

IN THE SUPREME COURT OF FLORIDA

HUMBERTO DELGADO, JR.,

Appellant,

v.

Case No. SC12-579

Lower Tribunal No. 09-CF-14276

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE THIRTEENTH JUDICIAL CIRCUIT,  
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

SUMMARY OF THE ARGUMENT ..... 18

ARGUMENT ..... 20

    ISSUE I ..... 20

        THE TRIAL COURT APPLIED THE CORRECT LEGAL  
        STANDARD IN IMPOSING THE DEATH SENTENCE.

    ISSUE II ..... 25

        DELGADO'S DEATH SENTENCE IS PROPORTIONATE.

    ISSUE III ..... 45

        APPLICATION OF THE AGGRAVATING FACTOR THAT  
        THE VICTIM WAS A LAW ENFORCEMENT OFFICER WAS  
        PROPER.

CONCLUSION ..... 51

CERTIFICATE OF SERVICE ..... 52

CERTIFICATE OF FONT COMPLIANCE ..... 52

TABLE OF AUTHORITIES

**Federal Cases**

Bertolotti v. Dugger,  
883 F.2d 1503 (11th Cir. 1989) ..... 46

Lowenfield v. Phelps,  
484 U.S. 231 (1988) ..... 49, 50

Ring v. Arizona,  
536 U.S. 584 (2002) ..... 50

Zant v. Stephens,  
462 U.S. 862 (1983) ..... 47, 49, 50

**State Cases**

Abdool v. State,  
53 So. 3d 208 (Fla. 2010) ..... 25, 26, 41

Aguirre-Jarquín v. State,  
9 So. 3d 593 (Fla. 2009) ..... 41

Altersberger v. State,  
103 So. 3d 122 (Fla. 2012) ..... 31, 42

Armstrong v. State,  
73 So. 3d 155 (Fla. 2011) ..... 34, 37, 42

Bailey v. State,  
998 So. 2d 545 (Fla. 2008) ..... 32, 33, 37, 42

Blanco v. State,  
706 So. 2d 7 (Fla. 1997) ..... 46

Brant v. State,  
21 So. 3d 1276 (Fla. 2009) ..... 26, 41

Burns v. State,  
699 So. 2d 646 (Fla. 1997) ..... passim

Caylor v. State,  
78 So. 3d 482 (Fla. 2011) ..... 41

Cooper v. State,  
739 So. 2d 82 (Fla. 1999) ..... 42, 43, 44

Crook v. State,  
813 So. 2d 68 (Fla. 2002) ..... 27

Crook v. State,  
908 So. 2d 350 (Fla. 2005) ..... 42, 43

<u>Diaz v. State,</u>	
860 So. 2d 960 (Fla. 2003) .....	34, 42
<u>Douglas v. State,</u>	
878 So. 2d 1246 (Fla. 2004) .....	47, 48
<u>Fitzpatrick v. State,</u>	
527 So. 2d 809 (Fla. 1988) .....	35, 36
<u>Gill v. State,</u>	
14 So. 3d 946 (Fla. 2009) .....	27, 28, 36, 41
<u>Green v. State,</u>	
975 So. 2d 1081 (Fla. 2008) .....	42, 43
<u>Grossman v. State,</u>	
525 So. 2d 833 (Fla. 1988) .....	21, 24, 34
<u>Haliburton v. State,</u>	
561 So. 2d 248 (Fla. 1990) .....	29
<u>Hardy v. State,</u>	
716 So. 2d 761 (Fla. 1998) .....	32, 33, 35, 36
<u>Hess v. State,</u>	
794 So. 2d 1249 (Fla. 2001) .....	38, 39, 40
<u>Hodges v. State,</u>	
55 So. 3d 515 (Fla. 2010) .....	41
<u>Keen v. State,</u>	
775 So. 2d 263 (Fla. 2000) .....	21, 22
<u>Larkins v. State,</u>	
739 So. 2d 90 (Fla. 1999) .....	42, 43, 44
<u>McWatters v. State,</u>	
36 So. 3d 613 (Fla. 2010) .....	27
<u>Menendez v. State,</u>	
419 So. 2d 312 (Fla. 1982) .....	46
<u>Orme v. State,</u>	
25 So. 3d 536 (Fla. 2009) .....	21
<u>Perez v. State,</u>	
919 So. 2d 347 (Fla. 2005) .....	46
<u>Reaves v. State,</u>	
639 So. 2d 1 (Fla. 1994) .....	34, 37, 42
<u>Rigterink v. State,</u>	
66 So. 3d 866 (Fla. 2011) .....	25, 36
<u>Rodgers v. State,</u>	
3 So. 3d 1127 (Fla. 2009) .....	41

<u>Scott v. State,</u> 66 So. 3d 923 (Fla. 2011) .....	38, 39, 40
<u>Serrano v. State,</u> 64 So. 3d 93 (Fla. 2011) .....	25
<u>Silvia v. State,</u> 60 So. 3d 959 (Fla. 2011) .....	36
<u>Sliney v. State,</u> 699 So. 2d 662 (Fla. 1997) .....	28
<u>Smith v. State,</u> 866 So. 2d 51 (Fla. 2004) .....	23
<u>Spencer v. State,</u> 615 So. 2d 688 (Fla. 1993) .....	12
<u>State v. Sturdivant,</u> 94 So. 3d 434 (Fla. 2012) .....	20, 45
<u>Stewart v. State,</u> 588 So. 2d 972 (Fla. 1991) .....	46
<u>Tedder v. State,</u> 322 So. 2d 908 (Fla. 1975) .....	20, 21, 22, 23
<u>Terry v. State,</u> 668 So. 2d 954 (Fla. 1996) .....	21
<u>Trushin v. State,</u> 425 So. 2d 1126 (Fla. 1982) .....	45
<u>Turner v. State,</u> 37 So. 3d 212 (Fla. 2010) .....	41
<u>Walls v. State,</u> 641 So. 2d 381 (Fla. 1994) .....	35
<u>Washington v. State,</u> 907 So. 2d 512 (Fla. 2005) .....	22
<u>Wheeler v. State,</u> 4 So. 3d 599 (Fla. 2009) .....	32, 33, 34, 42
<u>White v. State,</u> 616 So. 2d 21 (Fla. 1993) .....	23
<u>Wright v. State,</u> 19 So. 3d 277 (Fla. 2009) .....	41

STATEMENT OF THE CASE AND FACTS

On August 19, 2009, at about 10:00 p.m., Appellant Delgado shot and killed Tampa Police Department Corporal Michael Roberts. Roberts stopped his patrol car after observing Delgado pushing a shopping cart in an area known for criminal activity by homeless individuals using similar carts (V30/1862). At the time of the encounter, Delgado was armed with four loaded firearms: a .45 caliber semi-automatic Taurus pistol that fired the bullet killing Roberts [in pocket] (V31/2053-54, 2071-72; V33/2316); a .22 caliber revolver manufactured by RG Industries [in pocket] (V31/2053-54, 2067-68; V33/2313-15); a .223 Remington pistol, high capacity assault rifle manufactured by Kel-Tec [in backpack] (V31/1963, 2054, 2065-66; V33/2329-30), and a .9mm Luger semi-automatic manufactured by Glock [in backpack] (V31/2053-54; V33/2330-33; V34/2389-90). Delgado was also carrying receipts for gun purchases in North Carolina from November, 2006, and April, 2008 (V10/1734). On the transaction forms for two separate purchases, Delgado affirmatively misrepresented that he had no history of mental health problems, despite the fact that he had been involuntarily hospitalized three times (V39/3035-37). Delgado described himself as a gun enthusiast, with expertise in the use of firearms, and proud of

the fact that he "takes no shit from anybody" (V39/3080-81; V40/3206-07).

In the summer of 2009, Delgado came to live with an uncle in Oldsmar, Florida, after breaking up with his girlfriend, Shayla Evans, in North Carolina (V36/2731; V37/2811-12, 2818). Delgado and Ms. Evans had an on-and-off relationship for about five years, and had a son together (V36/2722). The uncle agreed Delgado could stay with his family about three months, but Delgado left a couple of weeks before that time was up when the uncle told him he needed to go because the uncle's daughters were frightened of Delgado (V37/2812, 2815-16). Delgado then stayed for a few days with a friend, Raidvil Richardson, that Delgado knew from the Virgin Islands that now lived in Tampa; from there, Delgado stayed with Richardson's friend, Karen Dent, for about a week (V37/2851, 2859-60). After leaving Dent's, Delgado obtained some type of housing through the Veteran's Administration, but he left in a day or two, complaining because the people there smelled and were crazy (V37/2855, 39/3076).

From that point Delgado slept in a park in Oldsmar or at a storage facility where he kept his belongings (V40/3199). He spent his days at the Oldsmar Public Library, where he had a library card and could charge his cell phone and use the computer to look for jobs (V40/3199). Delgado was dissatisfied

with benefits he was receiving from the Bay Pines Veteran's Administration in St. Petersburg and wanted to try to get assistance from the VA facility in Tampa; he had noted an apartment complex in that general location that advertised being helpful to veterans, and he had called them and intended to go there and attempt to negotiate a cheaper lease (V40/3201). On August 19, 2009, he set out with this goal.

The night of August 18, Delgado slept in the hallway of his storage facility (V40/3200). On the morning of the 19th he went to a jewelry store to try to get money he had put down for a watch on layaway; although the store did not have the cash on hand when Delgado got there, he waited outside for a time to see if someone might come in to make a purchase. Delgado was about as upset as any other customer in the same situation (V38/2895). After about 30 or 40 minutes, Delgado went back in and told them he would come back later (V38/2889-90); he took the bus back to his storage unit and packed up his more valuable items, including a laptop computer and his guns, and headed out, walking, towards Tampa (V40/3258). Delgado was able to identify the roads he traveled, stopping for lunch and snacks along the way (V40/3201, 3240-41, 3258). Somewhere near the interstate in Tampa he saw an abandoned shopping cart, and put his bag and coat in the cart (V40/3258-59).



Corporal Roberts reported stopping to conduct a field interrogation at 9:58 p.m. on August 19 (V30/1921-23). Three minutes and forty seconds later, there is a snippet of transmission and sounds of a struggle as the microphone on Robert's police radio was keyed (V30/1926, 1933-34).

Delgado provided Roberts with a Florida driver's license and a Veteran's Administration identification card (V39/3124, 40/3259, 45/3788). He wanted Roberts to know that he was respectable, despite looking like a homeless person (V45/3788). He took offense when Roberts wanted to search Delgado and his belongings rather than being appeased at Delgado's claim of being a veteran and former police officer (V40/3201-02). Delgado was tired, frustrated, and angry, thinking he was being disrespected and discriminated against (V40/3203, 3259). Then when Delgado advised Roberts that he had guns, Roberts became very concerned and told Delgado to get on the ground, away from the cart (V40/3202). Rather than comply, Delgado took off running, which prompted Roberts to fire a TASER at Delgado (V40/3202).

Eyewitness Richard Farmer described seeing the wires eject from the TASER, and was surprised to see Delgado pull the wire out from his shoulder without any apparent effect; Delgado did not fall to the ground, shake, or lose any muscle control

(V32/2107-09). Roberts ran up to Delgado and they started fighting; they were having a fistfight in the middle of the road, and Delgado was getting the upper hand and beating up on Roberts (V32/2109-10). Farmer saw Roberts lying down, on his back, with Delgado bent at the waist over him, hitting Roberts' chest with both hands (V32/2110-13). The injuries to Roberts' face, neck, and head were consistent with having been pistol-whipped (V32/2170). Farmer related that Roberts was lying with his arms out to the side, not moving or resisting, when Delgado shot him (V32/2114). The bullet entered through his right arm, passing into his torso and through his heart, lungs, stomach, and spleen, striking major arteries along the way (V32/2172-73).

When Tampa Police Sgt. Paul Mumford arrived at the scene, Roberts was laying on the ground motionless and Delgado was walking as if going to assist Roberts, but as Mumford approached, Delgado ran past Roberts and Mumford realized that he was a suspect, not a Good Samaritan (V30/1879). Mumford gave chase and yelled for Delgado to stop; Delgado stopped and pulled the Kel-Tec assault rifle out of his backpack, stood in a two-point stance as taught in the police academy with the gun pointed directly at Mumford, and yelled that he was going "to kill all you mother fuckers" (V30/1880-82; V32/2118-19). Mumford

had to retreat behind a dumpster and saw Delgado running toward a park (V30/1882, 1887-89).

Delgado called his uncle in Oldsmar and reported that he had been going down Nebraska Avenue with a shopping cart when an officer stopped him (V33/2296-98). The officer had "tased" him and there was a struggle; Delgado had fired a shot and the officer was on the ground, and Delgado thought he was dead (V33/2298). Delgado spoke of shooting himself, but his uncle told him not to, to think of his family (V33/2299).

A team of officers, including a K-9 unit, converged on Delgado as he hid behind a woodpile near a house a block or two from the park by the shooting scene (V31/1997; V40/3263). Delgado complied with requests to show his hands and was forcibly removed from behind the wood and arrested following a brief struggle (V31/1997-98; V40/3263). Delgado was upset and repeatedly telling the officers that he was one of them, that he did not mean to do it, and that he was mentally ill (V31/2053; V32/2216; V33/2271). The RG revolver and the Taurus pistol were both in his left front pocket, the assault rifle was at his feet, and the Glock pistol was in a holster in his backpack (which had been left back by the dumpster where Sgt. Mumford was accosted) (V31/2054; V33/2269). Corporal Roberts' police radio

and a cell phone were also found in the area where Delgado had been hiding (V31/2011-12; V32/2087-89).

The next day, Delgado asked Hillsborough County Detention Deputy Charles Hunt why there was a black band over his badge; when Hunt responded that an officer had been killed the night before, Delgado said he knew he was fucked if the officer was dead (V34/2433-34). Then Delgado explained how the incident had played out: he was stopped by the officer, and the officer asked if he could search Delgado's stuff, and started going through the shopping cart (V34/2436-37). Roberts pulled out the laptop, saying "what is this?" as if it was not Delgado's, but it was Delgado's; Delgado turned to run, but stopped when the officer said to stop, and at that point the officer had found the guns in the cart (V34/2437). So Delgado turned to run again but, as he ran, the officer shot him in the back of the neck with the TASER (V34/2437-38). Delgado said he must have "blacked out" at that point, which must have been when it happened, because when he woke up, the officer was on the ground (V34/2438). Delgado checked on him then ran; he admitted it was one bad choice after another (V34/2438).

Ten days later, Delgado asked Detention Deputy Chad Hyneman if Hyneman could recommend any good defense attorneys that would represent Delgado as the true victim in this crime (V34/2446-

47). About an hour later Delgado observed that he couldn't deny anything that had happened (V34/2448).

On August 25, Delgado told Detention Deputy Walter Etheridge that Roberts deserved it, that the shooting was self-defense because Roberts should not have been going through his things, and that Delgado was scared and ran when Roberts discovered the guns in the shopping cart (V34/2452, 2458-59). Delgado said that he thought he shot Roberts after Roberts tased him on his neck, and that he blacked out (V34/2459). Delgado also said that this never would have happened if his girlfriend had not kicked him out back in Fayetteville, that his uncle only let him stay three months and then he'd been homeless; Delgado blamed his former girlfriend for all of it, and said he had called her before the incident to see if she would take him back, but she refused (V34/2459). Delgado also told Etheridge that he had taken a weapons concealment course on how to hide weapons on his person, and had the certificate but never turned it in to the sheriff's office; he railed again about Roberts violating his rights and searching his bag, saying Roberts asked him where he stole the computer from, then kept looking and found the guns, then Delgado ran because he didn't want to go to jail (V34/2459-60).

Delgado spoke with defense mental health expert Dr. Michael Maher a total of eight times, starting on Sept. 2, 2009 (V38/2970); with Dr. Barbara Stein on Sept. 15, 2011 (V39/3118); with Dr. Wade Myers on October 13, 2011 (V40/3196); and with Dr. Donald Taylor on Sept. 13, 2011 (V40/2355). With all of the mental health experts, Delgado maintained that he blacked out upon being tased, and did not recall shooting Roberts (V38/3011-14, 3050-53; V39/3125, 3131-32, 3180; V40/3202, 3205-06, 3261-62, 3269-70). After reviewing all of the circumstances, Dr. Maher concluded that Delgado was experiencing a psychotic episode at the time of the shooting, and was unable to understand that his actions were wrong (V38/3017-18).

Doctors Stein, Myers, and Taylor all acknowledged that Delgado suffered a diagnosable mental illness on August 19, but concluded that he was not experiencing any psychotic episode at the time of the shooting and was still able to understand the nature and consequences of his actions and knew the difference between right and wrong (V39/3121-23, 3128; V40/3204-06, 3263-64). Reviewing Delgado's actions over the course of August 19, the State doctors all found strong evidence that Delgado was able to carry out goal-directed, organized behavior (V39/3123; V40/3208-09, 3256-59), and noted that Delgado called his uncle moments after the shooting, admitting what he had done and

acknowledging the wrongfulness of his actions (V39/3125-26; V40/3207, 3266-67). They examined Delgado's numerous comments about the offense and interactions with other people and determined there was no evidence or any indication that Delgado was experiencing any psychosis or break with reality at the time of the shooting (V39/3128, 3135; V40/3204-05, 3219, 3264-66). They noted mental health professionals at the VA had observed Delgado the week before and did not describe any manic behavior or need for hospitalization (V40/3213, 3267-68). While Delgado's mental illness was cited as a contributing factor in the crime, the totality of the circumstances demonstrated that Delgado was angry and frustrated with Roberts, and felt disrespected by Roberts' accusations (V39/3182-84; V40/3217-18).

Dr. Myers reviewed cell phone records and bank statements for several months before the offense, which showed Delgado exercised self-control and sound financial management; the VA records from 2006 to 2009 reflected that Delgado had been functioning surprisingly well, given how sick he had been in 2003 and 2005 (V40/3209-10, 3212). Myers noted that, since Delgado first had trouble in 2003 until his arrest six years later, Delgado had not been treated most of the time and was only in the hospital for about three weeks total (V40/3218).

The jury was given a special verdict form, requiring jurors to determine whether Delgado committed first degree premeditated murder, first degree felony murder, or both; the jury was specifically instructed that they must all agree and return a unanimous verdict (V42/3466-67). Delgado was convicted of first degree felony murder "only," and convicted as charged on the other offenses (V42/3517-18).

At the penalty phase, the State presented three witnesses to discuss victim impact, and the defense presented prior State witnesses Dr. Stein and Dr. Taylor, along with a psychiatrist and a physician from the jail (Dr. Jose Hernandez and Dr. Bethany Weaver), clinical psychologists Dr. Harry Krop and Dr. Mark Ruiz, and Delgado's ex-wife, ex-girlfriend, and Kimberly Dent. The lay witnesses discussed Delgado's positive character traits, family history, and symptoms of mental illness they had observed (V43/3599-3617, 3658-71). However, the focus of the penalty phase was the expert testimony regarding Delgado's mental health history and his state of mind at the time of the offense.

Drs. Stein, Taylor, Krop, and Ruiz all opined that Delgado was under the influence of an extreme mental or emotional disturbance at the time of the shooting (V43/3578, 3619; V45/3859, 3871). This conclusion was based entirely on the prior



mental health diagnoses, including bipolar disorder, and the fact that Delgado's mental health problems would be exacerbated by the life stressors he was experiencing (V43/3579, 3584, 3640; V45/3872, 3881). None of the doctors pointed to any evidence relating to the commission of the crime itself to support the existence of this aggravating factor.

These four doctors also concluded that Delgado was substantially impaired in his ability to conform his conduct to the requirement of the law (V43/3583, 3621; V45/3857, 3872). Again, these conclusions were based primarily on Delgado's history of mental illness and the life stressors Delgado experienced in the weeks before the offense, rather than specific facts relating to the encounter with Roberts (V43/3579, 3584, 3640; V45/3872, 3881).

The jury returned a recommendation for death by a vote of 8 to 4 (V44/3760). A hearing pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993), was held on January 13, 2012 (V45/3775-3890). The defense presented further testimony from Drs. Stein, Taylor, Krop, Ruiz and Maher (V45/3778-3800, 3833-89). A deputy with the Pinellas County Sheriff's Office also testified about encounters with Delgado on August 16 and 17, 2009, when the deputy spoke to Delgado about not sleeping in the park (V45/3801-05). Delgado was polite, responsive, and provided

identification; he remained calm and his demeanor did not change (V45/3803-06).

The State presented Dr. Myers (V45/3807-32). Dr. Myers testified that, despite Delgado's history of mental health problems, Delgado did not meet the criteria for either the extreme disturbance or the substantial impairment statutory mitigating factors (V45/3807-09). Myers discussed the nature of bipolar disorder as an illness that remits and recurs at different times, with symptoms at different levels of severity that wax and wane (V45/3808, 3810-11). A person with this disorder can be very impaired to the point of being psychotic, as Delgado clearly was in 2003 and 2005, but can also function normally for months or years between episodes (V45/3810-11). He contrasted Delgado's functioning around the time of the offense with other times when Delgado has experienced serious and severe symptoms of his illness; based on Delgado's ability to function well and to maintain self control, Myers concluded that Delgado was not acting impulsively the day of the crime and the shooting was not a product of impulsivity (V45/3807-09). According to Myers, Delgado was experiencing, at most, only mild symptoms of his illness and he did not meet the criteria for any mental disorder on the day of the shooting, as his illness was not exhibiting itself at the time of the crime (V45/3708-10). Myers

noted that Delgado's ability to wait patiently for 30 or 45 minutes at the jewelry store reflects the opposite of impulsive behavior, and again noted the lack of any evidence that Delgado experienced any psychotic break at the time of the shooting and did not have associated symptoms of mania or severe depression as you would need to meet the criteria for bipolar disorder (V45/3809, 3811-12). Other than some signs of agitation and suspicion, Delgado was functioning pretty well (V45/3811-12).

Myers felt his opinion was corroborated by the reports of the social worker, mental health counselor, and psychiatrist at the VA that had seen Delgado within two weeks of the murder, and did not identify any sort of disorder at work at that time beyond some anxiety (V45/3813-14). Similarly, after Delgado's arrest, he was upset but not observed to be psychotic or behaving abnormally (V45/3814-15). Myers recognized that Delgado was prescribed psychotropic medications in jail, and felt this appropriate given the stress, anxiety and agitation, in order to prevent a recurrence of the full-blown psychotic episodes Delgado experienced in 2003 and 2005 (V45/3815-16). Based on his review of all the information, Myers concluded that Delgado's mental health issues would shorten his fuse, but that his actions against Roberts were motivated by rage and retaliation (V45/3820-23, 3828). Delgado's perception that Roberts was

discriminating against him and harassing him was not due to paranoia, because Delgado was not having any paranoid delusions at the time (V45/3824-26). Myers noted Delgado's bipolar disorder was arguably a mild form given his ability to go from 2005 to 2009 with no medication and no major relapse with a severe episode; Delgado was not getting any mental health services between 2005 and the night of this offense, as the records documented he consistently refused them (V45/3826-27).

Myers also pointed out that Delgado was initially calm and cooperative with Roberts, and his anger and fear did not begin to build until it looked like he could be in trouble (V45/3829). If Delgado had been suffering paranoid delusions about police officers being out to get him, he would not be out walking along a major road and would have run as soon as an officer pulled over (V45/3830). In addition, the act of Roberts firing a taser would not trigger a bipolar episode, as bipolar features take a long time to come on or go away, not in a matter of minutes or even hours, and would not be likely to develop even over the hours that Delgado had been walking from Oldsmar (V45/3830-31).

Sentence was imposed on February 10, 2012 (V46/3902-11). The sentencing order reflects that the court provided great weight to the aggravating circumstance that the victim was a law enforcement officer engaged in the performance of his duties,

and moderate weight to the prior violent felony conviction aggravator, based on Delgado's aggravated assault on Sgt. Mumford (V9/1632-33). The court gave considerable weight to the statutory mitigating factor of no significant criminal history, noting that Delgado was 34 years old at the time of the offense; the statutory mitigator of age was also found and given little weight (V9/1633-34, 1641). The statutory mitigating factor of extreme disturbance was given substantial weight, with the court outlining the relevant expert testimony and noting the well-documented history of mental illness (V9/1634-38). However, the statutory mitigating factor of substantial impairment was rejected; instead, moderate weight was given to the fact that Delgado's ability to conform his conduct to the requirements of law was impaired, just not substantially so (V9/1638-41). As to this factor, the court again outlined the expert testimony, and concluded that Dr. Myers' view of the evidence comports with the evidence as presented, and that his testimony on this issue was the most credible and was accepted by the court (V9/1641). The court also noted that, other than Dr. Maher, none of the other experts testified that Delgado was in an acute psychotic state at the time of the offense (V9/1641). The court thereafter discussed and provided some measure of weight (generally little) to 40 nonstatutory mitigating factors (V9/1642-49). The court

concluded that the aggravating factors outweighed the mitigation, and imposed a death sentence for Roberts' murder (V9/1650).

SUMMARY OF THE ARGUMENT

Delgado offers no basis to disturb his convictions or sentences. The first and third issues he offers were not preserved for appellate review, since Delgado did not present the same arguments to the court below. Both issues are also without merit. The sentencing order reflects that Judge Battles applied the proper legal standard and independently determined that the aggravating factors outweighed the mitigating factors, compelling imposition of the death penalty. The use of the "victim was a law enforcement officer" aggravating factor was constitutionally appropriate; the factor narrows the class of defendants convicted of first degree murder eligible for the death penalty. This Court and the United States Supreme Court have previously rejected the argument that the factual predicate to support felony murder cannot be used to find an aggravating circumstance. Any possible concern about using the same factual basis in this case to find Delgado eligible for a death sentence is alleviated by the fact that a second aggravating factor also applied, which independently rendered Delgado eligible for death.

Delgado's proportionality argument also fails. The deliberate killing of a law enforcement officer is an egregious crime which is deserving of the ultimate penalty in the absence

of compelling mitigation. Because Delgado's mental health problems were not a significant factor in the killing of Corporal Roberts, and Delgado committed a second serious offense against Sgt. Mumford, this case is factually comparable to others where the death sentence has been imposed and upheld. The facts of Roberts' murder are not the least aggravated or the most mitigated. The death penalty was carefully considered, recommended, and imposed below, and a review of similar cases confirms the proportionality of Delgado's death sentence.



## ARGUMENT

### ISSUE I

#### THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD IN IMPOSING THE DEATH SENTENCE.

Delgado initially challenges the legal standard applied by Judge Battles in imposing his death sentence. Specifically, Delgado disputes a comment in the sentencing order, noting that a jury recommendation is entitled to great weight, and should not be overturned unless no reasonable basis exists to support it (V9/1650). According to Delgado, this standard, from Tedder v. State, 322 So. 2d 908 (Fla. 1975), only applies to life recommendations, and the standard for death recommendations is "entirely different" (Initial Brief, p. 65). Curiously, Delgado does not identify or describe the proper standard upon receipt of a death recommendation. This is a purely legal issue, so review is *de novo*. State v. Sturdivant, 94 So. 3d 434, 439 (Fla. 2012). As will be seen, the trial court's order does not reflect any error in imposition of the death sentence in this case.

It must be noted initially that any possible error with regard to the reference to the Tedder standard in the sentencing order was invited by the defense. Delgado's sentencing memorandum included a section called "The Trial Judge as Gatekeeper: Proportionality Review," which cited the same legal principles he is now challenging (V8/1513). The memorandum went

on to note that the application of the Tedder standard to death recommendations was "not entirely clear," but that the court was still required to weigh the recommendation, and that this Court had noted (in dicta) in Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), that a death recommendation was entitled to great weight (V8/1513). Accordingly, Delgado has no basis to complain about this language, directly from his sentencing memorandum, being included in the sentencing order. This argument is not only unpreserved for appellate review, see Orme v. State, 25 So. 3d 536, 553-54 (Fla. 2009) (Canady, J., concurring), any possible error was expressly invited. Terry v. State, 668 So. 2d 954, 962 (Fla. 1996) ("A party may not invite error and then be heard to complain of that error on appeal").

Moreover, although Delgado now claims that the proper standard is "different," as noted above he does not identify or describe any analysis that should have been conducted below that was not. In fact, the analysis required following a death recommendation is the independent weighing of the aggravating and mitigating circumstances. Keen v. State, 775 So. 2d 263, 283 (Fla. 2000). A review of the very thorough sentencing order filed below reflects that Judge Battles carefully considered all of the relevant circumstances and independently analyzed whether the aggravating factors outweighed the mitigation (V9/1632-50).

The comment about the Tedder standard, which simply repeated the language from Delgado's sentencing memorandum, was included in a section titled "Proportionality," an assessment which the trial court is not even required to make (V9/1650).

The cases cited by Delgado do not compel any finding of error. He notes several cases where, following a jury recommendation of life, the trial courts improperly mixed the standards by conducting an independent weighing of the aggravating and mitigating circumstances and then determining whether any reasonable basis supported the recommendation. Such error can be harmful when there is mitigation in the record which provides a reasonable basis for the recommendation, and harmless if no such mitigation exists. Washington v. State, 907 So. 2d 512, 513 (Fla. 2005); Keen, 775 So. 2d at 283. In the instant case, the defense requested the trial judge to override the jury death recommendation, and discussed a number of cases where trial courts have imposed life sentences despite jury recommendations for death (V8/1513-20). Although this extra analysis may not be required by statute or case law, it certainly does not create legal error for a trial judge to consider, and respond to, an argument which the defense has presented.

Delgado also asserts that similar errors occurred in White v. State, 616 So. 2d 21 (Fla. 1993), and Smith v. State, 866 So. 2d 51 (Fla. 2004). In White, the trial court expressly stated that it was "bound" by the Tedder standard to follow the jury's reasonable death recommendation, and urged this Court to recede from Tedder and to unequivocally hold that any death sentence, regardless of the jury recommendation, is clothed with a presumption of correctness. Similarly, in Smith, the court's comments reflect that the court considered itself "required" to impose a death sentence, whereas this Court has recognized that the law does not prevent a trial judge from exercising reasonable judgment and imposing a life sentence, even when the facts may warrant the death penalty. To the contrary, in the instant case, there is no language from the sentencing order which is inconsistent with any legal holding from this Court.

There is no indication that the court below was confused or misapprehended the proper analysis before imposing a death sentence, as in White and Smith. The court below did not expressly consider whether there was a reasonable basis for the death recommendation, or suggest that this Court should reconsider its jurisprudence in this area, or indicate that it was "bound" by the recommendation or "required" to impose a death sentence. Rather, Delgado is troubled by the court's

reference to giving the recommendation great weight, a standard taken directly from Delgado's sentencing memorandum and supported by this Court's case law. See Grossman, 525 So. 2d at 839 n.1 ("We have also held that a jury recommendation of death should be given great weight"). Even if some impropriety could be discerned based on the court's use of the disputed language, it would be harmless beyond any reasonable doubt, given the court's careful analysis of the aggravating and mitigating factors and independent weighing of the relevant circumstances. Accordingly, this Court must deny this claim and affirm the sentence of death imposed on Humberto Delgado.

## ISSUE II

### DELGADO'S DEATH SENTENCE IS PROPORTIONATE.

Delgado next challenges the proportionality of his death sentence. However, a review of comparable cases establishes that Delgado's sentence should not be reversed as disproportionate.

This Court has emphasized that its proportionality review is qualitative, not quantitative; it is "not a mere numbers game; rather, it is a holistic comparison of the circumstances of the current case with those of prior decisions where the Court has found that the death penalty was a proportionate punishment." Rigterink v. State, 66 So. 3d 866, 899 (Fla. 2011). Rather than counting the aggravating and mitigating circumstances, the Court considers the nature of, and the weight given to, the relevant factors. Serrano v. State, 64 So. 3d 93, 115 (Fla. 2011); Abdool v. State, 53 So. 3d 208, 224 (Fla. 2010) (noting large quantity of mitigation presented, but confirming that the focus is on the quality, not the quantity, of the evidence).

Delgado artfully portrays his case as one involving an emotionally disturbed individual who, after "battling the demons of severe mental illness" all his adult life, accidentally shoots a police officer in the midst of a tragic encounter following a long and tiring day. The evidence, however, demonstrates that

this is not a fair portrayal of Corporal Roberts' murder. The court below found that Delgado's mental illness did not play a substantial role in the crime, since the sentencing order expressly finds that Dr. Myers was the most credible witness in providing evidence of the extent to which Delgado was impaired by his bipolar disorder at the time (V9/1640-41). The evidence also established that this was not an accidental, instinctive, or reflexive shooting, but was a deliberate act by an individual motivated by anger over Corporal Roberts' perceived "disrespect" and the fear of being arrested for the guns he was carrying (V9/1640-41; V32/2114; V40/3203, 3211, 3217-18; V45/3828-29).

Judge Battles' findings as to Delgado's mental health are critical to assist the Court in weighing this type of mitigation appropriately. See Brant v. State, 21 So. 3d 1276, 1284-88 (Fla. 2009) (trial court findings critical to assist Court in appropriate weighing of mitigation). The fact that Delgado's brief focuses on the evidence he presented, rather than offering an analysis through the prism of the trial court's findings, is telling. Mental health evidence is far more significant if it can be linked specifically to the criminal behavior involved in the capital murder, and the court below substantially rejected that link by crediting Dr. Myers' testimony. Abdool v. State, 53 So. 3d 208, 225 (Fla. 2010); Gill v. State, 14 So. 3d 946, 965

(Fla. 2009); McWatters v. State, 36 So. 3d 613, 645 (Fla. 2010) (noting mitigation was based entirely on background, and "none of it pertained to the circumstances of the actual murders"); Crook v. State, 813 So. 2d 68 (Fla. 2002) (emphasizing the importance of linking illness and behavior). Although the court below found the "extreme disturbance" statutory mitigator to apply, the evidence to support that mitigator all relied exclusively on Delgado's *history* of having previously been diagnosed with a bipolar-type disorder with psychotic features, which is characterized as an extreme condition which can be treated but not cured (V39/3043-44). Delgado was only considered to be "under" the influence of an extreme disturbance due to the life-long nature of the disease, not due to any specific circumstance related to Roberts' murder.

The trial court also found that, although Delgado had a documented history of a diagnosable mental illness, it did not substantially impair his ability to act in accordance with the law. This finding is consistent with the evidence that Delgado suffered from a bipolar-type illness for approximately six years before the crime, which had been untreated but only resulted in mild symptoms in the four years immediately preceding Roberts' murder (V45/3826). Importantly, the overwhelming evidence demonstrated that throughout the day of the murder, including



before and just after the shooting, Delgado's actions reflect that he was goal-oriented, rational, and free of any psychosis (V39/3123, 3129; V40/3208, 3266-3267). Drs. Stein, Taylor and Myers all agreed that Delgado was not in a psychotic state, and that his claim as to having experienced a blackout was not true (V39/3127; V40/3204-07, 3270). This is also consistent with the observations of mental health professionals at the VA facility only days before the shooting, who recorded no indication of any extreme disturbance or concerns of psychosis (V39/3073-75; V40/3213).

In addition, this Court is not precluded from considering the deliberate nature of the shooting in considering proportionality. Because the analysis is a comparison of the totality of the circumstances with factually similar crimes and criminals, the Court can take facts beyond the stated sentencing factors into account. See Gill, 14 So. 3d at 956 (noting that although the trial court based its finding of the prior violent felony aggravator only on the prior capital felony conviction involving the Beverly Moore murder, there was evidence of five other prior violent felony convictions, including attempted murder); Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (noting brutality of attack in upholding proportionality of sentence, despite trial court's failure to find HAC).

Delgado insists that his case did not involve a premeditated murder; the special jury verdict did not confirm premeditation and the trial judge gave "slight" weight to the mitigator that Delgado did not "plan" the offense (V9/1642). However, this Court is not bound by the special jury verdict because the jury was not accurately instructed. The jury was given the option of convicting Delgado of first degree felony and premeditated murder, first degree premeditated murder only, and first degree felony murder only; they were told that the verdict had to be unanimous (V8/1442-45; V42/3467-71). However, there is no requirement of unanimity as to the theory of first degree murder. See Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990). Because the jury was not properly instructed on this point, this Court should not be bound by the special jury verdict.

Moreover, while the jury was instructed to convict Delgado of the highest "offense" upon which the jury agreed, they were not instructed of any need to consider distinct options within the same offense, so it cannot even be said that the jury necessarily discussed and rejected first degree premeditated murder. Finally, it is clear that this Court could consider the evidence of premeditation if there had been a general verdict returned. Given the purpose and nature of this Court's

proportionality review, it makes no sense to review cases where there is a special jury verdict differently than cases where a general verdict has been returned. In either case, the focus must be consideration of the totality of the circumstances. Otherwise, inconsistency within the context of proportionality review skews the analysis, and jeopardizes the constitutionality and legitimacy of the review.

The trial court's finding that Delgado "did not plan" for Roberts' murder does not negate the deliberate nature of Delgado's actions. Eyewitness Farmer testified that Delgado shot Roberts while Roberts lay helpless and unmoving in the street, having been knocked senseless by Delgado's beating (V32/2112-14). Although Delgado claims that the forensic evidence does not support this testimony, the trajectory of the bullet was subject to varying interpretations, as argued by both sides below (V41/3360-69; V42/3397-98). What cannot be disputed, however, is the fact that Roberts suffered physical injuries consistent with having been beaten about the face and head, and that the bullet was not fired close to entry as if in a struggle, but was fired from at least two or one and a half feet away, yet before Roberts could even draw his own weapon in defense (V32/2172). These undisputed facts fully establish the deliberate nature of

Delgado's actions, and this Court cannot ignore the concrete evidence on this point in assessing proportionality.

Placing all of the evidence in the proper context, it is clear that Delgado's death sentence is proportionate. This Court has upheld death sentences for the murder of a law enforcement officer in a number of comparable cases. In Altersberger v. State, 103 So. 3d 122 (Fla. 2012), a 19-year-old defendant with substantial impairment in his ability to conform his conduct to the requirements of law shot and killed a highway patrol sergeant who had pulled him over for erratic driving. Altersberger was under the influence of alcohol at the time, had a long-term history of substance abuse, was raised in a dysfunctional family and home environment, and pled guilty and took responsibility for the offense. Despite the obvious similarities with his case, Delgado does not mention Altersberger until more than twenty pages into his proportionality argument, where he dismisses it as dissimilar due to the aggravating factor of CCP and mental mitigation that was, according to Delgado, "nowhere near as strong as Delgado's" (Appellant's Initial Brief, p. 90). In fact, Altersberger's mitigation was stronger, since it substantially impaired him at the time of the crime.

Bailey v. State, 998 So. 2d 545, 548, 550-54 (Fla. 2008), also presents a similar case: Bailey was approached by a law enforcement officer because he was driving suspiciously; he was nervous because he was breaking the law, as he did not have a license and was on parole in Wisconsin (as Delgado was nervous because he was illegally carrying concealed weapons, and knew there was a danger of arrest); he was convicted of resisting an arrest with violence; he had a history of mental health problems including attention deficit hyperactivity disorder (ADHD), some very significant neuro-cognitive deficits that would be consistent with significant brain damage, post-traumatic stress disorder, severe alcohol and drug abuse, depression, and a number of personality disorders. The aggravation is on par with Delgado's case because Delgado's second aggravator, the assault on Mumford, is at least as weighty as coming to Florida for Spring Break while on probation for an apparent non-violent offense.<sup>1</sup>

Like Delgado, Bailey compared his case to Hardy v. State, 716 So. 2d 761 (Fla. 1998) ("Bailey asserts that his case is

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<sup>1</sup> The first aggravator, avoid arrest, was given great weight, just as the law enforcement victim aggravator was given great weight below. The avoid arrest factor is often merged with the law enforcement victim aggravator, as they are typically duplicative - and would be in Delgado's case. See Burns v. State, 699 So. 2d 646, 648 (Fla. 1997); Wheeler v. State, 4 So. 3d 599, 603 (Fla. 2009).

similar because Bailey likewise engaged in a spontaneous shooting in an effort to prevent an arrest, and Bailey had even more mitigation because his brain damage was not based on self-inflicted wounds"). This Court distinguished Hardy as it only involves a single aggravating factor, and accordingly was subject to a different standard of review. Bailey, 998 So. 2d at 553 (noting that a single aggravator is generally overcome by substantial mitigation, thereby confirming that even substantial mitigation does not generally overcome two or more aggravating factors). This distinction also demonstrates the strength properly allocated to the aggravating factor of law enforcement victim, since Burns v. State, 699 So. 2d 646 (Fla. 1997), withstood even this stricter single-aggravator proportionality review, despite the existence of two statutory mitigators (age and no significant criminal history) and "numerous" nonstatutory mitigating factors. Burns, 699 So. 2d at 648-49.

In Wheeler v. State, 4 So. 3d 599, 612 n.9 (Fla. 2009), this Court upheld the death sentence despite the trial court's finding that both mental mitigators existed. Wheeler also involved the shooting death of an officer, and Wheeler's prior convictions were based on contemporaneous attempted murder and aggravated battery charges on two other officers at the scene. Wheeler's case was admittedly more aggravated, involving a

protracted gun battle and the CCP aggravator, but both statutory mental mitigating factors were found and accorded "some" weight. The officer victim aggravator is so strong that Wheeler takes note of the fact that, standing alone, it does not "always" render a death sentence proportionate; obviously there is no one factor which would *always* satisfy proportionality, and the mere fact that this Court finds it necessary to point out this obvious limitation indicates that the factor is properly considered one of the weightiest in our statutory scheme. See also Diaz v. State, 860 So. 2d 960, 971 (Fla. 2003) (deputy shot after an altercation and a chase, with separate attempted murder in the same incident; two aggravators of CCP and prior violent felony conviction, and five statutory mitigating circumstances, including extreme mental or emotional disturbance and the defendant's diminished capacity to conform his conduct to the law); Grossman v. State, 525 So. 2d 833 (Fla. 1988) (where, as in Burns and the instant case, the officer was beaten first and then shot so that the defendant could avoid being arrested); Armstrong v. State, 73 So. 3d 155 (Fla. 2011) (the same two aggravating factors as Delgado, along with the aggravating factor of during the course of a robbery, characterized as "strong"); and Reaves v. State, 639 So. 2d 1 (Fla. 1994) (defendant shot an officer that responded to a 911 call and ran

a warrant check; the same two aggravators, as well as the mitigating factor of no significant criminal history).

This Court reduced a death sentence on proportionality grounds when the victim was a law enforcement officer in Hardy, 716 So. 2d at 766, and Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). Hardy, as previously noted, is a single-aggravator case, where the defendant was only 18 years old, had an abusive childhood, and shot himself in the head after killing the deputy. Fitzpatrick actually demonstrates why Delgado's sentence is proportionate, since it provides an example of truly persuasive mental mitigation. In that case, the defendant had an emotional age between nine and twelve years old, suffered schizophrenia-like symptoms, including appearing "psychotic" and "wild" *at the scene of the shooting*, and had a history of hallucinations and being "crazy as a loon;" the trial court found both statutory mental mitigators as well as age. This Court described the case as "a bizarre robbery scheme by an immature and emotionally disturbed young man who impulsively fired his weapon when surprised by a police officer," in Walls v. State, 641 So. 2d 381, 391 (Fla. 1994). Because Fitzpatrick was observed demonstrating signs of his mental illness at the scene of his shooting, his mental health evidence is far more compelling than Delgado's history of a mild bipolar disorder



which was not substantially impairing him at the time of Roberts' murder.

The proportionality analysis offered in Delgado's brief does not look at the issue holistically by contrasting comparable cases, but instead picks apart the aggravating factors and artificially inflates the mitigating evidence. This is evident from the fact that none of the cases Delgado discusses as comparable involve the killing of a law enforcement officer. Delgado does not address officer-killings until the end of his argument, where he concludes this case is most like Hardy and Fitzpatrick and that cases upholding the death penalty for killing a law enforcement officer are "in no way similar" to his case. As has been demonstrated, this case is more aligned with officer-killing cases where the death penalty has been upheld than with either Hardy or Fitzpatrick.

In addition, Delgado ignores the well-established principle that this Court does not reweigh the sentencing factors but determines proportionality accepting the jury's recommendation and the judge's balancing of the evidence. Rigterink, 66 So. 3d at 899; Silvia v. State, 60 So. 3d 959, 973 (Fla. 2011); Gill v. State, 14 So. 3d 946, 964 (Fla. 2009). While Delgado does not directly challenge the findings or weight given to any of the sentencing factors below, the presentation of his argument is a

distortion rather than a reflection of the findings noted in the sentencing order. For example, the way Delgado unreasonably discounts the aggravating factor that Roberts was a police officer is contrary to the court below finding this aggravating factor entitled to great weight. Similarly, Delgado offers, as an "uncontradicted" fact, that his mental illness played a "major" role in the crime, but the trial court affirmatively rejected this allegation by crediting the testimony of Dr. Myers, who opined that Delgado's ability to conform his conduct to the requirements of law were not substantially impaired at the time of the shooting (V45/3809).<sup>2</sup>

Delgado initially eschews the aggravated nature of the case, noting that the traditionally weighty factors of heinous, atrocious, or cruel and cold, calculated, and premeditated are not present. While HAC and CCP are certainly factors entitled to great weight, their absence does not render a death sentence disproportionate. This is particularly true in law enforcement victim cases, where officers are typically shot, often without a calculated plan. See Burns; Bailey; Armstrong; Reaves.

The most critical factor in this case, Corporal Roberts' status as an on-duty law enforcement officer, is reduced to

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<sup>2</sup> The "uncontradicted" facts offered in Delgado's brief are in no way conceded by the State. In fact, there are several assertions within this recitation of purportedly "overwhelming" evidence which were not proven in the evidence presented at trial.

insignificance in Delgado's analysis, due to it being inherent in the offense for which Delgado was convicted. The aggravating force of this circumstance does not lose any effect simply because the jury specified the nature of the murder Delgado committed at the guilt phase. The trial court gave great weight to this factor below, and both common sense and this Court's precedent support the conclusion that the murder of a law enforcement officer is an egregious crime, fully supporting the imposition of the death penalty. In Burns v. State, 699 So. 2d 646 (Fla. 1997), this Court upheld a death sentence, despite this being the only aggravator which applied and the existence of both statutory and nonstatutory mitigation.

Delgado also unreasonably minimizes his prior violent felony conviction, claiming it is not a strong aggravator because it occurred contemporaneous with Roberts' murder and comparing his case to Hess v. State, 794 So. 2d 1249 (Fla. 2001), and Scott v. State, 66 So. 3d 923, 934-39 (Fla. 2011). The court below gave moderate weight to this factor, and it was factually more serious and more violent than the contemporaneous convictions applied in Hess and Scott. The testimony below established that Delgado threatened Sgt. Mumford in order to effectuate an escape, and he was momentarily successful in doing so until additional officers arrived on the scene. And it was

not an empty or meaningless threat; Delgado put down his bag, and despite having other firearms at hand in his pocket, he stopped to withdraw his larger assault rifle, and raised it in a two-point stance as taught in the military (V30/1881). Sgt. Mumford had no choice but to retreat. The fact that Delgado did not simply fire wildly at Mumford but ran once he had secured the avenue of escape he sought supports the scenario that Delgado was in a stable frame of mind and able to make rational decisions.

The deliberate and violent nature of Delgado's assault on Sgt. Mumford is worthy of more weight than this factor as applied in Hess and Scott. In Hess, the prior violent felony involved sexual offenses committed on two of Hess's nieces two years *after* the capital murder. The circumstances of the offense were not developed for consideration, but this Court noted that the defendant's sister, the mother of the victims, testified extensively in his behalf at the penalty phase, and she and her daughters had forgiven Hess. Hess challenged whether these offenses could even be properly considered "violent" but this Court found that the statute facially defined a violent offense.

In Scott, the defendant was robbing a laundromat, and on his way in to the shop he hit a man in the head with the butt of his gun. This Court noted that the resulting aggravating battery

charge was not even brought until four days before jury selection. Since the only other aggravating factor was the murder being committed during the course of a robbery (just as in Hess), this Court carefully compared the prior conviction aggravator and, not surprisingly, concluded that it was not as weighty as convictions for more serious offenses committed before the capital murder. Certainly, the weight of this aggravating factor will vary significantly based on a defendant's record, but Delgado's attack on Sgt. Mumford is not to be dismissed lightly.

Delgado's attempt to minimize the significance of this factor in his proportionality analysis must be rejected. In Wheeler, the contemporary attacks on the other officers at the scene were significant enough to solidify the case as a strong two-aggravator case. But even if the weight of this factor is reduced, this case is still more aggravated than Hess or Scott, and therefore neither of those cases are persuasive to demonstrate disproportionality here.

Delgado's persuasive attempt to inflate the significance of his mental health mitigation has already been addressed as inconsistent with the findings entered in the sentencing order. It bears noting that, even if Delgado's mitigation were a stronger force behind Roberts' murder, there is no "mental

illness" exception to the death penalty. Gill v. State, 14 So. 3d 946, 965 (Fla. 2009). This Court has upheld the death sentence in many cases despite the existence of strong mental health mitigation. See Abdool v. State, 53 So. 3d 208, 224-28 (Fla. 2010) (19-year-old with both statutory mental mitigators and no significant criminal history); Aguirre-Jarquín v. State, 9 So. 3d 593, 609-10 (Fla. 2009) (24-year-old with both mental mitigators and long term substance abuse issues); Brant v. State, 21 So. 3d 1276, 1284-88 (Fla. 2009) (substantial impairment and no significant criminal history); Caylor v. State, 78 So. 3d 482 (Fla. 2011) (extreme disturbance and dysfunctional family); Gill v. State, 14 So. 3d 946, 963-66 (Fla. 2009) (both statutory mental mitigators); Hodges v. State, 55 So. 3d 515, 542-43 (Fla. 2010) (both mental mitigators; age; a lot of nonstatutory); Rodgers v. State, 3 So. 3d 1127, 1133-35 (Fla. 2009) (young defendant with extensive history of mental illness, sexually abused as child); Turner v. State, 37 So. 3d 212, 226-29 (Fla. 2010) (both statutory mental mitigators); Wright v. State, 19 So. 3d 277, 303-04 (Fla. 2009) (19-yr-old with both mental mitigators, neurological impairments and low IQ). While Delgado will surely respond that these cases all involve additional and/or more weighty aggravation, such argument simply reinforces the need to consider more factually

comparable cases, such as Burns, Altersberger, Wheeler, Bailey, Diaz, Armstrong, and Reaves.

The cases Delgado cites do not compel a different result. He cites many cases simply for general propositions rather than comparable facts. Throughout his extensive argument, the cases he discusses as factually comparable are Green v. State, 975 So. 2d 1081 (Fla. 2008), Crook v. State, 908 So. 2d 350 (Fla. 2005), Cooper v. State, 739 So. 2d 82 (Fla. 1999), and Larkins v. State, 739 So. 2d 90 (Fla. 1999). As noted previously, none of these cases involve the murder of a law enforcement officer. In addition, the mitigation found in those cases was both more persuasive in quality and substantially linked to the commission of the underlying offenses.

Green is a single aggravator case with substantial mental mitigation. Green had suffered from schizophrenic disorders for years before the murder, had been involuntarily committed to crisis stabilization a few months before the murder, and was observed to be psychotic the day of the shootings. There was no dispute about the significance of Green's mental illness on the crime, as even the State expert agreed that both statutory mental mitigating factors applied. Clearly, the finding that Delgado was not substantially impaired when he killed Corporal

Roberts establishes that Delgado's mental mitigation is nowhere near as compelling as that presented in Green.

In Crook, the uncontroverted mental mitigation included substantial frontal lobe brain damage from having been abused as a child, possible mental retardation, and the personality development of a three or four year old child; this Court repeatedly emphasized the importance of linking the mental defects to the defendant's conduct at the time of the murder. See Crook, 908 So. 2d at 358-59 ("We are particularly influenced by the unrefuted testimony of the mental health experts that **relate** the rage and brutal conduct in this crime to the defendant's brain damage and mental deficiencies;" "Most persuasive ... is the unrefuted testimony ... **directly tying** Crook's impairments to his functioning at the time of the murder ... These circumstances, especially the testimony **linking** the combination of Crook's brain damage and substance abuse to his behavior at the time of the murder, counterbalance the effect of the aggravating factors") (footnote omitted, emphasis added). Once again, Delgado's case does not offer the same critical link, tying his mental health issues directly into his conduct in shooting Corporal Roberts.

Both Cooper and Larkins involved murders during the course of a robbery; Cooper killed the owner of a pawnshop and Larkins



killed the clerk in a convenience store. Neither case is as serious as the killing of a law enforcement officer. Cooper presented an 18-year-old defendant with no prior criminal history, a brutal childhood, brain damage, mental retardation, and mental illness; this mitigation was sufficient to overcome the robbery-murder, even with CCP. In Larkins, both statutory mental mitigators were found and the uncontroverted testimony demonstrated that Larkins suffered from organic brain damage, impulse control, and low intelligence. Neither Cooper nor Larkins present a comparable case compelling a finding of disproportionality in Delgado's case.

In conclusion, Delgado's death sentence is heavily aggravated, fails to offer substantial mitigation, and is proportionate to a number of cases where this Court has upheld a sentence of death. This Court must affirm the sentence imposed below.

### ISSUE III

#### APPLICATION OF THE AGGRAVATING FACTOR THAT THE VICTIM WAS A LAW ENFORCEMENT OFFICER WAS PROPER.

Delgado's final issue challenges the application of the aggravating factor that the victim was a law enforcement officer engaged in the performance of his duties. According to Delgado, use of this aggravating factor violated the Eighth Amendment in this case because the jury's special verdict of felony murder provided the same essential elements as the aggravating factor, and therefore the aggravating factor did not narrow the class of people eligible for the death sentence. As this is a pure legal issue, review is *de novo*. State v. Sturdivant, 94 So. 3d 434, 439 (Fla. 2012).

Because Delgado is presenting an "as applied" challenge rather than disputing the facial constitutionality of the aggravating factor, he must have presented his argument at trial in order to secure appellate review. Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1982). Although his brief asserts that this claim was preserved by written and oral objection, a review of the objections below does not support a finding of preservation. The objections were not offered on Eighth Amendment grounds but asserted error on double jeopardy principles, claiming that the aggravating factor had been

"subsumed" by the substantive offense and its use was comparable to the improper consideration of "duplicative aggravating circumstances" (V8/1458-60). Delgado asserted that because the victim's status as a law enforcement officer was an element of the underlying felony, it could not also be used to enhance the sentence (V8/1548-50; V48/1944-45, 1960-63). At no time did Delgado assert to Judge Battles that application of this aggravator violated the Eighth Amendment because it did not serve to narrow the class of people eligible for the death penalty. Because Delgado did not assert the same argument against use of this aggravating factor below, his current claim of unconstitutionality "as applied" is not preserved for appellate review, and should be rejected on that basis. Perez v. State, 919 So. 2d 347, 377 (Fla. 2005).

Even if the claim is considered, however, no basis for reversal of Delgado's sentence has been offered. The argument which was made below and preserved for review, claiming use of this factor amounts to improper "double-dipping," has been rejected many times. Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997); Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991); Menendez v. State, 419 So. 2d 312, 314-15 (Fla. 1982); Bertolotti v. Dugger, 883 F.2d 1503, 1527-28 (11th Cir. 1989).

The Wyoming case law upon which Delgado currently relies was expressly considered in the rejection of this claim.

Delgado's new-on-appeal argument, that Justice Pariente's concurring opinion in Douglas v. State, 878 So. 2d 1246 (Fla. 2004), demonstrates the constitutional error in this case, is also without merit. The requirement that an aggravating factor narrow the class of people eligible for the death penalty is a requirement that the aggravating factor serve to set the case apart from all other murders generally. The Eighth Amendment does not require an aggravator to "narrow the class of people" convicted by special verdict of felony murder based on an underlying felony of resisting an officer with violence for eligibility purposes, but only to narrow the class of people convicted of "murder." Zant v. Stephens, 462 U.S. 862, 877 (1983).

Moreover, any possible claim that this aggravator failed to provide the necessary narrowing for eligibility could not make any difference on the facts of this case, since Florida law recognizes eligibility upon the finding of a single valid aggravating circumstance and in this case there were two aggravating circumstances found. Thus, even if one aggravator failed to narrow the class, the other aggravator would still render Delgado eligible for a death sentence. As eligibility is

independently established, there is no constitutional bar to consideration of this aggravating circumstance as a sentencing factor. Accordingly, Delgado's argument on this issue does not provide any reason to disturb the death sentence imposed, and this Court must affirm.

Delgado's death sentence is supported by more than simply the fact that he was convicted of murder. Here, Delgado was rendered eligible for the death penalty by virtue of his conviction for felony murder, with resisting an arrest with violence as the predicate felony. Clearly, Delgado's offense was narrower than simply murder, or even first degree murder. Because his offense necessarily encompassed a statutory aggravating factor, Delgado was eligible for a death sentence based on that narrow conviction. Even if Justice Pariente does not agree that a conviction for first degree murder alone renders a defendant eligible, even she would agree that the special verdict entered below necessarily accomplished this. See Douglas, 878 So. 2d at 1265 (Pariente, J., concurring) ("A defendant convicted of first-degree murder cannot qualify for a death sentence unless at least one statutory aggravating factor is found to exist."). In order for this Court to find that Delgado's death sentence is unconstitutional because there was no narrowing of the class of defendants convicted of first

degree murder, this Court would have to conclude that the jury verdict offers nothing more than the fact Delgado was convicted of murder. See Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding an aggravating circumstance must narrow the class of persons eligible and justify the imposition of a more severe sentence "compared to others found guilty of murder," emphasis added).

Finally, any possible error in considering this aggravating factor would necessarily be harmless in light of the two other possible aggravating factors - murder committed to avoid arrest and murder committed to disrupt or hinder law enforcement - which would apply, without duplicating elements of the jury's special verdict here. Presumably the only reason the State would not have sought these aggravating factors below is that they would be duplicative of the factor which was used, that the victim was a law enforcement officer. See Burns, 699 So. 2d at 648 n.3 (trial court properly merged all three aggravating factors into one).

Neither this Court nor the United States Supreme Court has ever held that a factor which renders a defendant eligible for the death penalty may not be also used as a sentencing enhancement. To the contrary, in Lowenfield v. Phelps, 484 U.S. 231 (1988), the Court upheld a death sentence despite the fact

that the sole aggravating circumstance merely duplicated an element of Lowenfield's convictions for first degree murder. As explained in Lowenfield, the constitutional requirement that a capital sentencing scheme provide a reasonable way to circumscribe the class of persons eligible for the death penalty under Zant may be satisfied in a number of ways, and is not violated simply because an aggravating factor - even when it is the sole support for a death sentence - duplicates an essential element of the murder conviction at issue. The only relevant distinction is that a defendant's eligibility must be determined by a jury in accordance with the Sixth Amendment's right to a jury trial, while a sentencing factor can be considered by a judge in order to impose sentence within the range of sentences for which the defendant is eligible. Ring v. Arizona, 536 U.S. 584 (2002). Delgado's argument in this case boils down to a contention that you may not use the same fact or element to find both eligibility and aggravation, but no case he cites even suggests that principle, let alone directly supports it.

In conclusion, Delgado's claim challenging application of the aggravating factor that the victim was a law enforcement officer engaged in the performance of his duty has not been preserved for appellate review, and should be rejected on that basis. Even if considered, his claim has no merit. The jury

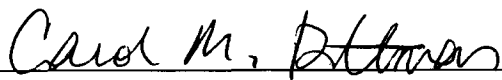
finding that Delgado killed a law enforcement officer engaged in the performance of his duties is certainly narrower than a conviction for murder, and properly served both to render Delgado eligible and to aggravate his sentence for killing Corporal Roberts.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the convictions and sentences entered below.

Respectfully submitted,

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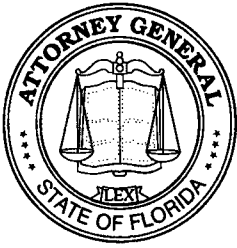
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Steven L. Bolotin, Assistant Public Defender, P. O. Box 9000 - Drawer PD, Bartow, Florida 33831-9000, [sbolotin@pd10.state.fl.us] and [appealfilings@pd10.state.fl.us], this 11th day of March, 2013.

CERTIFICATE OF FONT COMPLIANCE

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

  
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BY \_\_\_\_\_

March 11, 2013

Honorable Thomas D. Hall, Clerk  
Supreme Court of Florida  
500 South Duval Street  
Tallahassee, Florida 32399-1927

Re: Humberto Delgado, Jr. v. State of Florida  
Case No. SC12-579  
Lower Tribunal No. 09-CF-14276  
Death Penalty Case

Dear Mr. Hall:

Enclosed, please find for immediate filing in the above referenced case, the original and seven copies of the Answer Brief of the Appellee. Per Administrative Order AOSC04-84, this brief has been electronically submitted via e-mail on this date.

Sincerely,

CAROL M. DITTMAR  
Senior Assistant Attorney General

SDA/dms  
Enclosure(s)

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