IN THE SUPREME COURT OF FLORIDA

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

# REPLY BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes



Law Review Articles



Other Authorities

## ARGUMENT

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

The state makes four arguments: first, this issue was not preserved for appellate review by a contemporaneous objection; second, there's no evidence the jury saw this portion of the DVD; third, even if the jury saw it, it's not evidence that Davis invoked his right to remain silent; and, fourth, any error was harmless.

#### A. *Preservation is not an issue. The judge and the defense were assured by the state that the DVD had been properly edited; the defense reasonably relied on the state's assurances; and the state's failure to properly edit the DVD was not discovered until the case was on appeal.*

This Court has established the rule of preservation as a rule of fairness: the judge must be given a fair opportunity to rule on an issue, and counsel may not knowingly let an error go uncorrected in order to raise the issue on appeal. *See F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003). At bar, the state asks this Court to apply this rule unfairly.

The state says defense counsel did not preserve this issue because he should not have relied on the prosecutor's assurances (and his demonstration during the recess) that the DVD was properly edited: defense counsel should have suspected that the prosecutor did not properly edit the DVD and should have watched the

entire exhibit to make sure the inadmissible portion wasn't reinserted at some other point on the DVD.

This is asking too much. The record—including the record developed on remand—shows that the judge and counsel believed that the prosecutor had properly edited the DVD. Indeed, the **prosecutor** thought he had properly edited the DVD. As the prosecutor described it at the hearing on relinquishment, the redacted portion "magically" and "miraculously" reappeared on the DVD. ST7 376, 378. The prosecutor even attributed the error to "the ghost of Rose Mary Woods[.]" ST7 376-78. He said: "For the life of me, Judge, I don't know how these blasted five lines got in here. I'd like to shoot the person who allowed it to get in here." ST7 377. About the DVD jumping back to 4:25 a.m. during Ilarraza's testimony (T15 1778), the prosecutor said he "thought it was the blasted machine that was giving us trouble in court jumping back and forth." ST7 395.

The defense lawyers, like the prosecutor, did not know the redacted portion was reinserted later. ST7 405-06, 408. Jeffrey Harris said at the relinquishment hearing, "We did not go on to check to see that it was reinserted because there would be no reason to, we never dreamt that that would have happened." ST7 405.

The contemporaneous objection requirement presupposes that counsel knows that an error occurred. In *Shootes v. State*, 20 So. 3d 434 (Fla. 1st DCA 2009), for example, uniformed sheriff's deputies filled the courtroom during

closing arguments, jeopardizing Shootes's right to a fair trial. Defense counsel did not object because he was unaware of what was happening in the courtroom gallery. Because defense counsel was unaware of the error, the First District excused his failure to object during closing argument (*id*. at 437):

> **Defense counsel had no opportunity to object at the time the officers filed in to the courtroom because he was unaware of what was occurring in the gallery behind him**. As soon as counsel learned of the courtroom conditions, he filed the motion for new trial. The trial court considered the issue and denied the motion on the merits. This satisfied the purpose of the contemporaneous objection rule and was sufficient to preserve the issue for appeal. [e.s.]

Shootes discovered the error in time to file a motion for new trial, but here the error wasn't discovered until the appeal. This Court, however, has granted relief for errors uncovered for the first time on appeal. *E.g. Loureiro v. State*, No. SC07-1799 (relinquishing jurisdiction to circuit court, which vacated judgment and death sentence due to discovery of improper relationship between prosecutor and trial judge). *See also Perez v. State*, 801 So. 2d 276, 277 (Fla. 4th DCA 2001)(post-trial acquittal of collateral crime may be raised for first time on appeal); *Pomeranz v. State*, 703 So. 2d 465, 469 (Fla. 1997)(same).

Moreover, even if defense counsel can be faulted for relying on the prosecutor's assurances that the DVD was properly edited, the issue is prejudice not fault. In *Sayih v. Permutter*, 561 So. 2d 309 (Fla. 3d DCA 1990), a medical malpractice case, the doctor's defense counsel moved into evidence the plaintiff's

medical records. Defense counsel represented that these records pertained only to the case before the court. Based on this representation, plaintiff's counsel did not object to their introduction. During deliberations, however, the parties discovered defense counsel was wrong: included among the properly admitted medical records were damaging ones pertaining to the plaintiff's other medical problems. The jury returned a verdict for the doctor and the plaintiff appealed.

The Third District rejected the doctor-appellee's argument that plaintiff's counsel should have been more diligent in examining the records before they were sent to the jury (*id*. at 311):

> **That plaintiff's counsel breached a duty to thoroughly examine the records to ascertain that they were as defense counsel represented them to be is not dispositive.** Defense counsel had the same duty to insure that no extraneous materials were submitted to the jury, and certainly had an obligation to accurately represent to the court, on inquiry, the contents of the exhibits. If the misrepresentation as to the contents of the exhibit had been intentional, we would have condemned it as a contemptuous "ambush" tactic. **Nevertheless, even in the absence of intentional misconduct, the legal inquiry is whether the mutual mistake of the attorneys in failing to exclude the unrelated medical records was prejudicial to the plaintiff.** [Citations and footnote omitted; emphasis added.]

Here, even if defense counsel can be faulted along with the prosecutor, then their mutual mistake in failing to exclude evidence that Davis invoked his right to remain silent requires that a new trial be granted.

B. *Since the jurors were urged to study the DVD in deciding the crucial issue in the case, and since they likely searched the DVD looking for something they were (incorrectly) told was on it, it cannot be said beyond a reasonable doubt that they did not see the inadmissible portion left on the DVD by the state*.

The state argues there is no evidence the jurors saw this portion of the DVD. The correct inquiry, however, is whether the state can prove beyond a reasonable doubt they **didn't** see it (i.e., whether the state can prove the error was harmless beyond a reasonable doubt).

There is a long-standing presumption in Florida that jurors see what is sent back to them for deliberations. In *Hawkins v. State*, 13 So. 353 (Fla. 1893), the judge wrote "guilty" (he meant to write "given") in the margin of the jury instructions sent back to the jury room. Citing case law from other states, this Court presumed the jury saw this and reversed: "The fact being admitted that the charges, with this indorsement on the margin thereof, were in the hands of the jury during their deliberations, **the presumption is that it was read by them, in the absence of proof to the contrary**. *Clark v. Whitaker*, 18 Conn. 543 [1847 WL 633]; *Durfee v. Eveland*, 8 Barb. 46 [Sup Ct, N.Y. County 1850]." *Hawkins*, 13 So. at 354 (emphasis added).

In *Clark v. Whitaker*, the Connecticut case cited by this Court, an inadmissible paper was "before the jury, during all their deliberations[.]" 1847 WL

at 633, 5. The court held that "nothing short of proof that the paper was not opened and read, could save the verdict." *Id*.

In the New York case, *Durfee v. Eveland*, jurors were given the "minutes of the testimony which were taken by plaintiff's counsel." The court said: "From such an abuse of legal proceedings, **injustice must be presumed**, unless the contrary is most clearly and satisfactorily shown." *Durfee*, 8 Barb. at 46 (e.s.).

It remains the rule that jurors are presumed to carefully consider all the materials provided to them in their deliberations. *See Williamson v. State*, 894 So. 2d 996, 998 (Fla. 5th DCA 2005) (reversing where defendant's prior conviction was erroneously sent to jury room: "Since there is no direct testimony from the jury regarding whether they actually examined Mr. Williamson's earlier judgment and sentence before reaching their verdict, we will presume that they did so."); *Womack v. State*, 942 So. 2d 955, 956 (Fla. 4th DCA 2006) (reversing because jurors were given incorrect written instructions even though oral instructions were correct); *Concepcion v. State*, 857 So. 2d 299, 301 (Fla. 5th DCA 2003) (same).

There is nothing in the record to overcome the presumption that the jurors saw the inadmissible portion of the DVD. As outlined in the initial brief at p. 42, the circumstances of this case strongly suggest the jurors watched the entire DVD during deliberations. The DVD was the "beautiful raw data" the experts relied upon; indeed, it was probably the most important piece of evidence in the case. In

closing argument, the prosecutor told the jury over and over again to watch the DVD. In a case of this magnitude, a conscientious jury **would** watch the DVD, and watch it in its entirety.

There is also a reasonable possibility that the jury watched the entire DVD looking for something specific on it. For example, Dr. Butts testified (erroneously) that the DVD showed Davis telling the detectives he wanted to speak to his parents in private:

> [Prosecutor]: What else did you look at, Doctor?
>
> [Dr. Butts]: On the DVD, on Page --
>
> [Prosecutor]: We'll go by your recollection of what's on the DVD, we can't go by the transcript.
>
> [Dr. Butts]: **Okay, that's fine. On the DVD he requested to talk in private when his parents were there, when his parents initially got there.**
>
> [Prosecutor]: And what was the significance of that?
>
> [Dr. Butts]: **That he knew that he was being monitored and he didn't want the police to know what he was saying**. [T17 2186-87. Emphasis added.]

In closing argument, defense counsel disputed this testimony and challenged the jury to watch the DVD to see if what Dr. Butts said was true:

> There was a comment made by Dr. Butts that she thought he may have known he was on video or audio. I suggest to you, although I respect her very much, that that's ridiculous. **There is no evidence whatsoever that he's looking at a camera or knows that he's on camera, and really just the opposite. I challenge you to look at that DVD and come to any logical conclusion that he's**

> **malingering or that he knows that he's being videotaped. The proof shows just the opposite.** [T19 2354-55. Emphasis added.]

Whether Dr. Butts was right about Davis asking for privacy would have been important to the jury for this reason: if Dr. Butts was right, this is some evidence of Davis's sanity and it corroborates her testimony; and if she was wrong, that's not only less evidence of Davis's sanity, but the jury would have less confidence in her opinion that Davis was sane since some of the facts upon which she based her opinion were incorrect. **To determine whether Dr. Butts was correct about Davis asking for privacy, the jurors would have had to watch all of the DVD up until the parents' arrival**. Thus, the jury likely watched the DVD in search of evidence that was supposed to be on it and found instead different, appealing (and inadmissible) evidence of sanity that had been left there, however negligently, by the state.

> C. *Since the DVD showed Davis being explained his rights and raising the issue of his right to remain silent, and since there was no evidence of a subsequent interrogation, the jury must have concluded that Davis invoked his right to remain silent and the evidence was "fairly susceptible" of showing an invocation of that right.*

For its argument that the DVD is not fairly susceptible of being interpreted as a comment on silence, the state relies on *Thomas v. State*, 367 So. 2d 260 (Fla. 3d DCA 1979), and *Holland v. State*, 340 So. 2d 931 (Fla. 4th DCA 1976).[1]

[1] The state also cites *Hall v. State*, 403 So. 2d 1321, 1324 (Fla. 1981), but there this Court held that it was not a comment on silence to elicit testimony that

In *Thomas*, the court disapproved the state's practice at the time of "eliciting testimony indicating that a defendant was properly warned of his constitutional rights when the State does not seek to introduce any statement by that defendant into evidence." 367 So. 2d at 263. The court held, however, that such testimony is not evidence of silence **as long as there is no indication that the officers asked the suspect any questions**. *Id*.

*Holland* was decided similarly. Although the officer testified that Holland "gave no answer" when asked whether he understood his rights, "[a]t no point did the officer testify that appellant failed to answer questions or give a statement about the offense for which he had been arrested." 340 So. 2d at 932.

Unlike the officers in *Thomas* and *Holland*, Ilarraza clearly stated his intent to ask Davis "about what happened" that night. ("[B]efore we go on to talking about what happened tonight, I have to go over your rights." ST 279.) The DVD, therefore, is fairly susceptible of being interpreted by the jury as evidence that Davis invoked his right to remain silent.

Moreover, *Thomas* and *Holland* were decided before this Court established the "fairly susceptible" test in *David v. State*, 369 So. 2d 943 (Fla. 1979), and those cases might be decided differently under that test. In any event, because Ilarraza

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*Miranda* warnings were given when the purpose of that testimony is to prove that a subsequent statement was voluntarily made. Here, of course, Davis invoked his right to remain silent and gave no statement to police about the offenses.

made it clear he was going to question Davis, this case presents reversible error even under *Thomas* and *Holland*.

The state argues there was no comment on silence because the jury didn't hear Davis explicitly invoke his right to remain silent. *Answer Brief* at p. 10. But direct and indirect references to silence are inadmissible and harmful. *Ventura v. State*, 29 So. 3d 1086, 1088-89 (Fla. 2010). *See also* § 90.104(2), Fla. Stat. (courts should "prevent inadmissible evidence from being suggested to the jury by any means."). "Comments on silence are lumped together in an amorphous mass where no distinction is drawn between the direct or the indirect, the advertent from the inadvertent, the emphasized from the casual, the clear from the ambiguous, and, most importantly, the harmful from the harmless." *State v. DiGuilio*, 491 So. 2d 1129, 1136 (Fla. 1986).

The jury would have understood that Davis invoked his right to remain silent without hearing him explicitly say so. 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?"[2] Ilarraza said, "Well, yeah. Let me go over them and then you can decide

[2] The court reporter put a question mark here, but Davis's "remain silent" statement has little if any inflection. Exh. 44: 1:25:26. Thus, Davis's "remain silent" statement was fairly susceptible of being interpreted by the jurors (who had no transcript containing a question mark) as an assertion of his right to remain silent.

what you want to do, okay, it will be up to you." ST 279. Five minutes later (as shown by the clock in the room), the detectives are standing to leave. Given that it took the detectives 45 minutes to obtain Davis's basic biographical information, the jury would have known that Davis did in fact "decide" to "remain silent[,]" i.e., the jury would have known that interrogation about a triple-homicide would take more than a mere five minutes, and therefore Davis must have refused to talk to the detectives about these offenses.

Error occurs when, as here, the jury is made aware that the defendant was advised of and understood his rights, and, although the question is left lingering, the jury could readily conclude that the defendant invoked those rights. *See Garron v. State*, 528 So. 2d 353, 355-56 (Fla. 1988) (jury was told defendant was read and understood his rights, without direct statement that he invoked them); *West v. State*, 553 So. 2d 254, 257 (Fla. 4th DCA 1989) (same).

Here, it's clear that Davis understood his right to remain silent: Davis was asked about his rights and he gave that one as an example. Thus, under *Garron* and *West* this evidence is fairly susceptible of being interpreted as referring to his invocation of the right to remain silent. In fact, the evidence here is more susceptible of that interpretation than the evidence in *Garron* because in *Garron* there was no evidence that the officer intended to ask Garron any questions. Here Ilarraza clearly stated that he intended to ask Davis questions.

D. *The error was not harmless.*

The state argues the error was harmless, but to do so it has viewed the evidence in the light most favorable to the verdict. *Answer Brief* at pp. 39-41. This is contrary to *DiGuilio*, 491 So. 2d at 1135, which requires an examination of the entire record. An examination of the entire record shows this was a closely fought case on insanity. In fact, the weight of the evidence on that issue favors Davis. Davis's behavior was bizarre; his offenses out of character. Four defense experts (three at guilt phase and one at penalty phase) testified that he suffered from a brief psychotic disorder, and the state's expert could not rule out that diagnosis.

The state must prove its error "did not contribute to the ... conviction." *Garron*, 528 So. 2d at 356. The jury could have rejected the insanity defense based on an unconstitutional consideration—that someone who invoked his rights could not have been insane. Given this reasonable possibility, the conviction must be reversed.

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

The state argues that a person in custody has no expectation of privacy in a jail cell or police interrogation room. *Answer Brief* at pp. 43-44.

First, Davis was not in a prison, jail, or holding cell. He was in a room at the police department. And although detectives used the room to interview suspects

and witnesses, it didn't look like the classic "interrogation room" from film and TV with overhead light and two-way mirror. It looked more like an unused office.

Second, Davis wasn't talking to a cellmate or accomplice or friend. He was talking to his **parents**. And even if Florida has no parent-child privilege, there is a "widely shared social expectation[]"[3] that a parent-child discussion, especially in an emotionally charged situation like this one (a mentally-ill young man talking to his distraught parents), would be respected as private and not exploited by eavesdropping police.

Third, Detective Carmody fostered a sense of privacy. When Davis's parents arrived, Carmody brought them in the room, but before he did so he knocked on the door several times and called out Davis's name. Exh. 44: 1:36:37. The social convention of knocking on a door before entering is a sign of privacy. *See State v. Kendikian*, No. 08–08–00182–CR, 2009 WL 2709923 (Tex.App. El Paso Aug. 28, 2009) ("The detectives' conduct in arranging the meeting [between husband and wife], placing the two in a private room, closing the door, and knocking before entering created an expectation of privacy."); § 400.022(1)(m), Fla. Stat. (2011) (privacy rights of nursing home residents include the right "to close room doors

[3] An expectation of privacy is "reasonable" when it is consistent with "widely shared social expectations." *Georgia v. Randolph*, 547 U.S. 103, 111 (2006) ("The constant element in assessing Fourth Amendment reasonableness ... is the great significance given to widely shared social expectations....").

and to have facility personnel knock before entering the room…."); Steven R. Morrison, *The Fourth Amendment's Applicability to Residents of Homeless Shelters*, 32 Hamline L. Rev. 319, 392 (2009) (shelter's rights form included: "To ensure the privacy of residents, ... staff must knock before entering a resident's room."); David A. Gershaw, Ph.D., *Knock Before Entering*, A Line on Life, http://virgil.azwestern.edu/~dag/lol/Knock.html ("Although knocking involves politeness, it is related to a much deeper, more fundamental concept—territory…. Knocking before you enter allows others to maintain control over their territory.").

After Carmody brought Davis's parents into the room, he said he was going to close the door, and told them**, "Just knock if you want me, okay?"** Exh. 44: 1:36:56. A closed door is synonymous with privacy ("Behind closed doors").The United States Supreme Court ruled that Katz had a reasonable expectation of privacy when he entered the phone booth and **closed the door**. *Katz v. United States*, 389 U.S. 347, 361 (1967). And telling Davis and his parents they would have to knock to get the attention of police sent the clear message that the police could not hear what was going on inside the room and therefore the room was private. *See State v. Kendikian, supra*.

Fourth, Davis invoked his *Miranda* rights. The police, however, circumvented Davis's invocation of those rights. He invoked his rights by 4:40 a.m. But instead of taking him to jail, they left him in the interview room for

another hour-and-a-half. At 6:18 a.m. Detective Carmody brought Davis's parents into the room, gave the family a false sense of privacy as described above, and then secretly recorded their conversation.

When the police foster a family's belief that their discussion will be private, and then betray the family's trust by secretly recording their discussion in order to circumvent the invocation of rights, the state may not use the secret recording to pursue a conviction and death sentence. In *Allen v. State*, 636 So. 2d 494 (Fla. 1994), this Court said there was no error in refusing to suppress the holding-cell conversation between Allen and his accomplice, **but this Court cautioned that the result would be different if the police fostered an expectation of privacy in order to circumvent the invocation of rights** (*id*. at 497):

> There thus was no error here. We caution, however, that our conclusion in this regard rests on the fact that there was no improper police involvement in inducing the conversation nor any intrusion into a privileged or otherwise confidential or private communication. A different result might obtain otherwise. For example, police impropriety would exist if police deliberately fostered an expectation of privacy in the inmates' conversation, as happened in *State v. Calhoun*, 479 So. 2d 241 (Fla. 4th DCA 1985), especially where the obvious purpose was to circumvent a defendant's assertion of the right to remain silent. *Id*. The present case does not cross the line of what is permissible.

The state says *State v. Calhoun*, 479 So. 2d 241 (Fla. 4th DCA 1985), is distinguishable because Davis did not ask to speak to his parents in private.[4] *Answer Brief* at 43, 45. First, neither Davis nor his parents needed to ask for privacy because Detective Carmody led them to believe their conversation **was** private. It makes no sense to ask for something you already have or think you have.

Second, the state misreads *Calhoun*. The opinion quotes at length Judge Harper's findings of fact, and he found only that Calhoun "asked to speak with his brother," and that the brother was "was placed in the interview room for a private conversation with the defendant." 479 So. 2d at 242. After the conversation ended, the brother was again placed in the interview room. *Id*. at 242-43.

Although the appellate opinion says Calhoun's "response to hearing his *Miranda* rights was that he would like to talk to his brother privately before talking to the officers," *id*. at 243, the underlying facts were that he merely asked to speak with his brother and the officers then made a show of giving him privacy. In this circumstance, "it was reasonably predictable and foreseeable that the two [Calhoun] brothers would freely converse with each other about their respective cases, reasonably believing that their conversation was private." *Id*. at 244.

[4] In fact, Davis didn't ask to speak to his parents—they asked to speak to him.

The state argues that the "police did nothing to suggest that they were affording Davis any privacy other than shutting the door which had been shut the entire time." *Answer Brief* at p. 45. But as explained above, Detective Carmody did more than shut the door: he knocked before entering and he told Davis and his parents to knock if they needed to get his attention.

The state's cases are distinguishable. In *Lowe v. State*, 650 So. 2d 969 (Fla. 1994), the issue was whether Lowe's girlfriend was a state agent sent to get Lowe to confess, or whether allowing her to speak to him was a tactic likely to invoke an incriminating response under *Rhode Island v. Innis*, 446 U.S. 291 (1980). These claims have not been made here. Davis argues that suppression is required by *Calhoun* and its progeny, an argument that Lowe did not make.

In *Williams v. State*, 982 So. 2d 1190 (Fla. 4th DCA 2008), the defendant was in an interview room and given his cell phone, which he used to call a woman who was also in custody. The Fourth District held that suppression of the phone conversation was not required because "jailhouse conversations between inmates are admissible" and the "defendant did not ask for privacy and there was no suggestion that he had any." *Id*. at 1194. Again, this was not a jailhouse conversation between inmates, and there was a suggestion (in fact, more than a suggestion) that Davis and his parents had privacy.

In *Johnson v. State*, 730 So. 2d 368 (Fla. 5th DCA 1999), the defendant, unlike Davis, waived his *Miranda* rights and spoke to police; afterwards he spoke to his wife, and the conversation was recorded. The police denied saying anything to the defendant and his wife that would lead them to believe their conversation was private. The trial judge said that it was "inconceivable that the parties had a reasonable expectation of privacy" and that this was "pretty well conceded by defendant's wife[.]" *Id*. at 370.

In *Larzerelere v. State*, 676 So. 2d 394 (Fla. 1996), the defendant and her son were placed in a cell together before a hearing. This Court held that the State did not act wrongfully in recording their conversation because the defendant did not ask to speak to her son privately and there was no suggestion that their conversation was private. *Id*. at 405.

In *Boyer v. State*, 736 So. 2d 64 (Fla. 4th DCA 1999), the defendant was in custody and his conversation with his sister-in-law was recorded. The court held that the defendant had no reasonable expectation of privacy in this conversation given his "apparent awareness of the presence of microphones in the room and of the possibility that the conversation was under surveillance…." *Id.* at 66. Moreover, Boyer waived his right to remain silent by reinitiating contact with police, so this wasn't a case like *Calhoun* (or this one) where the police were circumventing the invocation of rights. *Id*. at 66-67.

The state argues the error in admitting the DVD was harmless based on the same erroneous analysis it used for Point I. *Answer Brief* at p. 49. The state also argues that "the fact cocaine was found in Davis['s] car and he appeared to be under the influence of drugs renders his admission to his parents harmless." *Id*. But Davis's alleged admission on the DVD that he used cocaine (an admission that Davis vigorously disputes) was the centerpiece of the state's case that Davis's psychosis was drug-induced. It cannot be said that the erroneous admission of the centerpiece of the state's case against Davis was harmless error.

> 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

The state relies on *McCoy v. State*, 853 So. 2d 396 (Fla. 2003), but that case serves as an example of what should have been done in this one. In *McCoy*, the judge independently compared the transcript to the audiotape of McCoy's conversation with witness Marcel (in fact, the judge edited a portion of the transcript); Marcel testified that the transcript accurately reflected the conversation she participated in with McCoy (that was the "clear implication" of her testimony); the jury was given a proper limiting instruction; and the transcript did not go back to the jury room. *Id*. at 402-05.

This Court said the judge in *McCoy* "scrupulously followed" *Martinez v. State*, 761 So. 2d 1074 (Fla. 2000), and commended him for his "fair and reasoned approach to the issues surrounding the audiotape and transcript at issue here." 853 So. 2d at 405. This Court then "reaffirm[ed] [its] commitment to the guidance of *Martinez*" and again mandated that courts follow the procedures outlined in that opinion (*id*.):

> Indeed, we explicitly reaffirm our commitment to the guidance of *Martinez*, and, with the issuance of this opinion, **mandate that trial courts make an independent pretrial determination of the accuracy of transcripts**, and give a cautionary instruction to the jury regarding the limited use to be made of the transcript, **prior to employment of these demonstrative aids during trial.** Because the trial court below did precisely this, McCoy's claims of error fail. [e.s.]

Here, the trial court did not make an independent determination of the transcript's accuracy as mandated by *Martinez* and *McCoy*.

The state acknowledges that defense counsel did not stipulate that the transcript was accurate, but argues that counsel's "failure to identify specific offending portions should render this claim unpreserved." *Answer Brief* at p. 51. But as outlined in the initial brief at p. 58, defense counsel repeatedly questioned the accuracy of the state's claim—a claim reflected on page 45 of the transcript—that Davis admitted on the DVD that he used cocaine. Early on, however, the judge erroneously said this was a "weight issue" and that it wasn't up him to decide whether the transcript was accurate. T11 1364.

Citing *Grimes v. State*, 244 So. 2d 130, 135 (Fla. 1971), the state argues that Ilarraza was qualified to authenticate the transcript because he listened to the conversation from a separate room. *Answer Brief* at p. 53. But *Grimes* is distinguishable because the officer in that case was a party to the conversation. Here, Ilarraza did not participate in the conversation with Davis and his parents. 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. Ilarraza did not do that; therefore, he was "in no better position than the jury to determine the contents of the tape recording." *Id*. at 1087 (c.o.).

Furthermore, Ilarraza's transcript was not accurate: the jury noticed the transcript did not track the DVD; nor did the transcript reflect that the DVD went back to 4:25 a.m. and then forward into the rights waiver; and page 45 of the transcript has Davis admitting he has cocaine in his system when it appears he actually said he **didn't** have cocaine in his system (and whether Davis had cocaine in his system was probably the central issue in the case).

The state argues the error was harmless because the jury had the DVD in the jury room and not the transcript. In *Dyer v. State*, 26 So. 3d 700 (Fla. 4th DCA 2010), a witness testified in violation of the best evidence rule about what was depicted on a surveillance videotape. Even though the jurors viewed the videotape

later and could decide for themselves what it showed, the court held that the error in admitting the testimony was not harmless because the testimony "may have predisposed the jury to view the tape as incriminating and contributed to their guilty verdict." *Id*. at 704.

The same harm occurred here. The transcript may have predisposed the jury to view the DVD as incriminating, especially on the contested issue of whether Davis admitted that he used cocaine. The harm is even greater because a police officer (Detective Ilarraza) vouched for the transcript's accuracy. T13 1705. *See Tumblin v. State*, 29 So. 3d 1093, 1102 (Fla. 2010) ("Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions…." c.o.).

## 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 state's theory below was that Proby's murder was "fueled by drugs and rage and revenge and anger." T19 2311. The prosecutor said that Davis killed Proby out of "rage and unrestrained passion and anger, and uncontrollable anger." T19 2313. And the prosecutor's theory on insanity was that it was drug induced. T19 2328-30.

The state's theory negates CCP, and so on appeal the state has tried to refute it. The state argues, for example, that Davis had time to reflect on his actions

during the "the drive to Proby's apartment" and the "walk to her second floor apartment." *Answer Brief* at p. 59. But Davis wasn't engaging in much reflective thought during the drive given that he stopped in the middle of an intersection, got on top of his car, and started shooting wildly into the air. T9 1127, 1135. And he also wasn't engaging in much reflective thought when he arrived at Proby's apartment, parked in a no-parking zone, left the car running, the door open, and his music blasting. T8 910-11.

The state relies on *Cruse v. State*, 588 So. 2d 983 (Fla. 1991), in arguing that the evidence here supports CCP. *Answer Brief* at p. 58. But *Cruse* is distinguishable. Cruse shot (or shot at) ten people, killing three of them, before he went to a different location and committed the two murders (of police officers) for which he was sentenced to death. Moreover, a month before the murders "he specially ordered" the assault rifle he used. And a week before the murders he bought a large quantity of ammunition. In addition to the advance procurement of the rifle and the ammunition, this Court found heightened premeditation in the circumstances of each murder (*id*. at 992):

> Officer Grogan was killed as he approached the Winn Dixie store. Cruse turned his attention away from the interior of the store, inserted a fresh thirty-round clip into the assault rifle, raised the rifle, aimed at Grogan's car, and shot eight rounds into the windshield. In addition, as rescue attempts were underway, Cruse expressed his intent by stating, "Where is the cop. Get away from the cop. I want the cop to die." Officer Johnson arrived at the store shortly after Officer Grogan. After being shot in the leg, Johnson attempted to find

> cover by going behind a car. Cruse pursued him into the parking lot and fired three more shots into his body.
>
> Finally, it is noteworthy that both of the murders for which Cruse was sentenced to die took place at the second site of shootings. By this time, Cruse had heard sirens approaching, reentered his car, and driven to another shopping center. This provided ample time for reflection. As the trial judge noted, by the time Cruse arrived at the Winn Dixie center "his premeditation was heightened to the extreme."

The state argues that *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992), and *Maulden v. State*, 617 So. 2d 298 (Fla. 1993), are distinguishable because the intensity of emotion in those cases was the result of an ongoing domestic dispute. *Answer Brief* at p. 59. But it is the intensity of emotion that is important, not its cause. In fact, that Davis's anger and intensity of emotion were the product of his disordered, psychotic mind, and not the result of an ongoing domestic dispute, makes this killing less cold, calculated, and premeditated.

Moreover, in *Richardson*, this Court said "[t]he eyewitnesses even testified that Richardson appeared angry, crazy, or mean when he shot Newton." 604 So. 2d at 1109. Here, the eyewitnesses testified that Davis appeared angry, crazy, or high when he shot Proby. (Jason Rolle said Davis "looked pissed off." T8 912. And Hermione Harrell said Davis was acting both "like he was crazy" and like he was on something. T8 943.)

Citing *Evans v. State*, 800 So. 2d 182 (Fla. 2001), the state argues that that the extreme mental or emotional disturbance mitigator does not negate CCP. *Answer Brief* at p. 60. First, unlike *Evans*, the court here found both extreme

mental or emotional disturbance **and** impaired capacity to appreciate the criminality of his conduct. Second, the facts in *Evans* showed a careful plan to kill, notwithstanding Evans's mental disturbance.

Evans and his confederates, including the victim, Lewis, planned a home-invasion robbery in Sanford. They had to abandon the robbery, however, because Lewis took the getaway car and stranded Evans and the others. Evans returned to Orlando and waited for Lewis to return. When Lewis did, Evans bound and gagged him. Evans made a makeshift silencer out of a shampoo bottle. He then took Lewis to a culvert, pushed him down, and shot him five times in the head. *Id*. at 185-86.

The trial court found CCP because, among other things, Evans "was thinking clearly enough to avoid connection to the murder by removing Mr. Lewis from the apartment before shooting him[,]" and he "was rational enough to place a silencer over the barrel to further avoid detection." 800 So. 2d at 193.

Unlike Evans, Davis was not rationally trying to avoid detection. Instead, he was irrationally drawing attention to himself: he stood atop his car and shot into the air; and he parked in front of Proby's apartment building, left the car running, the door open, and the music blasting.

The state concedes there was no "advance procurement" of the weapon. *Answer Brief* at p. 61. The state argues, however, that "CCP has been found in cases where the defendant already possessed guns; the focus is on whether the

defendant brings a weapon to the scene." *Id*. But the four cases it cites for this proposition involved much more than simply bringing a weapon to the scene.[5]

In *Ibar v. State*, 938 So. 2d 451 (Fla. 2006), the three victims were tied up and lying on the floor when Ibar shot them in the back of the head, execution-style. This Court said the murders were cold because they were execution-style killings; the murders were calculated because Ibar armed himself in advance, killed execution-style, and had time to coldly and calmly decide to kill; and there was heightened premeditation because the murders were not committed immediately, the victims were tied up, one victim was beaten for twenty minutes, and Ibar could have left the scene without killing them. *Id*. at 473-74.

In *Thompson v. State*, 648 So. 2d 692, 696 (Fla. 1994), the defendant was a disgruntled former employee who brought a gun and a knife to his former workplace. After he obtained a check from the bookkeeper, he took the bookkeeper and his assistant to a secluded area where he killed them. This Court upheld CCP because: "Thompson took the precaution of carrying a gun and a knife with him to

[5] This makes sense, of course, because 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). Thus, it takes more than bringing a weapon to the scene to qualify a murder as CCP. *See Power v. State*, 605 So. 2d 856, 864 (Fla. 1992); *Wyatt v. State*, 641 So. 2d 1336, 1341 (Fla. 1994); *Green v. State*, 583 So. 2d 647, 652-53 (Fla. 1991) (cases striking CCP where defendant brought weapon to scene). This Court has even struck CCP when there was advance procurement of the weapon. *White v. State*, 616 So. 2d 21, 22 (Fla. 1993).

the cemetery office. After he had obtained the check from Swack, he drove the victims to an isolated area and forced them to lie on the ground. Further, there is no indication that Walker resisted Thompson although Thompson and Swack did struggle with each other." *Id*. at 696.

In *Huff v. State*, 495 So. 2d 145, 153 (Fla. 1986), this Court found CCP because it was evident that Huff had planned to kill his parents in a remote and secluded area and he brought a gun for that purpose. And in *Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994), the defendant, as she had with several other men, lured the victim to a remote area in order to kill him and steal his belongings.

For heightened premeditation, the state takes one fact from Davis's penalty phase testimony (that after he was beaten up at the music studio, he "sat down on the sidewalk … trying to figure out what to do next." T24 2786.) and one fact from the DVD (that he told his parents he murdered Proby because she betrayed him) and adds them together to claim that "Davis blamed Proby for his beating and calmly 'figured out' he was to kill her with his assault rifle." *Answer Brief* at p. 62.

As a preliminary matter, the state can't rely on Davis's penalty phase testimony to establish an aggravating circumstance. The State has the burden of establishing an aggravating circumstance beyond a reasonable doubt. *Gonzalez v. State*, 990 So. 2d 1017, 1029 (Fla. 2008). And just as the state cannot use defense evidence to satisfy its burden of proof in the guilt phase, *see State v. Pennington*,

534 So. 2d 393 (Fla. 1988); *Walker v. State*, 604 So. 2d 475, 476-77 (Fla. 1992), it cannot use defense evidence to satisfy its burden in the penalty phase.

More fundamentally, the state's selection of these two facts ignores that Davis also testified at the penalty phase that it was Proby's later telephone call that made him believe that killing her was his God-given mission. T24 2789. (Davis also told his parents about this mission. T15 1787.) And it ignores that Davis's father asked Davis, "What kind of involvement do you have with her so that she could have betray you to make you murder her like that?" and that Davis's irrational answer was, "[S]he come into my life like my big sister (unintelligible), a sister real close to me. She was born the day before my birthday." T15 1822. In short, when we look at these facts in context we see that they show, not heightened premeditation, but the irrationality of Davis's thinking.

The state says the error in finding CCP was harmless under *Singleton v. State*, 783 So. 2d 970, 979 (Fla. 2001), and *Blanco v. State*, 706 So. 2d 7 (Fla. 1997), cases in which this Court held the death sentence proportional even after striking CCP.[6] *Answer Brief* at p. 62. But proportionality review and harmless error analysis are not the same thing. Proportionality review is a comparison of cases meant to insure that the death penalty is reserved for the most aggravated and least

[6] The state also cites *Heath v. State*, 648 So. 2d 660 (Fla. 1994), but that case did not involve striking an invalid aggravator.

mitigated murders. Harmless error analysis considers the impact an error had on the decision maker, and asks whether there is a reasonable probability that the error influenced the decision to sentence to death. Even if Davis's sentence is proportional without CCP, there is still a reasonable probability the sentencing decision was affected by its erroneous use. In *Perez v. State*, 919 So. 2d 347, 382 n.12 (Fla. 2005), for example, this Court said the error in finding HAC was not harmless, and, given that holding, proportionality review was not required. But under the state's view proportionality review would be the harmless error analysis.

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

As noted in the initial brief, 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). The state doesn't address this general rule, and most of the cases it cites are not shooting cases: *James v. State*, 695 So. 2d 1229 (Fla.1997), and *Rivera v. State*, 561 So. 2d 536 (Fla. 1990), were strangulation cases; *Buzia v. State*, 926 So. 2d 1203, 1214 (Fla. 2006), was a bludgeoning case; and *Douglas v. State*, 575 So. 2d 165 (Fla. 1991), was a beating-then-shooting case.

*Pooler v. State*, 704 So. 2d 1375 (Fla. 1997), was a shooting case, but it has the additional facts that separate it from the norm of premeditated murders. Not

only did the victim, Kim Brown, know two days before the shooting that Pooler planned to kill her, but when he arrived at her apartment he shot her brother in the back and terrorized her before killing her (*id*. at 1378):

> Any doubt she may have had about the sincerity of Pooler's threat must have been dispelled when he visited her apartment that morning with a gun, forced his way in, and shot her fleeing brother in the back. One need not speculate too much about what was going through Kim Brown's mind during this time, as her fear was such that it caused her to vomit. Even after Kim succeeded in locking Pooler out of the apartment, he broke his way back in, whereupon she and her brother ran out of the apartment in an effort to escape. Once he caught up with Kim, Pooler struck her in the head with his gun and dragged her to his car as she screamed and begged for him not to kill her. Pooler's final words to her before killing her were, "Bitch, didn't I tell you I'd kill you?" and "You want some more?"

The facts here are nothing like the facts in *Pooler*. Davis and Proby had no ill-feelings towards each other, and because of this she did not take his threat seriously. Once at the apartment, Davis did not, as Pooler did, terrorize Proby. Indeed, his 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. If Proby suffered mental anguish at all, it was of short duration. This case does not have additional facts that separate it from the norm of premeditated murders.

As for harm, the state uses the same faulty harmless-error analysis it used in Point IV. Again, proportionality review and harmless error analysis are two separate inquiries.

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

The state argues that Davis's cited cases are distinguishable because Davis killed three people. *Answer Brief* at p. 68. The state acknowledges, however, that Almeida committed two prior first-degree murders. *See Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999). Therefore, *Almeida* is more aggravated in this respect than the case at bar. And as noted in the initial brief, Davis's case has as much if not more mitigation than *Almeida*.

The state argues that unlike the defendants in *Robertson v. State*, 699 So. 2d 1343 (Fla. 1997), and *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988), Davis's mental illness was not of long standing and the judge gave the mental mitigation "only" moderate weight. *Answer Brief* at p. 68. First, it's the quality of the mental illness and its bearing on the offense that matters, not its duration. In fact, that Davis's mental illness was not an enduring trait, but a transient one, is arguably **more** mitigating. *Cf. Roper v. Simmons*, 543 U.S. 551 (2005) (categorically excluding juveniles from death penalty in part because their offenses are often result of transient immaturity and not enduring character traits).

Here, all the mental health experts testified that Davis was psychotic on the day of the offense. Only Dr. Butts thought it was substance-induced psychosis, but even she could not "rule out that he was suffering from an organic psychotic

disorder." T26 2978-79. Moreover, there was a direct causal link between Davis's mental illness and the offense. 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.

Second, that the judge gave Davis's mental mitigation "only" moderate weight does not distinguish this case from *Robertson* or *Fitzpatrick* in a way that helps the state. This is because the judge gave Robertson's mental mitigation **little** weight, 699 So. 2d at 1345, and it is unknown how much weight the judge gave Fitzpatrick's mental mitigation. *See also Almeida*, 748 So. 2d at 936 (Harding, C.J., concurring in part, dissenting in part)(noting that Almeida's mental mitigation was given little weight).

The state's four cited cases are distinguishable because they have more aggravation and less mitigation than the case at bar.

*Singleton v. State*, 783 So. 2d 970 (Fla. 2001). Singleton repeatedly stabbed a woman as she cried for help. He had been convicted of a prior violent felony in 1978 when he was 51, and he was in prison from 1979 to 1987. The trial court found the murder was especially heinous, atrocious, or cruel, and it found the two statutory mental mitigators and the age mitigator (age 69). *Id*. at 972.

*Blanco v. State*, 706 So. 2d 7 (Fla. 1997). Blanco broke into a house and shot the victim six times. The trial court found one statutory mitigator (impaired

capacity) and two aggravators: prior violent felony,[7] and murder committed for pecuniary gain and during commission of a burglary. *Id*. at 8-9.

*Heath v. State*, 648 So. 2d 660 (Fla. 1994). Heath and his brother robbed a traveling salesman. At Heath's direction, Heath's brother shot the salesman in the chest. *Id*. at 662. This didn't kill him, however, so Heath stabbed him in the neck and then tried to cut his throat. But the knife was too dull, so Heath instructed his brother to shoot him again. His brother shot him twice in the head killing him. The trial court found two aggravators: prior violent felony (for a prior second-degree murder conviction) and murder committed during commission of a robbery, and one statutory mitigator: under the influence of extreme mental or emotional disturbance. *Id*. at 663.

*Smithers v. State*, 826 So. 2d 916 (Fla. 2002). In a seven to ten day period, Smithers killed two women and threw their bodies in a pond. He chopped one with an axe, stabbed the other, and strangled both. The jury recommended death for each murder by a vote of 12-0. The judge found HAC, CCP, and contemporaneous violent felony in aggravation, and emotional disturbance and impaired capacity in mitigation.

[7] The prior violent felony was a 1981 armed robbery conviction. *See* http://www.law.fsu.edu/library/flsupct/85118/85118ini.pdf

Davis's case cannot legitimately be compared to these cases. Without CCP and HAC, the only aggravators are contemporaneous violent felony and commission during a burglary. The trial court gave the commission-during-burglary aggravator slight weight (as noted in the initial brief at p. 86 n.16, this would not have been burglary a few years before the offense). Therefore, the only aggravator of any substance is contemporaneous violent felony. Since *Furman v. Georgia*, 408 U.S. 238 (1972), only three people in Florida have been sentenced to death when the only aggravator was contemporaneous violent felony. *Jones v. State*, 705 So. 2d 1364 (Fla. 1998); *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995); *Menendez v. State*, 419 So. 2d 312 (Fla. 1982). All three were reduced to life on direct appeal.[8]

Even with CCP or HAC, or both, this is not this the most aggravated and least mitigated of cases. In *Ballard v. State*, 66 So. 3d 912 (Fla. 2011), the defendant killed his stepdaughter in order to regain custody of her minor daughter, with whom he was having an illegal sexual relationship. *Id*. at 918. About ten days before the murder he bought the pipe that he used to strike her over the head, and

[8] In *Woods v. State*, 733 So. 2d 980, 991 (Fla. 1999), this Court stated: "We have rarely approved a death sentence with a single aggravator involving a contemporaneous felony and substantial mitigation, and we cannot do so under the circumstances of this case." This Court did not cite an example of such rare approval.

after her death he knocked out her teeth to eliminate comparing them to dental records. *Id*. at 916.

The jury recommended death by a vote of nine to three. The trial court found CCP in aggravation and three statutory mitigators. The trial court also found numerous nonstatutory mitigators, but they were unremarkable (close relationship with wife, strong work ethic, lack of impulse control, etc.) and the court gave them little or no weight. *Id*. The court gave the statutory mitigators slight weight.

This Court held that Ballard's sentence was disproportionate (*id*. at 920):

> We find the imposition of the death penalty in this case to be disproportionate. This Court has previously stated that CCP is one of the weightiest aggravating circumstances. However, this Court has also held that the death penalty is reserved only for those circumstances where the most aggravating and the least mitigating circumstances exist. This is not such a case. In this case, the trial court found CCP to be the only aggravating circumstance. The trial court also found three statutory mitigating factors—(1) the defendant was under the influence of extreme mental or emotional disturbance at the time the capital felony was committed, (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and (3) the age of the defendant. Additionally, the trial court considered numerous nonstatutory mitigating factors. Accordingly, we find the death sentence to be disproportionate when comparing this case to other death penalty decisions. [Citations omitted.]

Davis's case is less aggravated and more mitigated than Ballard's. Davis killed because of his psychosis; Ballard because of his sexual avarice. Davis's mitigation was vast; Ballard's minimal. Accordingly, Davis's death sentence is disproportionate and it must be reversed.

## CERTIFICATE OF SERVICE

I certify that a copy of this reply 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 19th day of January, 2012.

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Paul E. Petillo

## CERTIFICATE OF FONT

I certify that this brief was prepared with 14-point Times New Roman type, in compliance with Fla. R. App. P. 9.210(a)(2).

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Paul E. Petillo