

IN THE SUPREME COURT OF FLORIDA

HUMBERTO DELGADO, JR., :
Appellant, :
vs. :
STATE OF FLORIDA, :
Appellee. :
_____ :

Case No. SC12-0579

BY _____
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APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant, HUMBERTO DELGADO, JR., was charged in Hillsborough County with first degree murder in the August 19, 2009 shooting death of Tampa police officer Michael Roberts. Delgado was also charged with aggravated assault on a law enforcement officer (Paul Mumford), carrying a concealed firearm, and depriving Corporal Roberts of means of communication (his radio) (1/26-29). The case proceeded to trial in November 2011 before Judge Emmett Battles and a jury. Delgado was receiving psychotropic medications throughout the trial (30/1825; 38/2956; 39/3102), as he had been during the two year period from immediately after his arrest until the time of the trial (43/3595-97, 3677; 45/3847-48, 3862-63, 3868-69). Defense counsel, in addition to contending that the evidence failed to prove premeditation or felony murder, relied on a defense of insanity(4/793), supported by the expert testimony of Dr. Michael Maher (38/3017). The state, in rebuttal, introduced the expert testimony of Drs. Barbara Stein, Wade Myers, and Donald Taylor, all of whom found that Delgado had a preexisting history of psychiatric hospitalizations and that he suffers from a serious mental illness (the overlapping diagnoses of bipolar disorder with psychotic features or schizoaffective disorder with psychotic features), but was not legally insane under the M'Naghten standard at the time of the shooting (39/3121-22, 3166-67; 40/3204-07, 3263-64, 3268, 3270).

The verdict form, on Count I, gave the jury the options of finding Delgado (1) guilty of first degree murder (premeditated and felony murder); (2) guilty of first degree murder (premedi-

tated only); (3) guilty of first degree murder (felony murder only); (4) lesser degree homicides, and (5) not guilty. The jury returned a verdict finding Delgado guilty of first degree murder (felony murder only), as well as finding him guilty on the other three counts (8/1442-45; 42/3517-18).

In the penalty phase of the jury trial, the state presented victim impact testimony from the Tampa police chief and from Corporal Roberts' wife and sister-in-law (43/3453-68). The defense recalled Delgado's ex-wife (the mother of his two older children) and a former girlfriend (the mother of his youngest child), who had earlier testified in the guilt phase about the events leading up to his prior psychiatric hospitalizations in the Virgin Islands and Fort Bragg (43/3602-17, 3658-71; see 36/2593-2611, 2720-38). The defense also called four psychiatric or psychological experts, two of whom (Drs. Barbara Stein and Donald Taylor) had testified for the state in the guilt phase. All four doctors (Harry Krop and Mark Ruiz as well as Stein and Taylor) diagnosed Delgado with severe and chronic mental illness, exacerbated in August 2009 by major life stressors (homelessness, rejection by family members, physical pain, and the effects of a long miserable daylong trek from Oldsmar to Tampa on August 19 which culminated in his encounter with Corporal Roberts). Drs. Stein, Krop, and Ruiz concluded that Delgado was under extreme mental or emotional disturbance at the time of the shooting, and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired (43/3577-84, 3632-42, 3690-92, 3697-3701). Dr. Taylor

found that Delgado was under extreme emotional disturbance, and that his capacity to conform his conduct was impaired, although he was capable of appreciating the criminality of his conduct (43/2619-22). The experts agreed (as Dr. Stein phrased it) that Delgado "is not an individual who in any way has an antisocial or sociopathic or psychopathic personality" (43/3585), based in part on the fact that he has no history of criminal behavior or violence. See 43/3624 (Dr. Taylor); 43/3635, 3642-43 (Dr. Krop); 43/3693-95 (Dr. Ruiz).

The jury, by a vote of 8-4, recommended a death sentence (8/1450; 44/3760). In the January 13, 2012 Spencer hearing the defense again presented Drs. Stein, Taylor, Krop, Ruiz, and Maher, while the state called Dr. Myers (who had testified for the state in the guilt phase but did not testify in the jury penalty phase). Dr. Myers did not dispute that Delgado had a major mental illness and had experienced extreme emotional disturbance in previous years, but was of the opinion that he did not have the "symptoms of an extreme emotional or mental disturbance in the period surrounding the time of this crime" (45/3807-09).

On February 10, 2012, Judge Battles imposed the death penalty on Delgado for the murder conviction, along with concurrent fifteen, five, and five year sentences on the noncapital counts (9/1631-67; 46/3910-12). As aggravating factors the judge found (1) the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties (great weight) and (2) the contemporaneous conviction of a felony involving the use or threat of violence (the aggravated assault on Sergeant

Mumford) (moderate weight) (9/1632-33). Judge Battles stated, "None of the other statutorily enumerated aggravating circumstances apply in this case and . . . [n]othing other than what is reflected in paragraphs 1 and 2 above was considered in aggravation" (9/1633). In addressing statutory mitigating circumstances the judge found (1) Delgado has no significant history of prior criminal activity (considerable weight); (2) the capital felony was committed while Delgado was under the influence of extreme mental or emotional disturbance (substantial weight); and (3) Delgado's capacity to conform his conduct to the requirements of law was impaired (moderate weight) (9/1633-41). Delgado's "long-standing severe psychiatric illness that was most likely genetic and outside of his control" was found as a nonstatutory mitigating factor and was given weight consistent with the court's findings regarding the statutory mitigators relating to his mental condition at the time of the crime (9/1649). Another nonstatutory mitigating circumstance was discussed by the trial court in the sentencing order as follows:

Dr. Stein, Dr. Taylor, Dr. Ruiz, Dr. Krop and Dr. Maher agreed that the Defendant's severe mental illness was exacerbated by numerous acute psychosocial or life stressors, which included the following: the Defendant was homeless for about a week before the instant offense; the Defendant was unemployed; his girlfriend and mother of his youngest son had recently terminated their relationship and asked him to leave because of his mental illness; his uncle also asked the Defendant to leave his home because of the Defendant's mental illness; the Defendant had been living on the streets and in his storage facility; he had little sleep and had not been eating well; the Defendant was not receiving the assistance and support he was expecting from the Veteran's Administration; and the Defendant, who also suffered from chronic knee pain, had just walked 15 miles from Oldsmar to Tampa over several hours on a very hot summer day.

The court found that this mitigating circumstance was established by the evidence, and he accorded it substantial weight consistent with his determination regarding extreme mental or emotional disturbance (9/1646).

Additionally, the court found, but gave little weight to, the statutory age mitigator and numerous other nonstatutory mitigators (9/1642-49).

In explaining his decision to follow the jury's recommendation of death, Judge Battles stated in his sentencing order:

The Court recognizes that the Supreme Court of Florida will conduct a proportionality review of the sentence in this case. See State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court is also mindful of its role and responsibility in rendering a decision in cases where the imposition of the death penalty is at issue. It is well settled that a jury's advisory opinion is entitled to great weight reflecting as it does, the conscience of the community, and should not be overturned unless no reasonable basis exists for the opinion. [Citing in a footnote Richardson v. State, 437 So.3d 1091 (Fla. 1983); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); and Grossman v. State, 525 So.2d 833, 839 n.1 (Fla. 1988)]. This Court's review of other reported capital cases has led the Court to conclude that the death penalty is not disproportionate.

(9/1650) (emphasis supplied).

STATEMENT OF THE FACTS

A. Trial - State's Case in Chief

At 9:58 p.m. on August 19, 2009, a Tampa police dispatcher received a brief snippet of radio transmission from Corporal Michael Roberts, from the intersection of Nebraska and Arctic in the Sulphur Springs area of Tampa. She immediately started trying to resume contact with him. Receiving no response she sent

officers to check on him (30/1919-31). She subsequently received a transmission that an officer was down, and rescue units, air service, and canine were needed. The suspect was described by Sergeant Paul Mumford as an elderly black male in his 40s or 50s, who ran west or northwest across the park to Yukon. Sergeant Mumford stated "I think he's 10-0" (meaning armed) (30/1912-13, 1916, 1929-30; 31/1979).

After this information was broadcast, a large number of Tampa police officers converged on the scene (30/1868-70, 1905-06, 1936-40; 31/1973-80, 1989-91, 2000-02, 2015-17, 2031-36, 2044-45, 2049-51, 2058-60, 2062-63; 32/2204-06; 33/2230-31, 2236-39, 2263-65, 2285-86). Corporal Roberts was lying on the ground motionless. CPR was performed (30/1876-78, 1941-44; 31/1981-88, 1991, 2001-02, 2045-48, 2060; 32/2206; 33/2239). Roberts' TASER and a spent TASER cartridge were on the ground nearby (33/2239-42; 34/2377-84). In the vicinity was a shopping cart with a walking cane leaning against it. There was a laptop computer in the cart (30/1870, 1875, 1940; 31/1980, 2034-35, 2041; 34/2361, 2401-02; 35/2537-38). On the ground was an ID card from the Department of Veterans' Affairs in the name of Humberto Delgado, Jr., and a green wallet containing items of identification belonging to Humberto Delgado, Jr. (31/2035-38, 2042; 34/2361-62, 2380-81). The wallet also contained, among other things, several receipts for firearms purchased by Delgado in North Carolina between November 2006 and April 2008 (31/2036-43; 34/2362) and a folded-up piece of paper with writing on it which read:

A message of promise to this evil world, filled with

liars and cheaters and monkey cheetahs. I am who I am. A living man who was betrayed and who knows that he is always being betrayed for bullshit. But since I do not like bullshit the Living GOD and eye have designed a punishment that is so great 4 U MONKEY CHEETAHS. That you will understand who is, who is, A LIVING GOD. DON'T worry for me anymore because of your zips and socials your SOULS, souls, souls, souls are lost to be MINED. So as (I am) priceless and free so will all mines be. All who stand against this Ay Ay will understand what it means to dye.

In loving memory I meditate you. As Pacheco as can be, as Humberto Delgado Jr. and all his children can be, as Tito can be, as those I love can be, as Abel can be, as the third Adam can be, as Wahman can be, as this whole world can be. Love you GOD for ever and ever, Amen.

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(10/1744; see 35/2536; 41/3379-81; 42/3431)

A radio BOLO was put out stating that Delgado had purchased four firearms including an assault rifle (mistakenly indicating that the weapons had been acquired within the last week or two) (31/2021, 2037-41; 33/2265, 2272-73; 35/2533-35).

Sergeant Paul Mumford was patrol supervisor for the evening shift in the north end of Tampa. Corporal Roberts was a member of his squad. After hearing the sound of a scuffle on his radio, Mumford was travelling north on Nebraska when he heard a single gunshot (which was not unusual for Sulphur Springs) (30/1854-68). As he reached the intersection of Nebraska and Arctic, his attention was drawn to a disheveled, homeless-looking man (Delgado) who was holding a bag in his hand. Mumford saw Corporal Roberts lying face-up on the ground with his arms to his side. A shopping cart was within five feet of Roberts' vehicle. The homeless-looking man was jogging at a slow pace; Mumford initially thought he was going to help Roberts but then realized he was a possible suspect

(30/1870-79).

Mumford began chasing the man west on Arctic and loudly ordered him to stop. Near a dumpster, Mumford saw him digging into the bag at his side (described as a canvas bag, like a gym bag) and he pulled out a firearm and - - from a distance of 25-30 feet - - pointed it at him. Mumford feared for his life at that point. He crouched down in back of the dumpster, crept around the corner of a white building, and drew his service weapon. According to Mumford, the "whole thing took a matter of seconds" (30/1879-82, 1887-90, 1913). [When interviewed by detectives on the night of the incident, Mumford told them he had drawn his own weapon when he first exited his vehicle, but at trial he said he didn't draw his weapon until after Delgado pointed a firearm at him, when he moved from the dumpster to the wall; "If I had drawn my weapon when I exited my vehicle I would have shot him" (30/1911-14)].

Mumford next "observed the suspect running into the dark. Asked if he still had anything in his hands, Mumford said "He still had a weapon in his hand at that point, yes." Mumford assumed he was heading to the park. Mumford went back to where Corporal Roberts was, and waited for back-up. The suspect was apprehended ten or fifteen minutes later behind a residence at 812 East Yukon (30/1890-95). Mumford identified Delgado on the night of his arrest - - and in court at trial - - as the person he had seen running from the vicinity of Corporal Roberts' vehicle, and as the person who pointed a gun at him (30/1895-96).

On cross, Sergeant Mumford acknowledged that as the suspect

was running away he [Mumford] went on his radio to inform dispatch and other police officers of the suspect's direction of travel, and he stated "I think he's 10-0" (armed). Mumford did not tell the dispatcher that the suspect had pointed a gun at him. Asked why he said "I think he's 10-0", Mumford explained "[O]nce he left my sight, I didn't know whether he was still armed or not" (30/1912-13, 31/1979; see defense closing argument at 41/3349-51).

A portion of Sergeant Mumford's testimony was corroborated by Officer Calhoun (who saw Mumford in his peripheral vision next to a building; "I believe he had his gun in a low raised position, but I wasn't sure what he was doing at the time") and Officer Anderson (who saw Mumford next to the white wall on the west side of Nebraska with his firearm drawn) (30/1941; 31/2045-46). Neither of these officers indicated that they saw the suspect.

Numerous police officers chased Delgado through the park until he was found (within 10-15 minutes) in the backyard of the residence at 812 East Yukon, where the officers (met with more or less passive resistance) pulled him from underneath a woodpile (30/1893-94; 31/1991-98, 2002-05, 2009-10, 2017-20, 2051-53, 2064; 32/2207-14; 33/2231-32, 2249-52, 2266-68, 2286-87). Many of the officers present heard spontaneous statements by Delgado to the effect of "I'm sorry. I'm sorry. God, I'm sorry (31/1997); "I'm sorry, I didn't mean to do it. I'm a police officer" (kept saying that over and over) (31/2005); "I'm sorry. I'm crazy. I'm one of you guys. Please don't hurt me" (31/2053; see 32/2216; 33/2234); "I'm sorry. He hit me with a stun gun, so I shot him" (33/2254); that he had been in the military and was a police officer in the

Virgin Islands and he just reacted to the TASER (33/2234, 2289; see 31/2028). A TASER prong and wire were tangled in his dread-locked hair, although not embedded in the skin (31/2028; 32/2091-92; 33/2223, 2254, 2272, 2289-91, 2302-04, 2307-09).

[Sergeant Eric Diaz is a graduate of TASER International's training academy, and he in turn instructs Tampa police officers in the use of the device. A TASER delivers 50,000 volts. First and foremost, according to Diaz, the TASER intimidates people because they are afraid of the electric shock. When the probes interact with the body "it just causes so much confusion inside the body, it causes these major muscle contractions"; the muscles lock up and it incapacitates the person for a short amount of time, causing him or her to be knocked to the ground. However, both probes have to come in contact to cause that; "if one probe and one wire is in contact, it can cause some effect; but it's not going to create an NMI (neuromuscle incapacitation)]. It's going to be a different type of response or different type of pain." Similarly, according to Diaz, some clothing or jackets or thick hair will keep the probe far enough away that it won't cause incapacitation. In his experience (contrary to TASER International's position) the TASER probe needs to make direct contact with the skin or it will not be as effective (34/2412-29). Diaz helped create the Tampa Police Department's Standard Operating Procedures regarding the use of TASERS; one of the things an officer should consider before using a TASER is whether the person is mentally ill (assuming the officer is aware of the person's mental health problems) (34/2418, 2426)].

After Delgado was placed in a police car at the scene of the arrest, Detective Houston tried to speak with him, but he was crying and mumbling incoherently. "He was just kind of babbling. I couldn't understand him" (34/2400).

Three loaded firearms were seized from Delgado at the scene of the arrest, and a fourth was recovered from his backpack (which was located on Arctic 150 feet west of Nebraska). These were a Taurus .45 caliber semiautomatic removed from his left front pocket; a small snubnose revolver from the same pocket, a Kel-Tec assault rifle lying by his feet, and a Glock semi-automatic from the backpack (31/2005-07, 2021-26, 2053-55, 2065-73; 32/2094-96, 2214; 33/2234, 2251-53, 2256, 2261-73, 2287-88, 2293-95; 34/2411-12). [The .45 caliber bullet which killed Corporal Roberts was fired from the Taurus .45 caliber handgun (33/2328, 2333). A partial DNA profile of a biological substance obtained from the interior frame of that weapon matched Corporal Roberts' DNA profile (35/2506-07; 7/1384-86)]. Also recovered at the scene of the arrest were Corporal Roberts' portable radio (30/1858-59, 1909; 31/2011-12; 32/2216-17; 33/2278-82; 34/2374), and Delgado's cell phone showing the last two calls were made to his uncle's residence phone at 10:06 and 10:07 p.m. (32/2088-90; 33/2296-99).

The uncle, Zolio Velasquez, testified that Delgado called him and told him what happened. He was going down Nebraska with a shopping cart and an officer told him to stop, and tased him. There was a scuffle; he fired a shot and he thinks the cop died. Delgado told his uncle he was going to shoot himself. He uncle told him not to do that, to think about his family (33/2296-99).

After he was brought to the Orient Road jail, Delgado made a series of statements (not in response to interrogation) to detention deputies. On the afternoon of the arrest, Deputy Hunt was wearing a black band over his badge. Delgado asked him what it meant, and Hunt said it represented that an officer was killed. Delgado said he knew he was fucked if the officer was dead. He was crying, and said he had been a police officer in St. Croix for five years. Then he told Hunt how the incident had played out. During the stop the officer was going through the shopping cart; he pulled out a computer and said "What is this?" in a tone like it didn't belong to Delgado. Delgado said it was his, and he started to turn and run. The officer said "Stop" and Delgado stopped, but by that time the officer had found a gun in the shopping cart. Delgado began running again and the officer shot him in the back of the neck with a TASER. Delgado thought he blacked out for a minute, and when he woke up the officer was on the ground. He didn't remember shooting him but that must have been what happened. He thought "if he's dead, I'm fucked", so he checked the officer and ran. It was just one bad choice after another (34/2430-38).

Deputy Etheridge testified that on August 25 Delgado made statements that "He deserved it. It was self-defense. He shouldn't have went through my shit." Delgado explained that the officer found a computer and asked where did he steal it from. He was scared and he ran when the officer discovered the guns in the shopping cart. "I think I shot him after he tased me on my neck. I blacked out." Delgado was pacing around the cell talking and

mumbling to himself, and at one point he said "I wish I could wake up from this dream and say, wow, what a dream." At another point he said this never would have happened if his ex-girlfriend hadn't kicked him out of the house in North Carolina. His uncle had only let him stay with him for three months and then he became homeless - - sleeping on the streets and in public bathrooms - - and his ex-girlfriend wouldn't take him back (34/2451-61).

Deputy Hyneman was observing Delgado on suicide watch on the night of August 30 when he asked him if he could recommend any good defense attorneys that would represent him as the true victim of the crime. Later that night he said that when the case came up he can't deny anything that happened. Delgado also made statements to the effect that he was in the military and everyone in his company was trying to kill him, and the V.A. Hospital was not helping and the entire system had failed him. There was also a time period in which Hyneman couldn't understand what Delgado was saying (34/2445-50).

The deputy chief medical examiner, Dr. Mary Mainland, performed an autopsy on Corporal Roberts. The cause of death was a single gunshot wound to the torso with perforation of the heart and lungs. The entrance was on the upper part of the right arm, and the bullet path was consistent with the right arm being down at Roberts' side at the time he was shot. No gunshot residue was found on Roberts' body or clothing, so it is possible that the shot was fired from two feet away or more (32/2162-75). [FDLE firearms examiner Kwong expressed the opinion that the gunshot wound was not a contact wound; "it could be anywhere between

greater than contact to four-and-a-half feet" (33/2336-37)]. Superficial contusions with no bruising under the skin (consistent with being struck with a pistol) were found on Roberts' face, head, and neck. There was nothing about those injuries that would cause Dr. Mainland to think they would result in unconsciousness (32/2167-69, 2177-82).

The encounter between Delgado and Corporal Roberts was not video or audio recorded. Although Roberts' vehicle was equipped with an in-dash camera which had been used to record a couple of traffic stops earlier that day, the camera was not activated on this occasion (32/2246-47; 33/2535-36). Moreover, the computer screen in Roberts' vehicle contained no information pertaining to Delgado (34/2384-86, 2401). However, the state presented four lay witnesses, and the defense one witness, who observed fragments of the incident.

Richard Farmer is a 29 year old Tampa resident and seven-time convicted felon. He was accompanied by his "home girl" Octavia Mack (who did not testify). They had gone to a strip bar but the cover charge was too high, so they were heading back to a friend's house in Suplhur Springs. Octvaia was driving, as Farmer had had 3-5 beers. They were heading north on Nebraska and it was just starting to get dark (32/2097-2102, 2125, 2143-46). Farmer saw the police trying to approach or grab a homeless man who looked Hispanic. [Farmer could not identify him, but in the context of the other evidence it would be Delgado]. The man kept walking. The officer drew his TASER and fired it. Farmer saw the man pull the TASER prong out of his shoulder. Farmer - - based on his

prior experience with being tased - - was surprised when the homeless man did not fall to the ground or appear to lose muscle control. However (as Farmer told investigators when he was questioned after the incident), the man did look like he had been tased and he was "hopping around" (32/2103-09, 2121, 2146-48).

After the homeless man pulled the taser out the policeman ran up on him and they started fistfighting, and the homeless man was getting the upper hand. Olivia Mack made a turn around the block, and while she was doing so Farmer could not see what was happening at Arctic and Nebraska. When they got back to the intersection the police officer was on his back, motionless with his arms at his sides, and the homeless man was punching him in the chest. Then "[t]he homeless man shot the police". According to Farmer, the homeless man was standing over top of the officer and shot him point blank in the chest [as contrasted with the medical examiner's testimony that the entry wound was in his upper right arm, the bullet was consistent with the arm being at his side, and the bullet fractured the humerus bone of the arm and lacerated an artery in the armpit before entering the chest cavity (32/2168-73)]. The shooter ran across Nebraska to the shopping cart, got a book bag out of it, and ran west on Arctic. There he put the bag down and took out another firearm, which Farmer thought was a machine gun. He put the clip in it, but Farmer didn't see him point it at anyone (32/2109-18, 2121, 2149-55). Farmer testified at trial that he heard the man say "I'm fixing to kill all you motherfuckers", but when Detective Durken asked him on the night of the incident whether he heard the man say anything Farmer

answered "No" (32/2119, 2158-59).

Right after the officer was shot, Farmer called 911. The tape of the 911 call (which contained Octavia Mack's voice as well as Farmer's; her statements were ruled admissible as nontestimonial excited utterances) was played to the jury (32/2121-43). In it Farmer expressed an interest in getting a reward, although that did not transpire (32/2139, 2144-45).

Michael Hamberg was driving southbound on Nebraska when he saw something which caused him to slow down and roll down his window to see what was going on. A police officer was in a confrontation with a dark skinned man with dreadlocks (identified from a photopack as Delgado) who was leaning on a shopping cart. The officer was holding up what looked like a bookbag in his left hand; his right hand was down by his side, possibly on his gun or TASER. He was yelling at the man "Get on the fucking ground. Get on the fucking ground". Hamberg watched for a while and then drove on; as he turned onto Bird Street he heard a loud pop which he assumed was a gunshot (32/2184-2203; see 35/2512-14).

William Campbell was driving home on Nebraska when he saw police cars and flashing lights. He saw a "dark complexion" on the ground; at first he thought the police shot somebody, but it turned out it was the police on the ground. Campbell then saw a shadow of a guy in a plaid shirt running in the dark. He ran behind a building on a side street by the park. Campbell could not see his face nor identify him (31/1968-72).

Eighteen year old Anthony Freeman was walking toward Nebraska with his little brother when he saw a dude with wild and crazy

looking dreads - - later identified from a photopack as Delgado -
- running (with a noticeable limp) through the park. He was
carrying a gun at his side. He was crying and he asked Anthony
for help, saying that the police were trying to kill him.
Anthony and his brother ran away (31/1961-66; see 35/2510-12).

B. Defense Case - Events at Nebraska and Arctic

Kent Sharp was driving south on Nebraska when he saw a police
car pulled over to the side of the road. A police officer in
uniform was having an altercation with someone. The other man
(later identified from a photopack as Delgado) "was a wide, thick
kind of a person" - - bulkier than the officer - - and his hair
was in dreadlocks (38/2934-38, 2942). The man raised his hands
above his head, put them down again, and headed north on the
sidewalk at a pace which was either a slow run or a fast walk.
The officer was following behind him. The other guy turned left
and was heading in the direction of Sharp's car when Sharp heard
the noise made by the TASER, but nothing happened. The man
stopped, turned right, and went behind Sharp's car, with the
officer still following. Sharp turned his car around and looked
out the window to see what was going on (38/2936-42, 2950-51). At
this point the guy with the wild hair was on the ground with the
thinner police officer sitting on top of him (38/2942-43, 2952).
Sharp thought the incident was over so he continued on his way to
pick up his friend. While driving down Seward he heard a gunshot
from the direction where he had just been. When he returned to
that location (after helping his friend pack her belongings into

his car) police cars were everywhere and the officer he'd seen earlier on the northwest corner of the intersection was laying on the southwest corner (38/2933, 2943-46).

C. Defense Case - Delgado's Background
(Virgin Islands and Fort Bragg)

In support of the insanity defense, evidence of Delgado's mental illness and psychiatric hospitalizations preexisting the events of August 19, 2009 was presented. Delgado had been a police officer in the Virgin Islands in the late 1990s and later worked for the Hovensa oil refinery in the Caribbean (36/2594-95, 2604, 2614-15, 2626-29, 2646-47, 2658, 2669-70, 2690-91) before coming to the United States and enlisting in the military.

Awilda Delgado is his ex-wife and the mother of his two older children (now 14 and 11) (36/2593-94). Toward the end of Delgado's time with the police department Awilda noticed a change in his behavior, and after he left that employment he became paranoid, talking about demons and saying that people were watching him and following him, or that somebody was in the tree looking through their window. He made her and the kids sleep on a mattress on the floor and he didn't want her to take them to school. They couldn't go outside because there were demons there; the kids had special blood and they wanted it. He also said that the children's legs were goat legs and he had to cut them off. [See also the testimony of Delgado's cousin and police colleague Juan Cruz regarding goat feet (36/2614-18)]. Although Delgado was never physically abusive to her or the kids, and she was not afraid of

him, Awilda knew she had to get him help (36/2601-07, 2611).

In April 2003 Awilda had Delgado involuntarily committed for treatment of his mental illness. He was hospitalized for about a week and placed on medication (Haldol, see 37/2780) which improved his mental condition but it made him feel like a zombie, so he stopped taking it (36/2604-09, see also 36/2641, 2648-50). The hallucinations and paranoia started again, with devils and demons and people in trees and people trying to kill him. Sometimes he wouldn't eat, drink, or sleep; he would just pace back and forth. He would talk about the Masons wanting him to join. Eventually Awilda reached the point where she just couldn't take it, so she took the kids and left (36/2609-11).

According to his uncle Angel Luis Ledesma, Delgado was a regular child growing up and an outstanding student, but there was a noticeable change after he entered the police department right out of high school (36/2626, 2635, 2638). He kept telling his uncle that the Masons were aggressively trying to recruit him, and they were going to get him and his family if he didn't join. He had refused, telling them his religion was Pentecostal. After Delgado went to work at the oil refinery he did well for a little while, but then his paranoia started up again. He was always looking over his shoulder as if his life were threatened, and "everybody he see was Mason." He was walking the streets at night, seeing demons and not sleeping. A couple of times he took off his clothes, saying that God told him not to wear clothes; he had to be outside and he can't be in a shower. On one occasion Ledesma found him hiding in the back of a building, disheveled and

black and blue. He said he was fighting demons. Ledesma took him home, cleaned him up, and arranged to have the police come and get him to take him to the hospital. [This was the first of Delgado's two psychiatric hospitalizations in the spring of 2003]. Although he was told they were there to get him help, Delgado was scared of the officers and they had to restrain him; he didn't want to go to the hospital and he said "They are going to take me somewhere else" (36/2628-33, 2639-42).

When Delgado stopped taking his medications his paranoid behavior returned (36/2641-42). Even after he went into the military and was stationed in North Carolina, he often called Ledesma, and his preoccupation with the Masons conspiring against him and trying to kill him never changed. At one point he told his uncle that 50 Cent, the famous rapper, was a Mason and was after him too. Ledesma was not aware of Delgado's hospitalization for mental health reasons while he was in the military (36/2633-34).

Digby Stridiron was Delgado's supervisor at the Hovensa oil refinery around 2001. Delgado would make comments to the effect that the Masons were after him and were watching him. Stridiron at first took the remarks with a grain of salt, but they continued, and he noticed Delgado frequently looking behind his back when he walked. After Delgado left Hovensa, Stridiron encountered him at a shopping center looking like a bum. He told Stridiron he wasn't sleeping because the devil was harassing him every night, but when he came out during the day the Masons "are out to see me because they want to kill me." Then there was another

incident around 2002 in the area of Mount Washington when Delgado was completely naked "ranting up and down the street." Stridiron and the lady from the store called the police and they took him away (36/2714-19).

Annette Delgado is a mental health supervisor at the Virgin Islands Department of Behavioral Services, and she is also Humberto Delgado, Jr.'s stepmother (since he was 16) (36/2657-58). After he joined the police force and continuing after he left police work, he became paranoid, particularly with regard to the Masons. He believed people were after him, and were trying to poison his food. He began wearing gloves and walking with a cane, and he claimed to be a character from the Bible (36/3660-65). In the spring of 2003 Annette got a phone call that Delgado was walking barefoot and shirtless on the highway in traffic. She went to pick him up, but he didn't want to come with her because he thought she was one of the people who was out to get him. Forms were filled out to have the police pick him up and admit him to a hospital [this was the second of his two hospitalizations that spring, 36/2666, 2668] where he stayed for about eight to ten days (with a three day extension; his family didn't think he was ready to be released but that was all the extra time they were able to get). He was not himself; he was drooling from the mouth, pacing back and forth with his limbs cramped up, and talking nonstop (36/2665-67).

Annette and Delgado's father (who was in Iraq at the time) got him an apartment near where they lived. He wasn't well enough to work then. Annette would visit him daily to make sure he ate

and bathed. She urged him to see a doctor because he wasn't acting normal, but he discontinued his outpatient treatment and stopped taking his medication because it made him lethargic and sick (36/2667-69). Later, when he was working at Hovensa, he continued to express that the Masons were pressuring him to join and "these were people that did things and they got away with it." At one point when he was staying with Annette he thought that demons were fighting him in the house. He set up mirrors in the bedroom because that was a way to catch the demons in the night when they came. He insisted on showering outside, and he would hide in the dark to escape being captured by the people who were looking for him. He would write the number 777 (representing something he'd read in the Bible) on the doors of his apartment and on the backs of pictures (36/2669-72). [Note that the incoherent piece of writing found in Delgado's wallet at the scene of the fatal encounter with Corporal Roberts was signed with the number 777, over the number 8 (10/1744; see 35/2536; 41/3379-81; 42/3431)].

After Delgado left the island and joined the U.S. military he sporadically kept in touch with his stepmother. One time he called her around 2:00 a.m., and she asked him why he was whispering. He said people were listening, and he wanted her to take the batteries out of the phone so they wouldn't hear the conversation. When she asked "What people?", Delgado told her there was an order out to kill him issued by 50 Cent, the rapper (36/2673). Delgado once got a speeding ticket while driving from North Carolina to Tampa, "[a]nd he was just obsessed that he wanted his tickets paid

because he did not want to have a record. He never had a record and he did not want this to spoil his record (36/2674).

As a person who worked in the mental health field, Annette tried to talk with her stepson about his mental illness, but he had no insight and didn't believe he was mentally ill; nor could he accept the fact that his family and friends thought he was mentally ill (36/2675). He even thought that his grandmother - - whom he loved dearly - - was trying to poison him and he stopped eating from her (36/2676).

Shayla Evans is Delgado's ex-girlfriend and the mother of his youngest child, a four year old son (36/2721-22). She met Delgado when he was in basic training in Virginia and they began a relationship. When Delgado was stationed at Fort Bragg in North Carolina, Shayla found a job and moved there. At first she did not realize that Delgado had a mental illness; she just thought he was different because he was from the islands. He was "really fun, nice, very sweet, family oriented." But after a while she noticed a change in his behavior. He thought people were trying to kill him; these included 50 Cent and his cohorts, as well as some people from the company he used to work for (Hovensa) because he had a wrongful termination lawsuit against them (36/2721-24, 2730-31, 2734). By the time he was about to leave the military she knew something was wrong (36/2731).

After Delgado left the military and Shayla was four months pregnant with his child, he moved back to Fayetteville to be with her. During this time period he was experiencing visual hallucinations; he would see angels or somebody who had just passed away

(36/2724, 2726, 2734-35). He was depressed and he prayed and fasted a lot; he never drank alcohol but he was consuming large quantities of juice. Shayla never knew what kind of day he was going to have, and it was kind of scary sometimes, though he never physically abused her. After the baby came, he appeared calmer when he was taking care of the baby (36/2723-29).

After the military, Delgado had a couple of civilian jobs and he tried going to college, but he couldn't sit still; he would get anxious and start pacing around the classroom. He switched to online classes, which was also short-lived (36/2727-28). During the course of their relationship he purchased four or five firearms in the pawnshops around Fort Bragg. Shayla would go with him and he would show her all the types of guns he wanted to collect. He was also looking at safes but they couldn't afford them (36/2729-30).

Shayla kept in touch with Delgado after they broke up and he left North Carolina. She spoke with him a couple of days before the August 19, 2009 shooting incident. "He was very frantic. Pretty much he was basically telling me that somebody kept calling his phone, hanging up on him. Somebody is trying to kill him." The caller was telling Delgado that he (the caller) was with Shayla, "like it was a boyfriend of some sort." Shayla suspected that Delgado was not eating and drinking "[b]ecause this was some of the things that I had dealt with in the past." He had no place to stay, and he was wanting her to come get him and bring him back to North Carolina for a couple of weeks so that when he got his check he could fly back to the Virgin Islands and live with his

mom. Shayla was driving in heavy traffic so she said she'd have to call him back, which upset him. When she later tried to call back, the phone rang unanswered and when she tried a second time it was disconnected (36/2732-33, 2737).

Dr. William Leusink, in 2005, was a major in the Army working as an adult general psychiatrist at the Womack Army Medical Center at Fort Bragg (37/2757-60). Humberto Delgado, Jr. was admitted to the inpatient psychiatric service on August 31, 2005 and was discharged a week later. Members of his unit had become concerned about his mental health and had brought their concerns to the attention of Dr. DeVries at the mental health clinic, who did a psychiatric evaluation and then arranged to have Delgado transported to Womack for hospitalization. The behavior which culminated in his referral for treatment was that he had called the MPs on the morning of August 30 and reported that someone was trying to kill him. He saw a vision from God telling him that someone is about to kill him, and he reported being awake for four days straight, but denied feeling tired as God gives him the strength to press on. The night before he had heard a noise in the adjoining room which frightened him, because he could not get in the room but the people trying to kill him could get out. "He also reported seeing a car and taking down the license plate and then providing the number to his Uncle Andrew in the Virgin Islands so he could find out who was after him. He reported that someone in his unit is also trying to kill him as he looks like the brother of the rapper, 50 Cent, who is also trying to kill him." Delgado had a bag packed with miscellaneous items for self-defense,

including a hammer, a pellet pistol, and a flashlight. He voluntarily relinquished those items when told he would be staying in the hospital to keep him safe (37/2761-64, 2782-84, 2802).

When he spoke with Private Delgado, Dr. Leusink confirmed that he had delusional beliefs and needed to be hospitalized. His diagnosis was Bipolar One disorder (the more severe of the two bipolar disorders) with psychotic features which complicated his mania. Dr. Leusink explained that "not everybody who has bipolar disorder necessarily has psychotic features to go along with it", but Delgado did have them. Because of his psychotic features, Dr. Leusink was aware that regardless of how much information or persuasion he gave him he would not be able to talk Delgado out of the perception of reality that he had. At the time Delgado was in a manic episode (a prerequisite for the Bipolar One diagnosis), characterized by his pressured speech, his decreased need for sleep, his grandiose and hyper-religious thought content (e.g., telling Leusink he was going to read the entire New Testament in one day), and his elevated mood (remarkable, Leusink explained, in a person who believes there are people out there trying to kill him) (37/2765-73, 2785).

Dr. Leusink felt that Delgado was being truthful when discussing his symptoms, and he willingly participated in treatment (37/2790-93). He did not diagnose Delgado with antisocial personality disorder or any other personality disorder (37/2786).

Dr. Leusink was aware that Delgado had had an unpleasant reaction to Haldol during his prior hospitalization in the Virgin Islands. He started him on two different kinds of antipsychotic

medication, Olanzapine and Seroquel (replacing the latter with Depakote after he developed a side effect from the Seroquel). As a result of the medication, the intensity of his paranoid delusions subsided but he never developed any insight that his beliefs had been irrational, or that the problem was in his mind and not with the rest of the world (37/2771-81, 2790, 2798-99).

Based on his diagnosis of Bipolar One disorder with psychotic features, Dr. Leusink recommended that Delgado should no longer remain in the Army. This recommendation was virtually automatic in light of the diagnosis itself, but Dr. Leusink further explained that if a mentally ill soldier is sent overseas and cut off from specialized psychiatric care or runs out of medications "there is a probability of a dangerous outcome." Delgado received an honorable medical discharge, with a 7-10 day supply of medication (37/2790-91, 2804-07). It was also noted, upon his discharge, that he has a knee injury (37/2786-87).

Dr. Leusink testified that Delgado has a chronic, life-long mental illness which can be treated but not cured. He further testified that life stressors increase the symptoms of bipolar disorder, and that it is not unusual for people with that disorder to stop taking their medications (37/2795-96).

On cross, Dr. Leusink stated (based on the prior hospitalizations in the Virgin Islands) that Delgado's mental illness preexisted his military service, and he did not have PTSD (post-traumatic stress disorder) from any military-related event (37/2803-04, see 2806). Asked by the prosecutor if there was "the concern in general terms that led to his discharge that had [he

been] put in a situation where is mental illness surfaced and he had access to firearms, there could be deadly results?", Dr. Leusink answered "Yes" (37/2802).

D. Florida, Summer 2009

Delgado's uncle and aunt, Zolio and Gloria Velasquez, had allowed him to stay at their Oldsmar home in the summer of 2009. Zolio knew when he invited him - - because it was known within the family - - that his nephew had mental problems. Delgado would make trips to the V.A. (Bay Pines in Pinellas County) to get medication, but he was angry that he wasn't getting the help he needed (37/2811-15, 2827-28). When Delgado came to stay with the Velasquez' he wasn't acting normal. He would pace nonstop, back and forth, throughout the house - - days and nights - - talking to himself "like if he was talking to another person." He wasn't sleeping and he constantly complained of headaches. He told his uncle that people were looking for him to kill him (37/2813-16, 2829, 2832, 2839-40). His behavior was frightening the Velasquez' three daughters (no intimidation or threats, just the weirdness), so Gloria told her husband to tell Delgado he would have to leave. As she put it, "What I saw is that he was sick. That I didn't want him in my home because he was sick." They gave him one more month but Delgado, offended, left right away. This was two weeks before the encounter which resulted in the shooting of Corporal Roberts (37/2813-18, 2823, 2830, 2835-37).

Raidvil Richardson is a childhood friend of Delgado's from the Virgin Islands. When they resumed their acquaintance as

adults, Delgado was no longer the same person. He "seemed crippled" to Richardson, and every time they had a conversation it would always degenerate into complaints that people, such as the "evil" Masons, were trying to harm him or poison him. It made Richardson uncomfortable and he would try to change the subject (37/2842-49, 2854). A couple of times Richardson suggested he might need treatment for his mental health problems, but Delgado didn't acknowledge that he had mental health problems; he thought the problem was with other people (37/2645, 2654-55).

A few weeks before August 19, 2009, Delgado called Richardson and said he was having trouble with his uncle and needed a place to stay. Richardson let him stay at his house for a couple of days, during which time he was still talking about "the usual stuff"; one time he put his belongings against Richardson's door so nobody could enter the room while he (Richardson) was gone (37/2851-53). Richardson then arranged for Delgado to stay with Kimberly Dent (a friend of Richardson's) for a week while Dent's grandmother was out of town (37/2851-53, 2857, 2859-61, 2864). Dent thought Delgado was "antsy" and somewhat paranoid, but she wasn't scared of him and didn't think he was out of his mind. He was constantly moving and pacing (usually walking with a cane). He said he was in a lot of pain, and couldn't work. She would see him talking to himself, and he told her he didn't sleep well. He talked to her about his working as a cop in St. Croix, about being in the military, and about his kids and religion. He called himself Abel, and he told Dent that the Masons were a group of bad people who were out to get him (37/2861-71). Dent testified that

"I know a few people that have their conspiracy theories, and stuff", so she didn't think anything of it (37/2862).

Dent knew that if Delgado wasn't staying with her he was going to be out on the streets. Before he left he showed his appreciation by making dinner for her and giving her a card (37/2865). He went to a shelter, and soon called Dent to ask if he could come back, but she had to decline because her grandmother had already returned (37/2866-67). Delgado also called Raidvil Richardson from the shelter, saying he couldn't stay there because it was full of crazy people (37/2855, 2857).

E. August 19, 2009 (Before the Encounter with Corporal Roberts)

Juan Luis Rosado is another old friend from the islands who knew Delgado before, during, and after his first two psychiatric hospitalizations, and witnessed some of the behaviors which landed him there (36/2643-51). Years later, on the morning of August 19, 2009, the day the policeman was shot in Tampa, Rosado received a phone call from Delgado, who said he needed a ticket because he wanted to come home. Rosado told him he couldn't talk and he hung up, "[b]ecause every time he call me he used to call me and talk about monsters and, you know, stupidity." When Rosado told him he had to hang up, Delgado started cussing him and his mother and "talking all kinds of craziness." In light of what happened, Rosado now feels guilty that he couldn't come for him (36/2651-56).

Cindy Fleshman worked at Kay Jewelers in the Countryside Mall. In July 2009 Delgado had paid a \$70 deposit to put a watch

on layaway. Fleshman perceived him as a homeless guy who came to walk around the mall. He was unkempt, unshowered, with long dreads and always wearing the same clothes. He had a back problem and he may have limped a little bit. He was strange, very jittery, and in her opinion "he wasn't necessarily all there", but he was polite and his conversations with her were rational (38/2888-89, 2892, 2894, 2897).

Around 11:00 a.m. on August 19, Delgado came into the store wanting to cancel the layaway and get his money back. Fleshman told him she couldn't give him a refund yet, because they had just opened and there was no money in the drawer. Delgado said he'd wait around in front of the store to see if anyone came in and paid cash. He seemed slightly upset but he was not screaming or making a scene. He waited 30-40 minutes, and then told Fleshman he'd come back later (38/2889-97).

Oldsmar resident Christopher Eisenhardt, a firefighter/paramedic, drove to the Lowe's building supply store in the midmorning of August 19. On his way there he saw a person who later became newsworthy on St. Petersburg Drive near the Oldsmar Public Library and a storage facility. On his way back he saw him again in front of the shopping plaza where Lowe's is located. The man was dressed like a vagrant and he looked out of place for the neighborhood. He had dreadlocks, wore baggy jeans, and had a military-style backpack that was weighted down. It appeared to Eisenhardt that he had some type of physical disability; he was walking slowly with a limp, and using a stick to help him walk. He did not have a shopping cart (38/2900-05; 2909-11).

Eisenhardt later saw a news photograph of a person who had been arrested in Tampa after something happened to a police officer there. Eisenhardt recognized him as the person he'd seen walking through Oldsmar; he contacted Tampa police, and identified Delgado from a photopack (38/2904-07).

At 9:52 p.m. on August 19, Lieutenant David Gillen of the Tampa fire department was responding in an ambulance to a call that took him southbound on Nebraska. At the intersection of Fairbanks a man almost stepped in front of the ambulance, then stopped short and let them go by. The man had dark skin, a dark beard, and dreadlocks, and he was pushing a shopping cart. Gillen identified Delgado from a photopack (38/2913-19).

Sylvia Cardenas, also a Tampa firefighter, was returning to the station in a fire engine after a run. Just before 10:00 p.m., while heading south on Nebraska, she saw a marked police car and, nearby, a uniformed officer who had pulled over a man with a shopping cart. The officer had a flashlight in one hand and something (possibly ID) in his other hand. The other guy was just standing there. Cardenas saw nothing unusual in the interaction; it looked like an ordinary police contact with a pedestrian (38/2923-31).

A "Stipulation regarding length of travel" was introduced showing that the distance between the location in Oldsmar where Delgado was seen in the morning, and the intersection of Nebraska and Arctic in Tampa, is approximately 15.4 miles (38/2957; 7/1378). It was further stipulated that on August 19, 2009 the temperature in Oldsmar ranged from 75-93 degrees (with a mean of

83); the temperature in Tampa ranged from 78-93 degrees (mean 86); the humidity level for Oldsmar was from 53-94 percent (mean 79); the humidity level for Tampa was from 52-100 percent (mean 81); and there was 1.17 inches of precipitation in Oldsmar (38/2958; 7/1376). Thirdly, it was stipulated that the two prescription medicine bottles found in Delgado's toiletry bag, each prescribed by the V.A. Medical Center at Bay Pines on July 13, 2009, contained 90 pills (out of 90 prescribed) and 30 pills (out of 30 prescribed) (38/2959-60; 7/1379). [Defense counsel represented in his closing argument that jurors could read from the pill bottles that one was for a muscle relaxer and the other for a stomach ailment (41/3381)].

F. Defense Case - Insanity (Dr. Maher)

Dr. Michael Maher is a forensic psychiatrist retained by the defense to evaluate Delgado; he saw him on eight occasions beginning September 2, 2009 (38/2966-71, 2974). He testified that Delgado grew up in a difficult environment; his mother "was a rather bad alcoholic" and there was a lot of arguments resulting in physical violence between his parents. Delgado himself was abused (as that term is used today) although he didn't necessarily see it that way; he described it as "harsh punishment." He was shuttled among different households, depending on how stable his own was at any given time, and he was in many respects raised by his grandmother (38/2975-76).

As a reaction to his chaotic upbringing, Delgado was drawn to police work as an occupation because he wanted some order in his

life; "[t]here would be clear rules and you wear a uniform and you do what's right." This, to Dr. Maher, is an important part of understanding Delgado's background and psychology (38/2978-79). Unfortunately, around the time period he was in the St. Croix police force, he developed a rather severe paranoid belief system in which he irrationally concluded that his fellow officers were trying to hurt or kill him. Someone from the Masons had approached him with an invitation to join, and this became elaborated into his feeling or "what he considered his knowledge . . . that somehow the Masons were connected in a conspiratorial way to the police, and that was how they were going to twist him or turn him, make him something he didn't want to be." If he didn't go along with them they would retaliate to the point of killing him, if that's what it came to (38/2979-80). When he left the force and went to work for the oil refinery on another island, these delusions persisted; he came to believe he would be targeted and killed by Masons in league with his employer if he stayed on that island (38/2980-82). It was clear to Dr. Maher that by that time "this is a man who has significant mental illness . . . clinically significant paranoia" (38/2981).

Delgado was hospitalized twice in 2003. His diagnosis at that time was major depressive disorder with severe psychosis (38/2983-84, 2990). This was important, Dr. Maher explained, because it established that long before the events giving rise to the criminal charges took place "[t]here was an established diagnosis of psychosis with paranoid ideas that required substantial treatment", and was "the beginning of a diagnostic trail that

continues through the present" (38/2984).

Delgado was treated with antipsychotic medications which have major serious side effects (and for that reason are not used in people with minor problems). These medications do not cure the mental illness, but they can suppress the symptoms. "And they are most effective in suppressing the symptoms early in the course of the illness." This did occur in Delgado's case and he recovered very significantly from that psychotic episode, but he also experienced many of the usual side effects including anxiety, confusion, restlessness, and sleep disruption. These are among the reasons, Dr. Maher explained, why it is very common for people with chronic mental illness to stop taking their medications (38/2984-89).

There was some episodic element to Delgado's mental illness, according to Dr. Maher; there were times when he was completely out of touch with reality, and other times when he could function reasonably well (38/2983). Some time after the two hospitalizations in St. Croix, Delgado - - seeking to rebuild his life - - came to the United States and entered the military. To him it seemed "a positive, structured, clear system" where you could do the right thing and serve your country, and there wouldn't be confusion about who was for you and who was against you." He enjoyed basic training and felt good about what he was doing (38/2990-91). Then he had another psychotic breakdown and was hospitalized for a third time at the Womack facility. He developed the paranoid beliefs that there were conspiracies targeting him, that people were trying to kill him, that people were crawl-

ing around in the ceiling tiles, and that there were explosive devices planted outside the barracks; all part of "a malevolent process directed at him" (38/2992). At the Army hospital, Delgado was diagnosed with a psychotic paranoid disorder. The specific diagnoses were bipolar disorder with psychotic features and schizoaffective disorder; these, Dr. Maher explained, are overlapping diagnoses which recognize the presence of psychosis (38/2992-93). [The diagnosis made at the Army Hospital was essentially the same as the one made by Dr. Maher four years later (38/2997-99)]. Delgado was discharged from the military based on his psychiatric illness as well as for his physical ailments. He was, and still remains, very uncomfortable acknowledging that his biggest problem in life is his mental health problem, not his back pain" (38/2993).

After his discharge, he once again set about trying to rebuild his life, this time living with a woman, Shayla, in a family-type situation and fathering a third child. He attempted to go to community college, and - - according to Shayla - - trying "very hard to be the best that he could be when he was healthy." Dr. Maher testified that this can work for some people who have an early depressive and psychotic episode in their life; they may stabilize and things may get better for them. This was not, however, true for Delgado; his illness was progressing. "This is a man who tries again and again, but to some extent as the years are going on here things are getting worse for him, not better" (38/2994-95).

Because of Delgado's paranoia and his inability to remain

stable and rational, his girlfriend couldn't handle it anymore and she told him to leave. Having no good place to go he wound up staying with an uncle in Florida. At this point he was not very functional, not receiving regular medication or treatment, and - - while he was able to do basic things like eat and get dressed and brush his teeth - - "[h]e is socially and psychologically on the road to homelessness" (38/2995-96). According to Dr. Maher, there is a great deal of research that supports the conclusion that people who are mentally ill get much worse when they are under stress; "t]his is why the combination between homelessness and mental illness is so difficult" (39/3093). In Delgado's case, his life was going downhill and he was becoming more socially isolated. When chronic mental illness gets worse, unless the individual has a very strong support system, his or her circumstances almost always deteriorate, and "[t]hey deteriorated in this case" (39/3097).

Dr. Maher testified that it is typical of people with Delgado's type of mental illness that the occurrence of a psychotic episode coincides with periods of poor or absent sleep (38/2997-98). Shayla Evans and others have observed that Delgado goes through periods where he sleeps very little. At some point he wants to sleep but he cannot "and he loses touch with reality during these periods." He develops blatantly irrational fears and paranoid ideas, as well as auditory hallucinations and possibly also visual hallucinations (38/2966; 39/3094). At the time of his confrontation with Corporal Roberts in Tampa, Delgado was homeless, without resources, and had been chronically sleep deprived

for at least two days and possibly as many as ten days (38/3002-03). His intention on August 19 was to try to get to the V.A. in Tampa to try to get housing assistance and medication. [According to Dr. Maher, Delgado still had no real insight into his mental illness, but "[i]t did reflect a recognition that he was in a bad state and needed help"]. The trek from Oldsmar to Tampa was terrible; he was tired, thirsty, in considerable pain from his knee injury, and he didn't know the exact location of the V.A. He was carrying his belongings (which he had retrieved that morning from a storage unit) in a backpack. At some point he found a shopping cart and he put his belongings into that. As 10:00 p.m. approached he was desperate, tired, and hungry. "[H]is state of mind was very confused, disorganized. He didn't describe to me hallucinating during his walk, but he certainly described feelings of malevolent forces coming down on him. He used words at times like it was happening all over again, referring to the prior experiences he had had with feeling that everybody was against him and somehow they were going to get him" (38/3003-08).

When he was approached by the uniformed police officer, Delgado was frightened and upset. He was afraid that the officer was going to do something to him; hassle him, hurt him, or accuse him of something. In Maher's opinion, his concerns were both rational (being confronted on the street when you are pushing a grocery cart full of stuff, including guns) and irrational (paranoid fears about people getting him and doing things to him). Delgado's narrative of what occurred amounted to fragmented, disconnected, disoriented bits of information, or "snapshot"

recollections (38/3008-10; 39/3049). The police officer began searching through his backpack without asking for permission, and Delgado had rational anxiety that he would think the laptop computer was stolen or that he would react negatively when he found guns. But the situation also stoked Delgado's irrational and paranoid anxieties; this was confirmation that the officer was after him, was going to hurt him or kill him without giving him a chance to explain. "There was no way out of this situation." He was in a fight or flight, live or die, state of mind, and his first instinct was to run away. Being zapped with the TASER (which he said felt like his head was a fried egg) shocked and frightened him and further confirmed his intensifying delusional belief that the officer had specifically targeted him and his life was in danger (38/3011-13; 39/3079; 3084-91). [Dr. Maher acknowledged that Delgado's perception that he was knocked to his knees for several minutes by the TASER was inconsistent with the observations of other witnesses. Dr. Maher does not believe that Delgado has the capacity to logically, rationally, accurately describe what happened out there on the street that night, apart from "snapshot memories." In Maher's opinion there were two potential effects of the TASER. "One of those effects I'm very, very confident was present and relevant is that . . . [the TASER] was pointed at him, that it was fired, and all of that confirmed in a psychotically enhanced and exaggerated way his absolute knowledge that the officer was after him and he was going to get him no matter what." Secondly, if the TASER actually delivered an electrical shock, that would also have caused confusion and

exaggerated his paranoia (38/3013; 39/3051, 3055-56, 3058, 3089-91)].

Delgado was not really sure what he remembered next, but he recalled at some point pointing at the police officer and hearing a bang (38/3014; 39/3052-53). He heard sirens. As he fled he continued to be in a state of mind where he believed he was going to be killed (38/3014-15; 39/3063).

Dr. Maher was of the opinion that Delgado suffers from a profound, chronic mental illness; his symptoms can be managed but the mental illness itself is incurable (39/3043-44). Asked on cross whether he found him to "embellish or exaggerate or feign symptoms of mental illness", Dr. Maher answered, "No. He does quite the opposite" If anything he tends to under-report his symptoms, although he was so disturbed and disordered that he didn't have much ability to hide them (39/3081-82, see 3098).

On the ultimate issue of insanity, Dr. Maher expressed the opinion that at the time of the homicide Delgado was in a psychotic, delusional state and was unable, due to his mental illness, to understand the nature and consequences of his actions (38/3017-18; 41/3304-05).

G. State's Rebuttal Case - Insanity (Drs. Stein, Myers and Taylor)

Dr. Barbara Stein is a forensic psychiatrist retained by the state in September 2009. She interviewed Delgado and gave him a battery of tests, and reviewed the records of his past psychiatric hospitalizations in the Virgin Islands and the Womack Army Medical Center (39/3108-21). Asked by the prosecutor whether she had an

opinion "as to whether on August 19th of 2009 Mr. Delgado suffered from a diagnosable mental illness", Dr. Stein answered in the affirmative. "It was either bipolar disorder with psychotic features or schizoaffective disorder bipolar type. These are serious mental illnesses involving mood and psychotic symptoms. Sometimes it's really hard to differentiate between the two. But for all intents and purposes, this is someone who had serious mood problems and serious problems with his - - his thinking and that was the psychotic part of the diagnosis" (39/3121-23, 3166-67). If she had to choose only one, Dr. Stein probably would go with the schizoaffective disorder bipolar type because it has some qualities that are more associated with schizophrenia, and because people with schizoaffective disorder tend to have more problems in between episodes (39/3166-67). Delgado's mental illness, Dr. Stein testified, is well-documented, chronic, and severe (39/3140-41).

While Dr. Stein concluded that Delgado did not meet the M'Naghten standard for legal insanity in Florida (39/3122), she also found that Delgado's psychotic, delusional belief system - - which he has had for many years - - was "very active" on the night of the shooting (39/3128). While he was not completely out of touch with reality, "he was psychotic. He's been psychotic for years and he was more ill in that last week because he was in really bad shape" (39/3128). He was "really at his wit's end", extremely despondent and hopeless. However, Dr. Stein did not believe that the shooting of Corporal Roberts happened directly in response to a feeling that Roberts was part of the Masonic or

government conspiracy (39/3128).

At the end of Dr. Stein's testimony on direct, the prosecutor asked her (over defense objection) if she had an opinion on whether Delgado had the mental capacity to form a specific intent to kill. She answered that her opinion was that he did have that capacity (39/3135-37). [The defense was later permitted to recall Dr. Maher to testify that he believed Delgado, due to his mental illness, did not have the capacity to form specific intent to kill (41/3303-05). However, the defense was not permitted to elicit the opinions of Dr. Taylor (who, like Dr. Stein, was retained by the state), Dr. Ruiz, and Dr. Krop, each of whom would also have expressed the opinion that Delgado (while not legally insane) lacked the capacity to form specific intent to kill (39/3153-63; 40/3271-72; see 19/446, 456-57, 489-90, 492, 515, 525-26)].

On cross, Dr. Stein testified that when she interviewed Delgado at the jail two years after the crime his paranoid, delusional system - - involving government authorities, rap stars, gangsters and masons - - was still active, but as a result of the medications and controlled environment they were less intense (39/3146, 3167-68, 3171-72). Although these entities were still out there trying to hurt him, he perceived that he was in a safer place in jail (39/3146).

Dr. Stein did not make an Axis Two diagnosis, and she saw no evidence that Delgado has antisocial personality disorder; there were no indications of prior trouble with the law and he held down a job as a police officer until his mental health problems got the better of him (39/3147-49, 3168-69). On Axis Three (pertaining to

physical problems relevant to a person's mental illness) Delgado has a history of chronic pain stemming from a back injury he suffered while in the military, as well as neck, shoulder, and knee problems (39/3169). And on Axis Four, pertaining to psychosocial stress, Dr. Stein believed that Delgado "was experiencing a number of very significant life stressors at the time" of the offense, including homelessness, unemployment, and separation from his children (39/3169, 3183). In her opinion the shooting may have been a reflexive reaction; it wasn't something he would have wanted to happen (39/3181-82). The main contributing factors included (1) Delgado's mental illness, (2) severe psychological stress, and (3) anger and embarrassment from what he perceived as being treated as less than human (39/3183-84). The prosecutor on redirect asked Dr. Stein (one of his own experts) about the anger factor; she answered:

. . . [H]e was very upset that [Corporal Roberts] went through his bag and that he was treating him like a thief. However, with that said, I don't think that would have, without the severe mental illness and without the significant life stressors would have been enough to do what he did. I think that he had a significant degree of decrease in impulse control.

(39/3184).

Dr. Wade Myers is a forensic psychiatrist retained by the state who interviewed and tested Delgado in October 2011, and reviewed his records (40/3190-98, 3220-21). Dr. Myers concluded that Delgado had a diagnosable mental illness; specifically bipolar disorder with psychotic features (40/3204-05). This is a cyclical illness (meaning it goes up and down over the course of time) and it is a chronic condition. "[Y]ou have to let it play

out for many, many years to see what the pattern is going to be."

In all likelihood Delgado will continue to need treatment for the rest of his life (40/3204-05, 3208). The psychiatric records from the Virgin Islands were consistent with a major mental illness. At least some of the symptoms probably existed from before 2003, as illustrated by family members who had observed significant signs of mental illness before he was actually hospitalized. Similarly, Delgado's records from the Womack Army Hospital were consistent with mental illness and delusional thinking; he believed that people were coming in through the ceiling tiles and that somebody had set up I.E.D.s outside trying to blow him up in the barracks (40/3226, 3234-35, 3238). Even when Dr. Myers saw him in 2011 Delgado still felt strongly about some of those beliefs. When Myers asked him if he thought he had a mental illness or not "he wasn't able to say yes or no to that" and wouldn't answer that question (40/3235, 3238).

According to Dr. Myers, Delgado was not prevented by his mental illness from knowing right from wrong, nor from understanding the nature and consequences of his actions (40/3206-07). Dr. Myers thought that Delgado's anger fuse would have been shortened by his hypomanic symptoms (i.e., more prone to become irritable) compounded by his chronic physical pain. ". . . [H]e had just walked a long way and he was tired and just wanted to relax and then this event occurred. I think he became very frustrated" (40/3219).

Dr. Myers did not diagnose Delgado with antisocial personality disorder or any other Axis Two diagnosis (40/3235-36).

Dr. Donald Taylor, a forensic psychiatrist retained by the state, interviewed and evaluated Delgado and reviewed his records (40/3250-56). Asked by the prosecutor whether Delgado had a diagnosable mental illness, Dr. Taylor answered yes, that he met the criteria for bipolar one disorder as well as paranoid personality disorder (40/3263-64). While Dr. Taylor had no doubt that that Delgado suffers from a major mental illness which is severe and persistent (40/3270), and while there were documented instances of psychotic behavior so extreme that they resulted in hospitalizations in St. Croix and in the military, Dr. Taylor did not believe that the symptoms of his mental illness had arisen to that level on the night Corporal Roberts was shot (40/3265-66). Dr. Taylor further expressed the opinion that Delgado did not meet the criteria for legal insanity at the time of the offenses; i.e., in spite of his mental illness he was capable of knowing the nature, consequences, and wrongfulness of his acts (40/3264, 3268). However, Dr. Taylor wouldn't have been surprised if the TASER momentarily stunned Delgado, and - - if so, he was suffering from both the TASER effect as well as his mental illness at the time of this incident (40/3270, 3273).

H. The Prosecutor's Guilt-Phase Closing Argument Acknowledging Delgado's Mental Illness

In his closing argument to the jury, urging them to reject the insanity defense, the prosecutor said this:

You won't hear me for one moment tell you or suggest to you that Humberto Delgado, Jr. does not suffer from mental illness. The overwhelming and unrebutted evidence is that he does. That's not the resolution of

the issue.

You won't hear me argue to you that in 2003 or 2005 he wasn't psychotic and he wasn't legally insane in the Virgin Islands or in the military hospital. The overwhelming, unrebutted evidence is that he was in a psychotic episode, a break from reality at that point.

(42/3412)

The prosecutor emphasized that what was at issue "is the defendant's ability to know right from wrong and whether he was insane at the time of the offense" (42/3413).

I. Penalty Phase

The prosecution presented victim impact testimony from Tampa's police chief and from Corporal Roberts' wife and sister-in-law (43/3543-68).

Dr. Barbara Stein, a state witness in the guilt phase was now called as a defense witness in the penalty phase (43/3577). Dr. Stein reiterated the Delgado has a very serious mental illness and he has been significantly impaired for many years (43/3577-78, 3383-84). At the time of the homicide, he was "in an exacerbated state where his mental illness had worsened" due to the extreme life stressors he was experiencing (43/3579). He found himself homeless, because his relationships with his girlfriend and his uncle had fallen apart, because they could no longer deal with his mental illness behavior. He was isolated, paranoid, angry, and in chronic physical pain (43/3579-80). Dr. Stein testified that Delgado's judgment was impaired, his ability to control his impulses was certainly impaired, and "in my opinion [the homicide] would not have occurred had he not been severely mentally ill" (43/3580, 3583-84).

With regard to the statutory mental mitigating factors, Dr. Stein concluded that Delgado was under extreme mental or emotional disturbance at the time the capital felony was committed, and that his ability to conform his conduct to the requirements of law was substantially impaired (43/3578-80, 3583).

In Dr. Stein's opinion, Delgado's mental illness was genetically based, and could be managed in a secure facility with the aid of medication. In fact, he has benefitted to a significant degree from medication during the last two years in jail, and has not been a problem in that setting (43/3580-81).

According to Dr. Stein, Delgado "is not an individual who in any way has an antisocial or sociopathic or psychopathic personality" (43/3585). Despite his dysfunctional childhood and the psychiatric problems he experienced as an adult, Delgado was "always considered to be a rather peaceful man actually" when he wasn't in an acute phase of his severe mental illness, and - - prior to the incident resulting in the death of Corporal Roberts - - he had no history of violence or trouble with the law (43/3384-87). Delgado did not plan to commit this crime, and he was, in Dr. Stein's opinion, profoundly distraught and remorseful (43/3584-85, 3589-90). She testified, "I've seen many, many defendants over the years in my 20 years of criminal forensic practice and you know the ones that are sorry because they got caught. Okay, Mr. Delgado, in my opinion, is not one of them. He is someone who was truly devastated by what he had done" (43/3590).

The state's cross-examination of Dr. Stein consisted of a single question and answer; she still adhered to her opinion in

the guilt phase that Delgado was legally sane at the time of the crime (43/3590). On redirect she explained that sanity or insanity is a separate question from mental illness as it relates to the circumstances of a crime or character of a defendant at issue in a penalty phase (43/3590-91).

Dr. Jose Hernandez (who did not testify in the guilt phase) was a treating psychiatrist at the Orient Road jail. Delgado had been placed on suicide watch (routine given the nature of the charges), and "[a]fter doing a total evaluation of him, I realized that he have a mental illness and he was very delusional and paranoid and I choose for him antipsychotic [medication]" (43/3592-95).

During the next year and a half, Dr. Hernandez saw Delgado on an almost daily basis, and continued to treat him with psychotropic (antipsychotic and antidepressant) medications (43/3596; see also the testimony of jail physician Beth Weaver at 43/3667). At first Delgado was reluctant to take the medications and wasn't sure whether he needed them, but Dr. Hernandez was able to convince him. Over time Dr. Hernandez saw definite improvement in Delgado's mental condition. In the jail, Delgado was not a behavior problem; he was quiet and respectful and followed the rules (43/3596-98).

Dr. Donald Taylor (a prosecution witness in the guilt phase now called as a defense witness in the penalty phase) reiterated that Delgado suffers from a major mental illness (43/3618-19). His psychiatric history, including delusional thinking, paranoia, and mood disturbance, is well-documented and resulted in his 2003

and 2005 hospitalizations (43/3620, 3622). The killing in this case was unplanned, and occurred in a highly stressful situation with a degree of fear involved (43/3619, 3622). Dr. Taylor stated that Delgado's mental illnesses were present at the time of the offense, along with "the level of anxiety and a heightened emotional state he was experiencing at that time", and "in my opinion that would be classified as extreme emotional disturbance" to a reasonable degree of medical certainty (43/3619). Under the same standard, Dr. Taylor opined that Delgado's capacity to conform his conduct to the requirements of law was impaired by his bipolar disorder, even if he was not experiencing a manic episode at that moment (43/3621).

According to Dr. Taylor, there is no indication that Delgado met the criteria for an antisocial personality disorder (43/3624).

And although there were times when he was experiencing the episodes for which he was hospitalized that he may have threatened to harm himself or family members, there was no evidence in the records that he ever carried out any serious acts of violence prior to the charged offenses (43/3623).

During the time he has been in jail, Delgado has received mental health treatment including psychotropic medications. Since he has been stabilized on the medications for a couple of years, there is no indication that he's been any type of disciplinary or behavioral problem. That stabilization, according to Dr. Taylor, is likely to continue as long as he remains in a structured setting where he receives treatment and medication (43/3625). The prosecutor had no questions on cross-examination for Dr. Taylor

(43/3626).

Dr. Harry Krop (who did not testify in the guilt phase) was the next defense expert witness in the penalty phase. He is a clinical psychologist specializing in neuropsychology and forensic psychology. Dr. Krop interviewed Delgado on three occasions in 2010 and 2011, administered neuropsychological testing, and reviewed numerous records (43/3627-32). With regard to the latter, Dr. Krop noted that unlike a lot of the first degree murder cases he's been involved with in the past, Delgado's case had preexisting medical records which "clearly document his psychiatric history, his paranoia, his delusional [thinking]" (43/3632, 3638). Those records were very well-documented and were consistent with Dr. Krop's observations, interview, and mental status examination (43/3632).

Dr. Krop's major diagnosis for Delgado is bipolar disorder with psychotic features (which is ongoing), in conjunction with a delusional, paranoid disorder and a major depressive disorder (both of which become more manifested during times of stress) (43/3632-34). One of the elements of his delusional thinking was his perception - - a product of his mental illness - - that law enforcement was corrupt and out to get him. "So I think that must be entered into the stressors and his mental state that preexisted in this situation particularly in terms of his not being able to fully understand why he was being confronted by law enforcement. He didn't feel like he had done anything wrong" (43/3638). At the time of his encounter with Corporal Roberts, Delgado was in an "extremely agitated and hyper state beyond normal"; he was de-

pressed, homeless, sleep-deprived, hot and tired from his long walk, experiencing physical problems, feeling rejected by his girlfriend and his uncle, and frustrated with the V.A. system. The combination of all of these life stressors with his mental illness (and especially his paranoia), all adds up - - within a reasonable degree of psychological certainty - - to extreme mental and emotional disturbance (43/3637-40). [Dr. Krop stated that he has testified in many capital cases and (while it is not uncommon for the defendant to have mental health problems) it is only in a very small minority of those cases that he has formed the opinion that the individual was under extreme mental disturbance (43/3637-38)]. It is also Dr. Krop's opinion that Delgado's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (43/3640-42). His anxiety level was so high that his sense of reality became distorted with fear that he would be killed on the spot or taken someplace where he could be killed. His impulsivity was extreme (43/3642-43). Similarly to Dr. Stein (see 43/3580), Dr. Krop testified that the shooting of Corporal Roberts was very specific to the conditions, stressors, and preexisting mental illness, and without the convergence of those factors "then likely this event would not have occurred" (43/3656-57).

Another aspect which is highly atypical of the large majority of criminal defendants whom Dr. Krop has evaluated is that Delgado does not have antisocial personality disorder, nor does he display what used to be called psychopathic or sociopathic traits (43/3635, 3642-43). While he probably could be diagnosed with para-

noid personality disorder, Dr. Krop believed that was "sort of redundant in that I felt that his paranoia was so severe that it was more the . . . delusional aspects of the axis one" (43/3635). He has been stabilized with medication while in jail, and his delusions have subsided to the point where he has not been a management or behavioral problem, but "he still looks back and believes that some of the things that were clearly delusional happened to him" (43/3643-45). Dr. Krop believes that Delgado is genuinely remorseful; moreover, all of the correctional officers Dr. Krop spoke to indicated that he was remorseful, "which is not something that I hear from correctional officers a lot about defendants" (43/3643-45).

On cross, Dr. Krop stated that an MRI and EEG revealed no structural abnormality in Delgado's brain. Neuropsychological testing showed mild memory deficits but no other deficits in executive functioning. Delgado's IQ of 91 was in the average range (43/3646, 3652-55, see 3634, 3655-57).

Dr. Mark Ruiz (who did not testify in the guilt phase) was another defense expert. He is a clinical and forensic psychologist who interviewed Delgado on five occasions (the first time within 48 hours of the crime), administered psychological tests, and reviewed the available records (43/3685-92). Among the tests were some designed to "specifically look at whether he was malingering. In these forensic evaluations, we often have times when people get in trouble with the law that they exaggerate or lie about their symptoms in order to avoid responsibility. So I administered tests to ensure that he wasn't doing that . . ." Dr.

Ruiz' testimony showed that Delgado did not appear to be malingering, nor was he feigning or exaggerating his symptoms (43/3689-90).

Dr. Ruiz diagnosed Delgado with bipolar one disorder with psychotic features, which causes him to periodically lose touch with reality (43/3690-92). The medical records from the Virgin Islands and the Army showed that he decompensated on three prior occasions, as he did again during the most recent episode which culminated in the shooting of Corporal Roberts (43/3691-92). On top of his mental health problems, Delgado was experiencing "a combination of very severe stressors" including living on the street, the breakdown ("through his mental illness, in my opinion") of all of his supportive relationships, and the frustrations of access to treatment (43/3696). His level of functioning in August 2009, according to Dr. Ruiz, was at "about a range that we'd usually see [in] somebody that has a very severe mental illness that would be sufficient to be admitted to a psychiatric unit of a hospital" (43/3697).

Regarding the statutory mental mitigators, Dr. Ruiz was of the opinion that at the time the capital felony was committed Delgado was under extreme mental or emotional disturbance (43/3697-99), and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (43/3700-01).

According to Dr. Ruiz, there is no indication that Delgado has an antisocial personality disorder; "[i]n fact, he didn't have a criminal history prior to this charge and he wasn't habitually

violent" (43/3693-95). Like Dr. Krop, Dr. Ruiz felt that Delgado was remorseful (43/3699-3700). During the course of his pretrial incarceration, medication improved and stabilized Delgado's mental condition, as would be expected. It is consistent with Delgado's disorder that "when people have . . . paranoid or psychotic features, medications are extremely important." "[T]he main thing we tell everybody is stay on the medications when you have a disorder of this severity" (43/3702-03). Delgado was not a behavior problem in the jail, and in Ruiz's opinion his condition would be likely to remain stable in structured confinement with the aid of medication (43/3701-03).

The prosecutor had no questions on cross-examination for Dr. Ruiz (43/3704).

Delgado's ex-wife Awilda and his former girlfriend Shayla Evans were recalled by the defense in the penalty phase. Their testimony overlapped to some extent with the more detailed information they provided in the guilt phase regarding Delgado's background and the manifestations of his mental illness which occurred in the Virgin Islands and in North Carolina. Awilda testified that before his mental illness changed his behavior Delgado was a good husband, and a really good father who made sure he provided for his kids and did everything with them. He never drank alcohol or smoked, and even later on - - when he was in a manic state or acting peculiar - - he was never physically or verbally abusive. Even after their divorce and his moving to the states, he maintained close contact with his children and stayed involved in their lives. He would "talk on the phone with my

daughter for hours and I would hear her just laughing talking to him." Awilda still cares for Delgado and considers him a good person, and the children love him and miss him (43/3602-17, see also 3588, 3704-08).

Shayla Evans testified that when Delgado's behavior started changing due to his mental illness he was never physically abusive, but sometimes he would become upset or frustrated because she didn't understand or believe some of the things he said were happening. Arguments would occur and he would curse and she would curse back. Shayla described episodes where Delgado would appear calm at first and then "go into a stage where he may be hallucinating about something, seeing angels appear, saying someone is trying to kill him . . ." This would last for about a week, and then he would subside into a depressed state where he didn't want to be around anyone or go anywhere (43/3660-62).

He was also in constant physical pain and had no health insurance (43/3663-64, 3667). He would get pain medication and psychiatric medication from the V.A. but it got to the point where neither medication was working "and he would just be like sitting there drained like out of focus." Eventually he just stopped taking the medications (43/3663-64).

Despite all of his problems, Delgado was a loving father to their baby and took good care of him. Shayla herself was a new mother; she had never planned on having children and she didn't really know a lot about it. For the first two years of their child's life Delgado was the primary caregiver (43/3664-65).

Shayla ultimately broke up with Delgado because it was just

too much for her to bear dealing with his mental problems, and the episodes were becoming more frequent (43/3667-69). When he wasn't having episodes he was entirely different; fun-loving, outgoing, upbeat, and generous (43/3669-71). After he left and moved to Florida, she was open to the possibility that she and their child might rejoin him, but that was conditional; "I wanted him to get help. Pretty much I said you need to find a place. You need to get medicine. You need to . . . get your life together. . . . I said because we can't be together if you don't take care of yourself" (43/3669-70).

The prosecutor's penalty phase closing argument was extremely brief and was focused almost entirely on Corporal Roberts having died as a law enforcement officer in the execution of his lawful duties (44/3721-25). The prosecutor did not argue that Delgado was not mentally ill at the time of the shooting, or that the mental mitigating factors of extreme mental or emotional disturbance and impaired capacity did not apply. The only thing he said which touched on the subject was:

And you must also know with certainty that when Corporal Michael Roberts in the execution of his duties that he was sworn to undertake when he stopped a chronically mentally ill and paranoid Humberto Delgado, Junior who was armed with four fully loaded weapons that Corporal Michael Roberts died a hero.

(44/3724-25)

Defense counsel emphasized Delgado's history of psychotic breakdowns; the unraveling of his social support systems which culminated in homelessness; his strange and irrational behavior during the weeks and days leading up to his encounter with Corporal Roberts (including his 15 mile walk in the heat with a bad

back and a bad knee trying to get to the V.A. on the day the shooting occurred); his mental condition at the time of the crime; the fact that he was tased before the struggle ensued; and his lack of a history of violence (44/3725-38). Defense counsel suggested that the person who came in contact with Corporal Roberts "was wild-eyed and crazy looking"; not the calm person the jury was seeing at trial who has been medicated for two years and is stable" (44/3737). Delgado, counsel argued, has been struggling with mental illness all his life - - working, trying to achieve, failing, starting over again - - and this unplanned crime does not warrant the death penalty over a sentence of life imprisonment (44/3737, see 3731-32, 3736).

J. Spencer Hearing

Six experts testified during the January 13, 2012 Spencer hearing. These were:

Dr. Stein (state witness in guilt phase; defense witness in penalty phase and Spencer hearing)

Dr. Myers (state witness in guilt phase and Spencer hearing; did not testify in penalty phase)

Dr. Taylor (state witness in guilt phase; defense witness in penalty phase and Spencer hearing)

Dr. Krop (defense witness in penalty phase and Spencer hearing; did not testify in guilt phase)

Dr. Ruiz (defense witness in penalty phase and Spencer hearing; did not testify in guilt phase)

Dr. Maher (defense witness in guilt phase and Spencer hearing; did not testify in penalty phase)

Drs. Stein (45/3791-92), Taylor (45/3838-40), Krop (45/3856-

57), Ruiz (45/3871-72), and Maher (45/3885) each stated their unequivocal conclusions that both statutory mental mitigators (extreme mental or emotional disturbance and substantially impaired capacity) applied due to Delgado's severe mental illness, which was exacerbated by the combination of life stressors he was experiencing at the time of the offense. [The opinion of Dr. Taylor - - one of the two defense penalty phase experts who had been retained by the state and testified for the prosecution in the guilt phase - - with regard to the second statutory mental mitigator was expressed more strongly in the Spencer hearing (when he made it clear that he found that "there was substantial impairment of his ability to conform his conduct) than in the penalty phase (where he said it was impaired but did not expressly use the modifier "substantially") (45/3840, see 43/3621)]. Dr. Myers, while acknowledging that Delgado has a major mental illness, was of the opinion that the statutory mental mitigators did not apply (45/3807-10).

As the six experts' Spencer hearing testimony largely overlaps with their prior testimony it will be summarized briefly. Dr. Stein reiterated her firm belief that Delgado's severe mental illness coupled with the acute life stressors "played a very significant role . . . in what happened" on August 19, 2009. But for these circumstances she believed the crime would not have occurred (45/3792). She recognized that Delgado's first response to the confrontation (after he was accused of theft) was flight, not fight, and it was at that point that a TASER was fired at him (45/3789). The only control over his illness that Delgado could

have had was to take medication "but unfortunately we see this in practice. People who are severely mentally ill don't always take medication" (45/3792). Delgado is not an antisocial personality, and it is significant in this regard that his first criminal offense occurred at age 34 (45/3797). In addition, there was nonstatutory mitigation in that Delgado "had a pretty chaotic upbringing" in which he would see his mother being beaten (first by his biological father and later by his stepfather). When Delgado, as a child, would try to intervene he too would be beaten. He was shuffled among various relatives and was exposed to a lot of alcoholism; "it was definitely full of abuse and probably some neglect" (45/3795-96). In Dr. Stein's opinion, Delgado is remorseful for the crime, he loves his children, and he is capable of rehabilitation if placed in a secure facility with proper medication (45/3796-98).

Dr. Taylor stated that Delgado's perceptions, because he is impaired by his mental illness, are not the perceptions of a reasonable man or a normal person. His feelings were more intense and exaggerated, and contributed to his overreaction to the circumstances he found himself in on August 19, 2009 when confronted by Corporal Roberts (45/3842-43). Dr. Taylor also noted Delgado's unstable and violent home life as a child (which included some physical abuse at the hands of his stepfather); his lack of a history of criminal behavior or violence; the absence of antisocial personality traits; his remorse; and his demonstrated capacity for rehabilitation "based on his response to antipsychotic medication and his behavior for the past two years"

(45/3845-52).

Dr. Krop stated that of all the cases he has ever done, Delgado's case is "right up there" in terms of the amount of documentation (from family members and psychiatric records) that this person has a preexisting serious mental illness (45/3587-88). Dr. Krop thought it was pretty obvious why Delgado was placed on antipsychotic medications immediately after his arrest. Over time the medication would have controlled the symptoms that precipitated this event, and - - after his dosage was increased - - that is what happened with Mr. Delgado, although "[i]t's clear from the medication regimen that it took some time to actually stabilize [him]" (45/3863). Delgado, in Krop's opinion, would not pose a danger in a structured prison setting with medication (45/3863-64).

Similarly, Dr. Ruiz stated that it was significant that the jail psychiatrist prescribed antipsychotic medications; it meant that he thought that Delgado had some type of psychosis. The fact that Delgado was kept on these medications for a considerable length of time and it seemed to stabilize him was an indication that the jail psychiatrist was on the mark (45/3867-69).

Dr. Maher testified that Delgado's paranoid belief system was in operation on August 19, 2009 when he came in contact with Corporal Roberts, and his paranoia escalated as the intensity of the encounter escalated (45/3881). As far as nonstatutory mitigation, Dr. Maher noted Delgado's "family history of chaos and exposure to domestic violence and what I would almost certainly characterize as abuse if I evaluated him as a child in Hillsbor-

ough County today, but he may not have characterized it that way" (45/3885-86). Delgado, in Maher's opinion, had struggled mightily against his mental illness, trying to work and trying to do the right thing. Unfortunately he had adverse effects from medication (especially the Haldol "which has a terrible side-effect profile"), so his experience said that this is a bad thing.

He "tries to avoid being mentally ill in ways that are counter-productive by not taking medication and not acknowledging his mental illness", while at other times he has sought out mental health treatment. Dr. Maher summarized: "When he did well with [his struggle against mental illness], he worked as a police officer and enlisted in the U.S. military. When he did poorly with it, he was out of control and disabled" (45/3886-87).

Dr. Myers (who first saw Delgado two years after the shooting incident) acknowledged that he suffers from a major mental illness, but expressed the opinion that "it wasn't exhibiting itself at the time of the crimes" (45/3810, 3816). Delgado would have met the criteria for a diagnosis of bipolar affective disorder with psychotic features at the time of his psychiatric hospitalizations in 2003 and 2005, "but you wouldn't diagnose him as having that forever." (45/3810). The severity of the symptoms varies (45/3810). Accordingly, while agreeing that Delgado had extreme mental or emotional disturbance in previous years, Dr. Myers was of the opinion that he was not under the influence of extreme mental or emotional disturbance when he committed the capital felony (45/3807-08). Similarly it was his opinion that Delgado's capacity to appreciate the criminality of his conduct or to

conform his conduct to the requirements of law was not substantially impaired (45/3808-09).

Dr. Myers believed that Delgado reacted violently because he believed that he was being harassed, discriminated against, and treated without dignity due to his being a man of color who had dreadlocks and looked scruffy. Myers acknowledged that Delgado had been under stress and may have been experiencing a hypomanic state (less than full-blown mania, but characterized by symptoms such as decreased sleep and increased energy and agitation), and he had just walked 15 miles on bad knees and with a bad back (45/3820-25, 3828-31). Dr. Myers agreed that Delgado's mental condition would have caused his feelings to be more intense than a normal person would have experienced under the same circumstances, and could have contributed to the events which took place (45/3820, 3823).

Defense counsel asked Dr. Myers on cross whether it is "fair to separate the mental illness from the social stressors he was experiencing at the time? Don't the two bounce off each other? One would affect the other and vice versa?" Dr. Myers replied "You could use the word multifactorial. Multiple things played into what happened that night" (45/3827).

SUMMARY OF THE ARGUMENT

This was an unpremeditated murder committed by a severely mentally ill defendant with a well-documented history of psychotic breakdowns but no history of criminal activity. One aggravator was inherent in Delgado's felony murder conviction itself; the second

aggravator (given only moderate weight) arises from the momentary act of pointing - - but not firing - - a gun at Sergeant Mumford while Delgado was fleeing in a panic. See Scott v. State, 66 So.3d 923, 935-39 (Fla. 2011). This Court has recognized that the death penalty is not necessarily proportionate simply because the victim is a law enforcement officer. Wheeler v. State, 4 So.3d 599, 612 n.9 (Fla. 2009). The circumstances of Delgado's life, and the circumstances of the sequence of events which culminated in the shooting of Corporal Roberts, make it clear that this is not one of the most aggravated of first degree murders, and it is certainly not one of the least mitigated. In accordance with the proportionality standard, Delgado's sentence should be reduced to life imprisonment.

[ISSUE I] IN DECIDING NOT TO OVERRIDE THE JURY'S DEATH RECOMMENDATION, THE TRIAL COURT USED THE WRONG LEGAL STANDARD; i.e., THE TEDDER STANDARD WHICH APPLIES ONLY TO JURY LIFE RECOMMENDATIONS

This is a case with only two aggravating factors; one of which (victim was a law enforcement officer engaged in the performance of his legal duties) was inherent in the conviction itself ¹, and the other (contemporaneous aggravated assault for momentarily pointing a firearm at Sergeant Mumford) was given only moderate weight. This case also involves overwhelming and compelling evidence of mental mitigating circumstances (including

¹ The jury acquitted Delgado of premeditated murder and found him guilty of felony murder only (8/1442; 42/3517). The sole underlying felony was resisting an officer with violence, and the elements of that offense required the jury to find that Corporal Roberts was a law enforcement officer engaged in the lawful execution of a legal duty (see 42/3441).

Delgado's well-documented and longstanding psychiatric history preexisting the charged crimes), as well as evidence of the deterioration of his life - - culminating in homelessness - - during the time period immediately before the homicide, and that he had no prior history of criminal or violent behavior until his encounter with Corporal Roberts at age 34. In other words - - even apart from the dispositive issue that the death sentence in this case is disproportionate [Issue II] - - this is a case in which a trial judge could quite reasonably have chosen to impose a sentence of life imprisonment notwithstanding the jury's 8-4 death recommendation if he had understood the proper legal standard for doing so.

In explaining his decision to follow the jury's recommendation of death, Judge Battles stated in his sentencing order:

The Court recognizes that the Supreme Court of Florida will conduct a proportionality review of the sentence in this case. See State v. Dixon, 283 So.2d 1 (Fla. 1973). This Court is also mindful of its role and responsibility in rendering a decision in cases where the imposition of the death penalty is at issue. It is well settled that a jury's advisory opinion is entitled to great weight reflecting as it does, the conscience of the community, and should not be overturned unless no reasonable basis exists for the opinion. [Citing in a footnote Richardson v. State, 437 So.3d 1091 (Fla. 1983); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); and Grossman v. State, 525 So.2d 833, 839 n.1 (Fla. 1988)]. This Court's review of other reported capital cases has led the Court to conclude that the death penalty is not disproportionate.

(9/1650) (emphasis supplied)

However, this Court's statements in Richardson, McCampbell, and Grossman were all made with reference to the Tedder² standard,

² Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

which is to be used only in determining whether a trial judge may impose a death sentence notwithstanding a jury's recommendation of life imprisonment. It is a life recommendation which cannot be overridden unless no reasonable basis exists to support it; indeed, the Tedder standard is so exacting that no "life override" death sentence in Florida has been upheld in the last 18 years.³ [On the other hand, there have been at least thirty cases during that time period where trial judges have exercised their independent judgment to impose sentences of life imprisonment notwithstanding jury death recommendations. See the appendix to the defense's sentencing memorandum at 9/1611; see 8/1562-1600; 9/1601-12].

"The singular focus of a Tedder inquiry is whether there is 'a reasonable basis in the record to support the jury's recommendation of life.'" Robinson v. State, 95 So.3d 171, 183 (Fla. 2012); Washington v. State, 907 So.2d 512, 513-14 (Fla. 2005); Keen v. State, 775 So.3d 263, 283 (Fla. 2000) (emphasis supplied). An entirely different standard applies when the jury recommends death, and this Court has cautioned that the two standards should not be intermixed. Washington, 907 So.2d at 513; Keen, 775 So.2d at 283. See also Justice Pariente's opinion (joined by Justice Labarga) specially concurring in Aguirre-Jarquín v. State, 9 So.3d 593, 611 (Fla. 2009)

One of the duties placed upon the trial judge is to give the recommendation of the jury "great weight," unless circumstances not applicable here allow lesser weight. See Muhammad v. State, 782 So.2d 343 (Fla. 2001). However, a definition of this subjective term,

³ The last time was in Washington v. State, 653 So.2d 362, 366 (Fla. 1994)

"great weight," is not contained in the statute or the case law. The most that can be said about the guidance the Supreme Court of Florida has given to the trial courts in applying this term is that when a jury returns a life recommendation, "great weight" almost always precludes the imposition of a death sentence, Smith v. State, 866 So.2d 51 (Fla. 2004), while "great weight" does not preclude the trial judge from disagreeing with a death recommendation and imposing a life sentence. Tompkins v. State, 872 So.2d 230 (Fla. 2003).

White v. State, 616 So.2d 21 (Fla. 1993), a case in which this Court reversed the death sentence on proportionality grounds, also involved an error in the trial judge's sentencing analysis very similar to the error made by Judge Battles in this Point on Appeal. After citing Tedder and Grossman for the propositions that (1) in order to sustain a death sentence following a jury life recommendation the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ, and (2) a jury recommendation of death reflects the conscience of the community and is entitled to great weight, the trial judge in White went on to say:

It is illogical "great weight" means one thing when applied to a life recommendation but something else when applied to a death recommendation. The Court is therefore bound to follow the jury's recommendation of death in the instant case since there is a reasonable basis for such recommendation and the Court is unable to find that no jury, comprised of reasonable persons, could have ever returned such a recommendation.

The White trial judge suggested that on appeal that the Florida Supreme Court should recede from Tedder, and instead hold that any sentence of death, regardless of the jury's recommendation, should be clothed with a presumption of correctness. 616 So.2d at 25. This Court - - in no uncertain terms - - declined the trial judge's invitation:

We reject the trial judge's suggestion that we "recede from Tedder and hold that any sentence of death, regardless of the jury's recommendation, is clothed with a presumption of correctness and will not be reversed absent a clear abuse of discretion on the part of the sentencing judge." To do so would effectively result in this state's death penalty being declared unconstitutional. It appears that the trial judge would like us to return to the era of unbridled discretion that resulted in Florida's prior death penalty statute being declared unconstitutional.

White v. State, 616 So.2d at 26.

Given the relatively few aggravating circumstances and the compelling mitigation in Delgado's case, the trial judge's error in using the wrong legal standard in deciding to follow the jury's death recommendation cannot be dismissed as "harmless." State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In Smith v. State, 866 So.2d 51, 67 (Fla. 2004), the trial judge misapplied the law in his order sentencing Lawrence Joey Smith to death, stating that "the Legislature of this state has required that death must be imposed when the aggravating factors far outweigh the mitigating factors, and this Court must be guided by this law". On appeal, this Court agreed with Smith that this language in the sentencing order is an incorrect statement of law. Quoting Alvord v. State, 322 So.2d 533, 540 (Fla. 1975), this Court said:

[Florida's death penalty] statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment.

866 So.2d at 67.

Smith's case was remanded for reconsideration of the sentencing options, and on remand a sentence of life imprisonment was imposed. See Appendix to the defense's sentencing memorandum, 9/1608, 1611, and Smith v. State, 2010 WL 293987 (Fla. 2d DCA 2010) (unpublished disposition). In the instant case, even more so than in Smith, the trial judge's misunderstanding of the applicable legal standard may well have interfered with his ability to exercise independent, reasoned judgment as to whether the totality of the factual circumstances (including strong and well-documented evidence of severe mental illness spanning Delgado's entire adult lifetime) showed that justice could be satisfied by a sentence of life imprisonment.

Having shown that error affecting the imposition of the death sentence occurred, the question remains what to do about it. Undersigned counsel suggests that this Court should do what it did in White and reverse Delgado's death sentence on proportionality grounds, which will render other sentencing issues moot. See, e.g., Scott v. State, 66 So.3d 923, 929 n.5 (Fla. 2011); Cooper v. State, 739 So.2d 82, 84-85 (Fla. 1999); Fernandez v. State, 730 So.2d 277, 283 (Fla. 1999); Hardy v. State, 716 So.2d 761, 766 n.2 (Fla. 1998). In the alternative, if this Court chooses to reverse and remand for resentencing based on the trial court's misunderstanding of the legal standard when the jury has recommended death, then it should defer ruling on the proportionality issue; if the trial judge (as in Smith) imposes life the question of proportionality will become moot, and if he imposes death, proportionality review will occur as an integral part of the appeal of

that sentence. See, e.g., Delhall v. State, 95 So.3d 134, 170 (Fla. 2012); Crook v. State, 813 So.2d 68, 78 n.8 (Fla. 2002); Clark v. State, 690 So.2d 1280, 1283 (Fla. 1997); Larkins v. State, 655 So.2d 95, 101 (Fla. 1995). Under the circumstances of this case, undersigned counsel submits that judicial economy would be much better served by a proportionality reversal, as in White.

[ISSUE II] THE DEATH PENALTY IS DISPROPORTIONATE BECAUSE (1) THE HOMICIDE OF A LAW ENFORCEMENT OFFICER DOES NOT NECESSARILY RENDER A DEATH SENTENCE PROPORTIONATE, AND (2) UNDER THE TOTALITY OF THE CIRCUMSTANCES HUMBERTO DELGADO'S CASE IS NOT AMONG THE MOST AGGRAVATED - - AND CERTAINLY NOT AMONG THE LEAST MITIGATED - - OF FIRST DEGREE MURDERS

A. The Two-Pronged Proportionality Standard

Proportionality review is a unique and highly serious function of this Court, and in carrying out this important task, the Court is mindful that death is a punishment reserved only for the most aggravated and least mitigated of first degree murders. Green v. State, 975 So.2d 1081, 1087-88 (Fla. 2008). It is not merely a counting process; what matters is the nature and quality of the aggravators and mitigators - - and the totality of the circumstances - - and how they compare with other capital cases in which the death penalty has been upheld or overturned. See Green, 975 So.2d at 1088; Larkins v. State, 739 So.2d 90, 93 (Fla. 1999). The proportionality standard is two-pronged: "We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of [first degree] murders." Crook v. State, 908 So.2d 350, 357 (Fla. 2005); Almeida v. State, 748 So.2d 922, 933 (Fla.

1999); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999). In Crook and Cooper, for example, the aggravation prong was satisfied (each case had three aggravating factors, including HAC in Crook and CCP and another robbery-murder in Cooper), yet their death sentences were still reduced to life imprisonment on proportionality grounds based on the mitigation prong. As explained in Crook:

As to the first prong, relating to aggravation, Crook has conceded, and we agree, that the trial court's finding of three aggravators is supported by the record and those findings place this case among the most aggravated of murders. Accordingly, under our death penalty jurisprudence as stated in Almeida and other decisions, we are next required to determine whether this case also falls within the category of the least mitigated of murders for which the death penalty is reserved.

Notably, this Court has previously vacated death sentences, especially in cases where substantial mental health evidence established the case as among the most mitigated.

908 So.2d at 357.

The Crook court cited and discussed Cooper, and said "While no two cases are exactly alike, we find the similarities between Cooper and this case compelling." 908 So.2d at 357-58.

B. Aggravation Prong

Humberto Delgado's case, like Crook and Cooper (and Green, 975 So.2d at 1085-90, and Larkins, 739 So.2d at 92-96) contains substantial - - even overwhelming - - evidence of severe mental illness and its nexus with the charged crime. Where Delgado's case differs from Crook and Cooper is on the aggravation prong. Delgado has only two aggravators, one of which is inherent in the conviction itself [see Hess v. State, 794 So.2d 1249, 1266 (Fla. 2001)], and the other (which was accorded only moderate weight)

arose from the momentary pointing (but not firing) of a gun at Sergeant Mumford while Delgado, in a panic, was fleeing the scene. This Court has recognized that the fact that a homicide victim was a law enforcement officer does not necessarily render the death penalty proportionate. Wheeler v. State, 4 So.3d 599, 612 n.9 (Fla. 2009). See Hardy v. State, 716 So.2d 761 (Fla. 1998); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). This Court has also frequently stated that among the most serious aggravating factors in Florida's statutory scheme are HAC (especially heinous, atrocious, or cruel) and CCP (cold, calculated, and premeditated). See, e.g., King v. State, 89 So.3d 209, 232 (Fla. 2012) (HAC and CCP); Rimmer v. State, 59 So.3d 763, 781 (Fla. 2011) (CCP); Abdool v. State, 53 So.3d 208, 224 (Fla. 2010) (HAC and CCP); Wade v. State, 41 So.3d 857, 879 (Fla. 2010) (HAC and CCP); McKenzie v. State, 29 So.3d 272, 287 (Fla. 2010) (CCP). In Larkins v. State, supra, 739 So.2d at 91-96 - - a case in which, like Delgado's, there were two aggravating factors and extensive mental health and other mitigation - - this Court took note of the fact that neither HAC nor CCP were present; and their absence, while not controlling, was relevant to the proportionality analysis. See also Fitzpatrick, 527 So.2d at 812 (noting HAC and CCP "are conspicuously absent").

Neither of these powerful aggravators - - HAC and CCP - - exists in Delgado's case. Not only was there no heightened level of premeditation or calculation, the jury by its guilt phase verdict actually acquitted Delgado of even simple premeditation, and found him guilty solely on a felony murder theory, with

resisting an officer with violence as the underlying felony. Clearly, in any proportionality analysis, the unpremeditated murder of a law enforcement officer would be less deserving of a death sentence - - all other things being equal - - than would the premeditated murder of a law enforcement officer.

A third aggravator which has often, but not always, been considered especially serious is prior conviction of a violent felony. See, e.g. Silvia v. State, 60 So.3d 959, 974 (Fla. 2011); Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002). However, the weight which that aggravator carries in a proportionality analysis depends on the time frame (i.e., whether the defendant has a history of committing violent crimes which occurred prior to the charged offense) and on the level of violence involved in the other crime or crimes. See Scott v. State, 66 So.3d 923, 935-39 (Fla. 2011); Hess v. State, 794 So.2d 1249, 1265-69 (Fla. 2001); Johnson v. State, 720 So.2d 232, 238-39 (Fla. 1998). In Hess, this Court found the death penalty disproportionate in a case with two aggravating factors, one statutory mitigator (no significant history of prior criminal activity), and extensive evidence supporting sixteen nonstatutory mitigators. The aggravating factors in Hess were (1) murder committed in the course of a robbery, and (2) prior conviction of a violent felony, based on sexual offenses which occurred subsequent to the charged homicide. While this Court agreed that both of these aggravators were properly found they were not sufficient, under the totality of the circumstances, to warrant a death sentence in light of the strong mitigation. As to the felony murder aggravator, it was "based

solely on the fact that [Hess] was engaged in the commission of a robbery when the killing occurred":

In other words, this aggravator is based on the same incident which resulted in Galloway's death. In addition, appellant was separately convicted of this robbery and received an additional sentence for that crime. Further, the exact circumstances surrounding the robbery are unknown as there were no witnesses to the crime and the appellant's statements reflect a variety of bizarre scenarios.

794 So.2d at 1266 (emphasis supplied)

Similarly in the instant case (aside from the constitutional argument in Issue III that an aggravator which is identical to an essential element of the first degree murder conviction does not genuinely narrow the class of persons eligible for a death sentence) the "victim was a law enforcement officer engaged in the performance of his official duties" aggravator is inherent in Delgado's murder conviction itself. It would have been different if he had been convicted of premeditated murder (or of first-degree murder under a general verdict, if there was legally sufficient evidence of premeditation), but here the jury acquitted Delgado of premeditated murder and found him guilty solely of felony murder based on the offense of resisting an officer with violence. The elements of that underlying felony required, inter alia, proof beyond a reasonable doubt that Corporal Roberts was a law enforcement officer, and that he was engaged in the execution of a legal duty (see 42/3441). So, as in Hess, the aggravating circumstance was an essential component of the crime, and (even assuming arguendo that it is not unconstitutional to use it at all) it should carry less weight in the proportionality analysis.

Also, as in Hess, the exact circumstances surrounding the

events are unknown. Delgado did not testify, and his mental condition and spotty recollection prevented him from giving coherent accounts to the psychiatrists and psychologists. Corporal Roberts could not testify, and the in-dash camera in his vehicle had not been activated. And although there were witnesses to portions of the encounter, their testimony was largely inconsistent with the physical evidence (Richard Farmer) and with each other (compare Farmer's observations with those of Kent Sharp).

The second aggravator in Hess was prior conviction of a violent felony. This Court said:

We also cannot help but note that these offenses actually occurred two years after the murder of Gallo-way, for which appellant received substantial sentences. At the time Hess committed the murder in this case, however, he had no history of committing violent crimes. While we agree that sexual offenses involving violence clearly qualify as prior violent felonies, we cannot ignore the fact that Hess does not have a significant history of committing violent offenses and both sexual offenses occurred after the murder in this case. See Urbin v. State, 714 So.2d 411, 418 (Fla. 1998). Thus, the aggravator in this case, albeit established, is not as "weighty" as it normally would be in cases where the defendant has a significant history of prior violent crimes, which includes prior murders.

See e.g. Ferrell v. State, 680 So.2d 390, 391 (Fla. 1996) (finding single aggravating factor of prior violent felony "weighty" where factor was based on prior second-degree murder conviction bearing many similarities to murder committed in instant case); Hunter v. State, 660 So.2d 244, 253 (Fla. 1995) (prior violent felony aggravator based on twelve prior felonies, four of which were prior felonies and eight of which occurred contemporaneously with the murder in the instant case); cf. Jorgenson v. State, 714 So.2d 423, 428 (Fla. 1998) (holding that length of time between prior convictions (1967 second-degree murder) and present crime and factual circumstances surrounding prior conviction "mitigate[d] the weight that a prior violent felony would normally carry").

794 So.2d at 1266 (emphasis supplied)

The Hess Court then considered the two aggravators against

the extensive evidence of nonstatutory mitigation, as well as the important statutory mitigation (which the trial court had erroneously failed to find) that Hess had no significant history of criminal activity prior to the charged murder, and concluded that Hess' death sentence was disproportionate.

In the instant case, Humberto Delgado lived for 34 years - - the adult portion of which he spent battling the demons of severe mental illness - - without engaging in criminal activity or violent behavior. His "prior conviction of a violent felony" was based on a momentary action - - while under the influence of extreme mental or emotional disturbance - - of pointing, but not firing, a gun at Sergeant Mumford.

In Scott v. State, 66 So.3d 923 (Fla. 2011), Kevin Scott and his accomplices Bolling and "Miami" planned a robbery of a coin laundry. As Scott entered the premises, the owner (Binjaku) was sitting on the floor working on a broken machine and another man (Koci) was sitting in a chair next to Binjaku. Scott hit Koci on the back of the head with the butt of his gun. Binjaku then got up, said he had no money, and told the intruders to go away, whereupon Scott pointed his gun at Binjaku and fired one fatal shot to his face. 66 So.3d at 926. Scott was arrested and tried for the crimes. The jury found Scott guilty of first-degree murder of Binjaku (by special verdict, under both premeditated and felony murder theories), armed robbery, and aggravated battery of Koci. 66 So.3d at 928 and 938. [Contrast the instant case where a special verdict form was also used; the jury rejected premeditation, and expressly found Delgado guilty of felony murder only

(8/1442; 42/3517)]. In sentencing Scott to death, the trial judge found two aggravators (murder committed during an armed robbery, and prior conviction of a violent felony based on the contemporaneous aggravated battery of Koci) and nine nonstatutory mitigators. This Court reversed the death sentence on proportionality grounds, and emphasized that the "prior violent felony" aggravator must be evaluated qualitatively. Discussing numerous cases, the Court distinguished true prior felonies from contemporaneous felonies, and more use of violence from less use of violence. 66 So.3d at 935-38. The Court noted that in Scott's case the circumstances giving rise to the prior violent felony aggravator - - the contemporaneous aggravated battery of Koci - - "mitigate against the weight that a prior violent felony would normally carry." 66 So.3d at 936. While it unquestionably qualified as an aggravator, in the proportionality analysis "we must consider that the facts supporting this aggravator demonstrate that the battery occurred at the same time as the murder and apparently involved a limited threat of violence and no permanent injury." 66 So.3d at 936. The circumstances in Scott stood "in stark contrast" with other cases in which the prior violent felony was not contemporaneous with the charged homicide, and/or where it involved extreme acts of violence resulting in death or serious injury.

In reversing on proportionality grounds, the Court found Scott's case to be comparable to Johnson v. State, 720 So.2d 232 (Fla. 1998):

Like the defendant in Johnson, Scott was convicted under both premeditated and felony-murder theories and his penalty-phase proceeding produced comparable mitigation. As in Johnson, the evidence here certainly

supports a finding of two aggravating circumstances; however, those aggravators are simply not compelling when the circumstances surrounding Scott's contemporaneous felony are adequately considered: the prior violent felony was predicated upon an aggravated battery occurring at the same time as the murder, it involved a relatively limited use of violence, and was not charged until the eve of trial. Moreover, the facts of the murder are less compelling than in Johnson, where the record reflected that Johnson shot the victim multiple times and then, without provocation, again shot the victim in the jaw. Id at 236. Here, Scott shot Binjaku only once, and, by Scott's account, the shot was in response to Binjaku rushing at him with a chair.

66 So.3d at 938 (emphasis supplied).

In the instant case, the contemporaneous aggravated assault on Sergeant Mumford is further weakened in the proportionality analysis by an important factor which was not present in Scott or Johnson. While Scott and Johnson had nonstatutory mitigating factors, and while Scott has the "no significant history of criminal activity" mitigator (as does Delgado) and Johnson had the age mitigator (very little weight), there was no evidence that either Scott or Johnson was chronically mentally ill, or under extreme mental or emotional disturbance, or had an impaired capacity to control their conduct. See 66 So.2d at 928-29, 935, and 938, and 720 So.2d at 235 and 238. Delgado, on the other hand, was all of those things at the time he struggled with Corporal Roberts and fired a single fatal gunshot, and he was all of those things minutes later when he was fleeing the scene in a panic and momentarily pointed a firearm at Sergeant Mumford. He did not shoot Sergeant Mumford, or shoot at him. Mumford crouched behind a dumpster, crept around the corner of a building, and drew his own weapon, and Delgado continued to flee. The "whole thing

took a matter of seconds" (30/1879-82, 1887-90, 1913). ⁴ Eighteen year old Anthony Freeman and his kid brother saw a dude with wild and crazy looking dreads running, with a limp, through the park. He was carrying a gun by his side and he was crying; he asked Anthony for help and said the police were trying to kill him (31/1961-66).

To recapitulate, this is an unpremeditated murder committed by a severely mentally ill defendant whose life was falling apart, after a miserable fifteen mile walk and a sudden, stressful encounter with a police officer who tased him as he tried to run away,⁵ with only two aggravating factors, one of which contained

⁴ For purposes of this proportionality argument, undersigned counsel is assuming without conceding that Sergeant Mumford's testimony - - which is the only evidence supporting the aggravated assault conviction and prior violent felony aggravator - - is truthful. While the resolution of credibility issues is for the jury and the sentencing judge, it should at least be noted that: (1) When Mumford went on his radio and described the suspect as an elderly black male in his 40s or 50s who ran west or northwest across the park to Yukon he said "I think he's 10-0" (armed). Mumford did not tell the dispatcher that the suspect had pointed a gun at him. Asked at trial why he said "I think he's 10-0" Mumford explained "[O]nce he left my sight, I didn't know whether he was still armed or not" (30/1912-13, 1916, 1929-30; 31/1979; see defense closing argument at 41/3349-51). Another inconsistency was that when interviewed by detectives on the night of the incident Mumford told them he had drawn his own weapon when he first exited his vehicle, while at trial he said he didn't draw his weapon until after Delgado pointed a firearm at him, when he moved from the dumpster to the wall; "If I had drawn my weapon when I exited my vehicle I would have shot him" (30/1911-14).

⁵ There is conflicting evidence as to whether the TASER prong landed in Delgado's shoulder (from which he pulled it out) or in his dreadlocks. Either way, it apparently did not cause an NMI (neuromuscle incapacitation). Whether there was any physiological effect is uncertain, but the sound of the TASER was loud enough for Kent Sharp to hear from his car, and as Dr. Taylor opined in the guilt phase (when he was a prosecution witness) it probably stunned Delgado at least momentarily (40/3270, 3273). Dr. Maher also testified that, at the very least, the TASER

the same elements as the underlying felony necessary for the murder conviction, and the other being a contemporaneous aggravated assault which took seconds and resulted in no injury. None of the "super-aggravators" - - CCP, HAC, or a prior violent felony which occurred at an earlier time or involved extreme violence - - is present; while the mitigating factor that Delgado has no significant criminal history is present. The fact that the victim was a law enforcement officer does not necessarily render the death penalty proportionate [Wheeler; see Hardy; Fitzpatrick], and it is not proportionate in this case.

C. Mitigation Prong

Eight psychiatrists and psychologists testified in this case. Three (Drs. Maher, Krop, and Ruiz) were retained by the defense to examine Delgado; three (Drs. Stein, Taylor, and Myers) were retained by the state to examine Delgado); one (Dr. Hernandez) was the treating psychiatrist at the Orient Road jail who evaluated Delgado immediately after his arrest; and one (Dr. Leusink) was the Army psychiatrist who diagnosed and treated Delgado when he was hospitalized at Fort Bragg in 2005. Two of the three prosecution experts (Stein and Taylor) who testified for the state in the guilt phase that Delgado did not meet the M'Naghten standard for legal insanity, subsequently testified for the defense in the penalty phase and the Spencer hearing. Remarkably, with eight doctors expressing their opinions (and with extensive lay testi

(..continued)

frightened Delgado and enhanced his paranoia, whether it delivered an actual electric shock or not (38/3013, 3051-58, 3089-91).

mony from numerous witnesses, including Delgado's ex-wife and ex-girlfriend, who knew him in the Virgin Islands, North Carolina, and Florida) the following facts were supported by overwhelming and uncontradicted evidence:

(1) Delgado suffers from a severe and chronic mental illness, with psychotic features, characterized by paranoia and delusional thinking.

(2) Delgado has a history of psychiatric hospitalizations (twice in the Virgin Islands in 2003, once at Fort Bragg in 2005).

(3) Delgado is not malingering or exaggerating the symptoms of his mental illness.

(4) Delgado does not have an antisocial personality disorder, and has never exhibited sociopathic or psychopathic traits. He has no record of prior criminal activity during the 34 years preceding the homicide of Corporal Roberts. Perhaps as a result of his chaotic upbringing, in which he witnessed a great deal of domestic violence (and most likely was physically abused himself, although he doesn't see it that way), he is strongly attracted to occupations which value rules, order, and doing the right thing. This is why he became a police officer in the Virgin Islands and later joined the U.S. Army. In both cases, however, his efforts to build or rebuild his life were thwarted by his mental illness.

(5) The symptoms caused by Delgado's mental illness can be managed, but the mental illness cannot be cured, by the use of antipsychotic medications.

(6) Antipsychotic medications can have serious and unpleasant side effects, and as a result it is common for mentally ill patients to be noncompliant. Delgado had a bad reaction, in particular, to Haldol in 2003, and he also stopped taking his medication in North Carolina before his girlfriend broke up with him and he left for Florida. Mentally ill people who go off their meds tend to decompensate, and this has been Delgado's pattern as well.

(7) Delgado is, to some extent, in denial about being mentally ill; he believes his delusions are real and the problem is that people are out to get him. When he is properly medicated (as he was for two years in jail awaiting trial, and during the trial itself), the intensity of his delusions subsides, but he still lacks

the insight that they are not real.

(8) Stress tends to exacerbate the symptoms of the mental illness with which Delgado has been diagnosed (i.e., the overlapping diagnoses of bipolar disorder with psychotic features, and/or the even more severe schizoaffective disorder with psychotic features).

(9) At the time of the August 19, 2009 homicide, Delgado had been rejected by family members (his girlfriend and mother of his youngest child in North Carolina, and his uncle and aunt in Florida) who could not cope with his mental illness and bizarre behavior. He was going long periods of time without sleep (which, according to his girlfriend was a trigger of his delusions and paranoia), and he was living on the street. On the day the homicide occurred he had walked fifteen miles, on bad knees and with a bad back, carrying his belongings (which included four loaded firearms and a laptop computer) in a military-style backpack, before he found a shopping cart near the end of his trek. He was trying to get to the Tampa V.A., which he vaguely knew where it was. [What he was thinking in bringing four loaded guns to the V.A. is unknowable, but it makes more sense in the context that four years earlier, when he was transported to the Womack Army Hospital at Fort Bragg, he brought a bag containing a hammer and a pellet pistol for self-defense. He voluntarily relinquished those items when told he would be staying in the hospital to keep him safe].

(10) Delgado's mental illness played a major role [Drs. Maher, Stein, Taylor, Krop, and Ruiz], or at least a contributory role [Dr. Myers], in the events of August 19, 2009 which resulted in the fatal shooting of Corporal Roberts. Five experts, two of them initially retained by the prosecution, unequivocally testified that at the time of the offense Delgado was under extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of law was substantially impaired. [Drs. Stein and Krop went so far as to say that but for Delgado's severe mental illness the shooting likely would not have occurred]. Dr. Myers agreed that Delgado suffers from a major mental illness, and had extreme mental or emotional disturbance in previous years, but he did not believe that the statutory mental mitigators existed at the time of the crime in 2009. However, even Dr. Myers acknowledged that Delgado had been under stress and may have been experiencing a hypomanic state (less than full blown mania, but characterized by decreased sleep and increased agitation). Dr. Myers agreed that Delgado's mental condition would have caused his feelings to be more intense than a normal person would have experi-

enced under the same circumstances and could have contributed to the events which took place that night (45/3820-21, 3823).

(11) Within days of Delgado's arrest, he was seen by Dr. Jose Hernandez, a treating psychiatrist at the Orient Road jail. After doing a total evaluation, Dr. Hernandez realized that Delgado "was very delusional and paranoid" and he prescribed antipsychotic medication.

(12) Delgado remained on antipsychotic medication (at an increased dosage than what he was initially given) during the entire two year period he was awaiting trial, and continuing throughout the trial itself. The medication eventually succeeded in stabilizing Delgado's symptoms (an outcome which suggested to Dr. Ruiz that the jail psychiatrist was on the mark), and he was not a behavior problem in the jail.

(13) In a controlled prison environment with mental health treatment and medication, Delgado likely would not pose a danger or a disciplinary problem.

In his sentencing order, the trial court found (1) that Delgado has no significant history of prior criminal activity (considerable weight); (2) that the crime was committed while Delgado was under extreme mental or emotional disturbance (substantial weight); (3) that Delgado's ability to conform his conduct to the requirements of law was impaired (albeit not substantially) (moderate weight). In his discussion of nonstatutory mitigating factors, the court found the Delgado was homeless and "under the stress of multiple psychosocial stressors" (substantial weight consistent with the court's findings regarding extreme mental or emotional disturbance); and that Delgado suffers from a longstanding and severe psychiatric illness (substantial and/or moderate weight consistent with the courts findings regarding extreme mental or emotional disturbance and impaired capacity)

(9/1633-41, 1646, 1649).⁶

Green v. State, 975 So.2d 1081, 1087-90 (Fla. 2008) was a single aggravator proportionality reversal, but this Court made it clear that even if it upheld the avoid arrest aggravator [which would make it a two aggravator case like Delgado's] "we would reach the same conclusion based on the substantial and uncontroverted evidence of the defendant's mental illness. We have consistently recognized such mitigation as among the most compelling." See also Santos v. State, 629 So.2d 838, 840 (Fla. 1994) ("Santos' case exhibits two of the weightiest mitigating factors - those establishing substantial mental imbalance and loss of psychological control"); Rose v. State, 675 So.2d 567, 573 (Fla. 1996) ("severe mental disturbance is a mitigating factor of the most weighty order"); Hurst v. State, 18 So.3d 975, 1014 (Fla. 2009) (evidence which establishes statutory and nonstatutory mental mitigation can be considered a weighty factor). This Court has frequently reversed death sentences on proportionality grounds in cases where there are two (or sometimes more than two) aggravators when there is strong and well-documented mental mitigation. In addition to Green, see, e.g., Larkins v. State, 739 So.2d 90, 92-96 (Fla. 1999) (pecuniary gain, and prior noncontemporaneous convictions of manslaughter and assault with intent to kill); Hawk v. State, 718 So.2d 159, 163 (Fla. 1998) (pecuniary gain and a contemporaneous attempted murder); Robertson v. State, 699 So.2d 1343, 1345 (Fla. 1997) (homicide committed during a burglary and

⁶ The trial court also found and accorded little weight to numerous other nonstatutory mitigators and the statutory age mitigator (9/1641-49).

HAC); Kramer v. State, 619 So.2d 274, 277-78 (Fla. 1993) (prior violent felony and HAC); Farinas v. State, 569 So.2d 425, 427-32 (Fla. 1990) (homicide committed during a kidnapping and HAC).

Delgado's case presents only two aggravators, one of which was accorded only moderate weight, and - - as in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) and Larkins v. State, supra, 739 So.2d at 95 - - HAC and CCP "are conspicuously absent." 527 So.2d at 812. [Fitzpatrick was reversed on proportionality grounds, even though five aggravating factors existed, based primarily on vast mental mitigation along with Fitzpatrick's young age].

Delgado's case is also much less aggravated than Crook v. State, 908 So.2d 350, 355-59 (Fla. 2005) (murder committed during a sexual battery, pecuniary gain, and HAC) and Cooper v. State, 739 So.2d 82 (Fla. 1999) (pecuniary gain merged with robbery, CCP, and another robbery-murder committed several days after the charged crime). This Court determined that, while Crook and Cooper were among the most aggravated of first degree murders, they were not among the least mitigated, so the death sentences were disproportionate.

The importance of mental health mitigation in the proportionality analysis was also emphasized in a case where this Court declined to reduce the defendant's sentence to life imprisonment:

Floyd's argument that the cases of Farinas v. State, 569 So.2d 425 (Fla. 1990), and White v. State, 616 So.2d 21 (Fla. 1993), demonstrate the lack of proportionality in his death sentence is misplaced. In both Farinas and White, our decision that a life sentence was proper was based in large measure on the significant amount of mental health mitigation present in each case. No similar situation exists here and, therefore, relief based on Farinas and White is not warranted. Our proportionality review leads us to con-

clude that the death sentence was properly imposed in Floyd's case.

Floyd v. State, 850 So.2d 383, 409 (Fla. 2002) (emphasis supplied).

Farinas, distinguished in Floyd, is (like Delgado) a two aggravator case. Unlike Delgado, the murder committed by Farinas was premeditated (although not CCP), and - - again unlike Delgado - - one of the aggravators was that the murder was especially heinous, atrocious, or cruel. 569 So.2d at 431. Yet the significant mental health mitigation in Farinas' case (which was nowhere near as compelling as Delgado's, see 569 So.2d at 428 and 431) was sufficient to render the death sentence disproportionate.

While no two proportionality cases are identical, of the numerous decisions involving the homicide of a law enforcement officer Delgado's case is much closer to Hardy v. State, 716 So.2d 761 (Fla. 1998) and Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), in which the death sentences were found to be disproportionate and were reduced to life imprisonment, than to any of the cases where the death penalty was affirmed. Hardy's case had slightly less aggravation than Delgado's but it also had considerably less mitigation. Fitzpatrick's case, on the other hand, had extremely strong mitigation but it also had five aggravators.

The factual circumstances in Hardy are somewhat similar to the instant case, although without the preexisting mental illness, the fifteen mile walk, and the TASER. Hardy and three others "had been driving around when their car broke down. They pushed it into a supermarket parking lot and began walking through the lot. Hardy was carrying a stolen .38 caliber handgun. Sergeant Hunt stopped the four young men and began to pat them down. While Hunt

was patting down Rodriguez, Hardy shot Hunt twice in the head at close range." 716 So.2d at 762. Hardy subsequently attempted suicide by shooting himself in the head with Sergeant Hunt's service revolver; he sustained brain damage but survived.

On the aggravation prong, the only difference between Hardy's case and Delgado's is the second aggravating factor - - given only moderate weight - - arising from Delgado's momentarily pointing a gun at Sergeant Mumford as he fled the scene. That is hardly enough to justify a death sentence for Delgado [see Scott v. State, supra, addressing the relative weakness of a similar aggravator in the proportionality calculus], especially in view of his copious mental mitigation and his lack of a criminal history.

On the mitigation prong, Delgado was found to be under extreme mental or emotional disturbance at the time of the shooting (substantial weight), and his ability to conform his conduct was impaired (moderate weight). As nonstatutory mitigators, the trial court found that he has a longstanding, severe psychiatric illness, and that at the time of the crime he was homeless and his "severe mental illness was exacerbated by numerous acute psychosocial or life stressors" (weight consistent with that given to statutory mental mitigators) (9/1646, 1649). No comparable mitigation existed in Hardy. Also found as a statutory mitigating factor in Delgado's case was the fact that he had no significant history of criminal activity (considerable weight). Again, no comparable mitigation existed in Hardy.

The mitigation which was found in Hardy consisted of the statutory factor of age (18) (some weight), and five nonstatutory

factors: (1) Hardy's impoverished and physically and emotionally abusive childhood (little weight); (2) his attempt at self-punishment by shooting himself in the head (little weight); (3) parole ineligibility (some weight); (4) his good and compliant behavior in jail indicating the likelihood that he will adapt well to a prison setting and will not endanger others (considerable weight); and (5) the brain damage he incurred as a result of his suicide attempt (considerable weight).

The mitigation in Hardy, while significant, pales in comparison with the strong mental mitigation - - preexisting the crime and contemporaneous with the crime - - in Delgado's case. In considering the effect of mental mitigation on the proportionality of a death sentence, it is important that the evidence show a nexus between the defendant's psychological condition and the circumstances of the crime. See Crook v. State, supra, 908 So.2d at 359. Here, Dr. Stein testified "in my opinion [the homicide] would not have occurred had [Delgado] not been severely mentally ill" (45/3580, see 3583-84). Dr. Krop testified that the shooting of Corporal Roberts was very specific to the conditions, stressors, and preexisting mental illness, and without the convergence of those factors "then likely this event would not have occurred" (43/3656-57). Five of the six mental health experts, two of whom were hired by the prosecution to examine Delgado, testified unequivocally that he met the criteria for both statutory mental mitigators at the time of the offense. A seventh doctor, Leusink, testified regarding Delgado's psychotic breakdown accompanied by paranoia and delusional thinking at Fort Bragg in 2005. An eighth

doctor, Hernandez, was the jail psychiatrist and the first medical expert to see Delgado after his arrest; closest in time to the shooting incident at Nebraska and Arctic. After doing a total evaluation, Dr. Hernandez realized that Delgado had a mental illness, and was very delusional and paranoid. Dr. Hernandez put Delgado on antipsychotic medications, which eventually worked and the intensity of his delusions subsided. The only expert who did not think that Delgado's mental illness was strongly manifesting itself at the time of the crime was Dr. Myers, who first evaluated Delgado two years after the shooting (and therefore after two years of treatment with antipsychotic meds). Dr. Myers was not only an outlier; he was an extreme outlier. Yet even he agreed that Delgado had been properly diagnosed with a major mental illness in the Virgin Islands and Fort Bragg, and while it was his opinion that the statutory mental mitigators did not apply at the time of the crime, he acknowledged that Delgado had been under stress and may have been experiencing a hypomanic state. He further acknowledged that Delgado's mental condition would have caused his feelings to be more intense than a normal person would have experienced under the same circumstances, and could have contributed to the events which took place. See State v. Dixon, 283 So.2d 1, 10 (Fla. 1973) (defining extreme mental or emotional disturbance as "easily interpreted as less than insanity but more than the emotions of an average man, however inflamed").

Among the acute stressors (found by the trial court as a nonstatutory mitigating circumstance) which nearly all of the experts said exacerbated Delgado's severe mental illness were his

homelessness and his estrangement from family members and loved ones: ". . . his girlfriend and mother of his youngest son had recently terminated their relationship and asked him to leave because of his mental illness; his uncle also asked the Defendant to leave his house because of the Defendant's mental illness. . . ." (9/1646). These are people who love Delgado and wanted to help him, but his delusional thinking and bizarre behavior were making it impossible to be around him. When Delgado came to stay with the Velasquez, his aunt and uncle, he wasn't acting normal. He would pace nonstop, back and forth, throughout the house - - days and nights - - talking to himself "like if he was talking to another person." He wasn't sleeping and he constantly complained of headaches. He told his uncle that people were looking for him to kill him (37/2813-16, 2829, 2832, 2839-40). His behavior was frightening the Velasquez' three daughters (no intimidation or threats, just the weirdness), so Mrs. Velasquez told her husband to tell Delgado he would have to leave. As she put it, "What I saw is that he was sick. That I didn't want him in my home because he was sick." They gave him one more month but Delgado, offended, left right away. This was two weeks before the encounter which resulted in the shooting of Corporal Roberts (37/2813-18, 2823, 2830, 2835-37).

The existence of mental mitigation distinguishes most of the cases in which this Court has affirmed the death penalty for the killing of a law enforcement officer, and the strength of the mental mitigation in Delgado's case distinguishes all of them. See Burns v. State, 669 So.2d 646, 650 (Fla. 1997) ("The considera-

tion given statutory mental mitigators, depending on the evidence presented to support them, may be substantial. [Footnote omitted]. Not only was the instant case devoid of the statutory mental mitigators, but the statutory mitigators that were found were afforded only minimal weight." [The mitigators in Burns were age (42) and no significant history of criminal activity (with reduced weight due to testimony that Burns previously sold crack cocaine), and several nonstatutory factors including poor socioeconomic background, contributions to the community, good prison record, some remorse, and some spiritual growth. 699 So.2d at 648-650]. See also Kearse v. State, 770 So.2d 1119, 1135 (Fla. 2000) (like Burns, Kearse's case was devoid of the statutory mental mitigators, and the other statutory and nonstatutory mitigators which were found were given minimal weight).

Not only is Delgado's case less aggravated than most of the law enforcement officer cases which this Court has affirmed, it is vastly more mitigated than all of them. The two main recent cases which even have any halfway significant mental mitigation are Altersberger v. State, ___ So.3d ___, 2012 WL 3853182 (Fla. 2012) and Wheeler v. State, 4 So.3d 599 (Fla. 2009); and in each of those cases the homicide of a police officer was not only premeditated but also cold and calculated (CCP). Moreover, in each of those cases the CCP aggravating factor was accorded great weight (in contrast to the moderate weight given Delgado's contemporaneous aggravated assault by momentarily pointing a gun at Sergeant Mumford). Moreover, the mental mitigation in Altersberger and Wheeler was nowhere near as strong as Delgado's. Altersberger's

is summarized as follows:

Altersberger also presented the testimony of two mental health experts. The first, Dr. Krop, a forensic psychologist, testified that Altersberger has anger issues that stem from his dysfunctional relationship with his mother and the insecurity caused by her poor parenting and decision-making throughout his childhood. Dr. Krop also explained that, despite his 103 IQ, Altersberger has problems with planning and impulse control and was extremely immature for his age, both socially and developmentally. Dr. Gur, a neuropsychologist who specializes in neuroimaging, testified that the orbital frontal and amygdala regions of Altersberger's brain are significantly undersized and that such a condition would result in impaired ability to control and regulate emotions and impulses, an impairment that would be exacerbated by drug and alcohol use or abuse. However, Dr. Gur stated that, because he had never met Altersberger and was not familiar with the facts of the case, he could not connect his findings to the crime itself.

The trial court in Altersberger found the impaired capacity mitigator and accorded it moderate weight and he also gave moderate weight to Altersberger's dysfunctional family environment; while the statutory age mitigator and eight other nonstatutory mitigators were given little, slight, or very slight weight. Neither the "extreme mental or emotional disturbance" statutory mitigator nor the "no significant history of prior criminal activity" statutory mitigator was found in Altersberger. [In Delgado's case, in contrast, these mitigators were found, and were accorded substantial weight and considerable weight respectively].

In Wheeler (in which this Court recognized that the murder of a law enforcement officer does not necessarily render the death penalty proportionate, 4 So.3d at 612, n.9), the statutory mental mitigators were found and given "some" weight (along with eleven nonstatutory mitigators, eight of which received minimal weight

and three "some" weight. This Court summarized Wheeler's mitigating evidence as follows:

The defense presented the mitigation testimony of two of Wheeler's friends, his pastor, and several of his family members including his mother, half sisters, aunt, uncle, and adoptive father. The net of this testimony was that Wheeler was never abused and lived a normal, happy childhood. Wheeler was a wonderful father, brother, friend, and nephew who worked hard and was remorseful for these crimes. After the doublewide mobile home Wheeler and Heckerman lived in was heavily damaged by hurricanes in 2004 and Wheeler lost his job, Wheeler was under a lot of stress, resulting in heavy methamphetamine use that changed his personality. Wheeler's stress was also the result of Heckerman's failure to take care of their children, her abuse of Wheeler, and her damage to repairs Wheeler had made on the doublewide. Wheeler's aunt testified on cross-examination that she had told police after the murder that several years prior to the incident, Wheeler said that Heckerman would call the police one day and, when they came and started shooting at him, he would take down as many as he could before they got him.

4 So.3d at 602-03.

In addition to the coldly calculated murder of Deputy Koester, Wheeler also fired his shotgun at Deputy Crotty (wounding him in the leg) and Deputy McKane (injuring his leg, hand, arm, shoulder, and lip). [Delgado, in contrast, pointed his gun at Sergeant Mumford for a moment and did not fire a shot].

Also, the "no significant history of prior criminal activity" mitigator - - found and given considerable weight in Delgado's case [see also Ray v. State, 755 So.2d 604, 612 (Fla. 2000)] - - was not present in Wheeler.

A couple of other law enforcement officer cases with weak mental mitigation are Smith v. State, 998 So.2d 516, 521-22 and 528 (Fla. 2008) (which also featured four weighty aggravators, including CCP; murder committed while under sentence of imprison-

ment; and prior convictions for murder, armed robbery, armed burglary, sexual battery, and kidnapping) and Howell v. State, 707 So.2d 674, 677 (Fla. 1998) (which had five valid aggravators including CCP).

Altersberger, Wheeler, Smith, and Howell are therefore in no way similar to Delgado's case, and this Court's other proportionality affirmances where the victim was a law enforcement officer are even less so. See, e.g., Hall v. State, ___So.3d___, 2012 WL 3732823, p. 13 (Fla. 2012) (no statutory mitigators, and "little weight" or "some weight" to eight nonstatutory mitigators); Armstrong v. State, 73 So.3d 155, 165 and 175 (Fla. 2011) (no mental mitigation; the only statutory mitigator was the background catch-all (little weight and some weight) and the only nonstatutory mitigator was that Armstrong had problems growing up because he was biracial (little weight)); Eaglin v. State, 19 So.3d 935, 941 and 950 (Fla. 2009) (no mental mitigation was presented); Bailey v. State, 998 So.2d 545, 551 and 553-54 (Fla. 2008) (trial judge's rejection of the statutory mental mitigators was supported by competent, substantial evidence); Franqui v. State, 804 So.2d 1185, 1198 (Fla. 2001) (no statutory mitigating circumstances and no nonstatutory mental mitigation); Gonzales v. State, 786 So.2d 559, 569 (Fla. 2001) (no statutory mental mitigators; nonstatutory mitigators, some of which related to Gonzales' mental condition, were given little weight); Holland v. State, 773 So.2d 1065, 1068 (Fla. 2000) (no statutory mental mitigators, and nonstatutory mental mitigators given little weight); Kearse v. State, 770 So.2d 1119, 1135 (Fla. 2000) (case was "devoid of the statutory mental

mitigators", and the mitigators which were found were afforded only minimal weight); Burns v. State, 669 So.2d 646, 650 (Fla. 1997) (same); Kilgore v. State, 688 So.2d 895, 900 (Fla. 1996) (mental health factors given little weight); [Merrit Alonzo] Sims v. State, 681 So.2d 1112, 1113 (Fla. 1996) (no statutory mitigators, and little or no weight accorded to the nonstatutory mitigators); Pietri v. State, 644 So.2d 1347, 1349 (Fla. 1994) (no statutory or nonstatutory mitigating factors); Griffin v. State, 639 So.2d 966, 968 (Fla. 1994) (no statutory mental mitigation, and the only nonstatutory mental health mitigator was a learning disability); Reaves v. State, 639 So.2d 1, 3, and 6 (Fla. 1994) (trial judge's rejection of the statutory mental mitigators was supported by competent, substantial evidence); Street v. State, 636 So.2d 1297, 1304 (Fla. 1994) (three valid aggravators, no statutory mitigators, and minimal nonstatutory mitigation); Valle v. State, 581 So.2d 40, 48-49 (Fla. 1991) ("Valle does not quarrel with the rejection of the two statutory mental mitigating factors"); [Clarence James] Jones v. State, 580 So.2d 143, 146 (Fla. 1991) (trial court did not err in finding no statutory or nonstatutory mitigators); Rivera v. State, 545 So.2d 864, 865 (Fla. 1989) (no statutory or nonstatutory mitigators); [Terry Melvin] Sims v. State, 444 So.2d 922, 925 (Fla. 1984) (no statutory mitigators); [Leo Alexander] Jones v. State, 440 So.2d 570, 577 and 579 (Fla. 1983) (no mitigators).

One last case worth mentioning is Patten v. State, 598 So.2d 60, 63 (Fla. 1992) (trial court did not err in finding that no mitigating circumstances existed with regard to Patten's mental

state; even one of Patten's own experts testified - - as did the state's experts - - that these factors did not apply). Patten's situation is reversed in the instant case; two of the three experts who examined Delgado on behalf of the prosecution (and who testified for the state in the guilt phase that Delgado does not meet the standard for legal insanity) unequivocally stated in the penalty phase and Spencer hearing that the statutory mental mitigators do apply to Delgado, and played a crucial role in the events which culminated in Corporal Roberts' shooting. And it cannot be argued that the trial judge properly rejected the mental mitigators based on the outlier testimony of Dr. Wade Myers because (while he may have watered down the impaired capacity mitigator based on Myers' views) the trial judge found extreme mental or emotional disturbance (as testified to by the other five experts), he found Delgado's longstanding and severe psychiatric illness as a nonstatutory mitigator, and he found that Delgado's mental illness was exacerbated by the stressors he was experiencing immediately prior to the murder.

This is not one of the most aggravated of first degree murders, and it is light years away from being among the least mitigated. In accordance with precedent, Delgado's death sentence should be reduced to life imprisonment without possibility of parole.

[ISSUE III] THE "VICTIM WAS A LAW ENFORCEMENT OFFICER ENGAGED IN THE PERFORMANCE OF HIS LEGAL DUTIES" AGGRAVATOR IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE (WHERE DELGADO WAS ACQUITTED OF PREMEDITATED MURDER, AND HIS FELONY MURDER CONVICTION WAS BASED SOLELY ON RESISTING AN OFFICER WITH VIOLENCE) BECAUSE THE ELEMENTS OF THE AGGRAVATOR ARE IDENTICAL TO THE ELEMENTS THE JURY NEEDED TO FIND IN ORDER TO CONVICT

Aggravation has been defined as any circumstance attending the commission of a crime which increases its enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime itself. Engberg v. Meyer, 820 P.2d 70, 90 (Wyo. 1991); Olsen v. State, 67 P.3d 536, 584 (Wyo. 2003); People v. Davenport, 41 Cal.3d 247, 289, 710 P.2d 861, 221 Cal.Rptr. 794 (1985). In capital cases, the finding of one or more aggravating circumstances justifying a sentence of death can be made in the guilt phase (as is done in states which have created a separate crime of capital murder predicated on a jury finding of special circumstances), or it can be made in the penalty phase (as is done in many other states, including Florida). See Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988). Either way, an aggravating circumstance cannot pass constitutional muster under the Eighth Amendment unless it genuinely narrows the class of persons eligible for a death sentence. Lowenfield, 484 U.S. at 244; Zant v. Stephens, 462 U.S. 862, 877 (1983); Porter v. State, 564 So.2d 1060, 1063-64 (Fla. 1990); Douglas v. State, 878 So.2d 1246, 1265-68 (Fla. 2004) (Pariente, J., concurring in result only as to sentence); Blanco v. State, 706 So.2d 7, 12-15 (Fla. 1997) (Anstead, J., joined by Kogan, C.J., concurring specially).

If the jury in the instant case had found Delgado guilty of premeditated murder - - or guilty of first degree murder pursuant to a general verdict (assuming legally sufficient evidence of premeditation) - - then there would be no constitutional problem with the aggravator. Compare Engberg, 820 P.2d at 90 (defendant convicted of felony murder only) with Olsen, 67 P.3d at 584 (defendant convicted based on findings of both premeditated murder and felony murder). But here the jury expressly rejected premeditation and found Delgado guilty of felony murder only (8/1442), and the only underlying felony on which they were instructed was resisting an officer with violence. Two of the four elements which the jury needed to find beyond a reasonable doubt in order to convict were that Corporal Michael Roberts was a law enforcement officer, and that (at the time of the violent resistance) he was engaged in the lawful execution of a legal duty (40/3441). Then, in the penalty phase, the jury was told it needed to find the same thing to establish the aggravating factor; i.e., that "the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties" (44/3745). Thus, the aggravator performed no narrowing function, because it merely repeated the constituents of the crime for which Delgado was convicted in the guilt phase. As Justice Pariente pointed out in her concurring opinion in Douglas, 878 So.2d at 1265 (emphasis in opinion, footnotes omitted):

In this case, a jury found Douglas guilty of first-degree felony murder with sexual battery as the underlying felony. During the penalty phase, the jurors were instructed that they could consider that the crime was committed during a sexual battery as an aggravating factor, and the trial court subsequently found this ag-

gravator in its sentencing order. These circumstances make this case distinguishable both from cases such as Blanco [v. State, 706 So.2d 7 (Fla. 1997)] in which the defendant is found guilty of first-degree murder by general verdict where there is sufficient evidence of premeditation, and from cases in which the defendant is convicted of multiple contemporaneous felonies. Under either of those circumstances, the felony supporting the aggravator is an additional factor which genuinely narrows the class of murderers eligible for the death penalty. The same cannot be said in this case, and I therefore conclude that as applied to Douglas, the murder in the course of a felony aggravator is unconstitutional under the Eighth Amendment.

This significant constitutional error - - without it there is only a single moderate-weight aggravator in the contemporaneous aggravated assault - - was preserved by written and oral objection below (8/1458-61, 1548-50; Supplemental Record, p. 1944-45, 1960-63), and stands an additional reason why Delgado's death sentence should be reduced to life imprisonment.

CONCLUSION: Based on the foregoing argument, reasoning, and citation of authority, appellant HUMBERTO DELGADO JR. respectfully requests that this Court reverse his death sentence and remand for imposition of life imprisonment without possibility of parole.

CERTIFICATE OF SERVICE

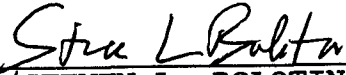
I certify that a copy has been e-mailed to Assistant Attorney General Carol Dittmar at CrimappTPA@myfloridalegal.com, on this 21st day of December, 2012.

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