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SUPREME COURT OF FLORIDA

CASE NO: SC12-890
L.T. NO: 16-2008-CF-011059-BXXX-MA

BILLY JIM SHEPPARD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Clay County, Florida

Honorable Judge J. Brad Stetson
Judge of the Circuit Court, Division CR-F

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This initial brief on direct appeal seeking to reverse conviction and sentence is filed on behalf of the Appellant, BILLY JIM SHEPPARD, pursuant to Fla. R. App. Pro. 9.142.

Appellant, BILLY JIM SHEPPARD, will be referred to as "the Appellant" or "Mr. Sheppard" or "Sheppard" and the State of Florida will be referred to as "the Appellee" or the "state."

References to the record on appeal will be designated by the volume number, followed by "R" and the page number, for example, (1 R 1.) References to a supplemental record on appeal will be designated by the volume number, followed by "SR" and the page number, for example, (1 SR 1.)

STATEMENT OF THE CASE

This case arises from a series of incidents that occurred in Jacksonville, Florida, on July 20, 2008. Co-defendant Rashard Evans was arrested on July 28, 2008, for his involvement in the alleged crimes; Billy Sheppard was arrested for his alleged involvement on August 8, 2008. (1 R 7-8.) On January 22, 2009, the state issued an indictment for Mr. Sheppard and Mr. Evans for two counts of first-degree murder for the deaths of Monquell Wimberly and Patrick Stafford, attempted armed robbery, possession of a firearm by a convicted felon, and grand theft auto. (1 R 31-32.)

Mr. Sheppard and Mr. Evans were tried separately. Mr. Sheppard proceeded to trial on January 10, 2012. (7 R 21.) The jury found Sheppard guilty on all charges on January 12, 2012. (4 R 656.)

Mr. Sheppard's penalty phase occurred on January 20, 2012; the jury recommended life for the death of Patrick Stafford and death by a vote of 8 – 4 for the death of Monquell Wimberly. (4 R 658.)

On January 27, 2012, Mr. Evans was acquitted of Mr. Stafford's murder and found guilty of manslaughter for the death of Mr. Wimberly, for which he received a term of 27 years on March 9, 2012. (4 R 616) (Uniform Case No: 16-2008-CF-011059-AXXX-MA.)

Mr. Sheppard's trial court held a Spencer[1] hearing on March 8, 2012. (6 R 1093.) The defense and state presented memorandums in support of life (4 R 615) and death (4 R 609), respectively.

In its March 30, 2012, Order sentencing Mr. Sheppard, the trial court found one aggravating factor, encompassing Mr. Sheppard's contemporaneous murder charge and two prior violent felonies (great weight) (4 R 663); one statutory mitigating factor, Mr. Sheppard's age at the time of the crime (little weight); and fifteen "non-statutory" mitigating factors: (1) the defendant is a loving brother, son, grandson, and friend (little weight); (2) Mr. Sheppard is capable of establishing and maintaining bonds with others (little weight); (3) he is friendly/good with family members, animals, and children (little weight); (4) he always has a desire to help his family members especially when they are sick (little weight); (5) he has shown concern in regard to family members and how they have had to endure his arrest and trial and the Defendant can still continue to positively impact people close to him (little weight); (6) his mother abused alcohol and drugs during his childhood, forcing him to live with his grandmother who had responsibilities of her own (some weight); (7) he was forced to witness frequent and on-going violence as a very young child (some weight); (8) Defendant has a limited education (little weight); (9) he suffered from poverty (slight weight); (10) he lost his father at a

1 Spencer v. State, 615 So. 2d 688 (Fla. 1993)

very young age (some weight); (11) he entered the penal system as an adult at 14 years of age and spent what should have been his high school years behind adult prison bars (some weight); (12) he was intoxicated at the time of the offense (very slight weight); (13) he is amendable to a productive life in prison (slight weight); (14) he suffered from mental disabilities that caused him to develop at a slower pace than other children his age and resulted in people taking advantage of him (slight weight); and (15) the he suffered the death of his stepfather in the months leading up to his arrest (little weight). (4 R 666-676.) The court followed the jury's recommendation and sentenced Mr. Sheppard to death for the murder of Monquell Wimberly. (4 R 676.)

A timely notice of appeal was filed on April 27, 2012. (4 R 687.) This appeal follows.

STATEMENT OF THE FACTS

Guilt phase proceedings:

During the state's case-in-chief at Mr. Sheppard's trial, the state introduced a video recording of Mr. Sheppard's interrogation during the direct examination of Detective Bowers. (9 R 596 – 10 R 625.) The video was over 30 minutes long. (9 R 596 – 10 R 625.) Mr. Sheppard repeatedly denied involvement in the homicides throughout the interrogation. (9 R 596 – 10 R 625.) In viewing the video, the jury watched the detectives belittle Sheppard (10 R 609, 10 R 614-16), accuse him of

lying and tell him that lying "is one of the worst qualities in a person." (10 R 606.) The jury heard the officers explain to Sheppard that if he did not tell them what happened, a jury of his peers would not find him credible because they would think Sheppard made the story up for trial purposes. (10 R 614-18, 625.) The police also told Sheppard that they knew he was either the shooter or the driver in the homicides because witnesses implicated him. (10 R 614-16.) The police referred to Sheppard as "PYC," a notorious Jacksonville gang, and explained that Sheppard has "been in the system long enough" to know that the charges against him were serious. (10 R 606-625.)

Also during the state's case-in-chief, Dtalya Barrett, a security guard at an apartment complex adjacent to the Monquell Wimberly crime scene, testified that she witnessed the drive-by shooting (9 R 418), called the police, (9 R 420), then saw the assailant's face for a second when he looked back. (9 R 422.) Ms. Barrett stated that she was 100% sure that the assailant she saw in the passenger seat of the car was Mr. Sheppard; however, when she was initially presented with a photo line up, she selected an individual that was not Mr. Sheppard, stating "he looks like the one." (9 R 424, 426, 428, 442.) She also indicated that the whole thing happened very quickly (9 R 440) and the "only thing on her mind" was her nephew because she thought he was the victim. (9 R 433, 441.)

Ms. Barrett further testified that, after initially cooperating with law

enforcement, she fled the scene of the crime based on her perception that Mr. Sheppard was going to murder her and her family:

> Witness: [I] have kids and if — if that gentleman shot a baby in broad daylight, I'm thinking what he going to do to me and my kids? And I left. I mean, they had me in a police car, you know, right there where everybody can see me sitting there, and you know, they didn't -- I mean, to me they didn't think about whether he can come kill us or whatever. And I wanted to get out and get to my kids and leave.

(9 R 435.) She continued with this line of testimony on re-direct. (9 R 445.) Defense counsel did not object to Ms. Barrett's comments. However, the trial court, outside the presence of the jury, acknowledged that Ms. Barrett's comments regarding her fears that Sheppard would kill her constituted "potential error" and "were getting a little close" to a "golden rule" violation because "the jurors should not be put in a position where anyone suggests to them that they or their families would be in jeopardy." (9 R 464-65.)

The state also presented testimony of Chaeva Powell. (9 R 530.) Ms. Powell acknowledged that she was the girlfriend of the co-defendant, Rashard Evans. (9 R 531.) Ms. Powell stated that Sheppard was Evans' friend and an on-again-off-again boyfriend of her sister. (9 R 532, 533.) Ms. Powell was allowed to testify, over defense objection on hearsay grounds, that: Mr. Evans told her to tell Mr. Sheppard to "get rid of the package;" that she relayed the message to Mr. Sheppard; and that,

upon questioning, Sheppard told her the "package" was a gun. (9 R 534, 535.) Mr. Sheppard did not state that the "package" was the gun used in the instant crimes. (9 R 534, 535.) Ms. Powell did not know whether Sheppard acted on Evans' message and does not know if Mr. Sheppard actually had a gun. (9 R 536.) However, the state argued that Mr. Evans' statement was admissible under the "verbal act" exception and the court allowed the testimony. (9 R 548.)

The state later relied on Ms. Powell's testimony in closing argument stating:

> State: You're allowed to consider the fact that Rashard Evans told his girlfriend, Chaeva Powell, who testified before you, to tell this defendant to get rid of the package, that when she asked this defendant, well, what's the package, he told her it was a gun.

The state also presented the following witnesses at trial: Khalilah Majors, who witnessed the Wimberly shooting (3 R 447) and could not identify the shooter; Willie Lee Carter who witnessed the alleged car jacking (3 R 469); Officer J.A. Gay of the Jacksonville Sheriff's Office (JSO) who responded to the Wimberly shooting (3 R 492); Richard Kocik, latent print examiner for the JSO who matched numerous prints on the car jacked vehicle to Rashard Evans (3 R 517); Kiava Sherrod, (4 R 650) who witnessed the Wimberly shooting; Shamika Worthey, (4 R 676) who heard the Stafford shooting and viewed the scene after the fact; Leporyon Worthey (4 R 685) who viewed the Stafford scene after the fact; Officer Howard Mac Smith, who responded to the Stafford shooting (4 R 693);

Michael Roberts, a jailhouse snitch who shared a cell with Sheppard and received a deal for testifying in Sheppard's case (4 R 714); Valarie J. Rao M.D., the state's Medical Examiner; and David Warniment, a FDLE firearms expert (4 R 797.)

The defense presented no witnesses. (11 R 845.)

Jury issues:

Prior to guilt-phase closing arguments, a juror, Ms. Nugent, informed the court that, while riding the juror bus on the way back to the parking lot, an alternate juror, Ms. Bostic, verbally informed her, in the presence of other jurors, that Sheppard was guilty. (11 R 915.) The court dismissed the alternate juror for engaging in pre-deliberations but kept the juror who had informed the court of the problem. (11 R 945.) Even though the juror did not know whether other jurors overheard Ms. Bostic's premature verdict, the court did not question the other jurors to determine if they overheard the alternate juror's opinion of guilt or if similar comments had been made to any other jurors. Closing arguments then ensued. (11 R 953.)

After a several hours of deliberation, the jury requested a copy of Detective Bowers' testimony, which included the interrogation of Sheppard described above. (12 R 1097.) The court informed the parties that the jury already had a video of Sheppard's interrogation in the jury room and it could not have a transcript of the testimony. (12 R 1101-2.) However, they could have the court reporter read back

the testimony that was not included on the video. The jury declined read-back and continued deliberations, (12 R 1108, 1112-13), whereupon it found Mr. Sheppard guilty on all charges. (3 R 533-579; 12 R 1122, 1155.)

Penalty phase proceedings:

The penalty phase commenced on January 20, 2012. (13 R 42.) The state sought only one aggravator, based on the contemporaneous homicide and prior violent felonies, and called Jacksonville Sheriff's Officer Dwayne L. Crouch to establish crimes that occurred when Mr. Sheppard was just 14 years old. (13 R 43-49.) The state also presented victim impact evidence. (13 R 52, 55.)

The defense called seven mitigation witnesses: Juwaun Newkirk, Mr. Sheppard's nephew, to discuss his positive relationship with Mr. Sheppard (13 R 61); Alonzo Adams, Mr. Sheppard's cousin, to explain Mr. Sheppard's positive characteristics (13 R 65); Chiquita Adams, Mr. Sheppard's cousin, to testify that Mr. Sheppard always had an upbeat attitude, helped take care of her mother while she was sick, and wrote positive letters while he was in jail (13 R 67); Curtiayanna Tompkins, an acquaintance of Mr. Sheppard, to explain that Mr. Sheppard sends her positive letters and encourages her through phone calls. (13 R 70).

Bessie Walker, Mr. Sheppard's grandmother, who helped raise him, explained the difficulties that Sheppard struggled with growing up. (13 R 73.) Kathryn Lunford, Sheppard's mother, also testified about significant adversity that

Sheppard experienced over the course of his young life. (13 R 79.) She explained that she had been a drug and alcohol addict since she and Sheppard's father broke up when Sheppard was 16 months old and that her addictions rendered her unable to care for her children. (13 R 1249-50.) She informed the jury that Sheppard's father died of sickle-cell anemia when Sheppard was only eight years old and that Sheppard also has the disease. (13 R 1250.)

Quintina Sheppard testified about her positive relationship with her brother and provided greater detail regarding their difficult childhood with their mother. (13 R 84.) She testified that Sheppard ran away from home because of the violence his mother inflicted. (13 R 87.) Quintina also explained that they grew up in poverty; had to move from house to house; and their mother failed to keep the power on or buy them food. (13 R 87.) When their mother had a "relapse," the children had to live with their grandmother. (13 R 1255.) She explained that this was difficult because children want to be with their mothers. (13 R 1254.) They heard gunshots every day in their grandmother's neighborhood. (13 R 1257.) Quintina also discussed the effect that adult prison had on Sheppard's development and how Sheppard struggled with the death of his best friend shortly before the instant crimes. (13 R 88-90.)

Following penalty phase, the jury recommended a life sentence for the death of Mr. Stafford and voted 8 – 4 in favor of the death penalty for the death of

Monquell Wimberly. (3 R 592-593.)

The defense presented numerous letters from Sheppard's family in the Spencer hearing. (4 R 628.) The letters discussed in greater detail the loving, fun attitude with which Sheppard approached life, and the joy he brought to his family, (e.g. 4 R 632.) Sheppard's sister, Quintina, wrote about the effect that Sheppard's crime and prosecution had on her family. (4 R 628.)

Sheppard's grandmother, Bessie Walker, confided to the trial court that the family knew something was wrong with Sheppard since he was a baby. (4 R 630.) She explained her attempts to get him into classes for "special people" and described exercises that she used to do to work with Sheppard's speech, walking and hands when he was a child. (4 R 630.) She wrote that Sheppard enjoyed singing but was discouraged from the activity due to his speech disorder – she said no one could understand him. (4 R 631.)

Sheppard's mother, Kathryn Lunford, in a letter to the court, discussed her addictions and Sheppard's intellectual difficulties. She revealed that Sheppard struggles with a low IQ and did not learn to speak until he was four. (4 R 633, 634.) He was in Speech Language Impairment classes (SLI) when he began school and was placed on medication at a young age. (4 R 633.) She reiterated the impact that losing a father, stepfather, best friend, and getting shot had on Sheppard. (4 R 633.) She explained that Sheppard was "really hurt" by these traumatic events and

"needs help." (4 R 634.)

Sheppard's aunt, Evangelist Cummings, also wrote the trial court a letter. She stated Sheppard has always been a follower and that people take advantage of him because he is a "few floors short." (4 R 635.) She opined that part of his problem was that he was unable to finish school. (4 R 635- 636.) Cheryl Cummings, Sheppard's cousin, also wrote the court, explaining that Sheppard was still "thinking and acting like a child" at the time of the crimes. (4 R 638.) His younger cousin, Muffin, stated that "when your[']re] not dealing with a full deck (basically not to[o] smart) anyone can take advantage of you…" (4 R 635.)

The trial court issued a sentencing Order on March 30, 2012. (4 R 656.) The court gave "great weight" to the aggravating factor of Sheppard's prior violent crimes, noting that with respect to the contemporaneous homicide, Wimberly died after Stafford, making the Wimberly crime worse. (4 R 664.) The court, while acknowledging that prior violent felony aggravator can only be found once, then added "considerable weight" to the factor based on two felonies arising from the same criminal episode, which that occurred when Sheppard was just 14. (4 R 665.)

In considering mitigation, the court assigned "little weight" to the statutory mitigator of age, following its acknowledgment that:

> Evidence was presented…that the Defendant had a difficult upbringing and missed numerous important life experiences while incarcerated during his formative years. In addition, there was evidence presented…that the Defendant's mental development

progressed at a slower pace than other children and that the Defendant suffered from some sort of mental disorder and/or disability.

(4 R 667.) The court found 15 "non-statutory" mitigating factors assigning each "slight," "little" or "some" weight. (4 R 674-676.) Ultimately, the trial court sentenced Sheppard as recommended by the jury, imposing Life for Count I as to Mr. Stafford and Death for Count 2 as to Mr. Wimberly.

This timely appeal follows.

STANDARD OF REVIEW

Argument I: Whether a statement falls within the statutory definition of hearsay or is admissible in evidence under a hearsay exception are questions of law subject to a de novo standard of review. See e.g. Powell v. State, 99 So. 3d 570, 573 (Fla. 1st DCA 2012).

Argument II, III, & IV: Errors that are not met with objection at trial are reviewed on direct appeal under the fundamental error standard. § 924.051, Fla. Stat. Error is fundamental where it "'reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Jaimes v. State, 51 So. 3d 445, 448 (Fla. 2010) (quoting State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)).

Argument V: "[T]o ensure uniformity in death penalty proceedings, [the Florida Supreme Court] make[s] a comprehensive analysis in order to determine whether

the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.'" Floyd v. State, 913 So. 2d 564, 578 (Fla. 2005) (quoting Anderson v. State, 841 So. 2d 390, 407-08 (Fla. 2003)). This court must undertake "a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) (quoting Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) (emphasis omitted)). "This entails 'a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.' In other words, proportionality review 'is not a comparison between the number of aggravating and mitigating circumstances.'" Offord v. State , 959 So. 2d 187, 191 (Fla. 2007) (citations omitted).

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING INADMISSIBLE HEARSAY IN THE FORM OF THE CO-DEFENDANT'S OUT-OF-COURT STATEMENT THAT IMPLICATED SHEPPARD IN THE MURDERS AND INFERRED THAT HE DISPOSED OF THE MURDER WEAPON?

II. WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO PLAY A RECORDING OF THE POLICE REPEATEDLY OPINING THAT SHEPPARD WAS GUILTY OF MURDERS THAT SHEPPARD CONSISTENTLY DENIED COMMITTING, OFFERED THEORIES OF HOW THE MURDERS OCCURRED, REPEATEDLY CALLED HIM A LIAR, AND MADE COMMENTS THAT, IF SHEPPARD DID NOT PROVIDE A STORY AND/OR PROVE TO THE DETECTIVES HE WAS INNOCENT DURING THE INTERROGATION, ANY STORY PROVIDED TO THE JURY AT TRIAL

WOULD NOT BE DEEMED CREDIBLE?

III. WHETHER THE COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE PREJUDICE INQUIRY INTO THE JURY'S PREMATURE JURY DELIBERATIONS WHEN AN ALTERNATE JUROR INFORMED A JUROR THAT IF SHE WERE ON THE PANEL, SHE WOULD FIND SHEPPARD GUILTY?

IV. WHETHER FUNDAMENTAL ERROR OCCURRED WHEN THE STATE'S MAIN WITNESS TESTIFIED THAT SHE WAS WORRIED THAT SHEPPARD WAS GOING TO MURDER HER AND HER FAMILY?

V. WHETHER THE DEATH PENALTY IS DISPROPORTIONATE IN SHEPPARD'S SINGLE AGGRAVATOR CASE WHERE SUBSTANTIAL MITIGATION WAS PRESENTED SHOWING THAT HE SUFFERS WITH A LOW IQ, WAS DEVELOPMENTALLY DELAYED AS A CHILD, GREW UP WITH A VIOLENT, DRUG AND ALCOHOL ADDICTED MOTHER IN IMPOVERISHED CONDITIONS, LOST HIS FATHER AND STEP-FATHER TO FATAL DISEASES, WAS ALWAYS A FOLLOWER, WAS RAISED IN A CRIME-INFESTED NEIGHBORHOOD WHERE HIS BEST FRIEND WAS GUNNED DOWN AND SHEPPARD WAS SHOT THREE TIMES, AND SPENT HIS TEENAGE YEARS IN ADULT PRISON RATHER THAN A HIGH SCHOOL, IS A LOVING, FUN FAMILY MEMBER AND FRIEND AND IS DEEPLY CARED FOR BY OTHERS?

SUMMARY OF THE ARGUMENTS

I. THE TRIAL COURT ERRED IN ADMITTING THE CO-DEFENDANT'S OUT-OF-COURT STATEMENT IMPLICATING SHEPPARD IN THE MURDERS AND INFERRING THAT HE DISPOSED OF THE MURDER WEAPON RESULTING IN VIOLATIONS TO SHEPPARD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Over objection, the state was allowed to present testimony of Chaeva Powell, the girlfriend of Evans, to say that Evans asked her to tell Sheppard to: "get rid of the package." Ms. Powell testified that she asked Sheppard what the

"package" was and he responded that it was a firearm. The state argued that the statement was admissible as an admission or under the "verbal act" hearsay exception. Contrary to the state's assertions, the statements should have been excluded because statements **couched** as verbal acts that do not explain the nature of the act or transaction, but rather directly implicate a defendant in a crime, are inadmissible. See Banks v. State, 790 So. 2d 1094 (Fla. 2001). Historically, statements clothed under this often-misunderstood "verbal act" exception as non-hearsay are met with strict scrutiny, resulting in reversals of convictions and sentences. Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989); Antunes-Salgado v. State, 987 So. 2d 222 (Fla. 2d DCA 2008); Aneiro v. State, 674 So. 2d 913 (Fla. 4th DCA 1996). Evans' statement to his girlfriend in this case does not meet the verbal act exception. Sheppard did not tell Ms. Powell that he **intended** to "get rid of the package," and the state presented no evidence that Sheppard "got rid of a package" following Ms. Powell's second-hand instructions. More importantly, the state could not offer any evidence that this "package" was the murder weapon, but inappropriately elicited this testimony to allow the jury to infer it was, which is exactly the reason it is inadmissible, as it was offered for the truth of the matter asserted. Banks, 790 So. 2d at 1097.

Likewise, Sheppard's response to Ms. Powell's ambiguous question is not admissible as an admission because it is a response to a question, or a definition.

The state did not offer any evidence that Sheppard's response indicated he possessed the "package," disposed or it, or whether it even was the murder weapon. Also, regardless of Sheppard's response, it does not change the fact that Mr. Evan's statement to Powell was rank hearsay that had no exceptions for its admissibility. Even if Sheppard's statement could be construed as an "admission" Evans' prior hearsay statements are inadmissible.

First, Evan's statement was inadmissible under any hearsay exception. Furthermore, the state presented this series of statements for the truth of the matter asserted: that Evans told Sheppard to get rid of a gun and Sheppard did as he was told. The jury was left to draw the inference that the gun referenced by Evans was the murder weapon, that Sheppard was in possession of it, and that Sheppard somehow disposed of it—this was improper. Keen v. State, 775 So. 2d 263, 273-76 (Fla. 2000) (explaining that mistrial should have been granted where inference from detective's hearsay testimony was that the police investigation had produced evidence that defendant was the murderer).

Where the state was unable to locate the murder weapon, Sheppard was unable to cross-examine Evans, and the prosecutor could not provide a single reason why Evans' hearsay statement should be admissible except the argument that the statement was a "verbal act" and/or Sheppard's "admission" somehow justified its introduction, and to agree that it "helped their case a lot," the statement

should have been excluded. The statement should have been excluded because it was blatantly inadmissible hearsay, and offered for no other reason than its truth, the introduction of which resulted in a violation of Sheppard's confrontation rights and a Bruton violation. The statement was irrelevant and more prejudicial than prohibitive. The error was not harmless, and a new trial should be granted.

II. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO PLAY A RECORDING OF THE POLICE REPEATEDLY OPINING THAT SHEPPARD WAS GUILTY OF MURDERS THAT SHEPPARD CONSISTENTLY DENIED COMMITTING, OFFERING THEORIES OF HOW THE MURDERS OCCURRED, REPEATEDLY CALLED HIM A LIAR, AND MAKING COMMENTS THAT, IF SHEPPARD DID NOT PROVIDE A STORY AND/OR PROVE TO THE DETECTIVES HE WAS INNOCENT DURING THE INTERROGATION, ANY STORY PROVIDED TO THE JURY AT TRIAL WOULD NOT BE DEEMED CREDIBLE

At trial, the jury viewed a lengthy video of Sheppard's interrogation where he repeatedly denied all involvement in the homicides. In the video the detectives laughed at Sheppard, referred to him by a derogatory name, called him a liar and told him that liars are the worst kinds of people. The jurors heard the officers warn Sheppard that if he refused to tell them what happened a jury would know that he made up an excuse for the purpose of trial. The police told Sheppard that they already knew he was guilty of either being the shooter or the driver because they had witnesses. The jury also learned upon viewing the video that Sheppard had a significant criminal history and knew the criminal justice system.

Although Sheppard unequivocally denied any involvement in the homicides,

these prejudicial accusations, theoretical scenarios, denigrating comments, and unsupported opinions from the detectives were heard by his jury, serving to improperly bolster the state's questionable case against Sheppard with inadmissible evidence, unfairly prejudicing Sheppard and violating his right to a fair and impartial trial. Jackson v. State, 37 Fla. L. Weekly S 683, 28 (Fla. 2012). The jury was provided this recording during their lengthy jury deliberations without any limiting instruction concerning the recording (check this jury instruction to see if it is correct- this is important). Indeed, the only question the jury had was regarding the interrogating officer's trial testimony. As such, the error in admitting the tape was not harmless and, like Jackson, requires reversal.

III. FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY TO DETERMINE IF SHEPPARD WAS PREJUDICED BY PREMATURE JURY DELIBERATIONS

Prior to deliberations, a juror informed the court that, while riding the juror bus, an alternate juror informed her that she found the defendant guilty. (11 R 913-48.) Given the prima facie showing that premature jury deliberations occurred, the burden shifted to the state to show that the defendant was not prejudiced by these deliberations. Ramirez v. State, 922 So. 2d 386, 390 (Fla. 1st DCA 2006). However, where the state failed to request (and the trial court failed to conduct) adequate questioning of the other jurors as to the premature deliberations, the

jury's verdict is presumed to be tainted and Sheppard should be granted a new trial. Roberts v. State, 66 So. 3d 401, 404 (Fla. 4th DCA 2011).

IV. FUNDAMENTAL ERROR OCCURRED WHEN THE STATE'S MAIN WITNESS TESTIFIED THAT SHE WAS WORRIED THAT SHEPPARD WAS GOING TO MURDER HER AND HER FAMILY IN VIOLATION OF SHEPPARD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

At trial, Ms. Barrett, an alleged eyewitness to the second homicide testified that she initially fled the scene of the crime because she thought Sheppard would kill her and her kids. After the close of the witnesses' testimony, outside the presence of the jury, the trial court informed the parties:

> **As a juror sits there and listens to that witness testifying as she did, we're getting a little close [to a golden rule violation],** and therefore I wanted — as I've got a duty in any case but especially in a first-degree murder capital homicide — or first-degree capital murder case, double homicide in this case, **let's be real careful that we avoid the golden rule.**

(9 R 464-65.) As suggested by the trial court, comments like those made by state witness Dtalya Barrett have repeatedly been held to violate the prohibition against "impermissibly inflaming the passions and minds of the jury," as well as violate the golden rule. Mosley v. State, 46 So. 3d 510, 520 (Fla. 2009); see e.g., Urbin v. State, 714 So. 2d 411, 420 n.9, 421 (Fla. 1998); Garron v. State, 528 So. 2d 353 (Fla. 1988); Brooks v. State, 762 So. 2d 879, 900 (Fla. 2000); Clark v. State, 553

So. 2d 240, 242 (Fla. 3d DCA 1989).

Additionally, the comment was an improper character attack on Sheppard and created a misleading inference to the jury that Sheppard has a propensity for violence and wished to track down this witness and kill her or her children. Dawson v. State, 585 So. 2d 443, 445 (Fla. Dist. Ct. App. 1991).

Ms. Barrett's repeated comments that she feared for her life were improper and prejudicial, requiring reversal for new trial.

V. WHETHER THE DEATH PENALTY IS DISPROPORTIONATE IN SHEPPARD'S SINGLE AGGRAVATOR CASE WHERE SUBSTANTIAL MITIGATION WAS PRESENTED SHOWING THAT SHEPPARD SUFFERS WITH A LOW IQ, WAS DEVELOPMENTALLY DELAYED AS A CHILD, GREW UP WITH A VIOLENT, DRUG AND ALCOHOL ADDICTED MOTHER IN IMPOVERISHED CONDITIONS, LOST HIS FATHER AND STEP-FATHER TO FATAL DISEASES, WAS ALWAYS A FOLLOWER, WAS RAISED IN A CRIME-INFESTED NEIGHBORHOOD WHERE HIS BEST FRIEND WAS GUNNED DOWN AND SHEPPARD WAS SHOT THREE TIMES, SPENT HIS TEENAGE YEARS IN ADULT PRISON RATHER THAN A HIGH SCHOOL, IS A LOVING, FUN FAMILY MEMBER AND FRIEND AND DEEPLY CARED FOR BY OTHERS

"[D]eath is not indicated in a single-aggravator case where there is substantial mitigation." Almeida v. State, 748 So. 2d 922, 933 ((Fla. 1999). **Only in cases involving "nothing or very little in mitigation" should death be affirmed in a case involving only one aggravator.** Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

This is a single aggravator case involving significant, compelling mitigation,

which demonstrates that Mr. Sheppard suffers from a low IQ, was a follower since birth and did not learn to speak until he was four. His father died of sickle-cell anemia when he was eight and passed the deadly disease on to Sheppard; his mother was a drug and alcohol addict who shuffled the family from home to home, failing to consistently provide basic necessities such as food and electricity; his mother was violent to Sheppard; he lived in a proverbial "war-zone" where it was normal to hear gun blasts everyday; he has a sixth-grade education; beginning at 14 years of age, he spent a quarter of his life in adult prison and became institutionalized in the process; in 2008, shortly after his release from prison, he lost his stepfather to cancer, was gunned down in a drive-by shooting, and his best friend was shot to death. Shortly thereafter, at only 21 years of age, he was charged with the instant crimes. Additionally, Sheppard's co-defendant, in a separate trial, was acquitted of Mr. Stafford's homicide and found guilty of manslaughter for Mr. Wimberly, receiving a term of 27 years.

Because Billy Sheppard's case is highly mitigated and carries only one aggravating factor, this Court must vacate the death penalty as in Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988); McKinney v. State, 579 So. 2d 80 (Fla. 1991).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING THE CO-DEFENDANT'S OUT-OF-COURT STATEMENT IMPLICATING SHEPPARD IN THE MURDERS AND INFERRING THAT HE DISPOSED OF THE MURDER WEAPON RESULTING IN VIOLATIONS TO SHEPPARD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Over objection, Chaeva Powell testified for the state that she received a call from her boyfriend, co-defendant Rashard Evans, who told her to relay a message to Sheppard: "get rid of the package." (9 R 551.) Ms. Powell testified that in relaying this message she asked Sheppard what the "package" was; Ms. Powell then testified that Sheppard told her that the "package" was a firearm. (9 R 552.) Absolutely no evidence was introduced by the state that this "package," or gun, was the weapon used in the crimes. However, the state inferred it was, and argued in their closing that the jury could rely on Powell's statement as evidence that Sheppard was guilty of committing these homicides (11 R 963.) Mr. Evans did not testify and could not be cross-examined.

Equally important, the state presented no evidence that Sheppard ever acted on Evans' request by disposing of a firearm. In fact, Ms. Powell testified that Sheppard said "nothing" after she passed along Evans' message. (9 R 536.)

The prosecution argued that Ms. Powell's hearsay testimony was admissible as a verbal act; however, the statement did not qualify as a verbal act as it was admitted for one purpose: for the truth of the matter asserted – that the "package"

was a firearm, that it was the murder weapon, and Sheppard got rid of it. Indeed, the prosecutor could not produce a single case supporting its "verbal act" theory, nor provide any evidence that the package was the weapon used in the crime, nor cite to a single reason for its use of Ms. Powell's testimony other than it directly implicated Sheppard as a partner in crime to the homicides, while simultaneously inferring that he disposed of the murder weapon. Because the statement was inadmissible hearsay, a violation of Sheppard's confrontation rights, a Bruton violation, irrelevant, and more prejudicial than prohibitive, the statement should have been excluded. The error was not harmless, and a new trial should be granted.

I. **Preservation**

This issue was preserved by contemporaneous objection (9 R 533, 546) and through a written motion for new trial. (3 R 602.)

II. **The facts in Sheppard's case**

At trial, the state sought to elicit a phone conversation between witness Chaeva Powell and her boyfriend, Sheppard's co-defendant Rashard Evans. (9 R 533.) The defense immediately objected on the basis of hearsay. (9 R 533.) The prosecutor opined the statement was a verbal act and offered to proffer the statement. During the proffer, Ms. Powell testified that Evans called her from the Duval County Jail and told her to tell Sheppard to "get rid of the package." Ms.

Powell had no idea what "the package" was, but subsequently asked Sheppard, who allegedly informed her that "the package" was a gun. (9 R 535.) This concluded the proffer of Ms. Powell's testimony. (9 R 536.)

The trial court, curious as whether Sheppard acted on Mr. Evans' this instruction, asked the prosecutor to "bring out from her" whether Sheppard indicated that he intended to get rid of a gun following Evans' demand. (9 R 536.) Ms. Powell responded in the negative, stating that Sheppard did not give any indication that he planned to carry out Evans' instructions, whether he actually had "the package" or a gun in his possession, or whether he would or could act upon Mr. Evans' instruction. (9 R 536.)

The defense argued the statement was inadmissible for a number of reasons. First, the defense stated they must have an opportunity to cross-examine the person asking the question, i.e. Evans, before the statement can come in. Counsel pointed out that this statement from Evans (relayed by Powell) created an issue under Bruton v. United States, 391 U.S. 123 (1968).

Next, counsel posed a relevance objection, as the state offered no evidence that "the package" referred to by Evans was the murder weapon. (9 R 537.) Third, counsel explained that the statement implies Sheppard had knowledge of the murder, possession of a firearm, and was therefore accusatory. (9 R 539.)

The defense also explained that the prosecution wanted to get the statement

in evidence because it infers guilt. (9 R 539.) Counsel pointed out that the statement was only being offered for its truth, and the prosecutor has no other purpose for its admission:

> Defense: That's why the state wants it in. We could say it's not for the truth [of the matter asserted], but that's what that's exactly what they're using it for. So I don't think it's admissible.

(9 R 539.) The court agreed the statement "tends to prove that the Defendant's involved in this case, in this crime" and asked for an exception to the hearsay rule. (9 R 540.) The prosecutor initially stated it was a statement of a co-conspirator but did not offer any argument and immediately switched this assertion, stating that the statement qualified as a "verbal act" presumably because they did not charge Mr. Sheppard with conspiracy. (9 R 542.) The prosecutor opined the statement did not prove "anything" and was admissible solely because it was a verbal act:

> Court: Mr. Fletcher's argued that it's hearsay. Well, it's not being offered to prove –
>
> Court: The truth?
>
> State: -- anything. Well, it's not being – it's a verbal act. Tell him to do this.

(9 R 542). The trial court disagreed and corrected the prosecutor's allegation that the statement did not prove "anything." (9 R 542.) The court opined that, if the statement did not prove "anything," it would be inadmissible as being irrelevant or

immaterial. (9 R 542.) The court then modified the prosecutor's statement as to why they wanted the testimony to come in, holding the testimony was being offered for the reason that "it helps your [the prosecution's] case a lot:"

> Court: So let's correct that statement. **You're offering it for some reason, and it's pretty obvious what it is. And it's a good reason. It helps your case a lot**.

(9 R 542) (emphasis added.) The prosecutor **agreed** the statement greatly assisted their case against Sheppard and attempted to explain that the statement was offered to "establish that Mr. Evans asked to relay a message." (9 R 542.) The prosecutor then said what was important was the response Sheppard gave when the message was relayed to him, arguing it was an admission by a party opponent. (9 R 543.)

The court reiterated the importance of this issue, noting that Sheppard's case was a death penalty case, and again requested the state to provide a hearsay exception under Florida Statute § 90.803 to Mr. Evans' out-of-court statement. (9 R 543-544.) The prosecutor, after scrolling through the hearsay exceptions under 90.803 with the trial court, **could not come up with a single hearsay exception nor a case "on point" in Florida.** (9 R 544.)

The prosecutor finally conceded the statement does not have an enumerated hearsay exception and regurgitated its belief that the statement was not hearsay, referring to its circular verbal act argument. (9 R 545.)

The trial court defined a verbal act as "another way of saying" the statement

was not offered for the truth of the matter asserted. (9 R 545.) The prosecutor agreed with the court's interpretation, alleging that the truth of the statement made by Evans to Powell is "irrelevant" because Powell relayed the statement to Sheppard, who made the statement admissible. (9 R 545.)

The defense reiterated that the statement was hearsay and did not qualify for the verbal act exception simply because it connects Evans and Sheppard to the crime. (9 R 546.) The defense again pointed out he could not cross-examine Evans' out-of-court statement because the statement was made by Evans, Sheppard's co-defendant this capital case. (9 R 546.)

In denying the defense's objection, the court held:

> Court: Whether it's – whether we call it a verbal act or not, the point is that it does not – it is not offered to prove the truth of any matter asserted. It barely asserts any matter. But to the extent that it does, in an abundance of caution and in the light most favorable to the defense, it still – it's irrelevant whether the statement was true or not.
>
> What is relevant was the defense's response, and that's the only reason the statement's coming in. Therefore, it's an admission – on the second level, it's admission against interest by the defendant and therefore it's coming in.

(9 R 548.)

III. **"Verbal Act" and other applicable law**

Admitting an extrajudicial statement known as a "verbal act" is met with a rigid four-part test: (1) the conduct to be characterized by the words must be

independently material to the issue; (2) the conduct must be equivocal; (3) the words must aid in giving legal significance to the conduct; and (4) the words must accompany the conduct. See 6 Wigmore, Evidence § 1772 (Chadbourn rev. ed. 1976). "Verbal acts" are a category of extrajudicial statements excluded from the hearsay rule, which are defined as:

> A verbal act is an utterance of an operative fact that gives rise to legal consequences. Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was made, not to prove the truth of what was asserted in it. Jack b. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence Sec 801.11 (Joseph McLaughlin, ed. Matthew Bender 2d ed. 2000); see also Charles W. Ehrhardt, Florida Evidence Sec 801.6 (2000 ed.).

Statements couched as verbal acts **that do not explain the nature of the act or transaction, but rather directly implicate a defendant in a crime, are inadmissible.** See Banks, 790 So. 2d 1094. Historically, statements clothed under this often-misunderstood "verbal act" as non-hearsay are met with strict scrutiny, resulting in reversals of convictions and sentences. Harris, 544 So. 2d 322; Antunes-Salgado, 987 So. 2d 222; Aneiro, 674 So. 2d 913.

In Banks, the Florida Supreme Court reversed the defendant's convictions, finding that the statements disguised as verbal acts were actually inadmissible hearsay and used only to establish that the defendant was a participant in the crime. Id. Banks was convicted as a principal to delivering cocaine. Banks' issue on

appeal focused on the prosecutor's claim that admissions made by a passenger in Banks car during the drug transaction that Banks was "cool" and "straight up," and that he and Banks were concerned about whether the undercover officer they were dealing with was a snitch, were verbal acts. Banks, 790 So. 2d at 1096-1097.

Banks contended that these statements constituted inadmissible hearsay and were openly used by the prosecutor solely to establish the truth of the matters asserted in the statements, i.e. Banks' participation in the illegal drug transaction. Id. at 1097. In granting Banks a new trial, the Florida Supreme Court held:

> We conclude that the same cannot be said as to Goodman's [the passenger] statements to the effect that Banks was "cool" and "straight up," and that he and Banks were concerned that Roaden [the undercover officer] may be a snitch. These statements by Goodman to Roaden did not serve to explain the nature of the act or transaction, but rather directly implicated Banks in the transaction. Indeed, Detective Roaden explained to the jury that the phrase "straight up" meant that the person was "with the game plan or part of the business." In other words, in this case being "cool" and "straight up" meant Banks was part of the deal. In addition, the testimony that Banks and Goodman had discussed Roaden being a possible police snitch also directly implicated Banks as Goodman's partner in crime.
>
> Importantly, the State simply cannot point to any purpose for the admission of these statements other than for the truth of the matter asserted therein, i.e. that Goodman had stated that Banks was part of the deal. As we recently stated in Keen v. State, 775 So. 2d 263 (Fla. 2000), [w]hen the only possible relevance of an out-of-court-statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a non-hearsay label. Id. at 274. Similarly, we conclude that the particular statements in question here did constitute inadmissible hearsay and do not fit within the "verbal act" doctrine

Id. at 1098-1099.

In Antunes-Salgado, 987 So. 2d 222, Antunes-Salgado was convicted of trafficking and conspiracy to traffic in cocaine. At trial, the prosecutor, under the verbal act exception, sought to prove the crime by introducing the statements of Antunes-Salgado's co-defendants to the police. Id. at 224. One of the officers testified the co-defendant told him that Antunes-Salgado offered to pay the co-defendant $500.00 to deliver the cocaine, and further stated that Antunes-Salgado gave her the telephone number for the confidential informant (CI) and gave her the cocaine on the morning of the transaction. Id. The officer testified that other co-defendant's also implicated Antunes-Salgado in the conspiracy. Defense counsel did not object and conceded to the admission of these statements under Florida Statute § 90.803(18)(e).

On direct appeal however, the Second DCA found that trial counsel's ineffectiveness was apparent on the face of the record, holding the statements were inadmissible under 90.803(18)(e) because they occurred when the conspiracy was over and did not "further" the conspiracy. The Second DCA further found that the statements were not admissible under 90.804(2)(c) as statements against interest, nor were non-hearsay "verbal acts." Id. at 226.

In its discussion as to whether the statements were verbal acts, the Second

DCA in Antunes-Salgado found:

> [A] "verbal act" is a statement that is relevant because it explains some observed act *by the defendant*. Thus, for example, had Tranquilino [the co-Defendant] told the CI that Antunes-Salgado would be accompanying her to the transaction, that statement would have been a "verbal act" because it would have served to explain Antunes-Salgado's presence in the back seat of the truck and might have established his involvement in the transaction. However, none of the statements actually offered by the State at trial were relevant to explain any act *by Antunes-Salgado*. Instead, the statements are relevant only to prove the truth of the matter asserted in them; i.e. that Antunes-Salgado had an agreement with the codefendants to deliver cocaine to the CI. While the State contends that the statements were not hearsay because they were offered to prove that Antunes-Salgado actually paid for his codefendant's assistance, the State cannot point to any purpose for the admission of these statements other than to prove the truth of the matter asserted in them concerning an alleged agreement between Antunes-Salgado and the codefendants to deliver cocaine. "When the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label." Keen v. State, 775 So. 2d 263, 274 (Fla. 2000). Thus, the statements were not "verbal acts," and defense counsel was ineffective for not objecting to their admission on this basis.

In Aneiro, 674 So. 2d 913, Aneiro was convicted of trafficking in cocaine. At trial, the state introduced a phone call between a confidential informant and Aneiro, arguing it was a "verbal act." Aneiro contended that since his defense was entrapment, and since he testified the CI induced him into delivering cocaine for money and use of the CI's vehicle, the introduction of a taped phone call between the parties over his objection required a new trial. The following conversation took

place between Aneiro and the CI:

CI: What kind of car will you be in?

Aneiro: A Nissan.

CI: A Lincoln?

Aneiro: Gray. A gray Nissan.

Id. at 913. In closing, the prosecutor rehashed the conversation between Aneiro and the CI, arguing that Aneiro was lying. Id. at 914. Aneiro successfully argued that the statement was inadmissible hearsay because it was an out-of-court statement offered to prove the CI did not know what kind of vehicle Aneiro was transporting the cocaine in. Aneiro claimed he should have been allowed to cross-examine the CI to test his credibility. The Fourth DCA reversed, holding that the statements did not prove the nature of the act, but rather proved the truth of the alleged statements that the CI did not know what car Aneiro would be driving, thereby disproving his entrapment defense. Id. at 915.

In Harris, 544 So. 2d 322, Harris was convicted of possession of cocaine with intent to sell. The state admitted the statement of a CI through a testifying police officer that the CI told him Harris was wearing a blue shirt and a hat and was supplying him cocaine to sell on the street. Id. at 324. The state argued the statement from the CI was a verbal act. The Fourth DCA disagreed and reversed Harris's case, finding the occurrence of the alleged sale was complete without the

statements of the CI, and the statements were not part of the transaction. Id.

Recently, in McElroy v. State, 100 So. 3d 63 (Fla. 2d DCA 2011), McElroy appealed his conviction for possession of cocaine, arguing that the trial court erred in denying his dispositive motion in limine to exclude the hearsay statements of his co-defendant, Kendrick, to a CI. In a drug buy set up by the CI that involved Kendrick, Kendrick advised the CI of McElroy's participation but recanted this out-of-court statement later on. McElroy argued that without the CI's testimony regarding Kendrick's statements to him, the state could not prove its case against him. The trial court determined that the statements were admissible as verbal acts, finding they were not hearsay. The Second DCA reversed, finding:

> The present case is like Banks - the CI's testimony that Kendrick told him that McElroy would be with her because he wanted to make some money off the deal and that he had a gun that he would use if anything went wrong did not serve to explain the nature of the transaction or McElroy's actions. It served only to prove the truth of the matter asserted, that McElroy was participant.

Id. at 64.

The **proper** introduction of a statement as a verbal act is described in Stevens v. State, 642 So. 2d 828 (Fla. 2d DCA 1994). In Stevens, an officer testified that he told Stevens' co-defendant, Hill, that he was looking for a dime, which is $10 worth of cocaine. The officer testified that after they discussed type and price, Hill stated to Stevens that he needed a dime. This court held that the

testimony was admissible as verbal act because it served to prove the nature of the **subsequent act by Stevens** of **reaching into his pocket, retrieving a plastic baggie, and giving it to Hill**. Id. (emphasis added)

IV. The admission of the co-defendant's statement as a "verbal act" in Sheppard's trial was reversible error

Applying Banks, Antunes-Salgado, Aneiro, Harris, and McElroy here, it is clear that the statements in question are inadmissible because they were only relevant to prove the truth of the matters asserted by the declarant Evans, i.e., that Evans told Sheppard to get rid of a gun – implicating that he and Evans were involved in the murders, and that Sheppard got rid of the murder weapon after being told to do so by his co-defendant. Indeed, the trial court duly noted this fact when it corrected the prosecution's curious assertion that the statement did not prove "anything," but they were offering it anyway. Rather, the court stated, the statement was offered because "it helps your [the state's] case a lot." (9 R 542.) Importantly, the state could not point to any reason nor cite a single case in support of their position that the statement was a verbal act, *conceding* that the admission of Evans' statements greatly advanced their theory of prosecution against Sheppard.

As in Banks, Harris and Aneiro, Evan's statement did not prove any act by Sheppard whatsoever. Irrefutably, when Ms. Powell was asked what Sheppard **did**

upon hearing her statement about the package, she replied "nothing." Literally, Evans' statement proved **nothing** other than he was a participant in the crime and that the murder weapon was likely disposed of.

Like Harris and McElroy, the crimes in the instant case were complete long before the statements in question and were not furthered by the statements, so the statement could not serve to explain part of some transaction or action of Sheppard. Indeed, Sheppard did not "act" at all on Evans' statement made from jail, and the prosecutor can never dispute this fact. Without a doubt, the statement served the only purpose the state intended to serve: to prove the truth of the matter asserted that Sheppard was a participant in the homicides and that the reason the state could not find the murder weapon is because Sheppard had disposed of it. Therefore, Harris, Aneiro, and McElroy apply and merit reversal.

Without evidence showing this "package" *was* the murder weapon, Evans' statement is also wholly irrelevant. The prosecutor could not introduce one scintilla of evidence that this "package" was the ***same*** gun used in the murders. Of course, the state used the statements to ***infer*** it was the murder weapon and said as much in its closing argument, which is exactly the reason why it is inadmissible under Banks and Salgado in the first place: it is an attempt to prove the truth of the matter asserted that Sheppard committed the murders and got rid of the murder weapon.

Although the prosecutor passed Evans' statement as a verbal act, the fact

remains the same: just as dressing a wolf in sheep's clothing does not make it a sheep – parading around inadmissible hearsay as a "verbal act" does not make it a verbal act.

V. The admission of the co-defendant's statement because Sheppard made an "admission" was reversible error

If this Court should find that the trial court's allowed Evans' hearsay statement to explain Sheppard's "admission," the trial court erred in this respect as well. The trial court's ruling literally puts the cart before the horse where it determined that because Sheppard made an "admission," the classic hearsay statement of Evans somehow becomes admissible.

Critically, Sheppard did not make an "admission against interest" when he defined "package" as "a gun." Florida Stat. § 90.804(2)(c) permits the admission of statements which are "so far contrary to the declarant's pecuniary or proprietary interest . . . that a person in the declarant's position would not have made the statement unless he or she believed it to be true." Sheppard's response that the "package" was a "gun" to a vague question posed by Evans' girlfriend – a question the state has not proven relevant to this case – does not make it a qualifying admission under Florida Stat. § 90.804(2)(c), it makes it an answer to a question. In explaining to Powell that "package" means "gun," Sheppard did not reveal anything but his grasp of street slang – he was not admitting that he possessed a

gun, that he got rid of a gun, that he knew which "package" Evans was referring to, that the "package" referred to by Evans was the gun involved in this crimes.

Even if this Court should find that Sheppard's response "a gun" was somehow a statement against interest, Evan's hearsay statement through the testimony of his girlfriend, Ms. Powell, is **still** not admissible for several reasons:

First, any finding by the court that the "admission" allows Evans' hearsay statement into evidence as a verbal act is misplaced. The still ignored the four-part test of Banks, and court mistook Sheppard's "admission" for an act or transaction. Indeed, Sheppard's statement **defined** what a "package" might be, but certainly did not explain whether Sheppard **acted by getting rid of the package** upon being informed of Evans' statement. See Antunes-Salgado, 987 So. 2d at 227 (A "verbal act" is a statement that is relevant because it explains **some observed act** by the Defendant).

If, for the sake of argument, the trial court relied only on Sheppard's "admission" to allow Evens' prior hearsay statements to come in, and did not rely on a "verbal act" exemption, the ruling was still erroneous. Florida Stat. § 90.804(2)(c), permitting the admission of statements against interest, **does not provide for the admission of the portions of a non-testifying codefendant's statements that implicate the defendant.** Antunes-Salgado, 987 So. 2d at 226; Lilly v. Virginia, 527 U.S. 116, 134 (1999) (holding that the portions of a

nontestifying accomplice's confession that implicate the defendant do not fall within any hearsay exception). Applying these rules, if Sheppard's definition of "package" as "a gun" is a statement against interest, Evans' statements to Ms. Powell, instructing Sheppard to dispose of a gun, thereby inculpating Sheppard, are inadmissible under Florida Stat. 90.804(2)(c).

Additionally, the court could not allow Evans' hearsay statements to add context or "completeness" to Sheppard's subsequent "admission." The rule of completeness, codified in Florida Stat. § 90.108(1), provides:

> When a writing or recorded statement or part thereof is introduced by a party, **an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously**. An adverse party is not bound by evidence introduced under this section.

(emphasis added). Although Florida Courts have applied this rule to verbal communications and conversations, the rule does not apply to the current situation because **the state is not an adverse party to the state** and therefore cannot invoke the rule of completeness to introduce Evans' hearsay statements to provide context for Sheppard's subsequent "admission." See e.g. Vazquez v. State, 700 So. 2d 5, 9 (Fla. 4th DCA 1997) ([I]t has generally been held that the rule of completeness allows the admission of otherwise inadmissible evidence **during cross-examination**, if fairness so requires.); Pulcini v. State, 41 So. 3d 338, 348

(Fla. 4th DCA 2010) (under the rule of completeness, "**once a party 'opens the door' by introducing part of a statement, the opposing party is entitled to contemporaneously bring out the remainder of the statement in the interest of fairness**.").

VI. The trial court's admission of this evidence was not harmless

Importantly, even when statements are properly admitted as verbal acts, or other exceptions, it would be improper for the State, like in Sheppard, to use the statements thereafter for the truth of the matter asserted therein. See Conley v. State , 620 So. 2d 180, 182-83 (Fla. 1993). Put another way, even if the statements at issue are somehow construed as "verbal acts" or qualified as some other exception by this Court (and further not found to be irrelevant, more prejudicial that prohibitive, a Confrontation Clause violation, or hearsay), the prosecution's use of Evans' statement in closing argument to prove that Sheppard was linked to the homicide **is still reversible error**. See Banks, 790 So. 2d at 1099.

Of course, the state will argue this error is merely harmless. However, a review of the record demonstrates otherwise. The evidence against Sheppard was hotly disputed at trial. Sheppard's attorneys presented a case of misidentification that resulted in a 5 ½ hour deliberation. The defense zealously attacked credibility of the only two main state witnesses as to the second homicide, Ms. Barrett and Mr. Roberts (a career criminal and jailhouse snitch, whose charges were ultimately

dropped around the time that Mr. Sheppard allegedly made incriminating statements to him. (10 R 724.) As to the first homicide, there were no witnesses. As to the second homicide, the lone eyewitnesses testimony was attacked on cross-examination as incredible, inaccurate, and a case of misidentification. (11 R 424, 426, 428, 442, 977-980, 983)

Mr. Evan's statement implicated Sheppard in the murders and inferred that he not only possessed the murder weapon, but destroyed it, thereby "explaining away" a large hole in the state's case – the fact that it never found the murder weapon. To compound matters, the prosecution referenced Mr. Evans' hearsay statements in its closing argument, telling the jury they can consider it as evidence of Sheppard's guilt as to the homicides:

> You're allowed to consider the fact that Rashard Evans told his girlfriend, Chaeva Powell, who testified before you, to tell this Defendant to get rid of the package, that when she asked this Defendant, well, what's the package, he told her it was a gun.

(9 R 548.)

With this evidence in mind, this Court cannot say with simple confidence required by State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) that the error in admitting this damning statement connecting Sheppard to the murder and the alleged murder weapon, as a stand-in for Sheppard's unimpeachable co-defendant, had no effect or impact on the jury's long-deliberated verdict.

As explained above, Evans' statements to Ms. Powell, introduced through the testimony of Ms. Powell, where Evans did not personally testify, was inadmissible hearsay that was not admissible under any exception. The statement was classic hearsay; the statement is irrelevant to the case; it impeded Sheppard's Sixth amendment right to confront his accusers and cross-examine Evans; presented a Bruton problem where Sheppard was unable to cross-examine Evans because Evans was a co-defendant in a first-degree murder case; it was presented for the truth of the matter asserted, was more prejudicial that prohibitive; and was relied upon by the state to explain to the jury why the state failed to recover the murder weapon.

For the above reasons, the inadmissible hearsay admitted through the testimony of Ms. Powell resulted in violations of Sheppard's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sec(s) 9, 16, Constitution of the State of Florida, requiring that a criminal defendant must have due process of the law and a fair trial, a right to confront his accusers and a right to trial free from self-incrimination. As such, Sheppard's conviction resulted in cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution and Article I, Sec. 17, Constitution of the State of Florida conviction and sentence should be reversed.

This Court should reverse Sheppard's conviction and sentence and remand

for a new trial.

ISSUE II

THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO PLAY A RECORDING OF THE POLICE REPEATEDLY OPINING SHEPPARD WAS GUILTY OF MURDER THAT SHEPPARD CONSISTENTLY DENIED COMMITTING, OFFERING THEORIES OF HOW THE MURDERS OCCURRED, REPEATEDLY CALLED HIM A LIAR, AND MADE COMMENTS THAT, IF SHEPPARD DID NOT PROVIDE A STORY AND/OR PROVE TO THE DETECTIVES HE WAS INNOCENT DURING THE INTERROGATION, ANY STORY PROVIDED TO THE JURY AT TRIAL WOULD NOT BE DEEMED CREDIBLE, A VIOLATION OF SHEPPARD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

I. Introduction

At trial, the jury heard a lengthy recording of Sheppard's interrogation where he repeatedly denied all involvement in the homicides. During this thirty-plus minute recording, the detectives laughed at Sheppard's responses, repeatedly told him he was a liar, that lying, "is one of the worst qualities in a person," and told him that if he did not tell the police what happened during his interrogation, a jury of his peers would not find him credible at trial because they would think Sheppard made the story up for trial. The police also told Sheppard that they knew he was either the shooter or the driver in the homicides, and they knew it was "one or the other" because numerous witnesses said he had a gun. The police repeatedly referred to Sheppard as "PYC," a notorious Jacksonville gang, and explained that Sheppard has "been in the system long enough" to know that the charges were

serious.

Although Sheppard unequivocally denied any involvement in the homicides, these prejudicial accusations, theoretical scenarios, demeaning statements, burden shifting statements, and unsupported opinions from the detectives were heard by his jury, serving to improperly bolster the state's questionable case against Sheppard with inadmissible evidence, unfairly prejudicing Sheppard and violating his right to a fair and impartial trial. As the jury was allowed to view this tainted recording and apparently did so for multiple hours in their deliberations, the error rose to being fundamental, requiring reversal of Sheppard's convictions and sentences.

II. The recording heard by the jury

Upon asking Sheppard some general questions, the detectives asked him if he knew why he was being interrogated. (10 R 606.) After Sheppard replied in the negative (the video, shown to the jury, depicts the detective laughing at Sheppard in response to his answer at around 11 minutes 27 seconds), Detective Bowers, one of the two detectives present, began the interrogation:

> Det. Bowers: Okay. Let me explain something to you. I am going to treat you with respect. I'm going to treat you just like a man, like an adult. But I don't care for lying. Okay? That's worse, one of the worst qualities in a person. I'm going to tell you the truth. I'm not going to lie to you. I'm not going to try and trick you, okay? (10 R 606.)

***

… All I'm here to find out is Billy that cold that he needs to be locked up forever. Is everything that comes out of his [Sheppard's] mouth a lie? Because so far, you're batting a thousand. We sat at this table. Every question I've asked you I knew the answer to before I asked it to you. All I'm trying to do, Billy, is find out are you a stone-cold killer and a liar or is there goodness in you. (10 R 609.)

***

Obviously the dead person can't speak for himself. His friends are speaking for him. His family is speaking for him okay?

I know he [one of the victims] was West Jax. I know that you're PYC. And I know that there's blood between y'all (inaudible) problems or issues. And it's been going on for a long time. What I'm here to find out is are you that cold that you're going to sit there and roll the dice and take the chances on losing your life?

Mr. Sheppard: (Inaudible).

Det. Bowers: Answer my question. Tell me about you and tell me about Rashard because Rashard [the co-Defendant] told me this: I'm not a killer. That doesn't deny anything about being there but it tells me: I'm not a killer…(10 R 612-613.)

***

So in any case, he was concerned that the two of you were there to rob him, so that's why he was making particular note of what y'all were doing, what your activities were. And surely didn't surprise him when a couple minutes later, our victim walks in and says y'all carjacked him. The witnesses same thing. And another problem is

that's not – that's not refutable. I'm not worried about that, that you know about. That's easy. That's all I'm doing.

My main concern with you knowing is are you the trigger man, are you the driver? Because you're one or the other. You've been around the game. You've been in the system long enough, enough times that you know that this time this is a hard charge. You understand carjacking itself can put you away until you're older than me and I'm old compared to you. How old are you, 21? I'm 52.

So it's not a game. They wouldn't have sent the U.S. Marshals after you if it was some little trumped up charge, joyride. But there's reasons behind (inaudible) that day and you have a right to be heard because you may have been an unwilling participant. You may have been along for the ride. It may have been an accident, the fact he got shot. It may have been the intention you were going to scare someone without the intent of killing them, but those are things that I can't whip up out of the air. Those are things, your own defense, you have to tell me, and this is the only chance you get. 'Cause when it goes in, it's going to be filed. And obviously it's going to be hard to get out from under it. You know that. You know that or you wouldn't have left town.

Mr. Sheppard: (inaudible).

Det. Bowers: You wouldn't have left town. You would have walked in here and said yeah, I took the guy's car but I didn't kill anybody.

Mr. Sheppard: I didn't kill nobody (inaudible) I don't go that way, never seen that boy.

Det. Bowers: PYC, you didn't steal a car? (10 R 614-616.)

***

Mr. Sheppard: I don't know about the carjacking (inaudible) none of that.

Det. Bower: Okay. What do you know about it? This is in your defense because this is what he's telling us, and his witness is telling us the same thing, and they are both willing to get on the stand.

Mr. Sheppard: (inaudible).

Det. Bowers: Pull firearm. What did you do?

Mr. Sheppard: (inaudible)

Det. Bowers: Okay. You jumped in or you both jumped in?

Mr. Sheppard: Joyriding (inaudible) nobody.

Det. Bowers: You jumped in. You both jumped in.

Mr. Sheppard: Carjacked nobody.

Det. Bowers: Answer the question. Tell me the whole truth or none of the truth. We're trying to get on a (inaudible) where I can believe you because that's important to you, and you know that if I can't make (inaudible) you know you won't be able to convince 12 people.

And I'm your voice basically when I talk to the State Attorney. When he makes a decision what to do with you, what to do with these charges, he's got to know from you what's going on. So if you walk me through what happened in your opinion that day and your own words, maybe I'll have better understanding what's being told to us. (10 R 617-618.)

Mr. Sheppard: Carjack nobody.

***

Det. Bowers: Now, the shooting takes place and the car goes down the street. The car comes back, and they're looking. And they're like, what did they come back for? Somebody wants to (inaudible). And that's the only thing that we can figure is whoever did it just wanted to get caught. And that was kind of the things that perplexed us at first, that all those people that looked out there, look out the window. They see the guy in the car. That's (inaudible).

As far as the car, the carjacking, I've got two people that said that y'all took it with guns. (10 R 622.)

Mr. Sheppard: (Inaudible)

Det. Bowers: Telling you, (inaudible) have guns.

Mr. Sheppard: Carjack (inaudible). Well, I'm saying I (inaudible) carjack somebody if that person in the store?

Det. Bowers: Did Rashard have a gun?

Mr. Sheppard: I don't know (inaudible).

Det. Bowers: Now, if you jumped out of the car and Rashard took off in the car, we know one thing. We know that he was shot from the passenger side. Now, if you're the driver, then I know you didn't shoot him. (Inaudible). And you may have been the driver and not known that he was going to get killed. You may have just been a driver in the stolen car and had no idea.

It's a bad situation to be in. But you've got to trust me, I didn't put you in this situation. I didn't create any of this. You and I never met before, have we?

> I've never arrested you before. You've never done anything wrong with me. We've known each other for how long, a minute? (10 R 622-624)
>
> [T]hose kinds of things, if they don't come out when we're in this room and they come out six months, eight months, two years down the road when its in trial, it kind of loses its punch; it loses its credibility. Because now you (inaudible) waiting for trial and (inaudible), well, this is what I'm going to say now. Well, we've already addressed that issue. If we addressed it already, then it's not really an issue for us. It's an excuse. So that's why we bring them up on the table now because those are the things that happen. When these things happen, it needs to come out, right off Jump Street.

(10 R 606-625.)

The detective's demands that Sheppard confess to the homicides were an exercise in futility, establishing no other fact than detective Bowers' prejudicial and irrelevant belief that: he had the right man who was a gang-related murderer, liar, and reoffender; that the homicide cases against Sheppard were strong; that Sheppard was required to explain why the state's evidence and "witnesses" against him indicated that he was a killer; and any "excuse" or defense given by Sheppard at trial would not be believed or found credible by the jury. As demonstrated above, the majority of Sheppard's interrogation played before the jury did not establish a material fact, and served no relevant purpose in advancing the state's case as to the homicides.

In repeatedly emphasizing the certainty of Sheppard's guilt and demanding an explanation of whether he was the shooter or the driver in the murders, the state was allowed to do what the law explicitly prohibits: comment on the defense's guilt and credibility, demand an explanation for the evidence, comment on a defendant's right to remain silent, let the jury know the lead detective believed Sheppard murdered two people, and let the jury know that because Sheppard did not offer a defense during the interrogation, any defense asserted at trial should be viewed as concocted and incredulous. In a case where the jury's deliberation went on for hours and, mid-deliberations, **its only request was to view the transcript of this irrelevant and prejudicial interview**,[2] fundamental error is shown, requiring a new trial. See Pausch v. State, 596 So. 2d 1216, 1219 (Fla. 2d DCA 1992) (Finding fundamental error in the introduction of a interrogation recording where detective accused defendant of lying, committing the crime, and being an unfit mother)

III. The applicable law

The law is clear that a witness' opinion as to the credibility, guilt, or innocence of the accused is inadmissible. Jackson, 37 Fla. L. Weekly S 683, (Fla. 2012); Seibert v. State, 923 So. 2d 460, 472 (Fla. 2006); Robinson v. State, 4 So.

2 Although the jury requested the transcript of this material, the Court informed the jury that it was only entitled to a read-back, at which point the jury declined and resumed deliberations without the requested material. (12 R 1108, 1112-13.)

3d 87, 90 (Fla. 3d DCA 2009); Schrader v. State, 962 So. 2d 369, 371 (Fla. 4th DCA 2007); Sparkman v. State, 902 So. 2d 253, 257-58 (Fla. 4th DCA 2005). These comments are especially troublesome when a jury is repeatedly exposed to an interrogating officer's opinion regarding the guilt or innocence of the accused. Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984). This is error because the policeman's role, like a prosecutor's in our system of justice, has at least the potential for particular significance being attached by the jury to any expressions of the [officer's] personal beliefs." Myers v. State, 788 So. 2d 1112, 1113-14 (Fla. 2d DCA 2001).

Police interviews containing these prejudicial statements of fact and expression of personal beliefs about the defendant's guilt should be redacted. See Robinson, 4 So. 2d at 90. The law originates from the fact that a jury cannot reasonably be expected to disregard the strong inference of guilt created by police officers' repeated statements of personal beliefs and conclusions because of the significance the jury likely attaches to their opinions. Id.

It is also improper to hear that if an accused was truly innocent, he would have told the police the full story during an interrogation, instead of waiting until trial, as these are impermissible comments on the accused's right to remain silent, as well an improper shifting of the burden of proof. See Toler v. State, 95 So. 3d

913 (Fla. 1st DCA 2012) (Prosecutor improperly exhorted the jury to accept the proposition that since defendant's initial meeting with the investigator, his story had been "spiced up" and "amped up"); State v. Hoggins, 718 So. 2d 761 (Fla. 1998) (Comment by prosecutor during cross-examination of defendant if his testimony was the first time he had ever given his version of the evidence susceptible of being interpreted by jury as a comment on the Defendant's right to remain silent and therefore improper); See also Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991) ("The state may not comment on a Defendant's failure to mount a defense because doing so could lead the jury to erroneously conclude that the Defendant has the burden of doing so.")

A fair reading of these comments also would be that the defense "conjured up" a defense, or in other words presented false testimony, a "highly improper" comment. See Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993) (quoting United States v. Spain, 536 F. 2d 170 (7th Cir. 1976)).

Calling the accused a liar, without sufficient predicate or evidence, is also error. See Gomez v. State, 751 So. 2d 630, 632 (Fla. 3d DCA 1999) (Fundamental error occurred where prosecutor encroached on jury's job by improperly weighing in with her own opinion of the credibility of the witnesses). Error also occurs when comments are made concerning the state charging the right person and bringing only charges it could prove. See Ruiz v. State, 743 So. 2d 1, 5 (Fla. 1999);

Johns v. State, 832 So. 2d 959 (Fla. 2d DCA 2002) (prosecutor's following statements errors "did we charge the Defendant with a gun? No. Because we couldn't prove it. We didn't charge anything that we couldn't prove. What we charged we provable.)

Statements commenting on the strengths of the state's case and that other uncalled witnesses would have corroborated evidence are also clearly improper. See Tillman v. State, 647 So. 2d 1015, 1015-16 (Fla. 4th DCA 1994). As are comments that an accused has a criminal history.

When the great majority of a detective's improper comments do not provoke a relevant response from the accused, the error is not harmless as the evidence should not have been admitted as the prohibitive statements of the accused are minimal when juxtaposed with the inappropriate statements by the detectives. See Pausch, 596 So. 2d at 1219 (finding it unreasonable to expect the jury to extract the admissible evidence while disregarding the aspersions of guilt created by the police officer's inadmissible statements); see also § 90.403, Fla. Stat. This is especially so when the officers are unsuccessful in securing a confession, and the statements serve no purpose but to allow the state to improperly elicit police opinion testimony and invade the province of the jury. Seibert, 923 So. 2d at 472.

In Jackson, 37 Fla. L. Weekly S 683 at 28, Jackson faced a similar situation to the one present here. Jackson challenged the trial court's admission of a

videotaped interrogation introduced at his trial. Although some of the recording was edited to exclude parts of the interrogation, the version heard by the jury contained repeated accusations about Jackson's credibility, guilt, and the weight and sufficiency of the evidence that were not expressed during in-court testimony. Id. at 34. Importantly, the detectives did not secure a confession throughout their entire interrogation, nor did the majority of the questioning invoke relevant responses.

> In reversing Jackson's conviction and sentence, the FSC Court held:
> While the detectives may have intended to secure a confession by consistently expressing their conviction in Jackson's guilt, they did not secure a confession throughout their thirty-seven minute dialogue. In addition, although the detectives' opinions about Jackson's credibility, guilt, and the weight and sufficiency of the evidence were not expressed during the in-court testimony, admission of these statements essentially permitted the State to improperly elicit police opinion testimony and invade the province of the jury.

Id. at 34.

Pausch is also analogous to Sheppard's case. 596 So. 2d at 1218. In Pausch, despite the state's argument that the issue was not preserved for appellate review, the court found that fundamental error occurred as the result of an admission of an interrogation by the police in which the detective accused Pausch of lying, abusing her son, and being an unfit mother. Id. In finding that fundamental error occurred, the Second DCA held:

> It is our judgment that allowing the jury to hear the nature and

> intensity of Bonsall's interrogation denied Pausch a fair trial. The introduction of Bonsall's statements was prejudicial, confusing, and misleading. § 90.403, Fla. Stat. (1989); see also, Pottgen v. State, 589 So. 2d 390 (Fla. 1st DCA 1991) (graphic contents of videotape).
>
> Although evidence should not be excluded merely because it contains "emotional overtones," the jury in this case could not have reasonably been expected to isolate and extract from the recording that which was admissible as evidence of the crime while disregarding the aspersions of guilt created by Bonsall's words. See Aetna Casualty & Surety Co. v. Cooper, 485 So. 2d 1364 (Fla. 2d DCA 1986). We acknowledge that the question of whether to admit or reject the whole or any portion of a challenged recording is properly within the discretion of the trial court. Herrera v. State, 532 So. 2d 54 (Fla. 3d DCA 1988). In our view, it is a better practice for the trial court to preview the recording to foreclose the possibility that any inadmissible or prejudicial portions might reach the jury. C. Ehrhardt, Florida Evidence § 401.4 (2d ed. 1992). In any subsequent trial of this matter, only those sections of the tape that are relevant and free from the taint of Bonsall's words may be played to the jury. See Food Fair, Inc. v. Anderson, 382 So. 2d 150, 156 (Fla. 5th DCA 1980).

Id. at 1218.

In Mohr v. State, 927 So. 2d 1031 (Fla. 2d DCA 2006), the defendant argued his appellate counsel was ineffective in failing to argue the trial court reversibly erred in allowing certain portions of his videotaped interview with the detective be presented to the jury. Id. Like Sheppard, the recording contained the detective's personal belief as to the defendant's guilt, theories of why defendant committed the offense, and why the victim was telling the truth. Id. at 1033. In reversing Mohr's convictions, the Second DCA held:

> Here, the detective, through the admission of his statements in the

> videotape, advised the jury of his personal belief in Mohr's guilt and his theories as to why Mohr committed the offense and why the victim was telling the truth. He presented his opinion as to the ultimate fact to be decided by the jury. The jury could not reasonably have been expected to disregard the aspersions of guilt created by the detective's words.

Id. at 1034.

Similarly, in Sparkman, 902 So. 2d 253, the Fourth DCA concluded a detective's out-of-court statements made during an interrogation of the defendant amounted to inadmissible hearsay, as they included the detective's recitation of the facts and his beliefs and theories about the case. In reversing Sparkman's case, the Fourth DCA held:

> These statements made by Brock [the detective], akin to many others in the videotape, were clearly not adoptive admissions by Sparkman, nor do they meet any of the other exceptions to the hearsay rule listed in Florida Statutes Sec. 90.803. Therefore, we hold that the trial court error in admitting the videotape as a whole into evidence, without first redacting Brock's inadmissible statements.
>
> Lastly, we hold that the error was not harmless. "If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." State v. Lee, 531 So. 2d 133, 136 (Fla. 1988.) It is the state's burden to prove that an error was harmless.
>
> ***
>
> In this case, the error was not harmless because Brock's out-of-court comments as to what he believed happened and that he believed Sparkman killed Courtney were so prejudicial that the erroneous admission of the statements cannot be considered harmless beyond a reasonable doubt. Id. at 1135. We therefore reverse Sparkman's conviction and remand this case to the trial court.

Id. at 259.

IV. Sheppard's case

In Sheppard, the jury was shown a video of lead Detective Bowers bolstering his own credibility; scoffing at Sheppard's denial of being in a gang; repeatedly accusing him of being a liar; providing unsupported theories of how the crime occurred, including an accusation that Sheppard was either the shooter or the driver; expressing his personal belief that Sheppard was guilty; explaining that other state witnesses were telling the truth in an effort to convince Sheppard he was lying; commenting on how Sheppard should know that the charges were serious because he's been in the "system" long enough; degrading Sheppard by referring to him by "PYC" and not his surname; and opining that, if Sheppard did not give him a defense now, a jury down the line would know that he concocted an "excuse" not worthy of belief.

As in Jackson, Mohr, Pausch, and Sparkman, the detectives' statements were irrelevant, inadmissible, highly prejudicial, and predominantly used to allow the detective and the state to present the detective's personal opinion as to the ultimate question to be decided by the jury. The comments from the detective that Sheppard was guilty are no different than a prosecutor expressing his personal opinion to the jury that Sheppard was guilty. Myers, 788 So. 1112 (Improper for prosecutor to express personal belief of witnesses credibility). For these reasons alone, this court

should reverse.

Critically, the detectives here made **additional** improper comments not found in the above cases. For instance, the jury was also allowed to infer that because Sheppard did not provide a statement to the detective during the interrogation, the jury should disbelieve **any defense Sheppard later developed as nothing but an "excuse."**

> Det. Bowers: Answer the question. Tell me the whole truth or none of the truth. We're trying to get on a (inaudible) where I can believe you because that's important to you, and you know that if I can't make (inaudible) you know you won't be able to convince 12 people.
>
> ***
>
> Det. Bowers: Those kinds of things, if they don't come out when we're in this room and they come out six months, eight months, two years down the road when its in trial, it kind of loses its punch; it loses its credibility. Because now you (inaudible) waiting for trial and (inaudible), well, this is what I'm going to say now. Well, we've already addressed that issue. If we addressed it already, then it's not really an issue for us. It's an excuse. So that's why we bring them up on the table now because those are the things that happen. When these things happen, it needs to come out, right of Jump Street.

(10 R 625.) These statements are problematic and egregious for several reasons. First, a fair reading of these comments would be that the defense "conjured up" a defense at trial, or presented false testimony, a "highly improper" prosecutorial

tactic. See Landry, 620 So. 2d 1099 (quoting Spain, 536 F. 2d 170). This statement was also a comment on Sheppard's right to remain silent, as it improperly inferred that Sheppard was required to explain himself and the incriminating evidence that the detective supposedly had against him. See Toler, 95 So. 3d 913; Hoggins, 718 So. 2d 761.

Third, the statements encouraged the jury to believe the video-recorded comments of the officer that, if Sheppard were innocent, he would have told the detective his story from the onset. This comment impermissibly shifted the burden of proof for Sheppard to prove he was innocent, an arduous task only accomplished by confessing during the interrogation or otherwise unbelievable, according to the officer. Jackson, 575 So. 2d at 188 ("The state may not comment on a Defendant's failure to mount a defense because doing so could lead the jury to erroneously conclude that the Defendant has the burden of doing so").

Lastly, the comment presented Sheppard and this defense team with a "catch-22." Particularly, this comment left Sheppard's defense in a quandary, for if he presented a misidentification defense at trial (which he did), the jury heard from the state's lead detective they should disregard the concocted defense and suspect it false because it was "made up" after the interrogation. On the other hand, if no defense was presented at trial, the jury heard the detective assert that the jury would still determine that Sheppard is a liar and a murderer because the detective said so,

upon hearing the detective's own theoretical story of how the murders occurred. This improper comment left Sheppard in a disastrously peculiar conundrum of either putting on a defense or no defense at all: both decisions carrying with them the lead detective's accusations that Sheppard is guilty under either option.

The jury could not have been reasonably expected to isolate and extract from the recording that which is admissible as evidence of the crime while disregarding the detective's improperly degrading statements, comments that Sheppard had been in the system a long time, and repeated opinions that Sheppard was guilty and scenarios of how Sheppard committed the murders. Pausch, 596 So. 2d at 1219. To be sure, police officers, "by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy." Tumblin v. State, 29 So. 3d 1093, 1101 (Fla. 2010) (quoting Bowles v. State, 381 So. 2d 326, 328 (Fla. 5th DCA 1980). As such, a jury is inclined to give great weight to their opinions. Id .[3]

Despite Sheppard's repeated denials, the jury heard the detective's improper accusations, carrying with the demands of Sheppard to tell the truth or be found

3 To be sure, it appears the detective was doing all he could to obtain a conviction or oblivious to prejudicial statements. Particularly, in testifying as to how he located Mr. Sheppard, the Detective told the jury he had the "career criminal team" assist. (9 R 578.) After trial court sus sponte ordered the state to have the detective clarify Sheppard was not a career criminal, the detective interestingly responds, "no. It's just the name of a unit within the SWAT team. They go out and they try to serve high-risk--." (9 R 594.) Again, the court briefly stops the proceedings and any further confusion. (9 R 594.)

guilty by the jury later, thus vitiating the fairness of Sheppard's trial, resulting in fundamental error. Brooks, 762 So. 2d at 899 (defining fundamental error as that which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error") (quoting McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999)).

V. The error was fundamental

The state will assert the clear error is not fundamental. This argument is unfounded, as the error was so prejudicial in this case that it cannot be said the prosecution would have obtained a verdict guilty without it. Pausch, 596 So. 2d at 1219.

Improper comments from a police officer are viewed from the outset as highly suspect because "[i]t is especially harmful for a police witness to give his opinion of a witnesses credibility because of the great weight afforded an officer's testimony." Seibert, 23 So. 2d at 472 (quoting Page v. State, 733 So. 2d 1079, 1081 (Fla. 4th DCA 1999)).

Of course, in this case, we are not confronted with improper comments from a random lay witness, but comments from the prosecution's **lead detective**. The fact that lead detective Bowers asserted that Sheppard was a killer makes the error doubly troubling, as "a witness's opinion as to the guilt or innocence **of the accused** is not admissible… on the grounds that its probative value is substantially

outweighed by unfair prejudice to the Defendant." Martinez v. State, 761 So. 2d 1074, 1079 (Fla. 2000); see also Glendening v. State, 536 So. 2d 212, 221 (Fla. 1988).

Undeniably, the evidence against Sheppard was not overwhelming. There was no confession. There was no physical or forensic evidence. The murder weapon was not recovered. The co-defendant did not testify against Sheppard. In fact, based on the same evidence, the co-defendant was acquitted of one homicide and found guilty of the lesser-included offense of manslaughter for the other (the Wimberly shooting for which Sheppard received a death sentence). The defense did not concede guilt, but rather strenuously argued the state arrested the wrong man and the case was one of mistaken identification. Defense counsel, in closing argument, pointed out that there was a "big hole" in the state's case and that "everything rests" on vehicle description from the witnesses. (11 R 975.)

The defense vehemently attacked the credibility and veracity of the prosecution's only alleged eyewitness, Ms. Barrett. Counsel argued that, when she had the opportunity to identify Sheppard immediately after the homicides, she "freaked out" and jumped out from the back of police car and ran away. (11 R 977.) Ms. Barrett could not identify Sheppard when asked to pick out his photograph from a stack of 100 possible suspects (9 R 424, 426, 428, 442); she only identified Sheppard when the photos were later limited to 6 possible suspects.

(11 R 978.) The defense continued this barrage on Ms. Barrett's credibility and argued that it was implausible that she could identify Sheppard as the passenger in a vehicle when she could not identify simple things such as how many doors were on the vehicle, what color the firearm was, what was the license plate number (or even one digit of it), or what color shirt was Sheppard wearing. (11 R 979-980.) The defense argued that the prosecution wants the jury to believe Ms. Barrett was "1,000 percent sure it was him [Sheppard]," but is so credible she "gets an F on everything else" in the way of identification. (11 R 980.) The defense argued this case was a classic case of misidentification, and that is why Ms. Barrett's testimony was incredulous and did not make "sense." (11 R 983.)

The defense further argued that, because the prosecution knew Ms. Barrett was a flimsy witness, they got "desperate" and went "to find somebody," needing to throw "the Hail Mary" to obtain a conviction. (11 R 983.) Defense counsel argued that Mr. Roberts, a career criminal and jailhouse snitch, who happened to be the only other witness implicating Sheppard, was the prosecution's "quarterback" and "savior." (11 R 983.) Mr. Roberts, the defense opined, allegedly heard Sheppard confess to the crimes. The defense reminded the jury that the prosecution even stated he would not have dinner with Mr. Roberts because he was such a criminal. (11 R 984.) The defense attacked Roberts' credibility and alleged that he obtained all of his testimony against Sheppard by reading police reports

when he shared a jail cell with him. (11 R 984.) The defense argued Roberts told multiple "lies" to the jury, rendering his trial testimony incredible and not worthy of belief. (11 R 984.) The defense suggested the jury disregard all of Roberts' testimony because "it just doesn't make sense." (11 R 985.) The defense suggested Roberts has every interest to lie in Sheppard's case because, if the jury convicts Sheppard, Roberts might have his sentenced reduced and go free. (11 R 985.) The defense opined Roberts "flipped the script," meaning "you tell somebody what you are charged with, they turn around and say he confessed to me, and here are the details because he told me the details." (11 R 987.) The defense reminded the jury that Roberts was a *nine-time convicted* felon and that he "has no regard for the law" or "oath to tell the truth when he took that stand." (11 R 988.) The defense also commented on the lack of DNA, fingerprints, or murder weapon in the case. (11 R 989-990.) The defense concluded its closing argument, stating:

> And that in a nutshell kind of sums up this case. That's the quarterback throwing the Hail Mary in desperation because they got the wrong car, a shaky identification. Miss Barrett identified somebody else.

(11 R 989.)

Admittedly, defense counsel's argument that the prosecution's case was weak does not make it so; however, in this instance the record demonstrates that defense counsel's description was an accurate summation of the case. Indeed, the

jury deliberated for over **5 1/2 hours**, indicating that the decision to convict Sheppard was not an easy one. (12 R 1093.) Critically, during its deliberations, the jury had in its possession the highly prejudicial recording, and its only jury question focused on this interrogation in that **the jury specifically asked for the transcripts of Detective Bowers' testimony (which contained the recording of the interrogation of Sheppard).** (12 R 1097.) The prosecution's case did predominately rest on two witnesses whose testimony could have been viewed as inherently suspect by the jury, and the fact the jury requested Detective Bower's testimony just prior to returning a guilty verdict indicates his improper comments were likely *the* deciding factor.

The state cannot gain succor in arguing the detective's statements are admissible because (1) they provoked a relevant response or (2) they provide context to the interview such that a rational jury could recognize the questions are interrogation techniques used to secure confessions. See McWatters v. State, 36 So. 3d 613, 638 (Fla. 2010). The fact that the majority of the detective's statements to Sheppard did not provoke any relevant responses and certainly no confession is fatal to any such argument. Instead, Mr. Sheppard adamantly denied shooting or killing anyone, committing any crime, possessing a firearm, "carjacking" a vehicle, or otherwise. To the extent Sheppard admitted to joyriding in a vehicle identified as possibly driven by the shooters, this admission certainly

was not relevant enough to permit the officer's problematic statements that repeatedly opined Sheppard was a liar, a killer of two victims, not credible in the eyes of a jury of his peers, and not worthy of belief should he put forth a "new" defense at trial.

Undeniably, the detective's interrogation was an attempt to secure a confession in two murder cases. Equally undeniable is the fact that they failed in these attempts, yet the jury heard their accusations that Sheppard was the killer over and over again, for nearly thirty-two minutes. Worse, the jury was told through this recording that the most important law enforcement officer – the lead detective – believed he was guilty of the crimes, was a liar and not credible, that there was an insurmountable evidence against him, and any defense he concocted at trial should be dismissed because Sheppard did not give an explanation at the beginning while at the same time concocting their own theories of how the crime occurred: all of which permitted the State to elicit blatantly prejudicial police opinion testimony and invade the province of the jury. Seibert, 923 So. 2d at 472 ("allowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury" (quoting Knowles v. State, 632 So. 2d 62, 65-66 (Fla. 1993)); Martinez, 761 So. 2d 1074.

Importantly, Sheppard did not take the stand in his own defense and argued the state's case was one of misidentification. As jurors are not required to separate

legitimate interrogation from "blatantly prejudicial" opinion testimony, they very well could have disregarded Sheppard's defense solely based on the detective's impermissible comments that he was a truthful person and Sheppard was not. See e.g. Mohr, Sparkman.

For the above reasons, the improper evidence admitted through the interrogation video resulted in violations of Mr. Sheppard's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sec(s) 9, 16, Constitution of the State of Florida, requiring that a criminal defendant must have due process of the law and a fair trial. As such, Sheppard's conviction resulted in cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution and Article I, Sec. 17, Constitution of the State of Florida, and conviction and sentence should be reversed.

This court should reverse Sheppard's convictions and sentences and remand for a new trial, free from the prejudicial and repeated accusations contained in the recorded interrogation.

ISSUE III

FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY TO DETERMINE IF SHEPPARD WAS PREJUDICED BY ESTABLISHED PREMATURE JURY DELIBERATIONS RESULTING IN VIOLATIONS TO SHEPPARD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS AND CORRESPONDING PROVISIONS OF THE FLORIDA

CONSTITUTION

I. Introduction

Strangely, the trial court, immediately following jury selection, informed the selected jurors which jurors were on the panel and which were alternates. (8 R 333.) Unquestionably, the judge's act of notifying the alternates that they were merely alternates caused a problematic event in Sheppard's case.

Prior to deliberations, a conscientious juror, Ms. Nugent, informed the court that an alternate juror, Ms. Bostic, verbally informed her that she believed the defendant was guilty. (11 R 913-48.) Despite this revelation, the trial court neglected to inquire whether other jurors overheard this conversation and, if so, whether the jurors were influenced by the alternate's comments. (11 R 913-48.)

Given the prima facie showing that premature jury deliberations occurred, the burden shifted to the state to show that the defendant was not prejudiced by these deliberations. Ramirez, 922 So. 2d at 390. However, the state failed to request and the trial court failed to conduct any further questioning. (11 R 913-48.) The jury's verdict is presumed to be tainted beyond worth of confidence, and Sheppard should be granted a new trial. Roberts, 66 So. 3d at 404.

II. Improper conduct by alternate juror in initiating premature jury deliberations

Immediately before the charge of the jury began, juror Nugent

communicated to the bailiffs that she needed to bring something to the court's attention. (11 R 913.) Nugent informed the court that on the prior afternoon, during the ride on the jury bus back to the parking lot, alternate juror Bostic told Nugent that, because she was only an alternate, she wanted Nugent to know that Bostic's verdict would have been guilty. (11 R 914-15.) Nugent claimed that she was not influenced by Bostic's declaration, but Nugent did not know whether other jurors overheard Bostic's statement. (11 R 917.) When asked by the court whether anyone else overheard, Nugent replied, "I have no idea. I really don't." (11 R 917.) Further, Nugent stated that she did not know whether Bostic had similar conversations with other jurors. (11 R 916.) When the court questioned Bostic, she denied having made such improper remarks to Nugent; the court excused Bostic but left Nugent on the jury. (11 R 943.) Neither the state nor the defense objected to Bostic's excusal or the court's retention of Nugent. (11 R 943.) The court never interviewed the other jurors or alternate jurors to determine whether they overheard the conversation between Nugent and Bostic on the jury shuttle or whether Bostic had similar improper conversations with them. (11 R 913-48.)

III. **The testimony of jury Nugent raised the presumption of the jury being tainted in a manner prejudicial to the defense**

As explained by the First DCA in Ramirez:

> **Deciding a case before hearing all the evidence is antithetical to a fair trial. Due process envisions a court that hears before it condemns and renders judgment only after proper consideration**

> **of issues advanced by adversarial parties.** In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals.

Ramirez, 922 So. 2d at 390 (emphasis added). Where alternate juror Bostic informed another juror prior to deliberations that she would find the defendant guilty, this juror violated the trial court's instructions. Williams v. State, 793 So. 2d 1104, 1107 (Fla. 1st DCA 2001) (If premature deliberations occurred, the jurors violated the trial court's instructions) (citing See Fla. Std. Jury Instr. (Crim) § 1.01, at 4 (Pretrial Instructions) ("You should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the argument of the lawyers and the instructions on the law by the judge. Until that time you should not discuss the case among yourselves.")).

After Nugent came forward and informed the court of this improper premature jury deliberation that Bostic initiated on the jury shuttle, a prima facie showing of prejudice existed. See Williams, 793 So. 2d at 1107; Russ v. State, 95 So. 2d 594, 600-01 (Fla. 1957); Ramirez, 922 So. 2d at 390. This shifted the burden to the state to rebut the presumption of prejudice. Williams, 793 So. 2d at 1107; Johnson v. State, 696 So.2d 317, 323 (Fla. 1997); Gray v. State, 72 So. 3d 336 (Fla. 4th DCA 2011). However, the state took no action to rebut the presumption, i.e., the state failed to request that the remaining jurors and alternate jurors be questioned. (11 R 913-48.) As explained by the First DCA in Ramirez,

"Deciding a case before hearing all the evidence is antithetical to a fair trial."

Ramirez, 922 So. 2d at 390. Based on these principles, once the court became aware the premature deliberations had taken place, the proper remedy was to order a new trial, unless the state could prove that the defendant was not prejudiced by the juror misconduct. Id. at 390.

The court thus, with or without a motion from counsel, should have conducted interviews with the remaining jurors as to whether they heard the comments from Bostic. See, e.g., Roberts, 66 So. 3d 401. Once a "suggestion of bias" has arisen, it is the duty of the trial court to "adequately inquire" into what prejudicial effect may have occurred. Id. at 403 (Fla. 4th DCA 2011). It was essential to determine whether there existed a reasonable doubt as to the impartiality of any of the remaining jurors. Busby v. State, 894 So. 2d 88 (Fla. 2004); § 913.03, Fla. Stat. Given the narrow confines of the jury shuttle, it is quite likely other jurors did heard Bostic's definitive statement that she believed the defendant was guilty. Such a prejudicial statement, particularly without any assurance from those who were within earshot that the statement did not affect their opinion of the case or their ultimate verdict, undermines the legitimacy and impartiality of the verdict reached in this case.

IV. **The trial court's failure to inquire further constitutes fundamental error**

The trial court's decision to ignore the possibility that other jurors overheard Bostic's improper comments or may have engaged in similar conversations with Bostic is subject to an abuse of discretion standard. Roberts, 66 So. 3d at 404; Gonzalez v. State, 511 So. 2d 700, 701 (Fla. 3d DCA 1987). It would have been easy and harmless to ask the remaining jurors whether Bostic told anyone else what the ultimate verdict should be. The trial court's failure to take that small step to ensure that the defendant's jury was not tainted was an abuse of discretion. This case is similar to the line of cases dealing with an alternate juror engaging in deliberations with the jury, in which fundamental error has been found, even where trial counsel lodged no contemporaneous objection. See, e.g., Fischer v. State, 429 So. 2d 1309, 1311-12 (Fla. 1st DCA 1983); United States v. Beasley, 464 F. 2d 468 (10th Cir. 1972). It is impossible to know whether the jury was improperly influenced by Bostic's clear violation of the law in failing to heed the court's jury instruction; thus, the trial verdict should be overturned.

For the above reasons, alternate juror Bostic's misconduct resulted in violations of Mr. Sheppard's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sec(s) 9, 16, Constitution of the State of Florida, requiring that a criminal defendant must have due process of the law and the jury verdict must be impartial. As such, Sheppard's conviction resulted in cruel and unusual punishment under the Eighth Amendment

of the U.S. Constitution and Article I, Sec. 17, Constitution of the State of Florida, and conviction and sentence should be reversed.

ISSUE IV

FUNDAMENTAL ERROR OCCURRED WHEN THE STATE'S MAIN WITNESS TESTIFIED THAT SHE WAS WORRIED THAT SHEPPARD WAS GOING TO MURDER HER AND HER FAMILY IN VIOLATION OF SHEPPARD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

I. Introduction

State witness Barrett, who could not identify Mr. Sheppard in an initial police line up and who allegedly witnessed the shooting of Marquell Wimberly, improperly informed the jury that she escaped a police squad car, then fled the scene of the crime, evading further officer questioning, because she was worried that the assailant would kill her and her family. Ms. Barrett's improper testimony inflamed the passions and minds of the jury, encouraged the jury to convict Sheppard based on bias and generalities, and resulted in a "golden rule" type of violation.

II. Witness Barrett's improper statements

During the guilt phase, the state called Ms. Barrett, who worked as a security guard at an apartment complex located near one of the crime scenes. (9 R 414-17.) She testified that she watched the drive-by shooting of the victim, (9 R 418),

called the police, (9 R 420), then saw Mr. Sheppard hanging out of the passenger seat of the assailants' car, (9 R 420-29).

She then testified that she ran toward the scene because she thought the victim was her nephew. (9 R 433.) When questioned by the state about why she fled the crime scene after speaking to law enforcement:

> State: And at some point in time, did you, for lack of a better term, run off?
>
> Witness: Yes.
>
> State: [W]hy did you do that?
> Witness: 'Cause I have kids and if — **if that gentleman shot a baby in broad daylight, I'm thinking what he going to do to me and my kids?** And I left. I mean, they had me in a police car, you know, right there where everybody can see me sitting there, and you know, they didn't -- **I mean, to me they didn't think about whether he can come kill us or whatever**. And I wanted to get out and get to my kids and leave.

(9 R 435.)

On re-direct examination, the state brought the witness's attention to the person in the passenger seat of the car, and she again engaged in improper testimony:

> State: What were you looking at [at] that point in time?
> Witness: I was looking at his face. **I was really looking at him, making sure he wouldn't come kill me**, and I was really trying to get — thinking that was my nephew.

(9 R 433.) Following this testimony, the court conferred with the parties outside the jury's presence and stated the following:

> Court: In all trials, I try to spot any potential error in advance. . . . It just occurred to me that when [the] last witness said . . . she was concerned that whoever did this might come do the same thing to her and/or her family.
>
> ***
>
> [I]f you-all address that in closing arguments, be very careful, State, because that's — if that's not worded correctly, it could be a golden rule violation. **The jurors should not be put in the position where anyone suggests to them that they or their families would be in jeopardy . . . .**
>
> ***
>
> **As a juror sits there and listens to that witness testifying as she did, we're getting a little close [to a golden rule violation],** and therefore I wanted — as I've got a duty in any case but especially in a first-degree murder capital homicide — or first-degree capital murder case, double homicide in this case, **let's be real careful that we avoid the golden rule.**

(9 R 464-65) (emphasis added.)

III. **Applicable law**

The prosecution and its witnesses may not put prejudicial, potentially misleading inferences and conjecture about the defendant before the jury. Dawson, 585 So. 2d at 445. In Dawson, where the trial court allowed the arresting officer to testify that people on crack generally rob and steal to get money to buy more crack and that the officer knew of cases where people on crack have robbed their own grandmothers, the appellate court reversed finding, "**The only purpose of such**

testimony is to place prejudicial and misleading inferences in front of the jury. " Id. at 445, citing Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) (emphasis added) (internal citations omitted).

Additionally, characterizing the defendant as a violent person can violate the prohibition against "impermissibly inflam[ing] the passions and prejudices of the jury with elements of emotion and fear." Brooks, 762 So. 2d at 900, Urbin, 714 So. 2d at 420 n.9; Cochran v. State, 711 So. 2d 1159, 1162 (Fla. 4th DCA 1998) (quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)). As held by this Court in Bertolotti, one must take care not to "inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Id. at 134 (Fla. 1985).

Finally, the state and its witness must not engage in "golden rule" statements that invite the jurors to place themselves in the victim's circumstances. Mosley, 46 So. 3d at 520; see e.g., Urbin, 714 So. 2d at 42; Garron, 528 So. 2d 353 (holding that the state committed a golden rule violation where the state asked the jury to imagine the victim's pain). Under well-established Florida law, golden rule statements are improper, are not evidence, and impermissably inflame a jury's sympathy, prejudice, and passions to the detriment of the accused. Lugo v. State, 845 So. 2d 74, 106-07 (Fla. 2003), Mosley, 46 So. 3d at 520; see also, Bailey v.

State, 998 So. 2d 545, 555 (Fla. 2008).

IV. **Sheppard's case**

In Sheppard's case, like the officer in Dawson who testified that all crack addicts would steal from their own grandmothers to buy their next hit, witness Barrett's statements that Sheppard was going to hunt her down and kill her and her family was based on her generalization and bias, and had no place in Sheppard's trial. Dawson, 585 So. 2d at 445. Ms. Barrett did not know the assailant she allegedly saw shoot Mr. Wimberly, he never threatened her, and she had no reason to suspect, aside from her fears and personal bias that the assailant would take her life if she was seen speaking to law enforcement. Like the officer's opinions in Dawson regarding his personal biases against crack addicts, Ms. Barrett's personal belief that Mr. Wimberley's shooter would kill her and her children was irrelevant, misleading, and prejudicial to Sheppard's case. Id. at 445.

Ms. Barrett's unfounded testimony that she feared for her life "impermissibly inflamed the passions and prejudices of the jury with elements of emotion and fear," a prosecutorial tactic condemned by this Court. Brooks, 762 So. 2d at 900, Urbin, 714 So. 2d at 420 n.9. Furthermore, Ms. Barrett's statements were an emotional response to the assailant that had nothing to do with the evidence in the case, and unquestionably encouraged the jury to render a verdict based on "emotional response to the crime or the defendant rather than the logical

analysis of the evidence in light of the applicable law." Bertolotti, 476 So. 2d 134.

Finally, the state's witness created an imaginary scenario that invited the jurors to imagine the witness in the same circumstances. As stated by the trial court, in expressing its concern with Ms. Barrett's testimony, "The jurors should not be put in the position where anyone suggests to them that they or their families would be in jeopardy. . . ." (9 R 464-65.) The witness's statements improperly suggested that she had reason to fear that Sheppard would kill her, inferring that Sheppard, upon seeing the victims, might try to harm them or their families. This statement infers that Sheppard would seek to kill anyone who stands in his way and invited the jurors to put themselves in Ms. Barrett's place. These types of statements must be condemned in Florida courts. Lugo, 845 So. 2d at 106-07, Mosley, 46 So. 3d at 520; see also, Bailey, 998 So. 2d at 555.

V. **Barrett's comments constitute fundamental error**

The witness's statements here were pure speculation on her part and it conjuring an imaginary scenario, which invited the jury to imagine their families in the same circumstances as the victim. Ms. Barrett's comments, like the officer's statements in Dawson, were based on the witness' own prejudice and bias and invited the jury to render a verdict based, not on the facts before it, but on their emotions created by this witness' guesswork. These comments, which encouraged

the jury to render its verdict on fear and emotion rather than the evidence in the case, are precisely the type of comments condemned in Brooks and Bertolotti.

The witness' statements were irrelevant and prejudicial and also suggested the defendant, in violation of Florida Statutes § 90.404(1), had a propensity to kill.

Ms. Barrett's improper statements in this case resulted in fundamental error where the guilty verdict could not have been obtained without the assistance of the state witness' improper statements. McDonald, 743 So. 2d at 505. The witness was the only person who allegedly witnessed the shooting and/or placed Mr. Sheppard at Mr. Wimberly's crime scene. The state relied on Ms. Barrett's testimony extensively in closing argument to demonstrate that Sheppard was guilty of the Wimberly crime. (11 R 959, 962-965.) Non-coincidentally, the Wimberly crime was the only one for which Sheppard was sentenced to death. Where this critical state witness not only testified about what she allegedly saw, but what she **imagined**, fundamental error occurred.

For the above reasons, the state witness' comments violated Mr. Sheppard's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sec(s) 9, 16, Constitution of the State of Florida, that a criminal defendant must have due process of the law and the jury verdict must be impartial. As such, Sheppard's conviction resulted in cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution and Article I, Sec. 17,

Constitution of the State of Florida, and conviction and sentence should be reversed.

ISSUE V

THIS COURT MUST VACATE THE DEATH PENALTY BECAUSE THE SENTENCE IS DISPROPORTIONATE IN SHEPPARD'S CASE WHERE IT IS NOT ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED CASES AND A SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

I. Introduction

This is a single aggravator case involving significant, compelling mitigation, which tends to show that the crimes Billy Sheppard allegedly committed were the end-result of a traumatic and heartbreaking life. Sheppard suffers from a low IQ, was a follower since birth, and did not learn to speak until he was four. His father died of sickle-cell anemia when Sheppard was eight and passed the deadly disease on to him; his mother was a drug and alcohol addict who shuffled the family from home to home, failing to consistently provide basic necessities such as food and electricity; his mother was violent to Sheppard; he lived in a proverbial "war-zone" where it was normal to hear gun blasts everyday; he has a sixth-grade education; beginning at 14 years of age, he spent a quarter of his life in adult prison, and became institutionalized in the process; and in 2008, shortly after his release from

prison, he lost his stepfather to cancer, was gunned down in a drive-by shooting, and his best friend was shot to death. Shortly thereafter, at only 21 years of age, he was charged with the instant crimes.

II. **Legal background**

The Eighth Amendment of the United States Constitution states that "cruel and unusual punishments [shall not be] inflicted." According to the Supreme Court, this clause "prohibits . . . sentences that are disproportionate to the crime committed." Solem v. Helm, 463 U.S. 277, 284 (1983). In deciding whether the death penalty is the appropriate penalty, this Court must consider the totality of the circumstances in the case in comparison to other cases. Id. The death penalty is not warranted unless the crime falls within the category of both the most aggravated and least mitigated of murders. Almeida, 748 So. 2d at 933, cert. denied, 528 U.S. 1181 (2000).

"[D]eath is not indicated in a single-aggravator case where there

issubstantial mitigation." Id. at 933. **Only in cases involving "nothing or very**

little in mitigation" should death be affirmed in a case involving only one aggravator.[4] Songer, 544 So. 2d at 1011.

III. **Substantial mitigation presented in penalty phase and Spencer hearing**

The mitigation in Mr. Sheppard's case, derived from the testimony and letters of Sheppard's family members and friends, is substantial and compelling.

Sheppard's struggles began when he was born. (4 R 629, 633-34.) His grandmother, Bessie Walker, in a letter to the trial court, explained, "when Billy was born, it didn't take long before the family knew that he was not like the other children [,] we knew something was wrong." (4 R 629.) Sheppard "was a little different from the rest of the children…" (13 R 1244.) She "tried to get him in a program for special people, but I am only his grandmother, I could get little help." (6 R 629) (emphasis added.) She stated that Sheppard was always smaller than the other kids his age. (13 R 1244.) She informed the court that when he was a child, "[w]e used to work with his hands, speech and walking." (6 R 629) (emphasis added). "Billy likes to sing but because of his [speech] disorder" no one could

4 It is Appellant's position that this Court should also endeavor to "look outside the universe of cases in which the jury imposed the death sentence" and further its search to discover similar cases where the state did not even seek death. Walker v. Georgia, 555 U.S. 979, 982-983 (2008) (Stevens, J. statement respecting denial of petition for writ of certiorari). "**Cases in both of these categories are eminently relevant to the question whether a death sentence in a given case is proportionate to the offens**e." Id. See e.g. Mortimer v. State, 100 So. 3d 99 (Fla. 4th DCA 2012); Payne v. State, 74 So. 3d 550 (Fla. 5th DCA 2011); Hicks v. State, 45 So. 3d 518 (Fla. 4th DCA 2010); Brinson v. State, 18 So. 3d 1075 (Fla. 2d DCA 2009); Denmark v. State, 646 So. 2d 754 (Fla. 2d DCA 1994).

understand him. (4 R 630-31.) His grandmother begged the court to sentence Sheppard to life because, "God gave us this special child." (4 R 630-31.)

Similarly, Sheppard's mother, Kathryn Lunford, described him as a "good kid, but slow." (4 R 633 (emphasis added). She explained that he suffers with a low IQ. (4 R 634.) He did not learn to speak until he was four years old and he was in classes for speech-language impairment (SLI) and was placed on medication when he started school. (4 R 633.) In addition to his cognitive and developmental delays, Sheppard suffers with sickle cell anemia, a serious genetic disorder, which leads to premature death (this same disease caused the death of his father and two aunts). (4 R 629; 13 R 1250, 1255.)

Sheppard's difficulties were not limited to low IQ, developmental delays, genetic disease, and learning disabilities. Sheppard's home life was in shambles, too. Sheppard's father, with whom he had a relationship, died of sickle cell anemia when Sheppard was eight years old. (13 R 1250.) Sheppard fell into a depression after his father passed away. (13 R 633.)

Moreover, Sheppard's mother was a severe drug and alcohol addict from the time that Sheppard was six months old, when she and Sheppard's father broke up. (13 R 1249-50.) Her drug and alcohol dependency rendered her unable to care for her children. (13 R 1249-50.) Quintina Sheppard, Sheppard's sister, explained that life with their mother was "difficult." (13 R 1234.) Sheppard and Quintina were

passed back and forth between their mother and grandmother, depending on whether their mother was sober or suffering from a "relapse." (13 R 1243, 1249, 1255.)

Sheppard grew up in poverty. When he and Quintina lived with his mother, they moved "every couple of months" because, as Quintina explained: "she just wasn't paying the bills, or it would be something wrong with where we lived. We just moved a lot." (13 R 1256.) There were times that they wouldn't have enough money for food or electricity. (13 R 1256-7.) When their mother suffered a relapse, she would use drugs, drink heavily, and was "drunk all the time." (13 R 1255.) Their mother was extremely violent to Sheppard when high. (13 R 1256.) Sheppard ultimately ran away from his mother's house due to her addiction and violence. (13 R 1256.)

When Sheppard lived with his grandmother, Bessie Walker, he had a purportedly stable home. (13 R 1257.) But, as described by Quintina, it was hard living with their grandmother because children want their mother to be around. (13 R 1254.) Additionally, trouble lurked just outside the door. The sound of gunshots was normal for Sheppard growing up – he heard shots nearly every day at his grandmother's house. (13 R 1257.) Unsurprisingly, given the bad neighborhood at his grandmother's, Sheppard fell in with a negative group of friends. (13 R 1244.) He struggled to fit in because of his developmental issues, low IQ, and small

stature, trying to "buy friendship" with the social security money he was given due to his father's death. (13 R 1244, 1246.) As aptly stated by Sheppard's aunt, Evangelist Cummings, "[m]y nephew is a follower," "you tell him something to do and [he] being what I call stupid will do these things." (4 R 635) (emphasis added). He is a few "floors short. . .[so] people took advantage of him." (4 R 635) (emphasis added.) Even Sheppard's younger cousin, Muffin, also described Sheppard as a follower: "when your [sic] not dealing with a full deck (basically not smart) anyone can take advantage of you…" (4 R 639.) Ultimately, Sheppard ended up going to prison at 14 years of age. (13 R 1244.)

Sheppard was released from prison when he was 20 and was not the same after that. (13 R 1258.) He arrived back into the world uneducated. (4 R 636, 638.) He lived with his sister because he had become institutionalized in prison and struggled with life on the outside. (13 R 1258.) Quintina described that he would get up extremely early in the morning, barricade himself in the room with the bed before he would go to sleep at night, and had to sleep with the lights on. (13 R 1258.)

Following Sheppard's release from prison, life did not improve and was punctuated by further trauma and the deaths of his loved ones. In February 2008, his stepfather, with whom he developed a bond, died of cancer. (4 R 633; 13 R 1251.) Then, Sheppard nearly died when he caught three bullets in a drive-by

shooting. (13 R 1251.) Finally, Sheppard's best friend since childhood was killed in a drive-by shooting just 30 minutes after leaving Sheppard's side. (4 R 633.) Sheppard took his friend's death very hard. (13 R 1259.) This was apparently the last straw. As observed by Sheppard's mother, he was "really hurt" by the tragic events in his life and needed to "get some help." (6 R 634.) The crimes for which Sheppard was convicted occurred shortly thereafter, on July 20, 2008, when Sheppard was just 21 years old.

Despite Sheppard's low IQ, learning and developmental disabilities, personal loss, and chaotic home life, friends and family members testified that Sheppard always maintained a positive, upbeat attitude. (e.g. 13 R 1234-5.) Sheppard has a positive relationship with friends and family members, encourages his younger relatives to do well in life, and is good with children. (13 R 1258, 3 R 668.) Sheppard helped his grandmother around the house and was respectful and protective of her. (13 R 1242-1244.) He always made an effort to make other people feel better. (13 R 1237.) Even while he was incarcerated he reached out to people and offered support and kindness in phone calls and letters. (13 R 1230, 1238, 1240.) When he was released from prison after his childhood crime, Sheppard helped his aunt, who was critically ill. He kept her company, cleaned for her, and made sure she had medication. (13 R 1245.)

Sheppard is deeply loved by his family members, who have been profoundly

affected by his alleged crimes and the trial process. (e.g. 4 R 628.) Following his latest convictions, his family regards him in a sadly sympathetic manner – as stated by his cousin, Cheryl Cummings, "**please do not put this child to death, and I say child because…he is still thinking and acting like a child**." (4 R 637-38) (emphasis added).

IV. The "age" statutory mitigator should be given great weight in assessing the proportionality of the death sentence

This Court in Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998), discussed the proper application of the age statutory mitigator where there was "'much' more than his chronological age to be considered which should have compelled the trial court to link those factors to his age or maturity as mitigation." Citing Echols v. State, 484 So. 2d 568, 575 (Fla. 1985).

The trial court in Mahn improperly rejected the statutory age mitigator with the following statement in its sentencing order:

> "The double murder took place on the Defendant's 20th birthday. None of the doctors that testified said that the Defendant was retarded. The Defendant had recently received his GED. The Defendant knew the difference between right and wrong. The Defendant's age at the time of the crime is not a mitigating factor."

Mahn, 714 So. 2d at 400. This Court, on review, found that Mahn was far from a normal nineteen-year old boy at the time of the killings:

> **Mahn had an extensive, ongoing, and unrebutted history of drug and alcohol abuse, coupled with lifelong mental and emotional instability. Mahn's unrefuted, long-term substance abuse, chronic**

> **mental and emotional instability,** and extreme passivity in the face of unremitting physical and mental abuse **provided the essential link between his youthful age and immaturity which should have been considered a mitigating factor in this case**.

Id.

Sheppard has nearly identical mitigating factors to Mahn, linking his age to the facts and circumstances of the crime: he has a history of drug abuse and admits that he was high at the time of the crime (4 R 673); he endured lifelong instability and poverty due to his mother's addictions (e.g. 13 R 1256-7); he witnessed and endured unrelenting violence at the hands of his mother (13 R 1256); was a chronic follower (4 R 635, 3 R 1244) who would do whatever his "friends" told him, (13 R 1244, 1246); and he was raised in an extremely violent community where he heard gunshots every day, he was shot three times, and his best friend was gunned down.

The trial court in this instant case, like Mahn, focused on specific characteristics of the defendant (i.e. the fact that he was a "loving relative and friend who would care for the sick" and the "criminal history set forth in his PSI paints a picture of someone with life experiences not commensurate with an immature 21-year-old…") to support its contention that Sheppard's age of 21 was not especially mitigating, while ignoring the full picture that Sheppard was anything but an "average" 21 year old, which "should have compelled the trial court to link those factors to his age or maturity as mitigation." Id. (4 R 667.)

V. **This is a single aggravator case**

The only aggravator sought and applied in this case was that Mr. Sheppard was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person, pursuant to Florida Statute § 921.141(5)(b). (4 R 663.) The state used the contemporaneous murder charge and two prior violent felonies to support the aggravator. The state and defense stipulated to two felonies (aggravated battery with a firearm), which arose from the same criminal episode and occurred when Sheppard was just 14 years old.[5] In considering this aggravating factor, the crimes that Sheppard committed as a child should not be given significant weight because, although Sheppard was sentenced as an adult for these crimes, he was merely a child. He was placed behind prison bars to learn the nefarious ways of hardened criminals instead of attending high school, receiving rehabilitative services, or otherwise developing life skills to cope with his situation. Johnson v. State, 720 So. 2d 232 (Fla. 1998).

VI. **This case is analogous to other cases where the death penalty has been found disproportionate**

The substantial, compelling mitigation in this case and single aggravator weigh in favor of a life sentence. Songer, 544 So. 2d at 1011 ("We have in the past affirmed death sentences that were supported by only one aggravating factor, **but**

5 The law is clear that, although Mr. Sheppard committed more than one prior violent felony, the crimes must be weighed as a single aggravating factor. Bright v. State, 90 So. 3d 249, 261 (Fla. 2012).

those cases involved either nothing or very little in mitigation" (emphasis added)).

A. **This case is more mitigated and less aggravated than Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988), where this Court found death disproportionate and vacated the death penalty**

Livingston broke into a house around noon on February 18, 1985, and stole two cameras, a .38 caliber pistol, and some jewelry. Livingston, 565 So. 2d at 1289. About 8:00 that evening he then entered a convenience store/gas station, shot the female attendant twice, fired one shot at another woman inside the store, and carried off the cash register. Id. The authorities were called, and the police arrested Livingston. Id.

To support sentencing Livingston to death, the trial court found three aggravating factors: **previous conviction of violent felony (contemporaneous attempted first degree murder with a firearm)**; committed during armed robbery; and committed to avoid or prevent arrest. Id. at 1292. Against these factors the **court weighed the mitigating circumstances of Livingston's age and his unfortunate home life and rearing**. The court found the death sentence warranted. However, this Court vacated Livingston's death sentence, stating as follows:

> Striking one aggravating factor [avoid arrest] **leaves only two to be weighed against the two mitigating circumstances found by the trial cour**t. In reviewing a death sentence this Court must consider the circumstances revealed in the record in relation to other decisions and

> then decide if death is the appropriate penalty. Menendez v. State, 419 So. 2d 312 (Fla. 1982); see, State v. Dixon, 283 So. 2d 1 (Fla. 1973). The record discloses several mitigating factors which effectively outweigh the remaining valid aggravating circumstances. **Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth, inexperience, and immaturity also significantly mitigate his offense. Furthermore, there is evidence that after these severe beatings Livingston's intellectual functioning can best be described as marginal. These circumstances, together with the evidence of Livingston's extensive use of cocaine and marijuana, counterbalance the effect of the factors found in aggravation.** Accordingly, we find that this case does not warrant the death penalty and, therefore, vacate that sentence and direct the trial court to resentence Livingston to life imprisonment with no possibility of parole for twenty-five years.

Id. at 1292 (insertion added) (emphasis added). Although Sheppard's prior violent felony aggravator was based on a contemporaneous homicide and two juvenile felonies, Livingston's aggravation is roughly equivalent where he had the prior violent felony aggravator of attempted first-degree murder plus a second aggravating factor. Livingston certainly hoped to achieve a second first-degree murder; after shooting the first victim, Livingston said, "'now I'm going to get the one in the back [of the store].'" Id. (insertion original).

Sheppard, like Livingston, also presented significant mitigation demonstrating a traumatic childhood at the hands of his mother, extreme drug use at and around the time of the crimes, and low intellectual functioning. Sheppard's mitigation is even more compelling than Livingston's where Sheppard lost his

father at a young age and was raised in brutal environment punctuated with rampant gun-violence, Sheppard nearly lost his life after being shot, and he lost his best friend to a drive-by shooting. When the totality of circumstances in Sheppard's case is measured against Livingston, the necessity of vacating Sheppard's death sentence is apparent. See also Robertson v. State, 699 So. 2d 1343 (Fla. 1997); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Urbin, 714 So. 2d at 416.

B. **The mitigation in Sheppard is more significant and the aggravation less significant than McKinney v. State, 579 So. 2d 80 (Fla. 1991), where this court found the death penalty disproportionate**

In McKinney, when the victim stopped to ask McKinney directions to get to I-95, McKinney shot the unsuspecting victim seven times and inflicted two acute lacerations to the victim's head. McKinney, 579 So. 2d 80. McKinney then took the victim's belongings and dumped the victim's body from a car into an alley and drove away. When police and fire rescue units responded to a witness' call, they found the victim semiconscious. Id. He died shortly after arriving at the hospital. Id. Witnesses testified that the victim left Nassau with $11,000 a gold Rolex watch and a wallet, which were not recovered. Id.

The trial court found three aggravating circumstances: The murder was[6] unnecessarily heinous, atrocious, or cruel; the murder was cold, calculated,

6 HAC and CCP were later rejected by this Court.

and

premeditated; and the murder was committed while McKinney was engaged in the commission of a robbery, kidnapping, and burglary. Id.

During the penalty phase, McKinney's mother testified that McKinney was the youngest of seven children and that she raised the children alone. She indicated that McKinney was very slow in school and unable to keep up with his classes. It was revealed that McKinney had borderline intelligence and possible organic brain damage. McKinney's school records show a history of attention deficit disorder in childhood, a learning disability, and chronic disruptive behavior. McKinney also had a substantial drug history. The state, in rebuttal, presented the testimony of two doctors who had found no evidence of mental impairment. However, the state's witnesses only examined McKinney to determine competence to stand trial and had performed no intelligence tests or background investigation. In mitigation, the court found the statutory circumstance of no significant history of criminal activity and gave little or no weight to non-statutory circumstances. Id.

Like Sheppard, the jury in McKinney recommended the death penalty by a vote of eight to four. Id.

In Sheppard, like McKinney, evidence was presented at trial that Sheppard suffers with low intelligence, was developmentally delayed, and was considered by his family and peers to be "different" than other, similarly aged people. Simmons v. State, 105 So. 3d 475, 506 (Fla. 2012) ("[M]ental mitigation that establishes

statutory and nonstatutory mitigation can be considered to be a weighty mitigator…"). Sheppard also had a substantial drug history and was high on marijuana, crack cocaine, and ecstasy at the time of the crimes. Songer, 544 So. 2d at 1011 (finding several mitigating circumstances "particularly compelling," including unrebutted evidence that defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs.") Additionally, Sheppard, unlike McKinney, presented significant mitigation regarding the loss of people close to Sheppard, depression, an impoverished upbringing, dysfunctional home life involving his mother's drug use and violence, and dangerous neighborhood. Additionally, Sheppard presented weighty evidence that he struggled with drug addiction and was on drugs at the time of the crime(s).

The trial court in the instant case also found **and applied the statutory mitigator of age**[7].

Sheppard, like McKinney, was a one-aggravator case involving an act of gun violence (however McKinney, unlike Sheppard, shot his victim 7 times and inflicted head wounds). Considering the totality of circumstances of Sheppard's case as compared to McKinney, it is evidence that the death penalty is disproportionate for Sheppard.

VI. **Sheppard was convicted of first-degree premeditated murder and**

7 And as argued above should have applied great or significant weight to the statutory mitigator where evidence shows that Sheppard's delayed mental age and immaturity were directly related to his crimes.

received the death penalty where his co-defendant, Rashard Evans, was convicted of manslaughter and sentenced a term of 27 years for the same crime

When a capital case involves a co-defendant, this court is required to address the relative culpability of the co-defendants in its mandatory proportionality analysis. Brooks v. State, 918 So. 2d 181, 208 (Fla. 2005). "In cases where more than one defendant is involved, the Court performs an additional analysis of relative culpability guided by the principle that 'equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment.'" Id. (quoting Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002)) (abrogated in part on other grounds).

Additionally, a co-defendant's sentence may be considered as mitigation in a capital case. See e.g. Gonzales v. State, 990 So. 2d 1017, 1022 (Fla. 2008) (noting that co-defendants' sentences considered by trial court as mitigation); Franqui v. State, 965 So. 2d, 22, 27 n. 3 (Fla. 2007) (noting co-defendant's sentence considered by trial court as mitigation).

As pointed out by trial counsel in its Memorandum in support of life for Mr. Sheppard:

> Mr. Evans was also indicted on January 22, 2009, with First Degree Murder (2 counts); Attempted Armed Robbery; Possession of a Firearm by a Convicted Felon; and Grand Theft Auto. Mr. Evans was found guilty of Manslaughter (as to the death of Monquell Wimberly) and Grand Theft Auto. He was found not guilty as to all other charges. Although Mr. Evans had a separate trial, thus a separate and

> independent jury heard evidence as to Mr. Evans' guilt, this Honorable Court had the benefit of hearing all evidence presented to both juries concerning the guilt of each charged defendant…the evidence as to both Mr. Sheppard and Mr. Evans was the same; namely that because they were stealing the car of William Dorsette between the two murders, which car was identified as being the killer car at the second homicide; and ballistics testimony which confirms the same gun was used at both homicides. The only difference between the evidence produced at each trial was that each trial had a separate testifying inmate…

(4 R 616.) Although the state argued that Sheppard was the shooter and Evans was the driver, this Court should consider the **severe disparity in sentences**, where Evans participated in the **same criminal episodes as Sheppard and the jury could have convicted Evans of first-degree murder under the principal theory**. This is especially true where the eyewitness who identified Sheppard as the triggerman initially identified the wrong person in a photo spread. (9 R 424, 426, 428, 442.) The only other witness to implicate Sheppard as the shooter was a jailhouse snitch, Mr. Roberts, a nine-time felon, whose sentencing hearing on a pending charge was put off until his testimony in Sheppard's case. (10 R 745, 747.) Roberts admitted he "[was] hoping that [his assistance in Sheppard's case] gets me out as soon as it possibly can." (10 R 746.) Mr. Roberts offered no evidence that could not be attributed to a reading of Sheppard's police report and court documents. (10 R 744-45, 748-49, 752-55.)

It is evident that where Evans' jury could have convicted Evans of first

degree murder under the principal theory, even upon a finding that he was not the shooter, the single most distinguishing factor between the end result in Evans' case and the end result in Sheppard's was the composition and attitudes of the respective juries and the defense presentations, rather than any real disparity in culpability.

Varying attitudes of respective juries and the presentation of relative defense teams is insufficient reason why one man should receive a death sentence while his co-defendant, inextricably involved in the same criminal episodes, received a term of 27 years. Therefore, Evans' sentence should have been considered as mitigation by the trial court and should be considered by this court in ascertaining proportionality.

All of the reasons discussed above, including the single aggravator and substantial mitigation that includes the statutory mitigator of age and significant non-statutory mitigation, including mental mitigation, weigh in favor of a life sentence, and Sheppard's death penalty should be vacated as disproportionate.

CONCLUSION

For the reasons discussed in the foregoing brief, this Court should reverse and remand for a new trial and sentencing and vacate Sheppard's death sentence as it is disproportionate to his alleged crime(s).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been sent via electronic mail to criminalappealsintake@myfloridalegal.com and via hand delivery to the Office of the State Attorney, 220 E. Bay St., Jacksonville, FL 32202, this 20th day June 2013.

/s/ Rick Sichta
ATTORNEY

CERTIFICATE OF COMPLIANCE AS TO FONT

Undersigned, pursuant to Fla. R. App. Pro. R. 9.210, gives Notice and files this Certificate of Compliance as to the font in Appellant's Initial Brief.

/s/ Rick Sichta
ATTORNEY