis drove down 31st Avenue toward Sunrise. *Id*. He was hanging outside the car window waving his rifle around. *Id*. He said this was to show others that he was God's servant and they were supposed to show him respect by staying behind him on the road. T11 1336. When Basdeo passed him, he followed Basdeo to the gas station where he killed him. *Id*. Davis interpreted Basdeo's passing him as disrespect to God. *Id*.

Ribbler testified that Davis said he didn't know why he killed Jones. *Id*. Ribbler said this wasn't inconsistent with psychosis. *Id*. In Ribbler's opinion, Davis was still psychotic when he killed Jones. T11 1337.

In Ribbler's opinion, Davis was suffering from a brief psychotic disorder, which is a mental disease, infirmity, or defect. T11 1347. Davis knew what he was doing, but didn't know what he was doing was wrong. T11 1349. Ribbler saw no evidence that Davis was malingering. T11 1347.

On cross-examination, Ribbler acknowledged that Davis and his parents spoke Jamaican Patois and English in the interview room. T11 1364-65. The prosecutor asked Ribbler whether he heard Davis admit on the DVD that he had used cocaine. T11 1362. Defense objected on the ground there was a dispute about what Davis said in this regard. T11 1363.[10] The court overruled the objection (T11 1364), and the prosecutor asked:

> Q. But you're telling us you did not hear him say, "That's why they did that, 'cause I have cocaine in my system, that's why they Tasered me three times, I mean, I shake it off"?
>
> A. I did not hear him admit to using cocaine. [T11 1365.]

Dr. Abbey Strauss, a psychiatrist, also testified that Davis suffered from a brief psychotic episode and didn't know what he was doing was wrong. T15 1933,

[10] Dr. Ribbler was called as a defense witness out of order (i.e., during the state's case). The DVD had not yet been published to the jury when Ribbler testified. This issue is discussed in Point III.

1954. He testified about the medical records and observations of Davis made at the jail. T15 1935. These included the records of Dr. Bel, the jail psychologist, who reported Davis's behavior as inappropriate and bizarre, and that he was religiously preoccupied. T15 1936, 1943. Records showed that Dr. Bel prescribed Risperdal, an antipsychotic medication. T15 1944. Strauss said if Davis had been on cocaine, Risperdal would have been counterproductive. T16 2035-36. Moreover, Davis was prescribed Risperdal for three and a half months, and no drug-induced psychosis lasts that long. T16 2041-42. Strauss saw no evidence that Davis used cocaine on December 2, 2005. T16 2030.

Over defense counsel's facts-not-in-evidence objection, the prosecutor also asked Strauss about Davis's reference to cocaine on the DVD. Like Dr. Ribbler, Strauss told the prosecutor, "I didn't hear it the way you heard it." T16 2002-04.

Dr. Dennis Day, a forensic psychologist, was appointed by the court to examine Davis. T17 2094-95. Asked his opinion of Davis's mental condition, Day said: "[H]e was experiencing serious delusions, apparent hallucinations, his behavior was bizarre, his behavior was non-goal directed, he had tremendous reference of ideas of religiosity, and his behavior was bizarre." T17 2097. Day's opinion was that Davis suffered from a brief psychotic episode, not a drug induced psychosis. T17 2098-2100. A drug induced psychosis lasts hours or days; Davis's

lasted much longer. T17 2106, 2108. Also, stressors, which precipitate the disorder, were present (the stabbing, getting kicked out). T17 2101.

D. *State's Rebuttal*

The state called one rebuttal witness: Dr. Lori Jane Butts, a psychologist. T17 2147. In her opinion, Davis knew what he was doing and knew it was wrong. T17 2153, 2189. She testified that she saw evidence that appellant malingered. T17 2157-58, 2172-74, 2180. She relied on witness testimony that Davis hid the gun and fled from the police; and that the DVD showed he wanted to talk to his parents in private. T17 2183, 2186-87.

Butts said "[t]here is a discussion on the DVD that he said I have cocaine in my system, about the Taser." T17 2222. She thought the better explanation of Davis's behavior was that this was a "was a substance-abuse situation." T17 2225. Nonetheless, Butts could not rule out brief psychotic disorder, and she said some of his behavior was consistent with psychosis. T17 2196-97.

E. *Penalty Phase*

The state relied on the trial evidence, and it put into evidence pictures of Proby and Basdeo. T23 2692-94; R7 2-3. The state read victim impact statements about all three victims. T23 2694-98.

Davis's mother testified that she and Davis's father were from Jamaica and moved to New York where they had children, including Davis. T23 2701. After

struggling financially in New York, they moved to Ft. Lauderdale. T23 2704-05. Ms. Davis took the children to live with relatives in Jamaica while she and Mr. Davis got situated in Florida. Davis was five years old. T23 2706. The children stayed in Jamaica for a year. Ms Davis said they were mistreated and not fed properly. T23 2708-09. They were regularly beaten. T23 2709-10. Davis ran away for two days and was found under the crawl space of a house. T23 2710-11. Although Ms. Davis was sending her relatives money, the children were essentially taking care of themselves. T23 2712.

Ms. Davis took the children to live with her husband's family. T23 2713. But the children were mistreated there as well. *Id*. Eight months later Ms. Davis brought the children to Florida. T23 2716. Ms. Davis said Davis was a kind, affectionate child who didn't like to fight; but in Florida he was picked on and beaten because of his accent. T23 2716-17.

In 1992, Hurricane Andrew wiped out the Davis' grocery store and restaurant. T23 2718. Their house went into foreclosure. T23 2719. Ms. Davis again had to leave the children with relatives in Jamaica. *Id*. The children couldn't get into school; they had to sleep on the floor of the house; and they were beaten. T23 2720-21. Davis was beaten so bad it left a scar on his arm. T23 2720. Ms. Davis brought the children back to Florida. Davis was now 10 years old. T23 2724.

The family continued to struggle financially so they all moved to Jamaica, where they owned a small, two-room house with no plumbing. T23 2723-24. By now there were six children. T23 2724. When Ms. Davis got a nursing job, she moved back to Florida and left the children in Jamaica with their father. T23 2728.

In Jamaica the children were invited to attend church by the preacher and his assistant. *Id*. Ms. Davis said the assistant sexually molested Davis. *Id*.

When Davis was 14 or 15 he went to New York to live with his grandmother (Ms. Davis's mother-in-law). T23 2731. She also treated Davis poorly and once put him out of the house (the police told her she had to take him back). T23 2731-32. At the time, Ms. Davis was a live-in maid. T23 2732-33. When she finally got a place of her own, the family reunited. T23 2733.

Ms. Davis talked about the stabbing Davis witnessed. T23 2734. She said one evening Davis came home in tears. *Id*. A boy he knew in school was stabbed; Davis tried to resuscitate him, but he died. *Id*. Ms. Davis said Davis became withdrawn, and she should have gotten him help. T23 2735-37.

Davis's younger sister, Ruth, told the jury about their life in Jamaica; how they had little to eat, were beaten, and had to take care of themselves. T23 2741-42. She said Davis was friendly, outgoing, and non-violent. T23 2746.

The week of the offense, Davis was abnormal. T23 2747. Davis said he was going to DJ for God; that he wanted to get a bible; that they were all saints; and that he wanted to do God's work. *Id*.

Marjorie Smith, a family friend, said Davis was a "kind, sweet, loving person" who once loaned her the $2000 he was saving for a car. T23 2750-51. Another family friend, Pamela Richardson, testified that Davis was a generous and good person. T23 2759.

Davis's brother, Daren Davis, 18, testified that he is now in college and plays football. T23 2752-53. He said Davis encouraged him to stay out of trouble and do well in school. T23 2754. He said Davis would pay for his equipment and fees so he could play league football. *Id*.

Kerron Matthew was a close friend of Davis's in high school. T23 2755. He said Davis was a generous friend who often bought him lunch because he couldn't afford it. T23 2757. Matthew said he was from Trinidad, and like Davis he was picked on by classmates. *Id*. Davis, however, was never violent. *Id*. When three kids wanted to fight Matthew, Davis was able to talk them out of it. T23 2758.

Charesse Sanford, the mother of Davis's three-year old son, testified that she and her son visit Davis at the jail often. T23 2765. She said Davis had never been violent with her. T23 2764. (She told the jury about a misunderstanding that once led to Davis's arrest for domestic battery. The charge was dropped. T23 2762-64.)

Dr. Michael Brannon, a forensic psychologist, testified that he was appointed to do a competency evaluation in April 2006. T24 2823. His testing showed that Davis was paranoid, his thinking confused and disorganized. T24 2827. He saw no evidence that Davis was malingering. T24 2824, 2828. Brannon said that recent testing showed a diminution of paranoia, and he saw no signs of psychopathic personality or antisocial personality disorder. T24 2841-44.

Brannon said that because Davis's childhood was "chaotic and abusive and neglectful," he would have expected Davis to have no friends and have been in trouble for fighting, abusing animals, and the like. But Brannon saw the opposite: Davis had friends and had not been in trouble. T24 2837-38.

Brannon said Davis suffered from a brief psychotic episode on December 2, 2005, and that his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. T24 2845-85, 2488. He also testified that Davis committed these homicides while under the influence of an extreme mental or emotional disturbance. T24 2487.

Brannon was asked his opinion of Davis's legal sanity at the time of the offenses. T24 2871. Brannon testified that he could see a clear connection between Davis's mental illness and the Proby and Basdeo shootings. T24 2872. But the connection wasn't so clear for the Jones shooting, which appeared more random, and less connected with Davis's mission delusion. T24 2872-74.

Davis testified at the penalty phase that he awoke December 1, 2005, and felt full of energy though he had slept little. T24 2781. He said he wondered "did I cross over like, did I die, or like was I in heaven, because during the day everything just felt peaceful." *Id*. He waited for a voice and heard a voice, which he didn't trust at first. *Id*. He felt he had to get a small bible. T24 He bought children ice cream and gave people food. Davis said he had a "loving and peaceful" feeling. Davis testified that the voices told him to go the Army-Navy store; that he had to buy a watch for some reason. T24 2784.

Davis explained how he got beaten up. T24 2785. He said he went to a music studio and there were three men there. *Id*. He told them how at peace he felt. *Id*. He dropped money on the floor to show how much he trusted them. *Id*.

That night he went back to the music studio. T24 2785. While there he was on his cell phone, and so he told the men to be quiet. T24 2786. They pushed him out of the studio. *Id*. He thought he dropped his cell phone inside the studio, so he jumped on top of a car. *Id*. The men came out and beat him up. *Id*. By now, Davis said, he felt he had a mission to do but didn't know what it was. T24 2787.

One of the men said he was going to get a gun, but he felt at peace, that the voice he was hearing said he was bluffing and wasn't going to get a gun. *Id*.

He saw his phone and keys on the ground. T24 2788. He left and got his gun. *Id*. When Proby called, he concluded this was his mission: "It clicked to me

then this is it, this got to be the person, this is the mission, because it made no other sense to me than it had to be her because the timing that she called me." T24 2789.

On the way to Proby's apartment, he fired his gun in the intersection. T24 2790. About the murders, he said "in the flesh physically that was me, mentally and spiritually that wasn't me." T24 2794. He said this was a nightmare, and he asked the victims' families to forgive him. T24 2793.

F. *Spencer Hearing*

Dr. Butts, the state's guilt-phase rebuttal witness, testified for Davis at the *Spencer* hearing that Davis's behavior on the day in question was not consistent with his behavior before or since, and that he was psychotic at the time of the offense. T26 2978. In her opinion, Davis suffered from a substance-induced psychosis, but she could not rule out an organic psychotic disorder. T26 2978. She also testified that Davis's ability to make decisions was impaired. T26 2979.

Drs. Ribbler, Brannon, Strauss, and Day testified that at the time of the murders Davis was under the influence of an extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. T26 2980-87.

SUMMARY OF THE ARGUMENT

Point I. On the DVD, Ilarazza said to Davis, "Yeah, before we go on to talking about what happened tonight, I have to go over your rights. You know what your rights are, right? Under the law?" Davis replied, "Remain silent?" Ilarraza said, "Well, yeah. Let me go over them and then you can decide what you want to do, okay, it will be up to you." The DVD then showed the detectives leaving the room. No statement by Davis to detectives was admitted. This evidence is fairly susceptible of being interpreted as referring to Davis's invocation of his right to remain silent. The error in admitting it was not harmless, and a new trial should be ordered.

Point II. After Davis invoked his right to silence and counsel, he spoke with his parents in the interview room. The police secretly recorded them after leading them to believe their conversation would be private. The court should have granted Davis's motion to suppress this recording.

Point III. The court erred in allowing the jury to use a state-prepared transcript of the DVD. The transcript was disputed at critical points, and it became the focal point of the jury.

Point IV. The evidence does not support CCP. Davis was psychotic and angry. The court erred in finding and instructing the jury on this aggravator.

Point V. The evidence does not support HAC. If Proby suffered mental anguish, it was of short duration and there was no protracted suffering. Accordingly, the court erred in finding and instructing the jury on this aggravator.

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

Point VII. The court erred in allowing Harrell to testify that Proby said, "He's coming to kill me." This was not admissible under the spontaneous statement exception to the hearsay rule.

Point VIII. Dr. Butts testified that Davis was upset because Dorothy Ferraro was a public defender. This testimony was speculative and inadmissible.

Point IX. Davis testified at the penalty phase. On cross-examination, the prosecutor was allowed to ask him argumentative questions.

Point X. This Court should hold that *Ring v. Arizona* applies in Florida, and that it requires a jury's unanimous conclusion that a particular aggravator is sufficient to warrant the death penalty.

ARGUMENT

POINT I REVERSIBLE ERROR OCCURRED WHEN THE JURY VIEWED A DVD ON WHICH DAVIS INVOKED HIS RIGHT TO REMAIN SILENT

On the DVD admitted in this case, Detective Ilarraza said to Davis, "Yeah, before we go on to talking about what happened tonight, I have to go over your rights. You know what your rights are, right? Under the law?" Davis replied, "Remain silent?" Ilarraza said, "Well, yeah. Let me go over them and then you can decide what you want to do, okay, it will be up to you." ST 279. The DVD then showed the detectives leaving the room. No statement by Davis to police was admitted. The first point on appeal presents two main issues: whether this evidence is fairly susceptible of being interpreted as referring to Davis's invocation of his right to remain silent, and, if so, whether the state can prove the evidence was harmless beyond a reasonable doubt.

A. *Factual Background*

Shortly after his arrest, detectives explained to Davis his right to remain silent and his right to counsel, and Davis invoked these rights. This was done in the interview room between 4:35 a.m. and 4:40 a.m., and it was recorded on a DVD. Before trial, defense counsel moved in limine to exclude this evidence. R3 498-99.

On June 15, just before jury selection, the court granted the motion in limine. T1 12. The judge cited *State v. Burwick*, 442 So.2d 944 (Fla.1983), and

Garron v. State, 528 So.2d 353 (Fla.1988), and said these cases were "pretty clear and unequivocal that you cannot, under any circumstances, even in this context, get into Mr. Davis' invocation of his rights." T1 12. The judge entered an order excluding "those portions of the audio/visual recording of the Defendant, while in custody, where he invokes his right to remain silent and for his attorney." R4 540.

On Wednesday, June 24, the parties discussed editing the DVD. T11 1407. Defense counsel said he wanted the prosecutor to remove "anything that starts the process of advising him of Miranda rights[.]" T11 1411. The judge said, "Anything involving the invocation of rights has been ordered to be redacted." *Id*. The judge directed the prosecutor to get the edited version to defense counsel on Friday. *Id*.

On Monday, defense counsel said he did not receive the DVD. T12 1427. That afternoon, the prosecutor produced the DVD, and he assured the court that he double-checked to make sure the judge's order had been complied with. T13 1703.

Only about five minutes of the DVD was played that afternoon during Det. Ilarraza's testimony. T13 1718. The next day, the court emphasized its prior ruling to the detective: "Now, the other thing is, Detective, you're on the stand, for record purposes, I was a little concerned, you understand also that you cannot get into anything involving his invocation of his rights, you understand that?" Ilarraza replied, "Yes, your Honor." T14 1729.

Shortly before the critical portion of the DVD was reached, the prosecutor asked to take a break so he and defense counsel could double-check that the DVD was properly edited. T14 1754. After a 15-minute break, the prosecutor again assured the court that it had been. T14 1754.

The DVD resumed. At 4:35 a.m. the DVD jumped forward to 4:40 a.m. with Detectives Carmody and Ilarraza leaving the room. Exh 44: 42:00. The DVD continued to 5:13 a.m. Exh 44: 1:15. At this point, however, the DVD inexplicably jumped back to 4:25 a.m. (i.e., ten minutes before Davis invoked his rights). The prosecutor and Detective Ilarraza were apparently surprised; Ilarraza advanced the DVD to 5:55 a.m., and it was played for the jury from that point on. T15 1778.

During deliberations, the jury requested the DVD, and so it and a DVD player were sent back to the jury room. T19 2452, 2469. When the jurors watched the DVD, it is unlikely they advanced the DVD from 4:25 to 5:55 a.m. as Ilarraza did at trial. This is important because the DVD doesn't skip from 4:35 a.m. to 4:40 a.m. the second time around. Instead, the DVD shows Ilarraza starting to explain to Davis his *Miranda* rights:

> DET. ILARRAZA: Yeah -- before we go on to talking about what happened tonight, I have to go over your rights. You know what your rights are, right, under the law?
>
> RALSTON DAVIS: Remain silent?
>
> DET. ILARRAZA: Well, yeah. Let me go over them and then you can decide what you want to do, okay, it will be up to you. [ST 279; exh 44: 1:25:18]

At this point, the DVD jumps forward to 4:40 and it freezes for a few seconds with the two detectives standing to leave. Exh. 44: 1:25:33. The DVD then unfreezes and they are shown leaving as before. No statement by Davis to the detectives was admitted at trial.

B. *Is this evidence fairly susceptible of being interpreted as referring to Davis's invocation of his right to remain silent?*

"[I]t is a fundamental principle of our constitutional law that a defendant cannot be penalized for exercising his fifth amendment privilege to refuse to communicate to the authorities information which would implicate him in the commission of a criminal offense." *Burwick*, 442 So.2d at 947 (c.o.). This fundamental principle is based on an implied promise to the defendant that invocation of the right to remain silent will carry no penalty. *Id.* at 948; *Wainwright v. Greenfield*, 474 U.S. 284, 289-90 (1986). Introducing evidence of a defendant's post-arrest silence breaks this implied promise and violates due process under article I, section 9, of the Florida Constitution. *State v. Hoggins*, 718 So.2d 761, 770 (Fla.1998). For the same reason, introducing evidence of post-*Miranda* silence violates due process under the Fourteenth Amendment to the United States Constitution. *Greenfield*; *Doyle v. Ohio*, 426 U.S. 610 (1976).

Florida law forbids comments that are "fairly susceptible" of being interpreted as a comment on silence. *David v. State*, 369 So.2d 943 (Fla.1979). This is a "very liberal rule" and "serves as a strong deterrent against prosecutors

advertently or inadvertently commenting on an accused's silence." *State v. DiGuilio*, 491 So.2d 1129, 1135-36 (Fla.1986). It applies to evidence as well as to prosecutorial argument. *DiGuilio* (rule applied to testimony by officer).

Evidence that the defendant invoked the right to remain silent is also inadmissible in cases involving the insanity defense. In *Garron*, for example, Garron's defense was insanity, and he presented substantial expert testimony that he was legally insane at the time of the offenses. *Garron*, 528 So.2d at 355. In rebuttal, the prosecutor asked the arresting officers two questions: first, whether Garron was "coherent," and, second, whether he indicated he understood his constitutional rights. *Id*. This Court disagreed with the state's argument that "the prosecutor's questions cannot be construed as comments on the exercise of constitutional rights." *Id*. This Court reversed and stated (528 So.2d at 355-56):

> It is not dispositive that the prosecutor did not expressly comment on the exercise of appellant's constitutional rights. However, when taken in context, it is clear that the questions asked by the prosecutor were intended to at least impliedly be a comment on the invocation of those rights as they relate to appellant's guilt or sanity.

The Fourth District's decision in *West v. State*, 553 So.2d 254 (Fla. 4th DCA 1989), *disapproved on other grounds, State v. Norstrom*, 613 So.2d 437, 439 (Fla.1993), is similar to *Garron*. There two officers testified about advising West of his *Miranda* rights, but their testimony was cut off before they could explicitly mention that he invoked those rights:

> [Officer Monti:] After that Officer Schuller read the rights from the Miranda cards, at which time the defendant advised he understood them and-
>
> [Officer Schuller:] … I did read Mr. West his *Miranda* rights as well as implied consent and before the lab technician drew the blood I asked him if he understood his rights and he said, "Yes" he did. And, I asked him if he would answer any of my questions and-

West, 553 So.2d at 257. Relying on *State v. Thornton*, 491 So.2d 1143 (Fla.1986), and *State v. Kinchen*, 490 So.2d 21 (Fla.1985), cases in which this Court reaffirmed the "fairly susceptible" test, the court held that the officers' testimony was fairly susceptible of being interpreted by the jury as evidence that West invoked his right to remain silent. *West*, 553 So.2d at 257.

Here, Detective Ilarraza said to Davis "before we go on to talking about what happened tonight, I want to go over your rights" and "[l]et me go over them and then you can decide what you want to do, okay, it will be up to you." Shortly thereafter the detectives left, and no statement of Davis was introduced. The DVD, therefore, is fairly susceptible of being interpreted by the jury as evidence that Davis decided—as he himself said—to "remain silent[.]" In fact, the jury would "naturally and necessarily" (the federal standard, *see Thornton*, 491 So.2d at 1144) interpret it that way. Accordingly, the introduction of this evidence, however negligently, violated Davis's right to remain silent and his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, and article I, section 9, of the Florida Constitution. *Greenfield*; *Doyle*; *Hoggins*.

C. *The state will be unable to prove the error was harmless beyond a reasonable doubt.*

Comments on silence are "high risk errors." *DiGuilio*, 491 So.2d at 1136. They "strike[] at the heart of our criminal justice system." *Ventura v. State*, 29 So.3d 1086, 1088 (Fla.2010).

Here, the error was not harmless because the jury could have grounded its rejection of Davis's insanity defense on the common sense view that someone who invoked his constitutional rights could not have been insane. *See Garron*, 528 So.2d at 355 ("There is little doubt that the admission of such evidence would raise an inference of guilt or, in this case, sanity.").

As noted above, the jury requested to view the DVD, and they had it and a DVD player in the jury room nearly all day on July 7, 2009. T20 2490. Moreover, the prosecutor in closing argument told the jury over and over again to carefully review the DVD during deliberations.T19 2327, 2396, 2399-2406. He told the jury, "listen to it carefully, listen to it carefully, you'll have all this evidence," T19 2327; and, "Let's go through that DVD. Now, you, yourselves, will have that DVD. What are some of the things that you should be looking at and listening to on that DVD?" T19 2401. In addition, all the experts relied on, and were questioned about, the DVD. Dr. Strauss called the DVD "beautiful raw data," and Dr. Butts agreed with that. T15 1930; T17 2155.

Given that the DVD was crucial to the case, given that the prosecutor urged the jurors to "listen to it carefully" during their deliberations, and given that they had it and a DVD player all through their day-long deliberations, it cannot be said beyond a reasonable doubt that it did not affect the verdict.

Even if the state can prove the error was harmless as to guilt, it must also show that the error was harmless as to penalty. *Gonzalez v. State*, 700 So.2d 1217, 1219 (Fla.1997); *Burns v. State*, 609 So.2d 600, 607 (Fla.1992). Just as the jury could have grounded its rejection of Davis's insanity defense on Davis's invocation of his constitutional rights, the jury also could have rejected, or given less weight to, the statutory mitigators of extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of his conduct. Accordingly, putting this DVD into evidence also violated Davis's rights under the Eighth Amendment to the United States Constitution.

Finally, although it appears that defense counsel bears little or no blame for this error, even if defense counsel were to blame, the issue is prejudice to Davis, not who is at fault. *Sayih v. Perlmutter*, 561 So.2d 309, 311 (Fla. 3d DCA 1990); *Meixelsperger v. State*, 423 So.2d 416, 417 (Fla. 2d DCA 1982). A new trial should be ordered.

POINT II THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE VIDEOTAPE OF DAVIS AND HIS PARENTS

After he was arrested, Davis was placed in an interview room where he was secretly video recorded. At 4:35 a.m., Davis invoked his right to remain silent and his right to counsel. But Davis was not taken to jail at this point. Instead, over an hour and a half later, and with the video recorder still on, Detective Carmody brought Davis's parents in the room. Carmody told Davis's parents he was going to close the door and "Just knock if you want me, Okay?" Exh 44: 1:36:37; T15 1780; ST 284. After Carmody closed the door, Davis and his parents spoke for 40 minutes. The state used this videotaped conversation to convict him.

Defense counsel moved to suppress the recording. R4 522; T12 1438-39; T13 1572. Relying on *State v. Calhoun*, 479 So.2d 241 (Fla. 4th DCA 1985), counsel argued that Davis's parents became unwitting police agents when they were brought in the interview room after Davis had invoked his right to remain silent and right to counsel. T13 1570-71. The court asked whether this was any different than recording the conversation of two suspects in the back of a patrol car. T13 1571. Counsel said the difference was that suspects in a patrol car may or may not talk to each other; but the only purpose of bringing Davis's parents in the room was to talk to Davis. *Id*.

After an abbreviated discussion of *Calhoun*, the court inexplicably denied the motion on the authority of that case. T13 1573; R4 539. This was error. Since

the facts are undisputed, the standard of review is *de novo*. *Connor v. State*, 803 So.2d 598, 605 (Fla.2001).

In *Calhoun*, the police sought to question Calhoun, a jail inmate, but he said he wanted to speak privately with his brother, who was also an inmate. The police monitored this ostensibly private discussion. An officer then entered and advised Calhoun of his rights. Calhoun invoked his right to remain silent and asked to talk to an attorney, and the officer left. The police then put Calhoun's brother back in the room and videotaped their conversation. 479 So.2d at 242-43. Judge Carl Harper suppressed the tape, and the Fourth District affirmed the order of suppression.

The Fourth District wrote that, although one does not normally have an expectation of privacy in a police interview room, Calhoun "had a clear expectation of privacy because such an expectation was deliberately fostered by the police officers." *Id*. at 243. The court found significant that Calhoun had invoked his right to remain silent and right to counsel and that the police tactic of sending in his brother circumvented those rights (*id*.):

> Furthermore, and perhaps even more significantly, after the first conversation the defendant specifically exercised his right to remain silent and his right to counsel. Not only were these rights totally ignored by the police but the officers circumvented them by bringing the brother back into the room and then taping the conversation which is the subject of the motion to suppress. To rule that under these circumstances the defendant's statements to his brother are admissible is to make a mockery of the *Miranda* rights.

The court agreed with Judge Harper's ruling that the police tactic of eavesdropping on Calhoun's conversation with his brother violated four rights: Calhoun's right to privacy and to be free from unreasonable searches and seizures under the Fourth Amendment and article I, section 12 and section 23, of the Florida Constitution; his statutory right not to be surreptitiously recorded under section 934.03, Florida Statutes; his constitutional right to remain silent; and his constitutional right to counsel. *Calhoun*, 479 So.2d at 245.

The Fourth District followed *Calhoun* in *Cox v. State*, 26 So.3d 666 (Fla. 4th DCA 2010). While being questioned about a robbery and attempted murder, Cox invoked the right to counsel. Cox made further statements, which the trial court suppressed. During the questioning, he was assured that he was not being recorded. Eventually, an officer took another suspect (McCall) to the interview room. The officer briefly questioned McCall, who said that Cox shot the guy deliberately. The officer left and the police secretly recorded a discussion in which Cox made incriminating statements to McCall.

The trial court refused to suppress Cox's statements to McCall in the interrogation room. The district court found error, ruling that under *Calhoun* Cox had a reasonable expectation of privacy and his statement had to be suppressed. (It also held that the statement had to be suppressed on the independent ground that

McCall had been used as an agent of the state to obtain statements after Cox had invoked his right to counsel.)

In *Allen v. State*, 636 So.2d 494, 496-97 (Fla. 1994), this Court held that the trial court should have suppressed Allen's statements after his mother asked to see him, but it found no error in the refusal to suppress secret recordings of statements later made by Allen and a fellow suspect in their prison cells. Normally there is no reasonable expectation of privacy in jail absent circumstances "such as coercion or trick." *Id*. at 497. This Court stated, however, that suppression might have been required "if police had deliberately fostered an expectation of privacy in the inmates' conversation, … especially where the obvious purpose was to circumvent a defendant's assertion of the right to remain silent." *Id*.

In circumstances similar to the case at bar, the Tennessee Supreme Court ordered suppression of taped conversations. *State v. Munn*, 56 S.W.3d 486 (Tenn. 2001). Munn was a suspect in his roommate's murder. He came to the station with his parents, and was interviewed in the felony booking room. The police had a tape recorder on the table in Munn's sight, but they also were secretly taping everything in the room with hidden equipment. After the interview, Munn was taken back to the lobby, where there were further discussions and Munn agreed to another interview. He was returned to the booking room, and his family was left outside in

the hallway. As the questioning became accusatory, his mother entered the room and said she had heard what was being said.

The officers asked if Munn and his mother wanted to talk, and then left them alone in the room, closing the door. Before leaving the room, they turned off the tape recorder on the table, although the secret recording continued. Munn then made incriminating statements to his mother.

The mother left, and later Munn spoke with his father and later still with both parents, and these discussions were also secretly recorded.

The trial court denied Munn's motion to suppress the secretly taped discussions with his mother and father, and the state appellate court affirmed, holding that Munn did not have a reasonable expectation of privacy in the police interrogation room. 56 S.W.3d at 488 (summarizing lower court's opinion).

The state supreme court reversed. It found Munn had an expectation of privacy because the police created one by turning off the tape recorder, leaving the room and closing the door (*id*. at 495):

> [W]e hold that the defendant had a subjective expectation of privacy in the conversation that he had alone with his mother in the interview room. We also hold that the subjective expectation of privacy continued during the later conversations that the defendant had while alone with his father in the interview room. These later conversations also took place after the officers agreed to shut off the audio tape recorder, left the room, and closed the door to assure privacy. There were no intervening circumstances that suggest the defendant and his father were not relying on the officers' prior

> assurances or that the defendant did not have a subjective expectation of privacy in the later conversations.

The court further held this expectation was reasonable and justified. *Id*. at 495-96. *See also People v. A.W.*, 982 P.2d 842 (Colo.1999)(holding that juvenile suspect's statements to father in police interview room had to be suppressed where police created reasonable expectation of privacy).

Here, Detective Carmody fostered an expectation of privacy. Carmody brought Davis's parents into the interview room; he said he was going to close the door, and he told them to knock when they were done. Thus, Davis and his parents had the room to themselves, and telling them that they would have to knock to get the attention of police implied that their conversation would be private. Further, Davis wasn't talking to a cellmate, or to an accomplice, or even to a friend or sibling. Davis was talking to his *parents*, and one would reasonably expect that the intimacy of that relationship would be respected as private. *See In re Agosto*, 553 F.Supp. 1298, 1325 (D.Nev.1983)("There can be little doubt that the confidence and privacy inherent in the parent-child relationship must be protected and sedulously fostered by the courts."); *Calhoun*, 479 So.2d at 245 ("The law anticipates and recognizes that close relatives will aid one another in a time of strife and need…."). Instead of respecting that relationship, the police used it to circumvent Davis's invocation of his right not to speak to the police about the offense (or speak to them only with the assistance of counsel).

Because the police fostered an expectation of privacy with the "obvious purpose [of] … circumvent[ing] a defendant's assertion of the right to remain silent[,]"[11] the court should have granted the motion to suppress.

Having introduced error into the trial, the state must show that it was harmless beyond a reasonable doubt under *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986). As explained in Point III, the prosecutor contended that Davis admitted on the DVD that he had cocaine in his system, and he argued this repeatedly to the jury in closing. T19 2329, 2399, 2406-07, 2409. Courts are "less likely to find an error harmless where the State relies on the erroneously admitted evidence during its closing argument." *Tripoli v. State*, 50 So.3d 776, 781 n.3 (Fla. 4th DCA 2010)(collecting cases). And even if the state can prove the error was harmless as to guilt, it must also show that the error was harmless as to penalty. *Gonzalez v. State*, 700 So.2d 1217, 1219 (Fla.1997). The DVD harmed both the insanity defense and the mental mitigators.

The trial court's ruling violated Davis's right to be free from unreasonable searches and seizures under the Fourth Amendment, his right to remain silent under the Fifth Amendment, and his right to counsel under the Sixth Amendment. These same rights were violated under article I, sections 9, 12, and 16, of the Florida Constitution.

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[11] *Allen v. State*, 636 So.2d at 497.

POINT III THE COURT ERRED IN ALLOWING THE JURY TO USE A STATE-PREPARED TRANSCRIPT OF THE DVD BECAUSE DEFENSE COUNSEL DISPUTED THE TRANSCRIPT'S ACCURACY, AND THE TRANSCRIPT BECAME A FOCAL POINT OF THE JURY

Detective Ilarraza prepared a transcript of the DVD, and over defense objection the jury was allowed to read it while the DVD was published. Defense counsel objected further when it became clear that the jurors were focused on the transcript rather than on the DVD. The court erred in overruling these objections.

A. *Factual Background.*

This issue first came up on Wednesday afternoon, June 24, when Dr. Ribbler testified. (Ribbler was a defense witness called out of order, i.e, during the state's case.) On cross-examination the prosecutor asked Ribbler whether he had seen on the DVD Davis admitting to his mother that he had cocaine in his system. T11 1361. Defense counsel objected and said this was not on the DVD; the prosecutor said it was. T11 1362. Defense counsel said the state had provided a transcript that said something about cocaine in Davis's system, but "[w]e are not acquiescing that that's what was said, it's obviously someone interpreting it." T11 1363. The judge said he would be instructing the jury about the proper use of a transcript and that he would not be determining the transcript's accuracy, the jury would:

> THE COURT: But, again, that's a weight issue, not an admissibility issue. As long as you're representing the tape is going to come in, the transcript is not going back, it's secondary evidence, and I'll give them an instruction about that, it will be up to them to decide

> whether it is or isn't. *It's not up to me to decide*, it's up to them to decide. [T11 1364; emphasis added.]

Later that day the prosecutor said the transcript was not accurate and needed more work. T11 1411, 1414. The parties also discussed editing the DVD (*see* Point I). T11 1411. The court told the prosecutor to provide the edited DVD to counsel by noon Friday so counsel could listen to it over the weekend. T11 1412. The court spoke again about the procedure for using a transcript:

> THE COURT: Noon on Friday. And the transcript, somebody has got to authenticate the transcript. But you look at that rule, unlike other courts, other state courts and federal court, the jury is never allowed to take the transcript back to the jury room. The jury must be informed of the limited usage of the transcript. It's the video, that's what commands their attention. If the transcript is helpful or not helpful, it's up to them, it's an aid, and it's a demonstrative aid, essentially. So, it is marked, it is put in the record, but it never goes back, that's how it's done. That's why I use that instruction. So, take a look at that instruction. [T11 1412]

On Monday, June 29, defense counsel said he had gone through the transcript but had not gotten the edited DVD. T12 1427. Later that morning, the court asked the prosecutor if he had made copies of the transcript for the jurors. T12 1561. The prosecutor said, "Judge, I just have to make sure we agree on it, because this is according to Detective Ilarraza, what he heard. I gave copies to them." *Id*. The prosecutor was going to go over the transcript again with Ilarraza. *Id*. The court explained again how the transcript would be handled:

> THE COURT: While these other witnesses are on, have the copies made. Now, he's going to authenticate it through that witness,

> you certainly have the opportunity to cross-examine the witness, and I'm going to give the jury the instruction on their recollection is what commands, but in order for them to proceed with it, we'll have it marked as an exhibit, everybody will get a copy of it, including the defense attorney, myself, the court reporter, and then we'll go through it, and you'll have the opportunity to cross him on that, as to the inaccuracies of that, I'll give you wide latitude. [T12 1561-62]

That afternoon the prosecutor had the transcript and copies for the jury. T13 1659. Defense counsel objected to the transcript, stating that he had not had a chance to read it for accuracy:

> MR. HARRIS: Judge, we're objecting to the transcript as even an aid to the jurors hearing, I have not had a chance to read the accuracy. I did read the first transcript that we received last Wednesday, and that was not totally accurate. I understand Mr. Cavanagh said that they went over and enhanced it and it's more accurate, I can't verify or vouch for that, and so we're objecting to the transcript. [T13 1660]

The court said defense counsel could voir dire Detective Ilarraza about the transcript. Ilarraza then testified that he had watched the DVD several times, that he was in the room when some of it was recorded, that he watched and listened to the conversation when he wasn't, and that the transcript fairly and accurately reflected what was said on the DVD. T13 1662-64.

On cross-examination, Ilarraza testified that he had no training in transcription and that his process was "you just listen to it and you just type whatever is said." T13 1664-65. Ilarraza said he used the inaccurate transcript

previously prepared and he "would just write on the transcript itself what I heard over what was said." T13 1666.

After Ilarraza testified, the court immediately ruled:

> THE COURT: I don't think you need to be an expert in this, it's a weight issue, Mr. Harris, I think it's really for the jury to determine. So, having heard the detective indicate that he – Was he present during this?
>
> MR. CAVANAGH: Yes, he was.
>
> THE COURT: Did you recognize the voices on there?
>
> THE WITNESS: Yes.
>
> THE COURT: All right. Having recognized the voices, having been present, I think he's capable, he properly authenticated the transcript. I will give the jury the instruction that it's going to be the jury's determination as to whether the transcript is incorrect or correct. [T13 1668]

The judge stated he would instruct the jury that the transcript is only an aid, that if there is a discrepancy between the transcript and the DVD, the DVD controls. T13 1668-69.

The trial resumed. Ilarraza told the jury that "he listened to it and looked at the transcript and it's fair and accurate." T13 1705. Over defense objection, the jurors were given a copy of the 79-page transcript, state's exhibit 44A, and the court gave the limiting instruction. T13 1705-06.

The jury watched the DVD for about five minutes before court adjourned for the evening. T13 1718. The next morning the DVD played for 20 to 30 minutes when defense counsel complained that the jurors weren't watching it. T14 1749. He said the "transcript is dominating the control of the courtroom right now" and

"every head is down consistently reading the transcript." *Id*. Defense counsel renewed his objection to the jurors using the transcript. *Id*.

Asked for his response, the prosecutor said, "Judge, it's there as an aid. They can look up. You know, perhaps you could remind the jury that the video is the best evidence, that the transcript is an aid." T14 1750. Asked if he made the same observations as defense counsel, the prosecutor said, "No. I've been looking at the video, Judge. From what I can see, they look back and forth every time I look up. I don't think they're focused on the transcript." *Id*. The judge said he had no independent verification, but it was natural for people to use a transcript when it is given to them as an aid. T14 1750. Defense counsel asked the court to observe the jurors. *Id*. The court said:

> THE COURT: Whether they're reading it or not, the transcript is an aid, they can hear it. They may not be watching it, but they can hear it. How do you know they're not listening?
>
> MR. HARRIS: Oh, I think they're listening, I don't think they're watching. Their heads are down, they are reading. I am not saying that they are not listening because I can't get into their brain, but I can tell you one thing, their eyes are not on the video. [T14 1750]

The court offered to instruct the jury again that the transcript was a secondary aid. T14 1751. Defense counsel repeated that "the problem is that the aid is now becoming a dominant factor and it's controlling." *Id*.

The judge overruled the objection, but told the jury:

> Let me emphasize to you again, each of you have transcripts that you are utilizing in viewing and hearing the DVD, but remember, the transcripts are secondary, they are there to aid you. The evidence that you are to rely upon is the actual DVD, the video, as well as the audio. A lot of you are looking down a lot and listening to it, but you need to watch and listen and use the transcript as an aid, but it is no more than an aid. The evidence itself, that you are to rely upon, is that DVD. Can everyone understand that?
>
> THE JURY PANEL: Yes. [T14 1753]

Later the jury noticed that the transcript did not reflect what was on the DVD (this was at page 73 of 44A). T15 1837. The judge ordered the bailiff to collect the transcripts:

> THE COURT: All right. Why don't we put the transcripts down and we'll just watch, okay, let's put the transcripts down, everybody put them down. Deputy, collect the transcripts, please.
> All right. You can resume. [T15 1837]

When the DVD concluded, defense counsel asked for a side bar:

> MR. HARRIS: The reason I asked for the side-bar is because I want the record to be clear what just happened, is that on Page 74 of the transcript it skipped a page and the video did not coincide with the transcript, and that's why, I believe, and correct me if I'm wrong, you asked the jurors to put down the transcripts.
> THE COURT: Any objection to that?
> MR. CAVANAGH: No, sir.
> MR. HARRIS: No.
> THE COURT: I'm asking Mr. Harris. Any objection to that?
> MR. HARRIS: I certainly have no objection. I wish we had done it 74 pages earlier. That's the reason I'm renewing my motion. [T15 1840]

B. *Standard of Review*

The standard of review for the use of a demonstrative aid is abuse of discretion. *Williams v. State*, 967 So.2d 735, 752 (Fla.2007). But when the aid is a transcript of a recording, the trial court's discretion is limited by the rules and procedures announced by this Court in *Martinez v. State*, 761 So.2d 1074, 1083-88 (Fla.2000). The trial court has no discretion not to follow them.

C. *Argument*

"[T]rial courts should exercise extreme caution before allowing transcripts of recordings to be viewed by the jury." *Martinez*, 761 So.2d at 1086. If a court does allow the jury to use a transcript, then (1) the transcript must be accurate, (2) it can't go back to the jury room, and (3) it can't become the focal point of the trial. *Id*. at 1083-84.

1. *Accuracy of the Transcript*

This Court said in *Martinez* that a transcript should not be used until "the defendant has had an opportunity to verify its accuracy…." *Id*. at 1085 (*quoting United States v. McMillan*, 508 F.2d 101, 105 (8th Cir. 1974)). Ideally the parties will stipulate to the accuracy of the transcript. *Id*. at 1086. "If there is a dispute as to the accuracy, the trial court should make an independent pretrial determination of the accuracy of the transcript after hearing from persons who can properly testify as to its accuracy." *Id*.

Here, defense counsel told the court that he did not have an opportunity to verify the accuracy of the transcript. T13 1660. Moreover, counsel disputed the transcript's accuracy. The prosecutor, quoting from page 45 of the transcript, asked Drs. Ribbler, Strauss, and Day whether they heard Davis on the DVD say to his mother: "What, you know what? You might be right. That's why they did that - 'cause I have cocaine in my system. That's why they Tase me three times - I mean, I shake it off, like this." T11 1365; T16 2003; T17 2113. When Ribbler was asked this question, counsel objected and said he knew there was a transcript that reflected this but he wasn't stipulating it was accurate. T11 1363-64. (And when Strauss and Day were cross-examined about it later, counsel again objected to the prosecutor's interpretation. T16 2003; T17 2113.)

The court erred in overruling these objections. Because defense counsel disputed the transcript's accuracy, the court should have made "an independent determination of its accuracy by reading the transcript against the" DVD. *Martinez*, 761 So.2d at 1085.

Moreover, the transcript was demonstrably inaccurate. As the jury noticed, the transcript did not track the DVD. And page 45 of the transcript—the centerpiece of the state's theory that Davis's psychosis was cocaine induced—was arguably incorrect to the point of attributing to Davis the opposite of what he actually said. In fact, if jurors had focused on the DVD, without preconditioning by

the state's transcript, they could have concluded that Davis said he *didn't* have cocaine in his system. But page 45 of exhibit 44a has Davis admitting he has cocaine in his system:

> A: I a-look at the newspaper and it say, everybody who dead from taser and put cocaine, abuse it - so all of them who are dead, use - they used to, um, abuse cocaine. Foolishness that - what, you know?
>
> Q3: Hmm.
>
> A: What, you know what? You might be right. *That's why they did that – 'cause I have cocaine in my system. That's why they tase me three times - I mean, I shake it off, like this.* And then – and then - I mean, you know something – you know how me know, you know how me know a-right now, because when I am on the ground and they tase me, I mean I start to say everything. And then my say, oh man, it's him, it's him. [Emphasis added.]

The accuracy of this is problematic. A few minutes before this, Davis's mother asked Davis, "What you take, you take some kind of drug, Junior? You smoke? What you do?" T15 1789-90; ST 293-94; exh. 44: 1:43:55. As pointed out *infra* at page 64, Davis responded by saying, "drugs," as if the notion were distasteful, and then said, "Come on, Man [or mom], I don't (unintelligible)." *Id*. Davis's mother took this answer to be a denial because she then asked, "So what are you thinking?" *Id*. If Davis had said to his mother just minutes later that he *did* have cocaine in his system, his mother—so interested in the cause of Davis's behavior—would have followed up on that. She didn't follow up on that because he didn't say that he had cocaine in his system.

Page 45 is also inconsistent with Davis's syntax. The following version, which is based on a close review of state's exhibit 44 (at 1:50:28), is more likely correct:

Davis: I look at the newspaper and it say, everybody who dead from-a taser and put - cocaine abuse in it - so all of them who are dead, use – they, um, used to, um, abuse cocaine.

Newspapers report that people who died after being tasered had cocaine in their system.

That's foolishness.

Foolishness that.

But you know what?

But the newspapers might be right about the lethal effects of cocaine. Davis uses the conjunction "but" to acknowledge the contrary position.

Mrs. Davis: Hmm.

Davis: They might be right. That's why them dead off[12] because [they] have cocaine in [their or the] system. That's why they tase me three times - I mean, I shake it off, like this.

That's why they died ("them dead off"—see note 12) because they had cocaine in their system. The pronouns are bracketed because unclear. The state claimed Davis said "*I* have cocaine in *my* system." But that can't be heard clearly. Nor does it make sense since Davis acknowledged the papers might be right that people on cocaine die from tasers.

And then – and then - I mean, you know something – you know how me know, you know how me know a-right now, because when I am on the ground and they tase me, I mean I start to say everything…. [This paragraph is from state's 44a.]

That's why I was able to shake off being tasered [i.e., because I didn't have cocaine in my system].

[12] *See Dictionary of Jamaican English* (F.G. Cassidy & R.B. Le Page eds., 2d ed. 2002) 145 (defining "dead" as, "By ellipse of the verb *be*, so that the adjective carries the force of the verb: to be dead, to die" and giving examples: "When they [negroes] were old and 'ready to dead'" and "If hell get any more fire the people will faint and dead as they reach.") and 328 (defining "off" as "following a verb and indicating completion of the action" and giving example: "When him baptize off all of dem, him siddown…"; and "following a verb, making it more emphatic").

The point here is not to prove conclusively that this version is the correct one. Rather, it's to show that defense counsel's complaints about the accuracy of the transcript—and this portion in particular—were well-founded. And as explained below, allowing the jury to use a transcript that reflects one party's interpretation of a disputed videotape or recording prejudices the other party. This is because the transcript irrevocably shapes the jurors' perception of the recording. Further, it's not enough to give a limiting instruction, to instruct the jury, in effect, "now that I have shaped your interpretation of the recording with my own, feel free to interpret it yourself without regard to my interpretation." This is impossible; it's a bell that can't be unrung. *See Petion v. State*, 48 So.3d 726, 736 (Fla.2010)(recognizing "innate inability of the human mind to obliterate what it has heard." Citation and emphasis omitted.)

The court didn't exercise "extreme caution" before allowing the jury to use the transcript. And the transcript should not have been used until counsel had an opportunity to verify its accuracy. Further, because the transcript's accuracy was disputed, the court should have made an independent determination of its accuracy. *Martinez*, 761 So.2d at 1086. Instead, the judge said early on, "It's not up to me to decide, it's up to them [the jury] to decide." T11 1364.

Moreover, Ilarraza did not properly authenticate the transcript. He was in the room with Davis only briefly. He was not a party to the conversation Davis had

with his parents, and so he was unlike the witness in *Martinez* who could testify that the transcript was an accurate reflection of the conversation *she participated in* with the defendant. 761 So.2d at 1083. Nor did Ilarraza testify as the detective did in *Martinez* that "the quality of what he heard as the conversation was taking place was better than the recorded version." *Id*. Ilarraza overheard the discussion but did not participate in it. Such persons may not verify the accuracy of a transcript unless they "can establish that the quality of the conversation that they overheard or listened to was better at the time they overheard it than the quality of the tape recording." *Martinez*, 761 So.2d at 1086. This was not established at bar. In short, Ilarraza was "in no better position than the jury to determine the contents of the tape recording." *Id*. at 1087 (*quoting Harris v. State*, 619 So.2d 340, 343 (Fla. 1st DCA 1993)). This is especially true given that Ilarraza prepared the transcript four years after the event.

This Court in *Martinez* cautioned "that the trial court should not allow the validity of the transcript to be bolstered by testimony from those who simply listened to the tape after it was made." *Martinez*, 761 So.2d at 1087. That is in essence what happened here.

2. *Focal Point*

"One of the primary dangers of allowing the jury to use an unadmitted transcript is that it may become the evidence that the jury relies upon rather than

the tape itself[.]" *Id*. at 1084. This is especially harmful when there are disputed portions of the recording (like the dispute about page 45 above). This is because:

> [J]urors may substitute the contents of the more accessible, printed dialogue for the sounds they cannot readily hear or distinguish on the tape and, in so doing, transform the transcript into independent evidence of the recorded statements. A related risk arises when a transcript attributes incriminating statements to a defendant that the defendant does not admit making.

Martinez, 761 So.2d at 1084 (citation and quotation omitted).

This danger is even greater when the transcript is of a *video* recording. An enormous amount is communicated to us nonverbally, and our law recognizes this. Jurors are instructed, for example, to consider "how the witnesses acted, as well as what they said." Fla. Std. Jury Instr. (Crim.) 2.04. An important principle of appellate review—the deference given to a trial court's factual findings—is premised on the trial court's superior position "to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses." *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976).

The information conveyed by bearing, demeanor, and body language is lost if jurors have their noses in a transcript. In a federal case, for example, the court upheld the prosecutor's peremptory challenge of a blind juror on the ground that "a substantial amount of the government's evidence is either photographs or videos, the types of things, for the juror to understand the full impact, the juror must see." *United States v. Watson*, 483 F.3d 828, 834 (D.C. Cir. 2007).

There is an important example of this here. When Davis's mother asked, "What you take, you take some kind of drug, Junior?", Davis's reaction was visceral and unfeigned: he appeared to take offense at the question and said "drugs" as if the notion were distasteful. Exh. 44: 1:43:55. The jurors missed this evidence if they were reading the transcript. (In fact, exhibit 44a, p. 39, doesn't reflect that Davis said "drugs," though it is audible on the DVD.)

Finally, it is not dispositive that the transcript was not sent back to the jury room, for the jurors carried into their deliberations their memories and first impressions formed as they read the transcript.

This case was about Davis's mental state at the time of the killings. The state contended his irrational acts were the product of cocaine psychosis. It buttressed and even bootstrapped its claim with its transcript containing a disputed version of Davis's statements regarding cocaine. The state cannot prove beyond a reasonable doubt that the error in allowing the jury to use a disputed and demonstrably inaccurate transcript was harmless. A new trial should be ordered.

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

The court found the aggravating circumstance that the crime was committed in a "cold, calculated and premeditated" manner (CCP). R5 794-97. Over objection, the jury was instructed on CCP. T21 2558-63, 2875. This was error.

A. *Factual Background*

About 15 minutes before Davis arrived at Proby's apartment, Proby called Davis and Hermione Harrell listened in. T9 918. Harrell could hear Davis yelling at someone and heard him say, "come out." T9 918. Davis said something to Proby that he led her to say, "He's going to come kill me." T8 919-20.[13]

A few minutes before he arrived at Proby's apartment, Davis stopped his car in the middle of a busy intersection. With horns honking at him, Davis got on top of his car and started shooting into the air. T9 1127, 1135. He got back in and drove the short distance to Proby's apartment.

At Proby's apartment, Davis left his car running and music blasting. T8 910. Asked if that was unusual in light of what happened, witness Jason Rolle said, "I mean, if someone is coming to commit a crime, why would they blast the music[?]" T8 910. Rolle said Davis looked like he had been in a fight and was angry ("he looked pissed off") T8 912. Rolle also said Davis "had a serious face, like he was in the army or something." T8 902, 906.

Harrell said Davis "looked like he was smoking or drinking, or on something. I've never seen him like that, even the times that I've seen him." T8

[13] As explained in Point V, it does not appear that Harrell or Proby were very frightened by whatever it was Davis said. They made no effort to leave. Harrell responded by sending Davis a text message that said, "Sorry for disturbing you, this is your homegirl Tish, call me when you get this message." T8 920. And Proby opened the door and let Davis in. T8 922, 938.

923. Harrell said that Davis was acting both "like he was crazy" and like he was on something. T8 943. Before killing Proby, Davis repeatedly yelled at her, "You set me up, you set me up." T8 922, 938.

According to the state, Proby's murder was "fueled by drugs and rage and revenge." T19 2311. The state said that when Davis arrived at Proby's apartment "he had been beaten up, he had blood coming from his lip, and he had been freshly beaten up." T19 2312. The state argued that Davis was under the effects of "rage and unrestrained passion" and "uncontrollable anger." T19 2313-14.

All the experts agreed—even the state's expert—that Davis acted in a state of psychosis.[14] Based on the undisputed facts, the court found that Davis was under the influence of extreme mental or emotional disturbance, and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired R5 798-800. Nonetheless, the court instructed the jury on the aggravator of cold, calculated premeditation, and found it in the sentencing order. In similar circumstances, this Court found this aggravator unsupported by the evidence, and those holdings should be followed at bar.

B. *Standard of Review*

[14] Drs. Ribbler, Strauss, Day, and Brannon testified that it was an organic—not drug induced—psychotic disorder. T11 1306-07; T16 2042-43; T17 2098-2100; T24 2845-46. The state's expert, Dr. Butts, testified that the psychosis was drug induced, but she could not rule out an organic psychotic disorder. T17 2225; T26 2978.

This Court established the following standard of review for a trial court's ruling on an aggravating factor:

> The standard of review for a trial court's ruling on an aggravating factor is whether competent, substantial evidence supports the trial court's finding. This Court has concluded that "competent substantial evidence" is tantamount to "legally sufficient evidence" and "[i]n criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt."

Williams v. State, 967 So.2d 735, 764 (Fla.2007)(c.o.). Under this standard, this Court should strike CCP at bar.

C. *Argument*

The CCP aggravator applies to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder." *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990). The aggravator "normally, although not exclusively, applies to execution-style or contract murders." *Douglas v. State*, 575 So.2d 165, 167 (Fla.1991). There is a four-part test to determine whether the CCP aggravating factor is justified: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation

(premeditated); and (4) the defendant must have had no pretense of moral or legal justification. *Williams v. State*, 37 So.3d 187, 195 (Fla.2010).

The court erred in instructing the jury on the circumstance and applying it at bar. The record does not establish that Davis acted with cool and calm deliberation, that he had a careful plan or prearranged design, or that he exhibited heightened premeditation.

1. *Cool and Calm Reflection*

The state's theory was that Davis killed Proby out of "rage and unrestrained passion" and "uncontrollable anger." T19 2313-14. Simply stated, this disproves CCP because killings based on rage are not CCP. As noted above, "the killing must have been the product of cool and calm reflection and not an act prompted by … a fit of rage (cold)." *Williams*, 37 So.3d at 195. In *Geralds v. State*, 601 So.2d 1157, 1164 (Fla.1992), this Court held that a killing done in rage and sudden anger was not CCP. And in *Williams*, 967 So.2d at 764, this Court struck CCP because one of the state's theories was that the murder was prompted by rage.

This Court set aside CCP because of intensity of emotion and anger in *Richardson v. State*, 604 So.2d 1107 (Fla.1992). There the victim Irene Newton made Richardson move out of the trailer they shared. He returned several times and eventually she called the police. After the police left, Richardson came back and said he was going to kill her. The next day he returned and they fought. When

Newton left the trailer, Richardson followed and picked up a shotgun he had placed nearby. He shot and killed Newton and then tried to shoot himself.

This Court said that although the murder was "calculated, it was not 'cold,'" and so CCP was not proved (*id*. at 1109):

> Richardson's actions were spawned by an ongoing dispute with his girlfriend, one that involved an obvious intensity of emotion. *The eyewitnesses even testified that Richardson appeared angry, crazy, or mean when he shot Newton.* Accordingly, the element of coldness, i.e., calm and cool reflection, is not present here. The factor of cold, calculated premeditation thus is not permissible. [Emphasis supplied.]

Davis's psychosis also negated the cold component of CCP. The court found that at the time of the killing he was under the influence of extreme mental or emotional disturbance, and that his ability to appreciate the criminality of conduct or to conform his conduct to the requirements of law was substantially impaired. Such a profound disturbance is contrary to a finding that he acted in a calm, reflective manner. In *Spencer v. State*, 645 So. 2d 377, 384 (Fla.1994), this Court said: "Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator."

Extreme emotional distress negated the cold element in *Maulden v. State*, 617 So.2d 298 (Fla.1993). In that case, Maulden killed his ex-wife, Tammy, and her boyfriend. The day before the murders he left a threatening message with the boyfriend's father. On the day of the murders Maulden "woke up and decided to

kill Tammy Maulden." He drove to her apartment; then he left and dug up a gun he had buried earlier in the day. He returned to the apartment, crawled through a bathroom window, and shot his ex-wife and her boyfriend. This Court held that the killings were the product of Maulden's extreme emotional distress and not "cold."

This Court in *Cannady v. State*, 620 So. 2d 165, 170 (Fla.1993), disapproved application of the circumstance even where the defendant apparently contemplated the murder for a period of months. The evidence there was that Cannady thought that Gerald Boisvert had raped his wife. After brooding over the matter for several months, he shot his wife and then had his son drive to Boisvert's house.

On the way, Cannady told his son he was going to kill Boisvert. When they arrived, Boisvert was standing in his front yard. Cannady asked Boisvert for a beer to lure him to his truck. When Boisvert approached, Cannady shot him in the head several times. Cannady reloaded his gun, got out of his truck, and shot Boisvert again. In all, Cannady shot Boisvert seven times.

This Court rejected the judge's finding of the circumstance (*id*. at 170):

> Under the circumstances, the murder of Boisvert was not "cold," although it may have been "calculated." On the facts of this case, "[t]here was no deliberate plan formed through calm and cool reflection, only mad acts prompted by wild emotion." *Santos v. State*, 591 So. 2d 160, 163 (Fla.1991) (citation omitted). The emotional distress apparent from this record mounted over a two-month period, during which time Cannady continued to believe that Boisvert had raped his wife, causing her physical and emotional pain. It reached a pinnacle after Cannady killed his wife and set out to kill the apparent cause of her suffering. The trial court's findings that Cannady was

> under the influence of mental or emotional disturbance at the time of the murders and that he was an alcoholic suffering from brain atrophy were supported by expert testimony and further support the conclusion that Boisvert's murder was not the result of "cold" deliberation. Consequently, we conclude that this aggravating factor was not established for Boisvert's murder.

The state also contended that Davis was on a cocaine binge. But excessive drug use can negate CCP. In *White v. State*, 616 So. 2d 21, 22-23 (Fla.1993), White broke into the home of Scantling, who had a restraining order against him, and attacked her and a friend with a crowbar. Jailed for this attack, he said he would kill Scantling if he bonded out.

White bonded out. He got a shotgun at a pawn shop, and a half hour later he found Scantling, shot her as she tried to run, then went up to her and shot her again, telling a witness, "I told you so." Although the pawnbroker and the taxi driver who picked him up said he appeared sober, his sister said he was intoxicated, and a friend said he was high on cocaine. At penalty phase, he put on evidence of his self-report of extensive drug use. *Id*. at 22-23.

The trial court found CCP in sentencing White. It also found that the murder occurred while he was high on cocaine and "while he (questionably) was under the influence of extreme mental or emotional disturbance" and that his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (questionably) was substantially impaired." *Id*. at 24. This

Court struck CCP because there was evidence of excessive drug use and the judge explicitly found that White was on cocaine at the time of the murder. *Id*. at 25.

From the foregoing, the court erred in finding the circumstance since there was substantial unrebutted evidence of Davis's disturbed mental state that established both statutory mental-mitigating circumstances and refuted the "cold" element of the circumstance.

2. *Careful Plan or Prearranged Design*

Mental mitigating circumstances also "weigh against the formulating of a careful plan to kill[.]" *Besaraba v. State*, 656 So. 2d 441, 445 (Fla.1995). In *Santos v. State*, 591 So.2d 160, 163 (Fla.1991), after threatening to kill her two days before, Carlos Santos purchased a gun and took it to Irma Torres's home. Seeing her and her child, he chased them down and shot them. This Court struck the CCP circumstance, reasoning that, although Santos "acquired a gun in advance and had made death threats—facts that sometimes may support the State's argument for cold, calculated premeditation[,]" CCP was not present because there "was no deliberate plan formed through calm and cool reflection, … only mad acts prompted by wild emotion." *Id*. at 162-63. This Court so ruled even though the trial judge rejected both statutory mental mitigating circumstances.

Here, the events leading up to the killing belie a finding of "careful plan or prearranged design." Davis did not procure the gun with the intention of

committing this offense; he bought it by chance when his friend offered it for sale. T8 884, 897-98. *Compare Bell v. State*, 699 So.2d 674, 677 (Fla.1997)("Our review of the record shows that appellant told several people that he planned to kill Theodore Wright, and he purchased a gun for that purpose."). On the day of the killing, Davis was beaten up, and in his disordered mind he associated this with Proby. Davis and Proby had had no difficulties or ill-feelings before that. And shortly before the killing, Davis could not have done much more to draw attention to himself. Therefore, the killing was not the product of a careful plan or prearranged design; it was the product of an unbalanced, psychotic mind. As in *Santos* there "was no deliberate plan formed through calm and cool reflection, … only mad acts prompted by wild emotion." *Id*. at 162-63.

3. *Heightened Premeditation*

"Heightened premeditation" is something more than that necessary to prove the premeditation prong of first-degree murder. *Jackson v. State*, 648 So.2d 85, 89 (Fla.1994). In *Almeida v. State*, 748 So.2d 922 (Fla.1999), for example, Osvaldo Almeida was kicked out of a restaurant for underage drinking (he was 20). Almeida was "acutely embarrassed" and several hours later he obtained a handgun, returned to the restaurant, and shot the manager who had kicked him out. Because Almeida had been drinking, had a history of acting impulsively, and both of the mental mitigating circumstances had been established, this Court found no

heightened premeditation. *Id*. at 932-33. *See also Mahn v. State*, 714 So.2d 391, 398 (Fla.1998)("This rash and spontaneous killing evidenced no analytical thinking, no conscious and well-developed plan to kill. Thus, we find insufficient evidence of the heightened premeditation required to establish beyond a reasonable doubt a finding of CCP.").

D. *The error is not harmless*.

This Court held in *Mahn*, 714 So.2d at 398, that instructing the jury on CCP was not harmless error where the state argued CCP in closing and the jury recommended a death sentence by a vote of eight to four. The same circumstances are present here. The prosecutor argued that the CCP elements were established during its closing penalty phase argument (T24 2881-82), and the jury recommended a death sentence for Proby's murder by a vote of eight to four. As in *Mahn*, this Court should order a new penalty phase and resentencing.

The error in instructing on this aggravator denied Davis due process and a fair and reliable sentencing under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 9 and 17, of the Florida Constitution.

POINT V THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL

The court found the aggravating circumstance that the crime was especially heinous, atrocious, or cruel (HAC). R5 792-94. Over objection, the jury was instructed on HAC. T21 2549-53, 2875. This was error.

A. *Factual Background*

Davis and Harrell dated once, and Harrell introduced Davis to Proby. T8 914-15. Although the precise nature of Davis and Proby's relationship was not established, they did not seem to have any ill-feelings towards each other. In fact, that night Proby called Davis. T8 918. Inexplicably, Davis said something to Proby that he led her to say, "He's going to come kill me." T8 919-20.

Harrell told Proby she should call the police, but Proby didn't call the police and she didn't flee the apartment. T8 919. Harrell responded by sending Davis a text message that said, "Sorry for disturbing you, this is your homegirl Tish, call me when you get this message." T8 920.

Thus, it does not appear that Proby was terrified by whatever it was Davis said. This might have been because Davis was generally peaceful, at least as described by the witnesses. Randy Redick, Jr., for example, said Davis was polite, respectful, and not an excitable person. T8 894-95. Davis's high school friend, Kerron Matthew, testified that although he and Davis were picked on in school

Davis was never violent. T23 2757. Dr. Brannon said that because Davis's childhood was "chaotic and abusive and neglectful," he would have expected Davis to have no friends and have been in trouble for fighting, abusing animals, and the like. T24 2833, 2838. But Dr. Brannon saw the opposite: Davis had friends and had not been in trouble. T24 2837-38. And Dr. Butts testified that Davis's behavior on the day in question was not consistent with his behavior before or since, and that he was suffering some type of psychosis. T26 2978.

In any event, Proby was not so scared as to refuse Davis entry: she opened her apartment door and let him in. T8 922, 938. When Davis entered, he immediately accused her of setting him up and demanded that she get down, which she did. T8 923-24. With her back turned towards him, Davis shot Proby, killing her instantly.[15] T8 925.

The court instructed the jury on the aggravator of especially heinous, atrocious, or cruel and found it in the sentencing order. In more egregious circumstances, this Court found this aggravator unsupported by the evidence, and those holdings should be followed at bar.

B. *Standard of Review*

[15] Proby was shot 23 times, but the medical examiner testified that the head wound killed Proby instantly and was likely the first shot, a fact the state conceded in its sentencing memorandum. T10 1209-11, 1215-16; R5 712. The court found in mitigation that Proby was rendered unconscious immediately. R5 803.

As with CCP, the standard of review this Court applies to a claim regarding the sufficiency of the evidence to support an aggravating circumstance is that of competent, substantial evidence. *Guardado v. State*, 965 So.2d 108, 115 (Fla.2007). The state must prove the aggravator beyond a reasonable doubt. *Williams v. State*, 967 So.2d 735, 764 (Fla.2007).

C. *Argument*

Since every murder can be characterized as especially heinous, atrocious or cruel, the HAC aggravator must be defined in such a way as to avoid an overboard and unconstitutional application. *Maynard v. Cartwright*, 486 U.S. 356 (1988). This Court defined HAC in *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

This Court has said that HAC is "appropriate in torturous murders involving extreme and outrageous depravity" or those in which the perpetrator "exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another." *Santos v. State*, 591 So.2d 160, 163 (Fla.1992)(*citing Cheshire v. State*, 568 So.2d 908, 912 (Fla.1990)). The murder "must be *both*

conscienceless or pitiless *and* unnecessarily torturous to the victim." *Richardson v. State*, 604 So.2d 1107, 1109 (Fla.1992)(*citing Sochor v. Florida*, 504 U.S. 527 (1992)(emphasis in original)).

A murder by shooting is generally not HAC unless accompanied by additional facts that separate it from the norm of premeditated murders. *Diaz v. State*, 860 So.2d 960, 967 (Fla.2003). In *Diaz*, the victim saw Diaz shoot at his daughter as she fled in her car. Diaz chased the victim into his house and held him at gunpoint. The victim was saying, "Calm down, put it down, come on, calm down, take it easy." But Diaz pointed the gun directly at his chest and pulled the trigger. The gun, however, was out of ammunition and only clicked. The victim "visibly relaxed, but Diaz reloaded the gun." The victim ran into the bathroom and Diaz followed. As the victim turned to face him, Diaz shot him three times. He returned about a minute later and shot him two more times.

The victim was shot in the abdomen, upper chest, and back of the head, but the medical examiner could not determine the order in which the shots were fired. This Court struck HAC because "the murder was carried out quickly, the medical examiner could not determine the order in which the shots had been fired, and the fact that the gun was reloaded does not, without more, establish an intent to inflict a high degree of pain or otherwise torture the victim." *Id*. at 968.

Like *Diaz*, this Court rejected HAC in *Santos*, *supra*, because the murders were carried out quickly. Santos had a gun and he threatened to kill the victim. Two days later Santos saw the victim walking down the street with her 22-month-old daughter. When the victim saw Santos she ran. Santos caught up with her and shot her in the hand and head, and shot the victim's daughter in the head.

This Court has also set aside HAC where the mental anguish was of short duration and there was no protracted suffering. In *Rimmer v. State*, 825 So.2d 304 (Fla.2002), Rimmer and his accomplice robbed a stereo store. They bound two employees with tape and had them lie down. After they loaded their car, Rimmer said to one of the employees, "You know me." The employee denied that he did. Rimmer then said, "You do remember me" and walked up to him and shot him in the head. This caused one of the customers to jump up. Rimmer told him to lie back down. Rimmer then walked over to the second employee and shot him in the head. This Court rejected HAC as applied to the murder of either employee, and said this about its application to the murder of the second employee (*id*. at 329):

> [He] was killed within a very short time (perhaps only seconds) after Knight and, therefore, would have experienced only a very short period of mental anguish, if any at all. All of the cases wherein we have approved a finding of HAC, however, evince longer and significantly more protracted suffering, as well as additional cruel acts not present (or even analogous to those) in the instant case.

Here, the court found that this was not a quick murder because Proby's "immeasurable fear and terror" began when Davis threatened her over the phone:

> There can be no doubt that Ms. Proby suffered immeasurable fear and terror as the events played out, from the inception when defendant stated on the telephone that he was going to come kill her, to the point when he showed up at the door with the rifle in hand. This was followed by the Defendant, while still armed, making accusatory statements at Ms. Proby and ordering her to the floor. The Court finds that the killing was undoubtedly conscienceless, pitiless, and unnecessarily torturous. [R5 794]

But the judge's conclusion here is not supported by the evidence. If Proby had been in "immeasurable fear and terror" when Davis spoke to her on the phone, she would have fled the apartment or called the police, or both. She did neither. And if she had been in "immeasurable fear and terror" she would not have opened the door and let Davis in the apartment.

An aggravating factor can be proved with circumstantial evidence, but "the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." *Williams*, 37 So.3d at 196-97. Proby was undoubtedly afraid once Davis entered her apartment, but the murder happened too quickly for it to be torturous or otherwise set it apart from the norm of premeditated murders. *Compare Allred v. State*, 55 So.3d 1267 (Fla.2010) (HAC applied where victim hid in shower while defendant, who had previously threatened to kill her, shot and killed victim's friend, then shot and wounded another friend, before finding and shooting her); *McGirth v. State*, 48 So.3d 777 (Fla.2010)(HAC applied where victim was shot in chest and begged for her life;

defendant ignored her pleas and 15 to 30 minutes later, shot victim's husband and then killed victim).

Moreover, Davis's behavior was so unexpected and out of character there is a reasonable hypothesis that Proby doubted to the end that Davis would actually shoot her. In any event, she had less reason to fear that she would be shot than the second employee did in *Rimmer*, or the victim in *Diaz*, who saw the defendant reloading the gun, or the victim in *Santos*. Like the victim in *Rimmer*, Proby "would have experienced only a very short period of mental anguish, if any at all." And as in *Diaz* and *Santos*, the murder was carried out quickly. There are no additional facts that separate this case from the norm of premeditated murders.

The Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions require that aggravators "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Porter v. State*, 564 So. 2d 1060, 1063-64 (Fla.1990) (*quoting Zant v. Stephens*, 462 U.S. 862 (1983)). The use of HAC at bar would violate this rule.

The error in instructing on this aggravator denied Davis due process and a fair and reliable sentencing under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 9 and 17 of the Florida Constitution.

POINT VI THE DEATH SENTENCE IS NOT WARRANTED BECAUSE THIS WAS NOT THE MOST AGGRAVATED AND LEAST MITIGATED OF MURDERS

A. *This Court has established proportionality review as a safeguard to ensure that the death penalty is imposed only for the most aggravated and least mitigated of murders.*

Because the death penalty is a "unique punishment in its finality and in its total rejection of the possibility of rehabilitation[,] … its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So.2d 954, 965 (Fla.1996)(*citing State v. Dixon*, 283 So.2d 1, 7 (Fla.1973)). This Court decides whether a death sentence is proportionate by "compar[ing] 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). Even if the offense is one of the most aggravated, the death penalty will not be upheld if the offense is not also one of the least mitigated. *Id*. This Court summarized proportionality review in *Offord v. State*, 959 So.2d 187, 191 (Fla.2007), as an analysis to determine if the murder is among both the most aggravated and the least mitigated:

> We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. In other words, proportionality review is not a comparison between the number of aggravating and mitigating circumstances. [Citations and quotation marks omitted.]

B. *A qualitative review of the underlying basis of the aggravating and mitigating circumstances shows this is not among the most aggravated and least mitigated of murders*.

A comparison of Davis's case to other cases shows that this is not the most aggravated and least mitigated of murders.

In *Robertson v. State*, 699 So.2d 1343, 1344-45 (Fla.1997), the facts were as follows:

> .... On Monday, September 2, 1991, the nude, badly decomposed body of Carmella Fuce was found in the bedroom of her Tallahassee apartment. Ms. Fuce was found on her back. A pair of pants were tied around her head and a brassiere was stuffed in her mouth. A teddy bear was between her legs, and an electrical cord was around her neck. The victim's hands were tied behind her back with a piece of cloth and an electrical cord. According to the medical examiner, the cause of death was strangulation asphyxia. The medical examiner further testified that the victim's brassiere had been stuffed down her throat with such force that if she had not been strangled, the gag could have caused her death.
>
> Written on the bedroom wall were the words "Saten sic, Nigger, Fuck, FSU, FAMU, KKK, ANM." The handwriting on the wall matched samples later submitted by Robertson. Ms. Fuce's car was found in the apartment complex parking lot, with the driver's door unlocked. A single key was in the ignition and the anti- theft device on the steering wheel was unlocked.

The trial court found two aggravating circumstances: HAC and capital felony committed during the course of a burglary. Despite these circumstances, this Court found the death penalty disproportionate in light of the substantial mitigation (*id*. at 1347):

> Although the trial court found two valid aggravating circumstances, we find that death is not proportionately warranted in

> light of the substantial mitigation present in this case: 1) Robertson's age of nineteen; 2) Robertson's impaired capacity at the time of the murder due to drug and alcohol use; 3) Robertson's abused and deprived childhood; 4) Robertson's history of mental illness; and 5) his borderline intelligence. When compared to other death penalty cases, death is disproportionate under the circumstances present here. *Cf. Nibert v. State*, 574 So.2d 1059 (Fla.1990) (death penalty not proportionately warranted where heinous, atrocious, or cruel aggravator was offset by substantial mitigation that included abused childhood, extreme mental and emotional disturbance and impaired capacity due to alcohol abuse). For no apparent reason, Robertson strangled a young woman who he believed had befriended him. It was an unplanned, senseless murder committed by a nineteen-year-old, with a long history of mental illness, who was under the influence of alcohol and drugs at the time. This clearly is not one of the most aggravated and least mitigated murders for which the ultimate penalty is reserved. *See Kramer v. State*, 619 So.2d 274, 278 (Fla.1993).

In *Kramer v. State*, 619 So.2d 274, 278 (Fla.1993), the court found HAC and prior violent felony and the statutory mitigators that Kramer was under the influence of mental or emotional stress and that his ability to conform to the requirements of law was impaired. This Court reduced the sentence to life:

> The factors establishing alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison are dispositive here. While substantial competent evidence supports a jury finding of premeditation here, the case goes little beyond that point. The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk. This case hardly lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s. Our law reserves the death penalty only for the most aggravated and least mitigated murders, of which this clearly is not one. Accordingly death is not a proportional penalty here. [Citation omitted.]

In *Fitzpatrick v. State*, 527 So. 2d 809 (Fla.1988), a case involving *five* aggravating circumstances, this Court also reduced the sentence to life (*id*. at 812):

> Thus, the trial judge's findings of the mitigating circumstances of extreme emotional or mental disturbance, substantially impaired capacity to conform conduct, and low emotional age were supported by sufficient evidence. In contrast, the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent. Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer. We do not believe that this is the sort of "unmitigated" case contemplated by this Court in *Dixon*. Indeed, the mitigation in this case is substantial.

In *Almeida*, *supra*, the trial court found two aggravators, CCP and prior violent felony for committing two prior murders. This Court struck CCP and held the death penalty disproportionate—notwithstanding Almeida's commission of two prior murders—because of the substantial mitigation, including the statutory mitigators of extreme mental or emotional disturbance, impaired capacity to appreciate the criminality of his conduct, and age of the defendant at the time of the crime (748 So.2d at 933-34):

> The trial court additionally found three statutory and many nonstatutory mitigators, including a brutal childhood and vast mental health mitigation. This Court has reversed the death penalty in cases where the extent of mitigation was comparable or less, even in the face of significant aggravation. *See, e.g.*, *Robertson v. State*, 699 So.2d 1343 (Fla.1997); *Nibert v. State*, 574 So.2d 1059 (Fla.1990); *Fitzpatrick v. State*, 527 So.2d 809 (Fla.1988). In addition to the mental health mitigation in the present case, the defendant was twenty years old at the time of the crime, and the present crime and the prior capital felonies all arose from a single brief period of marital crisis that spanned six weeks. We note that the jury vote was seven to five.

> On this record, we cannot conclude that the present crime is one of the least mitigated murders. In fact, the record shows just the opposite-i.e., that this is one of the most mitigated murders the Court has reviewed. Accordingly, we find Almeida's death sentence disproportionate.

In the case at bar, the trial court found CCP, HAC, and contemporaneous conviction of a violent felony in aggravation.[16] R5 791-98. Davis argues that CCP and HAC are not established. But even with CCP and HAC, a qualitative review of this case shows that this is not the most aggravated and least mitigated offense.

The court found four statutory mitigators: extreme mental or emotional disturbance, impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law, no significant criminal history, and age of the defendant at the time of the crime (Davis was 21). R5 798-801. The court also found in mitigation that Davis: grew up in a poor environment; was abandoned as a child several times; was physically and mentally abused; came from a broken home; lacked parental support and guidance; loves and cares for his family; can be rehabilitated; and is not a psychopath, nor does he have an anti-social personality disorder. R5 801-804.

[16] The court also found in aggravation that the offense was committed during a burglary, but it gave that aggravator slight weight. R5 797. Before 2001 this would not have been a burglary. *Delgado v. State*, 776 So.2d 233, 240 (Fla.2000). That year the Legislature amended the definition of burglary to include an invitee's commission of a forcible felony in a dwelling or structure. *See* § 810.015, Fla. Stat. (2001); ch. 2001-58, § 1, at 282-83, Laws of Fla.

In proportionality review, this Court gives special emphasis to cases with substantial mental mitigation.[17] This emphasis is a logical part of this Court's review. There is a tendency of jurors to treat mental illness as an *aggravator* not a mitigator. *See* Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L.Rev. 785, 816 & n. 227 (2009)(citing studies that show jurors tend to view mental illness as an aggravating, not a mitigating factor). This Court's review safeguards against that tendency.

There was substantial mental mitigation here. In *Almeida* this Court characterized Almeida's mental health mitigation as "vast." 748 So.2d at 933. This case has as much if not more. The court found that Davis committed the offense while he was under the influence of extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.

It was undisputed that Davis was psychotic at the time of the offense; the only dispute was its cause. Four experts, Drs. Ribbler, Strauss, Day, and Brannon,

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[17] *See, e.g., Green v. State*, 975 So.2d 1081, 1090 n.3 (Fla.2008)(collecting cases); *Sager v. State*, 699 So.2d 619, 623 (Fla.1997); *Voorhees v. State*, 699 So.2d 602, 614 (Fla.1997); *Knowles v. State*, 632 So.2d 62, 67 (Fla.1994); *White v. State*, 616 So.2d 21, 25-26 (Fla.1993); *McKinney v. State*, 579 So.2d 80, 85 (Fla.1991); *Nibert v. State*, 574 So.2d 1059, 1063 (Fla.1990); *Farinas v. State*, 569 So.2d 425, 431 (Fla.1990).

testified that Davis's psychosis was organic.[18] Dr. Butts thought it was substance-induced psychosis. T26 2978-79. Nonetheless, Dr. Butts also testified, "I cannot rule out that he was suffering from an organic psychotic disorder." T26 2978.

The DVD vividly corroborates the experts' testimony. Davis is often unintelligible (e.g., "They beat me up, but it's all good, I feel that love, I feel the love, love, one love; black, white, Arab, Chinese, Indian, Jamaican, Haitian." T15 1825.). He talks about scripture, thrones, David and Solomon, saints, and how the AR-15 is his rod and his staff (referring to Psalm 23, a Psalm of David). At one point, Davis's father asked him, "Do you know who I am?" T15 1785.

Police and jail personnel also corroborated the expert testimony. Officers Hagerty and Jenkins said Davis appeared to be either under the influence of drugs or was mentally ill. T10 1229, 1241; T13 1636-37. Officer Levy said that judging by his behavior it was possible he was mentally ill or psychotic. T10 1257. Officer Connor said he was rambling on in a "religious type overtone," and that he said something to the effect that he was directed do to this and that Jesus would forgive him. T13 1643, 1650.

Victoria Corcoran, an emergency medical technician at the jail, assumed Davis had some sort of psychological problem; and she did not think he was faking symptoms or trying to appear mentally ill. T13 1597, 1601. Curtis Dubuque, a

[18] T11 1306-07; T16 2042-43; T17 2098-2100; T24 2845-46.

corrections deputy, testified, "There was something obviously -- to me there was something wrong with him." T15 1861.

Also relevant to proportionality analysis is whether there is a causal link between the mental health mitigation and the offense. *See Offord*, 959 So.2d at 193; *Miller v. State*, 373 So.2d 882, 886 (Fla. 1979)("Our decision here is based on the causal relationship between the mitigating and aggravating circumstances."). This Court stated in *Miller* at page 886:

> [A] large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse.

Here, such a connection is present. Dr. Butts testified that Davis's behavior on the day in question was not consistent with his behavior before or since. T26 2978. Therefore, the only explanation for the offense was Davis's psychosis.

Davis's background was also similar to Almeida's: neglect and abuse (physical and sexual) in a developing country. As a child staying with relatives in Jamaica, Davis was regularly beaten; he was not fed properly; and he was sexually abused. T23 2709-10, 2728. At age six or seven, Davis ran away for two days and was found under the crawl space of a house. T23 2710-11. Although Ms. Davis sent money to her relatives, Davis and his sister were essentially taking care of themselves. T23 2712.

Surprisingly, Davis largely overcame this upbringing. Brannon said that because Davis's childhood was "chaotic and abusive and neglectful," he would have expected Davis to have no friends and have been in trouble for fighting, abusing animals, and the like. But he saw the opposite: Davis had friends and had not been in trouble. T24 2837-38. And although Davis was picked on and beaten in school because of his accent, he was not violent in return. T23 2716-17, 2757.

"[C]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008)(citations and internal quotation marks omitted). Given the evidence of Davis's psychosis, his young age (21), his lack of criminal history, his impoverished and abusive upbringing, as well as the evidence that he was under the influence of an extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, the death sentence is disproportionate when compared with other cases in which this Court has imposed a life sentence.

POINT VII THE COURT ERRED IN ALLOWING HARRELL TO TESTIFY OVER HEARSAY OBJECTION THAT PROBY SAID, "HE'S GOING TO COME KILL ME."

Harrell testified that Proby was mouthing words to her as she was on the phone with Davis. T8 920. Over defense hearsay objection, Harrell testified, "He

told her, she repeated, he's going to come kill me." T8 920. The state used this evidence to prove that Davis threatened to kill Proby.

This Court reviews evidentiary decisions for an abuse of discretion, but a judge's discretion "is limited by the rules of evidence and by the principles of stare decisis." *McDuffie v. State*, 970 So.2d 312, 326 (Fla.2007). At bar, the evidence was admitted contrary to law, so that the judge erred or abused his discretion.

The prosecutor didn't say what hearsay exception he was relying on, but it appears he was trying to establish the predicate for the spontaneous statement exception to the hearsay rule. § 90.803(1), Fla. Stat. This exception makes admissible a "spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness." *Id*. Such a statement is a declaration "made by those present when a thing took place, made about it, and importing what is present at the very time." *Deparvine v. State*, 995 So.2d 351, 369 (Fla.2008)(quotation omitted). In order to qualify under this exception, the statement must describe an event as it is occurring or very shortly thereafter. § 90.803(1), Fla. Stat. The trustworthiness of the statement is based on its spontaneity and lack of reflective thought. *Deparvine*, 995 So.2d at 368.

Here, Proby said, "He's going to come kill me." This is not, on its face, reporting what Davis said. Rather, Proby *interpreted* what he said as a threat. That is, Proby engaged in reflective thought about what he said. Because reflective thought diminishes the required spontaneity and, thus, the trustworthiness of the statement, it was not admissible.

As the proponent of this evidence, the state had the burden of showing that it fit within an exception to the hearsay rule. *See Yisrael v. State*, 993 So.2d 952, 956 (Fla.2008). The state failed to do so. Accordingly, the court erred in admitting it. The error was not harmless as to the guilt phase, where it was used as evidence of sanity and premeditation, nor as to penalty phase, where it was used as evidence of CCP and HAC. A new trial should be ordered.

POINT VIII THE COURT ERRED IN ALLOWING DR. BUTTS TO TESTIFY ABOUT THE CAUSE OF DAVIS'S BEHAVIOR WHEN DOROTHY FERRARO SAW HIM AT THE JAIL

Assistant Public Defender Dorothy Ferraro saw Davis in the jail on December 20 or 21, 2005. T15 1893. She said he was in the holding area where inmates wait to speak to their attorney. T15 1893. Ferraro could not speak to Davis, however, because he was yelling gibberish and jumping up and down. T15 1893-94. Ferraro testified that Davis said something about his lawyer but it was out of context and unintelligible. T15 1894. Ferraro thought he was mentally unstable and "couldn't believe that they even brought him down." T15 1894.

Before calling Dr. Butts as a witness, the state proffered her testimony that she reviewed the notes or diary of Davis's girlfriend and that they showed that Davis was upset because Ferraro was a public defender, not because he was mentally ill. T17 2135. Counsel objected that this was speculation, that there was no evidence that Davis knew that Ferraro was a public defender. T17 2137-38.

The court overruled the objection, stating:

> THE COURT: Under 90.401 and 90.403, the Court deems that this evidence that's been proffered is relevant, that it is evidence that is relied upon by the expert in rendering her opinion, that any objection regarding the nature of the evidence, particularly whether it is speculation or the like, goes to the weight not as to the admissibility, under 90.401 as well as 90.403, I take it as a motion in limine or an objection to the evidence, that objection will be overruled, and that evidence will be admitted. [T17 2139-40]

Dr. Butts testified she was in court for the presentation of the defense case, and that she watched Ferraro's testimony. T17 2174-75. She told the jury that "based on reading the notes of Mr. Davis's girlfriend, he was angry because he didn't want a public defender, and so that accounts for that behavior…. It was not necessarily that he was mentally ill, but he was angry." T17 2175.

This Court reviews evidentiary decisions for an abuse of discretion, but a judge's discretion "is limited by the rules of evidence and by the principles of stare decisis." *McDuffie v. State*, 970 So.2d 312, 326 (Fla.2007). Here, the court erred or abused its discretion in admitting Dr. Butts's testimony because it was inadmissible speculation.

Expert testimony that is speculative in nature is inadmissible. *See Fassi v. State*, 591 So.2d 977, 978 (Fla. 5th DCA 1991)(expert's testimony comparing wall graffiti to handwriting sample was inadmissible because it "is too speculative"); *Ruth v. State*, 610 So.2d 9, 11-12 (Fla. 2d DCA 1992)(opinion of expert was "pure speculation and, as such, was inadmissible"). Butts's testimony was speculative because we don't know Davis's girlfriend's basis of knowledge. Did Davis tell her why he was angry? Or was she speculating about the cause of his anger? We also don't know the context of Davis's girlfriend's note. Was she referring to Davis's attitude towards Assistant Public Defender Dorothy Ferraro? Or was she referring to Davis's attitude towards public defenders in general?

Having introduced error into the trial, the state must show that it was harmless beyond a reasonable doubt as to both guilt and penalty. *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986). But the error was not harmless. This was a closely fought case on insanity. Any inadmissible evidence prejudicing that defense could have tipped the balance. Accordingly, a new trial should be ordered.

POINT IX THE COURT ERRED IN ALLOWING THE PROSECUTOR TO ENGAGE IN ARGUMENTATIVE CROSS-EXAMINATION OF DAVIS AT PENALTY PHASE

Davis took the stand at the penalty phase. When he testified that this was a tragedy and a nightmare, the prosecutor asked, "Was it a tragedy, your telling that man, Mr. Basdeo, to open his mouth, sticking that gun in his mouth and blowing

out his brains, was that a tragedy, that deliberate act?" T24 2800. Defense counsel objected that this was argumentative, but the court overruled the objection. *Id*.

When Davis testified that he liked Proby, the prosecutor asked, "Did you like her enough to murder her by pumping 20 or 30 bullets into her body?" T24 2806. Again, defense counsel's objection that this was argumentative was overruled. T24 2806. (Davis answered, "That question don't make no sense. How could you like somebody enough to murder them?" *Id*.)

Although Davis did not dispute that he shot Proby, the prosecutor was allowed to ask over defense objection: "And you shot her again and again and again and again and again and again … and again and again and again and again and again and again, until you thought the magazine was empty?" T24 2795. The prosecutor continued: "And that was you who not only fired into her back, you fired into her head, smashing her skull and her brain, wasn't it?" T24 2795.

Not only did the court allow the prosecutor to ask argumentative questions, it also allowed the prosecutor and Davis to argue with each other. The prosecutor asked Davis, "And you put the barrel of that AR-15 in Mr. Basdeo's mouth, didn't you?" T24 2799. Davis answered by saying that the prosecutor was not looking at the big picture. T24 2799. The prosecutor said, "The big picture here, Mr. Davis, is the murder of three human beings." T24 2799. Defense counsel objected that this was argumentative, but the court overruled the objection. T24 2800. At one point,

the prosecutor and Davis argued with each other about what on the DVD was relevant. T24 2808-09. Defense counsel's objection that there was no question being asked was overruled. T24 2809.

The court erred in allowing the cross-examination to degenerate in this fashion. The purpose of examining witnesses—on cross and direct—is to "facilitate … the discovery of truth." § 90.612(1)(a), Fla. Stat. It is "not to serve as argument, or to form a subtle purveyor of argument." *Roe v. State*, 96 Fla. 723, 734, 119 So. 118, 122 (Fla.1928). *See also Gonzalez v. State*, 450 So.2d 585 (Fla. 3d DCA 1984)(Pearson, J., concurring)("[I]t is highly objectionable ... to make a closing argument to the jury in the guise of cross-examining defense witnesses.").

This Court reviews evidentiary issues for an abuse of discretion, but a judge's discretion "is limited by the rules of evidence and by the principles of stare decisis." *McDuffie v. State*, 970 So.2d 312, 326 (Fla.2007). Because the court allowed the state to cross-examine Davis in an argumentative fashion contrary to well-established law, a new penalty phase should be ordered.

POINT X THE TRIAL COURT ERRED IN DENYING DAVIS'S REQUESTED SPECIAL VERDICT FORM AND INSTRUCTIONS FOR AGGRAVATORS

Defense counsel argued that, under *Ring v. Arizona*, 536 U.S. 584 (2002), special instructions and verdict forms should be given that require the jury to unanimously find aggravating circumstances beyond a reasonable doubt. T21

2585, 2595-96. The trial court denied counsel's request. *Id*. The instructions and advisory verdict given in this case did not require all the jurors, or even a majority of them, to find the same aggravating circumstance beyond a reasonable doubt. T25 2914-16. This was error. (Davis concedes that this Court has rejected the argument presented here. *State v. Steele*, 921 So.2d 538 (Fla. 2005).)

Jury unanimity is necessary to ensure that the death penalty is not applied inconsistently or arbitrarily. Therefore, without requiring jury unanimity, "Florida's capital sentencing scheme is likely unconstitutional" under the Eighth Amendment. Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 17 (2009).

In addition, a guilty verdict by less than a "substantial majority" of a 12-member jury (i.e., 9 or more jurors) is so unreliable as to violate due process under the Fourteenth Amendment. *Johnson v. Louisiana*, 406 U.S. 356 (1972); Cantero & Kline, *Death is Different*, *supra* at 24 ("*Johnson* supports the argument that in a capital case at least, a super-majority (or unanimity) is required by the Due Process Clause."). Moreover, under the Sixth Amendment, a "judge's authority to sentence derives wholly from the jury's verdict." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). And that verdict must be either unanimous or a super-majority, as explained in Cantero & Kline, *Death is Different*, at p. 24 (footnotes omitted):

> *Burch* [*v. Louisiana*, 441 U.S. 130 (1979)], *Ballew* [*v. Georgia*, 435 U.S. 223 (1978)], and *Williams* [*v. Florida*, 399 U.S. 78 (1970)],

> support the argument that the Sixth Amendment renders Florida's capital sentencing scheme unconstitutional. When one considers these cases in light of the Supreme Court's extensive "death is different" jurisprudence, the Court's explicit approval of larger juries for more serious crimes, and the Court's instruction that the Sixth Amendment requires capital sentencing schemes to "draw lines" regarding minimum numbers of jurors and majority size, it is reasonable to expect that the Supreme Court, when faced with the issue, may hold that the Sixth Amendment requires capital sentencing schemes to incorporate large juries that must render super-majority, if not unanimous, verdicts in capital cases.

Admittedly, the jury unanimously found Davis guilty of prior capital felonies (the contemporaneous convictions for first degree murder of Basdeo and Jones), and this Court has held that this makes *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), inapplicable. *See Silvia v. State*, 36 Fla. L. Weekly S138, S145 (Fla. April 7, 2011). However, under our statutory scheme the jury must determine whether a "*sufficient* aggravating circumstance" has been proved beyond a reasonable doubt. § 921.141(2)(a), Fla. Stat. (2005)(emphasis added). Whether Davis's contemporaneous convictions were sufficient to authorize the death penalty was a decision the jury had to make unanimously at the penalty phase. They should have been so instructed. A new penalty phase hearing should be held.

The verdict in this case does not authorize the death penalty under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, or article I, sections 9, 16, and 17 of the Florida Constitution.

CONCLUSION

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

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been furnished to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this 5th day of May, 2011.

_____
Paul E. Petillo

CERTIFICATE OF FONT

I certify that this brief has been prepared with 14 point Times New Roman type, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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Paul E. Petillo