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IN THE SUPREME COURT OF FLORIDA

HUMBERTO DELGADO, JR.	:	
Appellant,	:	
vs.	:	Case No. SC12-0579
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This reply brief is directed to Issue II. Appellant will rely on his initial brief with regard to Issues I and III. The state's brief will be referred to herein by the designation "SB".

ARGUMENT

[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. Overview

The state presents a one-sided and highly selective Statement of Facts which omits and/or mischaracterizes the mitigating evidence. The state says undersigned counsel "artfully portrays [Delgado's] case as one involving an emotionally disturbed individual who, after 'battling the demons of severe mental illness' all his adult life, accidentally shoots a police officer in the midst of a tragic encounter following a long and tiring day" (SB 25). First of all, the undersigned never argued that the shooting was "accidental"; only that it was unpremeditated (consistent with the jury's guilt-phase verdict) and that it occurred while Delgado was under extreme mental or emotional disturbance, as a consequence of his severe and chronic mental illness, exacerbated by the overwhelming life stressors he was experiencing on the day of the encounter and in the weeks preceeding it (consistent with the trial court's sentencing findings). Apart from the red herring term "accidentally", it is the evidence - - not the undersigned's "artful" portrayal thereof - - which establishes that Delgado has

battled the demons of severe mental illness all his adult life, and was under extreme stress and emotional disturbance at the time of his unexpected encounter with Officer Roberts.

In its argument, the state thoroughly misconstrues the trial judge's sentencing findings, repeatedly and wrongly asserting that he found no nexus between Delgado's mental illness and the crime. The state also misstates the proportionality standard; relies on circumstances (i.e., the supposedly deliberate nature of the shooting) not found by the trial judge and inconsistent with the jury's verdict; and virtually ignores the "no significant history of prior criminal activity" mitigator which was found by the trial court and accorded considerable weight.

B. Proportionality Standard

The state asserts that "[t]he facts of [Corporal] Roberts' murder are not the least aggravated or the most mitigated" (SB 19). Undersigned counsel would agree that this case is not among the "least aggravated" (although it is far from being among the most aggravated; with only two aggravators, one of which was given only moderate weight, and no findings of HAC or CCP). Counsel would not agree with the state's assertion that this case is not among the "most mitigated", in light of the overwhelming evidence of Delgado's severe mental illness, and how it led to the complete unraveling of his life and contributed to the escalation of the encounter which culminated in Corporal Roberts' murder, as well as Delgado's lack of any history of violence or significant criminal activity prior to the events of that night. But - - in any event - - the state's assertion gets the proportionality standard

exactly backwards. Under well established Florida law, the death penalty can be upheld only when the crime is shown to fall within the category of both the most aggravated and least mitigated of first degree murders. Armstrong v. State, 73 So.2d 155, 174-75 (Fla. 2011); Crook v. State, 908 So.2d 350, 357 (Fla. 2005); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999); see also Offord v. State, 959 So.2d 187, 193-94 (Fla. 2007). This is plainly not such a case, which is why the state is trying to stand the proportionality standard on its head.

C. Nexus

The state's proportionality argument is premised on the false assumptions that the trial court found that Delgado's mental illness was not significantly linked to the crime (See SB 19, 26-27, 37, 43), and that the evidence supporting the "extreme mental or emotional disturbance" mitigator "all relied exclusively on Delgado's history of having previously been diagnosed with a bipolar type disorder with psychotic features, which is characterized as an extreme condition which can be treated but not cured" (SB 27) (emphasis in state's brief). According to the state, "Delgado was only considered to be 'under' the influence of extreme disturbance due to the life-long nature of the disease, not due to any specific circumstance related to Roberts' murder" (SB 27). As support for its contention, the state cites Abdool v. State, 53 So.3d 208, 225 (Fla. 2010); Gill v. State, 14 So.3d 946, 965 (Fla. 2009); and McWatters v. State, 36 So.3d 613, 645 (Fla. 2010) (SB 26-27). In Abdool, the mental mitigators (which were given little weight by the trial judge, see 53 So.3d at 215)

"could not be linked to the crime committed", which was the coldly premeditated burning murder of a girl who was apparently annoying Abdool by pursuing him romantically, and whom he believed was pregnant with his unwanted child. In Gill, "there was no evidence linking the Rosello murder [the coldly premeditated strangulation of Gill's cellmate, after Gill had been sentenced to life imprisonment for an unrelated murder] to Gill's brain anomaly or his history of chronic mental illness." And in McWatters (involving three separate murders in which multiple aggravators including CCP (in two cases) and HAC (in all three) were found and given great weight, while neither of the statutory mental mitigators were found) the nonstatutory mitigation was entirely based on McWatters' background "and none of it pertained to the circumstances of the actual murders." The state further notes that Crook v. State, 813 So.2d 68 (Fla. 2002) emphasizes the importance of linking the defendant's mental illness to the crime for which he is to be sentenced (SB 27). See also Crook v. State, 908 So.2d 350, 358 (Fla. 2005).

The state's contention that the evidence supporting the trial court's finding that Delgado was under the influence of extreme mental or emotional disturbance when the capital felony was committed is based entirely on his history of mental illness and is not linked to the crime is thoroughly refuted by the trial court's sentencing order itself (emphasis supplied):

> During the penalty phase and the Spencer hearing, the Defendant presented the testimony of Barbara Ann Stein, M.D., Donald R. Taylor, Jr., M.D., Harry Krop, Ph.D., and Mark Ruiz, Ph.D. During the Spencer hearing, the Defendant presented the additional testimony of Michael Maher, M.D. Although their diagnoses of the

Defendant differed slightly, each mental health expert opined that the Defendant had a severe mental illness and was under the influence of an extreme mental or emotional disturbance when he killed Corporal Roberts.

Each of the above experts agreed that the Defendant, who was not taking any medication for his mental illness, had a long-standing, well-documented history of severe mental illness and had three psychiatric hospitalizations due to his mental illness. The most recent hospitalization was in 2005, approximately four years prior to the killing of Corporal Roberts. The experts further 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; 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.

Dr. Stein diagnosed the Defendant with schizoaffective disorder bipolar type, with a history of bipolar disorder. Dr. Stein noted that persons with the Defendant's severe mental illness are extremely sensitive to stress. Consequently, in Dr. Stein's opinion, the aforementioned acute psychosocial stressors exacerbated the severity and intensity of his mental illness as well as the symptoms of his mental illness. Dr. Stein also opined that at the time of the offense, the Defendant was in an exacerbated state where his mental illness had worsened. She concluded he had become severely depressed and despondent and had a sense of despair and hopelessness. She also believed the Defendant was isolated, becoming more paranoid and angrier, and that his judgment, reasoning, decision-making, and impulse-control were impaired. Dr. Stein noted that the Defendant was in a very desperate state when the offense occurred and opined that the offense would not have occurred if the Defendant had not been severely mentally ill.

Dr. Taylor diagnosed the Defendant with bipolar one disorder and paranoid personality disorder. Dr. Taylor cited the Defendant's psychiatric history and noted that, although the Defendant's condition was not

as severe as when he was previously hospitalized, it was evident that he continued to experience symptoms of his mental illness because doctors and nurses who examined him for medical problems also recognized his mental health problems and recommended psychiatric consultation and treatment. Dr. Taylor noted that both of the Defendant's diagnoses are significant mental health issues which were present at the time of the offense. Dr. Taylor testified that, due to the Defendant's paranoid personality traits, the Defendant already had a baseline of suspicion and mistrust of others, particularly police officers. Due to his bipolar disorder, it was Dr. Taylor's opinion that the Defendant was also in a state of hypomania, which is characterized by irritable mood, sleeping poorly, poor decision-making, and a lack of impulse control. Dr. Taylor testified that the hypomanic state also would have heightened the Defendant's emotions, intensifying his feelings of fear or anger. Dr. Taylor opined that what he initially described as a mild to moderate emotional disturbance became exacerbated by the events preceding the killing of Corporal Roberts, especially the above-described psychosocial stressors. Finally, as his confrontation with Corporal Roberts developed, it was Dr. Taylor's opinion that the Defendant experienced another stressful situation which intensified his feelings of fear and anger and frustration, resulting in an extreme emotional disturbance.

Dr. Krop diagnosed the Defendant with bipolar disorder with psychotic features as well as a delusional disorder and a cognitive disorder not otherwise specified. Dr. Krop noted that the Defendant had a pre-existing history of a serious mental illness. He further testified that the Defendant was very likely in a hypomanic state at the time of the offense. In addition to that manic state, Dr. Krop believed the Defendant was in a paranoid or delusional state that increased as his encounter with Corporal Roberts escalated. Considering the combination of the Defendant's severe mental illness and pre-existing personality characteristics of low self-esteem and feelings of rejection, the aforementioned acute psychosocial stressors and his escalating confrontation with Corporal Roberts, Dr. Krop concluded that the Defendant suffered from an extreme mental disturbance at the time of the instant offense.

Dr. Ruiz diagnosed the Defendant with bipolar one affective disorder mixed with psychotic features. Dr. Ruiz evaluated the Defendant on August 21, 2009, two days after the instant offense. Dr. Ruiz described the Defendant as depressed, agitated, distressed, upset, remorseful and somewhat paranoid. Dr. Ruiz gave him a

global assessment of functioning score in the mid-40's and explained that meant the Defendant was having severe symptoms that affected his social and occupational functioning. In Dr. Ruiz's opinion, such a score in a person with severe mental illness would be sufficient for admission to a psychiatric facility. Dr. Ruiz further testified that the Defendant's mental health history consistently reflects that the Defendant gets very irritable, has mood swings and marked paranoia. Dr. Ruiz testified the Defendant believes people are out to get him and he arms himself. He concluded that during his altercation with Corporal Roberts, the Defendant was under the influence of an extreme emotional disturbance due to the combination of his mental illness and the above-described stressors.

Dr. Maher initially diagnosed the Defendant with depression with psychotic features or a psychotic episode. He later diagnosed the Defendant with post-traumatic stress disorder, depression in the context of a bipolar disorder and a personality characteristic associated with a paranoid belief system. Dr. Maher evaluated the Defendant two weeks after the offense. He described the Defendant as wild and in a psychotic state, agitated, distracted, illogical, suffering from psychomotor agitation, and unable to maintain a reasonably and consistently coherent stream of speech. He concluded that the Defendant's condition had improved over the weeks and was typical of someone who is being treated for acute psychosis but is not yet stabilized. Dr. Maher noted that the Defendant had a paranoid belief system regarding law enforcement and it was present when he came into contact with Corporal Roberts. He opined that the Defendant appeared to be in a hypomanic state at the time of the offense. Additionally, Dr. Maher cited to the numerous psychosocial stressors that were also present. Dr. Maher opined that the Defendant was under the influence of an extreme emotional disturbance.

Additionally, Jose Hernandez, M.D., a psychiatrist at the Hillsborough County Jail when Defendant was arrested, evaluated the Defendant on August 20, 2009, shortly after his arrest. He testified that after his evaluation of the Defendant, he concluded the Defendant was mentally ill, very delusional and paranoid, and placed him on antipsychotic medication. He subsequently added an anti-depressant to the Defendant's medication. (9/1634-37)

The only expert who opined that Delgado was not under extreme mental or emotional disturbance at the time of the offense was Dr.

Myers. Dr. Myers acknowledged that Delgado did suffer from extreme emotional disturbance in the past, including his psychiatric hospitalizations in 2003 and 2005. However, his symptoms "waxed and waned", and at the time of the encounter with Corporal Roberts, he "was stressed out, but he was handling it. He was methodically moving ahead in his life, trying to make his life work out." (9/1367-38)

While the state argues that the trial court found Dr. Myers to be the most credible of the experts (SB 26, 37), that is true only as to the "impaired capacity" mitigator and not as to the "extreme mental or emotional disturbance" mitigator. On the former, the judge found that Delgado's capacity to conform his conduct was impaired, but not substantially so, and gave this mitigating factor moderate weight (9/1641). He stated "Dr. Myers' testimony on this issue is the most credible and is accepted by the Court" (9/1641) (Emphasis supplied). The trial court made no comparable finding with regard to the "extreme mental or emotional disturbance" mitigator, nor did he omit the important modifier "extreme" (9/1638). As the judge stated in his sentencing order, Dr. Stein, Taylor, Krop, Ruiz and Maher (the first two of whom were retained by the prosecution and testified for the state in the guilt phase) all agreed that Delgado "had a severe mental illness and was under the influence of an extreme mental or emotional disturbance when he killed Corporal Roberts" (9/1634). Dr. Myers, on the other hand, "opined that on the day of the shooting [Delgado] 'had some mild symptoms of mental illness'" and that he was not under the influence of extreme mental or emotional

disturbance when he killed Corporal Roberts" (9/1637). Notwithstanding Dr. Myers' contrary opinion, the trial court found the "extreme mental or emotional disturbance" statutory mitigator, and accorded it substantial weight (9/1638). The trial court's finding of this mitigator - - one of the most compelling in Florida's statutory scheme[1] - - is much more consistent with the views of Stein, Taylor, Krop, Ruiz and Maher than with those of Myers. So the state's assertion that "the trial court affirmatively rejected" the view that Delgado's mental illness played a major role in the crime (SB 37) is misleading and false, as demonstrated by the sentencing order itself.

In finding extreme mental or emotional disturbance, the trial judge properly focused on Delgado's mental state at the time of the crime. Delgado's "long-standing severe psychiatric illness that was most likely genetic and outside of his control" was separately found as a nonstatutory mitigator (9/1649). And as another nonstatutory mitigator (accorded substantial weight consistent with the trial court's determination as to "extreme mental or emotional disturbance" at the time of the offense) the trial court further found:

> ...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

[1] See, e.g., Santos v. State, 629 So.2d 838, 840 (Fla. 1994); Rose v. State, 675 So.2d 838, 840 (Fla. 1996)

> 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. In its Sentence Memorandum, the defense also suggests that the Defendant's love and separation from his children was a stressor. (9/1646)

[Nowhere in this finding does the trial judge even mention Dr. Myers' contrary opinion that Delgado was handling his stress well, methodically moving ahead with his life].

The record in this penalty phase is replete with expert testimony that highly stressful life circumstances make the symptoms of mental illness worse; and replete with lay and expert testimony that this is true of Delgado, both in the ongoing course of his mental illness and in the weeks and days leading up to the crime. Nobody - - not even Dr. Myers - - expressed the opinion that homelessness, unemployment, sleep deprivation, and breakdown of family support are experiences which alleviate the severity of a person's mental illness.

D. Guilt-Phase Verdict

The state, pulling out all the stops in search of a way to justify this disproportionate death sentence, attempts to impeach the jury's guilt-phase verdict. As recognized by the trial judge in his sentencing order, "[t]he jury, by special verdict, found [Delgado] guilty of first degree felony murder, not premeditated murder" (9/1642; see 8/1442). The trial judge also stated that no aggravating circumstances other than (1) the victim was a law enforcement officer engaged in the performance of his official duties and (2) the contemporaneous aggravated assault on Sergeant

Mumford apply in this case, and nothing else was considered in aggravation (9/1633). Nevertheless, the state argues that this Court should factor-in the supposedly "deliberate nature of the shooting in considering proportionality" (SB 28, see 19, 26, 29-31). The state says "it is clear that this Court could consider the evidence of premeditation if there had been a general verdict returned" (SB 29) and "this Court is not bound by the special verdict because the jury was not accurately instructed" (SB 29).

This is an extraordinary claim for the state to be making, since it is the state which is nearly always the beneficiary and the strong advocate of the sanctity which is accorded jury verdicts; especially when the challenge relates to matters (such as jury instructions) which inhere in the verdict. See, e.g. Simpson v. State, 3 So.3d 1135, 1143-44 (Fla. 2009); Devoney v. State, 717 So.2d 501 (Fla. 1998). In the instant case, the trial prosecutor expressly stated that he did not object to either the jury instructions or the special verdict form; in fact, it appears from the record that the prosecutor participated in preparing the instructions and verdict form (see 38/3025, 3027; 40/3276; 41/3286, 3296; 42/3478). The transcript of the charge conference reflects:

> THE COURT: 3.12, verdict.
>
> MR. PRUNER [prosecutor]: No objection.
>
> MR. WATSON [defense counsel]: No objection.
>
> THE COURT: The verdict form which I'll read in its entirety.
>
> MR. PRUNER: No objection.
>
> MR. WATSON: No objection. (41/3296)

Similarly, the state complains on appeal that "there is no requirement of unanimity as to the theory of first degree murder" (SB 29). At trial, however, the prosecutor not only agreed to the instructions and the special verdict form, he also affirmatively told the jury, "[Y]ou'll be given an instruction by the judge to guide you as to how you apply the law to the facts and the verdict form" and "[Y]ou'll have a number of questions that you'll need to resolve unanimously" (41/3339, see also 3341). Under any circumstances - - and especially under these circumstances - - the state should not be heard to complain that the jury's verdict should be disregarded because "the jury was not accurately instructed" (SB 29) or "the jury was not properly instructed" (SB 29).

Remarkably, the state claims that for this Court to consider a special jury verdict (i.e., one rejecting a finding of premeditation) differently than a general verdict would "skew the analysis" and jeopardize the constitutionality and legitimacy of the proportionality review (SB 30). However, while special verdict forms are not required in first-degree murder trials, they are certainly permitted (and perhaps even encouraged)[2] within the trial court's discretion, and this Court has recognized a jury verdict finding a defendant guilty of felony murder only to be significant in assessing whether death or life imprisonment is the appropriate penalty. See Jackson v. State, 25 So.3d 518, 524, 535 (Fla. 2010) (jury, by special verdict forms, found that Jackson was guilty of first-degree murder under the theories of both

[2] See Castro v. State, 472 So.2d 796, 797-98 (Fla. 3d DCA 1985).

premeditated murder and felony murder, while finding that co-defendant Wooten - - who received a life sentence - - was guilty of felony murder only); Perez v. State,919 So. 2d 347, 356-57 (Fla. 2006) (verdict form "contained a space for the jury to designate whether they found Perez guilty under the theory of premeditated murder, felony murder, or both"; jury "found Perez guilty of felony murder but declined to find him guilty of premeditated murder"); Hawkins v. State, 436 So.2d 44, 46-47 (Fla. 1983) (jury "found Hawkins guilty of first-degree felony murder committed during a robbery and expressly rejected a finding of premeditated murder"). Some courts in other jurisdictions have concluded that such a verdict is tantamount to an acquittal of premeditated murder. Huffington v. State, 486 A.2d 200, 204 n.6 (Md 1983); Huffington v. State, 500 A.2d 272, 285 (Md. 1984); State v. Herrera, 850 P.2d 100, 110 (Ariz. 1993).

Whether or not the jury's verdict expressly declining to find premeditation amounts to an acquittal for double jeopardy purposes, it certainly should preclude the state from contending on appeal that the death penalty is proportionate based in large part on the supposedly "deliberate nature" of the killing. The evidence in this case was sharply in dispute on the question of premeditation, and any conflicts and reasonable inferences must be resolved - - as the state is usually quick to point out - - in favor of the verdict. [For example, the state's star eyewitness on the disputed issue of premeditation was seven-time convicted felon Richard Farmer, who claimed that the police officer was lying motionless on his back, with his arms at his sides, and the

homeless man [Delgado] was standing over top of the officer and shot him point-blank in the chest (32/2114-15, 2143, 2156-58). This scenario is flatly inconsistent with the testimony of the medical examiner (on direct examination by the prosecutor) that the entry wound was in Corporal Roberts' upper right arm, the injury was consistent with his 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 state claims on appeal that "the trajectory of the bullet was subject to varying interpretations, as argued by both sides below (V41/3360-69; V42/3397-97)" (SB 30). However, even under the prosecutor's own hypothesis, the bullet entered the officer's arm (which was at his side and not raised) and traveled laterally through his arm and into his chest (42/3397-98). If the prosecutor didn't think Farmer's supposed eyewitness account was accurate, clearly the jury could reasonably have rejected it as well. Yet the state on appeal relies on Farmer's testimony as support for its argument that, despite the jury's verdict, this Court should weigh "the deliberate nature" of the killing in order to uphold Delgado's death sentence (SB 30)].

If you are deliberately trying to execute a motionless police officer lying flat on his back with his arms at his sides, and his head and chest unprotected, do you fire a single shot into his arm? The jury, by its verdict, evidently thought not. It is the state's misguided effort in this appeal to persuade this Court to disregard the jury's special verdict - - made on a verdict form which the prosecutor agreed to and helped prepare - - which would

truly jeopardize the constitutionality and legitimacy of the proportionality review.

E. Delgado's Comparison Cases

Even if Delgado had been found guilty of premeditated murder, the death penalty would still be disproportionate. The closest comparison case, by far, is Hardy v. State, 716 So.2d 761 (Fla. 1998) which involved the premeditated murder of a police officer. While Delgado's case contains slightly more aggravation than Hardy's (both cases have the "victim was a law enforcement officer" aggravator, while Delgado's also has a second moderate-weight aggravator arising from his contemporaneous act of momentarily pointing (but not firing) a gun at Sergeant Mumford), neither case involves HAC or CCP. Moreover, Delgado has much stronger mental mitigation than existed in Hardy. Unlike Hardy (whose brain damage resulted from a suicide attempt after the crime), Delgado suffered from a severe and well-documented mental illness for many years prior to the crime, which was exacerbated by his extremely stressful circumstances in the weeks and days leading up to the crime. Numerous expert witnesses (including Dr. Stein and Dr. Taylor who were retained by the prosecution to examine Delgado) agreed that Delgado was not malingering and does not have an antisocial personality disorder (and not even Dr. Myers claimed that he did). [Contrast Kocaker v. State, 2013 WL 28243 (Fla., Jan 3, 2013) (trial court properly rejected "extreme mental or emotional disturbance" mitigator based on evidence indicating that any mental disease or defect developed after Kocaker committed the murder, and based on testimony suggesting

that Kocaker is manipulative and antisocial)]. Unlike Hardy, the trial court found and gave substantial weight to the statutory mental mitigating circumstance that Delgado was under extreme mental or emotional disturbance when the killing occurred (9/1638). Also unlike Hardy, Delgado had no significant history of criminal activity; a factor which the trial judge accorded considerable weight (9/1633-34). The much stronger mitigation in the instant case than in Hardy more than counterbalances the second, moderate-weight aggravator arising from the aggravated assault on Sergeant Mumford, especially since that offense was also committed while Delgado was under extreme mental or emotional disturbance. In Wheeler v. State, 4 So.3d 599, 601-02 (Fla. 2009), relied on by the state (SB 33), in addition to the coldly calculated murder of one deputy sheriff, Wheeler also fired his shotgun at two other deputies, wounding both of them. Delgado, in contrast, pointed his gun at Sergeant Mumford for a moment and did not fire a shot.

While Hardy is the most comparable proportionality case involving the killing of a law enforcement officer, Delgado also calls this Court's attention to a number of other cases - - reversals on proportionality grounds - - with two (or more) aggravating factors and strong and well-documented mental mitigation. These include Crook v. State, 908 So.2d 350 (Fla. 2005) (HAC, sexual battery, and pecuniary gain); Cooper v. State, 739 So.2d 82 (Fla. 1999) (CCP, robbery, and another robbery-murder committed several days after the present crime); Larkins v. State, 739 So.2d 90 (Fla. 1995) (pecuniary gain and prior noncontempora-

neous convictions of manslaughter and assault with intent to kill); Hawk v. State, 718 So.2d 159 (Fla. 1998) (pecuniary gain and a contemporaneous attempted murder); Robertson v. State, 699 So.2d 1343 (Fla. 1997) (HAC and burglary); Kramer v. State, 619 So.2d 274 (Fla. 1993) (HAC and prior violent felony); Farinas v. State, 569 So.2d 425 (Fla. 1990) (HAC and kidnapping).

A couple of single aggravator cases are also pertinent to the proportionality analysis here. In Green v. State, 975 So.2d 1081, 1087-90 (Fla. 2008), this Court upheld the first aggravator (contemporaneous conviction of attempted murder) and struck the second (avoid arrest), and reversed Green's death sentence on proportionality grounds. The Court noted that even if there had been a second valid aggravator it would not have changed the result: "Even if we upheld the avoid arrest aggravator . . . 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." 975 So.2d at 1088.

In Klokoc v. State, 589 So.2d 219 (Fla. 1991), in which the defendant shot his daughter in the head as she slept in order to spite his estranged wife, the trial judge found one aggravator, but it was the powerful one of CCP. Regarding statutory mitigators, the trial judge found that Klokoc was under the influence of mental or emotional disturbance [omitting the modifier "extreme"] but this disturbance was of only two weeks duration. Similarly, the judge found that Klokoc's capacity to conform his conduct was impaired [omitting the modifier "substantially"] by his "love/

revenge emotions toward his wife", but the judge agreed with Dr. Greenblum's diagnosis that Klokoc had a personality disturbance but not any mental illness. The judge further found that Klokoc had no significant history of criminal activity, but "[t]his circumstance is substantially diminished" by Klokoc's prior abuse of his wife. Finally, two nonstatutory mitigators - - his troubled family relationships and his having been a good material provider - - were found. On appeal, this Court reduced Klokoc's death sentence to life imprisonment:

> While this record reflects that this murder occurred when Klokoc was not in a heightened rage, it is unrefuted in this record that he was under extreme emotional distress. The record also establishes that he suffers from bipolar affective disorder, manic type with paranoid features, and that his family has a history of suicide, emotional disturbance, and alcoholism. Further, he had no record of prior criminal activity. 589 So.2d at 222.

Delgado's mitigation in the instant case is much stronger than Klokoc's, as reflected by the sentencing orders in the two cases. Delgado has a documented history of severe mental illness (bipolar disorder with psychotic features) throughout his adult life, resulting in several psychiatric hospitalizations. The trial judge found this history as a nonstatutory mitigator (9/1649), as well as the combination of life stressors during the period leading up to the crime which exacerbated his mental illness (9/1646). The judge found as a statutory mitigator entitled to substantial weight that Delgado was under extreme mental or emotional disturbance at the time of the offense. Unlike the trial judge in Klokoc, he did not omit the modifier, nor did these findings reflect Dr. Myers' contrary opinion that

Delgado was not under extreme mental or emotional disturbance, and that he was methodically "handling" his stress. Dr. Myers, it should be noted, did not evaluate Delgado until two years after the crime, during which time he had been treated with increasing dosages of antipsychotic medication. On the other hand, Dr. Jose Hernandez, the psychiatrist at the Orient Road Jail, evaluated Delgado shortly after his arrest, and realized that he had a mental illness and was very delusional and paranoid (43/3592-95). Dr. Hernandez treated Delgado with psychotropic medications, which eventually resulted in some improvement in his mental condition (43/3592-98). Two psychiatrists who were retained by the state to examine Delgado (and who testified for the state in the guilt phase that he did not meet the M'Naghten standard for legal insanity) - - Dr. Stein and Dr. Taylor - - testified on behalf of Delgado in the penalty phase and the Spencer hearing. Both Dr. Stein and Dr. Taylor concluded that Delgado, as a result of his mental illness exacerbated by his recent life circumstances, was under extreme mental or emotional disturbance at the time of his escalating encounter with Corporal Roberts, and Dr. Stein even expressed the opinion that the homicide would not have occurred had Delgado not been severely mentally ill (43/3580, 3583-84).

Dr. Myers - - of the numerous mental health experts who testified in this case - - was a total outlier. If the trial judge had nevertheless rejected the extreme mental or emotional disturbance mitigator (or the life-stressors nonstatutory mitigator) based on Dr. Myers' opinion, perhaps the state's proportionality argument would be somewhat stronger due to the deference

which is accorded to the trial court's credibility determinations. [But see Klokoc]. However, that is emphatically not what the trial court did. The state complains throughout its brief that undersigned counsel is ignoring the sentencing findings, instead preferring to focus on the evidence (see SB 26, 36, 40). Actually it is the state which disregards both the trial court's sentencing findings and the evidence.

Finally, Delgado's "no significant history of criminal activity" statutory mitigator, which was given considerable weight by the trial court (9/1633-34), is much stronger than Klokoc's diminished-weight finding on that mitigator. Therefore, while Delgado's case contains a second moderate-weight aggravator arising from his momentarily pointing a gun at Sergeant Mumford, his case is significantly more mitigated that Klokoc's case, especially when the mitigating evidence in each case is evaluated through the "prism" of the trial court's sentencing order (see SB 26). In light of the compelling mental mitigation and Delgado's lack of a history of crime or violence, the second aggravator does not render the death sentence proportionate. See Green, 975 So.2d at 1085; see also Crook, Cooper, Larkins, Hawk, Robertson, Kramer, Farinas.

F. The State's Comparison Cases

The state's comparison cases are in no way similar to Delgado's, but there are a lot of them. Many of them are much more aggravated than Delgado's case, most are much less mitigated, and quite a few are both.

The state cites seven cases involving the homicide of a law

enforcement officer (SB 31-35, 37-38, 42):[3]

Altersberger v. State, 103 So.3d 122 (Fla. 2012) (SB 31, 42). This seems to be the case which the state thinks is closest to Delgado's and - - although it was thoroughly discussed in his initial brief (at p. 90-91) - - the state takes undersigned counsel to task for not mentioning it earlier in his argument (SB 31). The state goes so far as to make the unsupportable assertion that Altersberger's mitigation was stronger than Delgado's (SB 31). Once again it is the state which is both ignoring the mental health evidence in the two cases and failing to view it thought the "prism" of the trial court's sentencing findings. As the Altersberger trial judge set forth in his sentencing order, the defense in that case presented two mental health experts, one of whom opined that Altersberger has anger issues stemming from his dysfunctional relationship with his mother, and (despite his normal-range IQ) is extremely immature and has problems with impulse control. The second expert, a neuropsychologist, concluded that the orbital frontal and amygdala regions of Altersberger's brain are significantly undersized, which would result in impaired ability to control emotions and impulses. Drug or alcohol use or abuse would exacerbate the impairment. "However, Dr. Gur stated that because he had never met Altersberger and was not familiar

[3] An eighth cited case, Diaz v. State, 860 So.2d 960 (Fla. 2003) (SB 34, 42), does not involve a law enforcement officer, although it was inaccurately cited as such in Wheeler v. State, 4 So.3d 599, 612 (Fla. 2009). The victim in that case was the father of Diaz' estranged girlfriend. Accordingly, Diaz will be discussed along with the state's other comparison cases not involving law enforcement officers.

with the facts of the case, he could not connect his findings to the crime itself." 103 So.2d at 125 (emphasis supplied). The trial court in Altersberger found the impaired capacity mitigator and accorded it moderate weight (as did the trial judge in the instant case) 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. Delgado's case contains overwhelming evidence of severe mental illness connected to the crime; Altersberger's does not. While the victim in both cases was a law enforcement officer, Delgado's second aggravator is the moderate-weight finding regarding the contemporaneous act of momentarily pointing a gun at Sergeant Mumford. Altersberger's second aggravator was CCP, given great weight by the trial judge, while in the instant case there was not even a contention by the state that the shooting was coldly calculated or preplanned, and the jury in its guilt-phase verdict rejected even simple premeditation. To put it mildly, Delgado's case is nothing like Altersberger's.

Bailey v. State, 998 So.2d 545 (Fla. 2008) (SB 32-33, 42). The trial court in Bailey found two great-weight aggravators, found that the evidence failed to establish either of the statutory mental mitigators, and gave the age mitigator and the nonstatutory

mitigators little or very little weight. 998 So.2d at 551-52. On appeal, this Court determined "that the circuit court's rejection of the statutory mental mitigating factors is supported by competent substantial evidence . . ." 998 So.2d at 553-54.

Burns v. State, 699 So.2d 646 (Fla. 1997) (SB 33, 42). In Burns, this Court wrote "Nor does the instant case involve any statutory mental mitigators. The consideration given statutory mental mitigators, depending on the evidence presented to support them, may be substantial. Not only was [Burns'] case devoid of the statutory mental mitigators, but the statutory mitigators which were found were afforded only minimal weight. The trial judge found that the evidence presented regarding a 1976 gambling conviction and testimony indicating Burns had previously sold crack cocaine reduced the weight to be afforded the statutory mitigating factors of no significant prior criminal history and Burns' age of forty-two [footnotes omitted]".

Wheeler v. State, 4 So.3d 599 (Fla. 2009) (SB 33-34, 42). In Wheeler (in which this Court recognized that the murder of a law enforcement officer does not necessarily render the death penalty proportionate; see e.g. Hardy v. State, supra; Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988)), the trial court found two great-weight aggravators, one of which was CCP. Wheeler's mitigating evidence, as summarized by this Court, amounted to the following:

> 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 tes-

> timony 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.

Based on this evidence, the trial court in Wheeler found both statutory mental mitigators and gave them "some" weight (along with eleven nonstatutory mitigators, eight of which received minimal weight and three "some" weight). 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 - - was not present in Wheeler.

Grossman v. State, 525 So.2d 833, 836,840-41 (Fla. 1988) (SB 34). Grossman's case contained three aggravating factors, one of which was HAC, and no evidence of mental illness. No mitigating factors were found by the trial judge.

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

strong, while committing an armed robbery of a restaurant, shot and killed one deputy sheriff (Greeney) and shot a second deputy (Sallustio) three times (including at least one shot to his chest), wounding him. The trial court found three great-weight aggravators, including "prior violent felony" based not only on the contemporaneous attempted murder of Sallustio, but also on another armed robbery which Armstrong had committed thirteen days earlier. 73 So.3d at 161-62 and 175. Conversely, the mitigation in Armstrong's case was described by this Court as "scant". 73 So.3d at 175. The trial court considered and rejected four statutory mitigators (no significant history of prior criminal activity, age 28, minor participation, and extreme duress). [Apparently, Armstrong did not even contend that the statutory mental mitigators applied]. The only statutory mitigator found was the background catch-all (little weight and some weight) and the only nonstatutory mitigator found was that Armstrong had problems growing up because he was biracial (little weight). 73 So.3d at 165-66 and 175.

Reaves v. State, 639 So.2d 1 (Fla. 1994) (SB 34-35, 42). The trial court in Reaves found two strong aggravators and relatively weak nonstatutory mitigation. This Court on appeal found no error in the trial court's rejection of the statutory mental mitigators. 639 So.2d at 6.

The state also relies on nine decisions not involving law enforcement officers (or ten including Diaz) as comparison cases, but none of them are meaningfully comparable to Delgado's case:

Abdool v. State, 53 So.3d 208 (Fla. 2010) (SB 25-26, 41). The two aggravators in Abdool were extreme: CCP (based in part on Abdool's prior efforts to hire acquaintances to murder the victim and the unborn child which he believed she was carrying, and in part on his purchase of gasoline, a gas can, and duct tape before driving the victim to a remote area) and HAC (he wrapped the victim in tape, doused her with gasoline, lit her aflame, and watched her burn to death). After noting that the death penalty is reserved for the most aggravated and unmitigated of murders, the Court said that when it considers the aggravating circumstances it "has consistently recognized that 'CCP and HAC are two of the weightiest aggravators in Florida's statutory scheme.' [citations omitted]. Necessarily then, when these two aggravators are present, the mitigating circumstances must be of considerable weight to overcome them". 53 So.3d at 224. [This Court has also noted that the absence of CCP and HAC, while not controlling, may be a factor indicating that life imprisonment is the proper sentence under a proportionality analysis. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1995); Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988)]. In Abdool, the mitigation was described by this Court as "relatively minimal", and the mental mitigators (which were accorded little weight by the trial judge) could not be linked to the crime. 53 So.3d at 215 and 225.

Aguirre-Jarquin v. State, 9 So.3d 593 (Fla. 2009) (SB 41). This was a double murder, as were each of the three cases found comparable to it on proportionality review. 9 So.3d at 610. For the murder of Carol Bareis, four or five valid aggravators (depending

on the validity of the "avoid lawful arrest" factor, which this Court did not decide) were found, three or four of which were accorded great weight. One of the aggravators was HAC. For the murder of Bareis' daughter, Cheryl Williams, three aggravators were found, including HAC which was given great weight. The trial court gave moderate weight to the mental mitigators [in contrast to the substantial weight accorded "extreme mental or emotional disturbance" in the instant case]. The "no prior history of criminal activity" mitigator was not found in Aguirre-Jarquin, while in the instant case Delgado's lack of a criminal history was found and accorded considerable weight.

Brant v. State, 21 So.3d 1276 (Fla. 2009) (SB 41). This case involves the murder of Brant's female neighbor in the course of a protracted torturous attack which included burglary, kidnapping, and sexual battery. After being raped, the victim was choked and suffocated to unconsciousness; when she regained consciousness and ran to the front door, Brant dragged her back into the bedroom and choked and suffocated her again. This went on for some time. He then took her into the bathroom, and - - as she was still hiccupping and breathing a little bit - - he put her in the tub and, using three items as ligatures, finally strangled her to death. 21 So.3d at 1278. Needless to say, the trial judge found HAC and sexual battery as aggravators, according both of them great weight. 21 So.3d at 1283. While the impaired capacity mitigator was found and given moderate weight, the extreme mental or emotional disturbance mitigator was not found, while the no signifi-

cant history of criminal activity mitigator was found but given little weight.

Caylor v. State, 78 So.3d 482 (Fla. 2012) (SB 41). Caylor was convicted of first-degree murder, sexual battery involving great physical force, and aggravated child abuse in the killing of a 13 year old girl. Three aggravators - - each accorded great weight - - were found, including HAC and the fact that Caylor was on felony probation at the time of the murder. 78 So. 3d at 490-91 and 500. The "extreme mental or emotional disturbance" mitigator was accorded "some" weight, four nonstatutory mitigators received little or very little weight, and the "no prior history of criminal activity" mitigator was absent. 78 So.3d at 491 and 500.

Diaz v. State, 860 So.2d 960 (Fla. 2003) (SB 34, 42). Diaz went to the home of his ex-girlfriend, planning to kill her. As she was backing her car out of the garage, Diaz fired three gunshots at her, wounding her in the neck and shoulder. As she drove away toward the hospital, she saw Diaz in the front yard, pointing his gun at her father, Charles. As the confrontation continued, Diaz chased Charles into and around the house. Ultimately, Diaz put the gun inches from Charles' chest, but the weapon was out of ammunition and it only clicked. Diaz reloaded, chased Charles into the bathroom and fired three more shots, killing him. 860 So.2d at 963-64. The trial court found two valid aggravators (one of which was CCP) and accorded them great weight. 860 So.2d at 964 n.3 and 971. The extreme mental or emotional disturbance

mitigator (which was largely based on Diaz being emotionally distraught over the break-up with his girlfriend) was given moderate weight [as compared to substantial weight in the instant case]; the impaired capacity mitigator was given very little weight [as compared to moderate weight in the instant case]; and the no significant history of criminal activity mitigator was also given very little weight [as compared to considerable weight in the instant case]. 860 So.2d at 964-65 n.4.

Gill v. State, 14 So.3d 946 (Fla. 2009) (SB 26-28, 41). This is one of the very few cases cited by the state which does contain evidence of a pre-existing severe mental illness. However, unlike Delgado's case, in Gill "there was no evidence . . . linking the [charged] Rosello murder to Gill's brain anomaly or his history of chronic mental illness". 15 So.3d at 965. Distinguishing Crook v. State, 908 So.2d at 356-58, this Court noted that the mental health experts in Crook related the mitigation to the circumstances of the charged crime, while in contrast none of the mental health experts in Gill did so. 14 So.3d at 966. "Nor was there any evidence . . . that the [prior] Beverly Moore murder, which formed the basis for two of the aggravators in his case, was causally linked to Gill's mental illness such that the two aggravators should have been diminished in weight or not found." 14 So.3d at 966. [The evidence indicated that Gill had told someone in advance of the prior murder that he was going to Moore's house to get money and if she did not cooperate he would kill her. Compare that with the instant case, where Delgado's act of momentarily pointing a gun at Sergeant Mumford while fleeing from the

scene of the Roberts shooting was done under the same state of extreme mental or emotional disturbance, fueled by paranoia, delusional thinking, and sleeplessness, which Delgado was under at the time of his escalating encounter with Corporal Roberts]. Gill strangled Rosello, his cellmate at the DOC's Reception and Medical Center, in a cold, calculated, and premeditated manner, just days after Gill was sentenced and incarcerated for the prior, unrelated murder of Moore. Three aggravators, each accorded great weight, were found by the trial court: CCP, under sentence of life imprisonment, and prior violent felony conviction. 14 So.3d at 956 and 964. Gill also differs from Delgado's case in the following important respect: Delgado has no significant history of crime or violence (a factor accorded considerable weight), while this mitigator was absent in Gill, not only due to the Moore murder but also due to his five other violent felony convictions including an attempted murder. 14 So.3d at 956.

Hodges v. State, 55 So.3d 515 (Fla. 2011)(SB 41). In Hodges, the trial court found five valid aggravating factors; these were HAC, sexual battery, pecuniary gain, prior violent felony convictions (a prior noncontemporaneous robbery and a separate noncontemporaneous aggravated assault), and under sentence of imprisonment (he was on parole for the robbery offense at the time of the charged murder). 55 So.3d at 522 and 542. Evidence of another sexual murder committed by Hodges in Ohio a little more than a year after the charged murder was introduced as Williams Rule evidence. 55 So.3d at 521-22. The trial court found the extreme mental or emotional disturbance mitigator and gave it moderate weight [as

compared to substantial weight in the instant case]. The impaired capacity mitigator was given minimal weight [as compared to moderate weight in the instant case]. 55 So.3d at 542. The no significant history of criminal activity mitigator - - as is obvious in light of Hodges' record - - is absent.

Rodgers v. State, 3 So.3d 1127 (Fla. 2009)(SB 41). In Rodgers, the aggravating circumstances were CCP and prior conviction of two noncontemporaneous violent felonies (another murder and an attempted murder). 3 So.3d at 1130-31. The trial judge rejected both statutory mental mitigators, although he found Rodgers' history of mental illness as a nonstatutory mitigator. 3 So.3d at 1131 and n.2. Again, unsurprisingly in light of Rodgers' earlier crimes, the "no significant history" mitigator was absent.

Wright v. State, 19 So.3d 277 (Fla. 2009)(SB 41). The Wright case involved a double murder during a protracted crime spree; the sequence was a home invasion burglary and theft of guns, followed by a non-fatal drive-by shooting, followed by the abduction of two men and their execution-style killings, followed by a separate armed carjacking. 19 So.3d at 284-86. The three great-weight aggravators for each murder included CCP and the contemporaneous murder; the statutory mental mitigators were given "some" weight, and the "no prior history of criminal activity" mitigator was absent. 19 So.3d at 303-04. On proportionality review, this Court wrote:

> This Court has previously determined that the death penalty is a proportionate sentence in cases that involved multiple murders and extensive aggravation. See Pearce v. State, 880 So.2d 561 (Fla. 2004) (finding three aggravating circumstances – CCP, prior violent

> felony, and murder committed during a kidnapping – and few mitigating circumstances); Spann v. State, 857 So.2d 845 (Fla. 2003) (finding five aggravating circumstances – prior violent felony, murder committed in the course of a felony, avoid arrest, pecuniary gain, and CCP – and six nonstatutory mitigating circumstances); Philmore v. State, 820 So.2d 919 (Fla. 2002)(twenty-one-year-old codefendant to Spann, finding five aggravators and eight nonstatutory mitigators). Each of these cases shares the factual circumstances of the defendant driving a victim to an isolated place and shooting him or her execution-style.
>
> It is clear that the aggravating factors here support the imposition of the death penalty. In total, Wright was convicted of contemporaneous capital felonies for the double murders, five violent felonies for the carjacking, armed robberies, and kidnappings, three violent felonies from the drive-by shooting, and two violent felonies from the prison batteries. Additionally, the CCP aggravator is one of the most serious aggravators provided by the statutory sentencing scheme. See Larkins v. State, 739 So.2d 90, 95 (Fla. 1999).

19 So.3d at 304.

Turner v. State, 37 So.3d 212 (Fla. 2010)(SB 41). Four valid aggravators were found in Turner, including HAC, CCP, and under sentence of imprisonment (the murder having been committed in Florida two days Turner escaped from a South Carolina jail in a stolen county SUV). 37 So.3d at 215-16, 220, and 227. While the statutory mental mitigators were found and given moderate weight, the "no significant history of criminal activity" mitigator was absent. 37 So.3d at 220 and 227. In affirming Turner's death sentence, this Court wrote:

> Turner contends that the circumstances in his case are comparable to those in a number of cases involving mental mitigation where this Court vacated the death sentence. All of the cases advanced by Turner, however, involved far fewer aggravators than the instant case. See Larkins v. State, 739 So.2d 90, 95 (Fla. 1999)("We also note that neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators

> are present in this case. These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and while their absence is not controlling, it is also not without some relevance to a proportionality analysis."); Hawk v. State, 718 So.2d 159, 163 (Fla. 1998)("In the present case, the two aggravating circumstances (i.e., pecuniary gain, and the contemporaneous attempted murder of Matthew Gray) are arrayed against copious mitigation."); Robertson v. State, 699 So.2d 1343, 1345 (Fla. 1997)("The trial court found two aggravating factors: (1) the capital felony was committed during the course of a burglary; and (2) the murder was especially heinous, atrocious, or cruel."); Kramer v. State, 619 So.2d 274, 277-78 (Fla. 1993) ("In this case, the trial court found two aggravating factors: prior violent felony conviction, and the fact that the murder was heinous, atrocious, or cruel."); DeAngelo v. State, 616 So.2d 440, 442 (Fla. 1993) ("In sentencing DeAngelo to death, the trial court found only one aggravating factor, that the murder was cold, calculated, and premediatated."); Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990) ("The trial court imposed the death sentence upon finding one aggravating circumstance: that the murder was committed in an especially heinous, atrocious, or cruel manner."); Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1998)("In contrast, the aggravating circumstances of heinous, atrocious, and cruel, and cold, calculated and premeditated are conspicuously absent.").

37 So.3d at 228-29.

The last cited case in the Turner quote - - Fitzpatrick - - is a five aggravator case in which a law enforcement officer was killed, but in light of the strong mental mitigation (along with young age) and the absence of HAC and CCP, the death penalty was found to be disproportionate. 527 So.3d at 810-12. Hardy v. State, supra, 716 So.2d at 762-66, is another case involving the killing of a law enforcement officer where the death sentence was reduced to life imprisonment on proportionality grounds. Hardy contains only slightly less aggravation than Delgado's case [the difference being the second, moderate-weight aggravator arising from Delgado (while under extreme mental or emotional disturbance)

momentarily pointing (but not firing) a gun at Sergeant Mumford; contrast Wheeler and Armstrong, where an additional officer or officers were shot and wounded]. On the other hand, Delgado's case involves far stronger mental mitigation than Hardy's; as well as the "no significant history of criminal activity" mitigator, which was absent in Hardy. While no two cases are identical[4], Hardy and Fitzpatrick are by far the most relevant comparison cases; while the seventeen cases relied on by the state - - including the seven law enforcement officer cases - - are much more aggravated than Delgado's case, or much less mitigated, and frequently both.

G. Conclusion

In no way is this one of the most aggravated and one of the least mitigated of first degree murders. In order to satisfy the proportionality standard, the evidence, viewed in light of the trial court's findings, must meet both of these criteria [Armstrong; Crook; Cooper]; here it met neither.

In accordance with precedent, Delgado's death sentence should be reduced to life imprisonment without the possibility of parole.

[4] See Crook v. State, 908 So.2d at 358.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Senior Assistant Attorney General Carol M. Dittmar at carol.dittmar@myfloridalegal.com and to the Office of the Attorney General at CapappTPA@myfloridalegal.com, on this 20th day of May, 2013.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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