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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 REPLY BRIEF

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ARGUMENTS IN REPLY

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING, AS A VERBAL ACT, 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

Appellee incorrectly contends that the statement allegedly made by the co-defendant Evans, which was testified to at trial by Evans' girlfriend, Ms. Powell, was not offered for the truth of the matter asserted. Appellee relies on this incorrect legal conclusion in an attempt to skirt the violated principles of hearsay, Crawford, and Lilly/Bruton. If the Court is persuaded by the Appellant's argument, that truth claims were in fact asserted in the co-defendant's statement, then the Appellee's position fails as to all three of those principles.

I. Co-defendant's statement was in fact offered to attempt to prove something powerful

Powell, in testifying about what she told to Sheppard, was allowed to testify that the co-defendant told her to tell Sheppard to "get rid of the package." As was implied in the state's argument to the jury in closing, this imperative statement contains several implied assumptions, e.g. Sheppard was in possession of a gun, that gun was used in the murder of two people, and Sheppard was involved in those murders. (2 R 963.) If a question of the sort made by the co-defendant were

posed by an attorney to a witness during a trial, the objection would be "assumes facts not in evidence." If this were a logical debate, the fallacy would be "begging the question" or "hidden assumption." This was not a neutral, casual instruction; it was pregnant with meaning and accusation. The Appellee asserts that the statement of the co-defendant has no significance except to set into context Sheppard's response, but clearly the co-defendant's statement itself was strong evidence that the prosecution was eager to put before the jury. In essence, the prosecution was able to put forth an accusation of double murder against Sheppard by his co-defendant without having any of the liabilities of having to put the co-defendant on the stand and subjecting him to cross-examination. This is exactly the type of unfair and harmful situation that Lilly/Bruton, Crawford, and the hearsay rule in general were formulated to avoid.

II. Verbal act doctrine clearly does not apply in this case

Despite the case law presented by the Appellant in his Initial Brief demonstrating that the verbal act doctrine does not apply, the Appellee references the verbal act doctrine in its Answer Brief. As explained by FSC in Banks, "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 actually made, not to prove the truth of what was asserted in it." Banks v. State, 790 So. 2d 1094, 1097-

98 (Fla. 2001). The most obvious example is that statements which form a legal contract should be admitted into evidence. See, e.g., A.J. v. State, 677 So. 2d 935, 937 (Fla. 4th DCA 1996) ("Words of a contract, often characterized as verbal acts, are non hearsay because they have independent legal significance - the law attaches duties and liabilities to their utterance." Citing Text.); 1 Fla. Prac., Evidence § 801.6 (2013 ed.).

Other classic examples of verbal act evidence are suits for slander (e.g., M. F. Patterson Dental Supply Co. v. Wadley, 401 F.2d 167, 172 (10th Cir. 1968) ("In a slander action, evidence of an out-of-court statement which allegedly is defamatory is admissible despite the hearsay rule.")); a conspiratorial agreement (e.g, State of N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1075 (2d Cir. 1988) ("Statements were not hearsay but were admissible as a verbal act describing the making or terms of conspiratorial agreement. The hearsay rule does not exclude relevant testimony as to what the contracting parties said with respect to the making of an oral agreement.")); showing that a person was aware of a certain event (e.g., Smith v. State, 7 So. 3d 473 (Fla. 2009) (Police report found in defendant's room which identified victim as the shooter in a second murder and stated she was going to testify against him was not hearsay since it was offered to "show that Smith had knowledge about Brown being a witness against him and this gave him a motive to have her killed.")); or the actual words used in forming a

drug deal in which the defendant was involved (e.g., McElroy v. State, 100 So. 3d 63 (Fla. 2d DCA 2011), reh'g denied (Nov. 3, 2011)).[1]

Nothing about the co-defendant's alleged statement to his girlfriend that the defendant should "get rid of the package" had legal significance in and of itself. On the contrary, the state put this statement forward so that it could argue in closing that Sheppard was in possession of the gun that was used in these two murders; assumptions were put before the jury by the hearsay accusation of a co-defendant who was insulated from cross-examination by his absence from Sheppard's trial.

III. The Appellee cannot coherently claim both that the statement of the co-defendant was not offered for the truth of the matter asserted and that the co-defendant's statement was relevant

The co-defendant's statement and Sheppard's response to it, only become relevant if, in fact, the co-defendant's statement contained the truth – assertions

[1] Two of the cases cited by the Appellee deal with words uttered during drug deals, which clearly are in a different category than this accusation made by Sheppard's co-defendant. State v. McPhadder, 452 So. 2d 1017 (Fla. 1st DCA 1984); Decile v. State, 516 So. 2d 1139 (Fla. 4th DCA 1987). The Appellee also cited cases with the highly different facts of the setting of a police interview. McWatters v. State, 36 So. 3d 613, 638 (Fla. 2010); Breedlove v. State, 413 So. 2d 1 (Fla. 1982), and a case where a murdered woman's statements made the day prior to the murder to her husband that she had aborted his baby and was now pregnant with the child of another man. Blackwood v. State, 777 So. 2d 399 (Fla. 2000). In one of the cases cited by the Appellee, the court actually found error in admitting the mother's out of court statement along with her son's party opponent response, but found that the error was harmless where the son's incriminating statement mirrored what his mother had stated. Francis v. State, 808 So. 2d 110, 129 (Fla. 2001).

that the Appellant is arguing in this brief, i.e., that the co-defendant was essentially referencing Sheppard's involvement in the murders, his possession of the murder weapon, and the reason why the murder weapon was never found (because Sheppard got rid of it). While the state enjoyed presenting the co-defendant's statement to the jury, the state did nothing to actually connect those dots, in the form of putting forth evidence to link the co-defendant's statement about "the package" and Sheppard's statement about "the gun" to the crimes alleged in this case. These prejudicial statements were recklessly placed before the jury without any reason to have confidence that they had anything to do with the case.

On the flip side, the more strenuously the Appellee argues that the co-defendant's statements clearly pertained to the murders involved here, the more obvious it becomes that getting the co-defendant's accusations before the jury is exactly a side benefit that the state was hoping for in pursuing this line of evidence. The reality is that sufficient evidence was not put forward to make Sheppard's response to his co-defendant's alleged statement of any evidentiary value, or to alleviate ambiguity as to what the jury could actually make of Sheppard's response, e.g., was he guessing as to what the co-defendant might have meant when he said it was a gun. The state failed to provide enough context to give evidentiary significance to Sheppard's statement, and certainly not enough context to make the admission of Sheppard's statement more probative than prejudicial.

IV. The Appellee now argues harmless error, but the prosecutor formerly admitted the powerful nature of this evidence

During the trial, 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.) In the words of the trial court, 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 had to agree that this was tremendously significant material to put in front of the jury — essentially an allegation from the co-defendant that Sheppard was involved and had the murder weapon. In the Initial Brief, the Appellant presented the weaknesses in the prosecution's case, and in light of those the erroneous admission of this tremendously influential hearsay accusation cannot be ignored or interpreted as harmless. The error was not harmless where the jury heard, over defense objection, Evans' instructions to Sheppard for the truth of the matter asserted, that Sheppard had a gun, the murder weapon, and got rid of it as instructed. The error was even more egregious where the state, in closing argument, relied on this comment to patch a previously missing puzzle piece – the missing murder weapon. As such, Sheppard is entitled to a new trial on these grounds.

ISSUE II

THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO PLAY A RECORDING OF THE POLICE REPEATEDLY OPINING SHEPPARD WAS GUILTY OF A MURDER THAT SHEPPARD CONSISTENTLY DENIED COMMITTING, OFFERING THEORIES OF HOW THE MURDER OCCURRED, REPEATEDLY CALLING 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, A VIOLATION OF SHEPPARD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS (restated)

Appellee misses the point of Sheppard's second claim in two critical ways. First, any way you spin the issue, the facts remain that: improper opinions were contained in a lengthy video published to the jury featuring JSO detectives stating that Sheppard was guilty, a liar, a gang-member, a long-time criminal, and that if he were innocent of murder, he would immediately come up with a plausible excuse. The opinions also inflamed the passions and minds of jury, detracted from the jury's fact-finding duty, and switched the burden of proof to Sheppard, among other constitutional problems. See e.g. Jackson v. State, 107 So. 3d 328 (Fla. 2012); Seibert v. State, 923 So. 2d 460, 472 (Fla. 2006); Sparkman v. State, 902 So. 2d 253, 257-58 (Fla. 4th DCA 2005). This is especially true where the inflammatory, inappropriate comments came from law enforcement officers (and in this case the lead detective), who, for good reason, "bring with their testimony an air of authority and legitimacy." Tumblin v. State, 29 So. 3d 1093, 1101 (Fla.

2010); see also Seibert, 23 So. 2d at 472.

While ignoring the case law above, Appellee attempts to justify these highly prejudicial comments by arguing that: they are admissible to "show the effect on Sheppard" (even though the detectives' comments had no relevant effect on Sheppard); to provoke a "relevant incriminatory response" from Sheppard (even though Sheppard did not confess to any crime, but momentary "joyriding"); and to determine whether his "confession" was voluntary (although defense never called into question the voluntariness of Sheppard's interactions with law enforcement, so there was no reason for the state to establish it).

Which leads to the second major flaw in Appellee's argument: the constant opinions of guilt and speculation by JSO detectives within the videotape only provoked a response regarding Sheppard's potential auto-theft, not the homicides. Contrary to Appellee's un-cited recitation of the facts (AB 49), Sheppard never confessed to anything but "joyriding" during his police interrogation. (10 R 617.) Although Sheppard admitted that he drove a car that did not belong to him away from a convenience store, he vehemently denied carjacking. (10 R 617, 618-619.)

Appellee claims "Defendant acknowledged that he and Evans changed seats in the car shortly after it was stolen such that Defendant was seated in the passenger's seat." (AB 49). However, both the trial transcripts at 10 R 620 and the

interrogation video at 25:20[2] demonstrate Appellee's critical factual error. Sheppard **never indicated that he was a passenger in the car**. Instead, Sheppard informed the detectives **that he got out of the car shortly after the joyride began; then, Evans got behind the wheel, and drove off without Sheppard**:

> Sheppard: I got out of it [the car].
>
> Detective: You got out of it?
>
> Sheppard: I got out of it.
>
> Detectives: Rashard took it from there. Any idea who he (inaudible) or who he picked up with him?

(Video 25:20) see also (10 R 620, 622) ("[I]f 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…"). According to Sheppard, he was nowhere near the car when the murder occurred, let alone in the passenger seat. (Video 31:53) ("I wasn't anywhere around there [the scene of the crime] and that's the God's honest truth.") Undeniably, Appellee's critical factual error, overlooking Sheppard's insistence that he was never in the passenger seat, undermines the state's entire argument.

The detectives' own statements demonstrate that the material issue, and the point of the questioning, was not whether Sheppard was a joyrider, but whether he committed the homicides. (10 R 608) ("This is not an auto theft. We don't

[2] Sheppard will hereinafter cite to State Exhibit 44, Sheppard's interrogation video, as Video, time, e.g. (Video 1:11).

normally deal with that kind of stuff.") Where Sheppard denied involvement in any murder, denied carjacking, and denied being in the passenger side of the vehicle, his taped statements and the officers' comments were irrelevant to the case.

Sheppard unfalteringly denied any involvement in any carjacking or homicide. (10 R 616) ("I didn't kill nobody, never seen that boy") (10 R 617) ("I don't know about carjacking") (10 R 617, 618) ("carjacked nobody") (10 R 620) ("didn't have guns.") In fact, the last words out of Sheppard's mouth before the tape cut off, as he looked at a photo of Wimberly, was that he did not "know this man." (Video 32:15.) Based on these facts, Appellee's argument that the tape was relevant to a material issue and that Sheppard "implicated himself in two murders" is completely untrue and unsupported by the record. (AB 54). Even if the officers' statements prior to Sheppard's admission to joyriding **were** allowed, the entirety of the other improper remarks should have been redacted, as Sheppard adamantly denied any involvement to the homicides, despite the officers' repeated demands that he admit otherwise. Sparkman, 902 So. 2d at 257-58.

The weakness of Appellee's argument is apparent from the argument itself. Indeed, Appellee completely ignores all the relevant case law on this issue and omits any discussion concerning whether the officers' statements are unduly prejudicial, inflammatory, an improper comment on Sheppard's guilt, or improperly shift the burden of proof. As Sheppard explained in his Initial Brief,

the state may not engage in insidious, inflammatory, or otherwise improper tactics at trial. Contrary to the Appellee's understanding of the law (AB 53)[3], this is true whether the improper comments occur in closing argument,[4] direct examination,[5] opening statement,[6] or cross-examination.[7] Similarly, impermissible comments are impermissible comments whether they come in through the prosecutor or a state witness. See e.g. Jones v. State, 777 So. 2d 1127, 1128 (Fla. 4th DCA 2001) (law enforcement); Brown v. State, 344 So.2d 641 (Fla. 2d DCA 1977) (improper testimony of both investigating officer and victim's mother). In fact, improper statements that come in through a law enforcement officer are even **more prejudicial**. See e.g. Seibert, 923 So. 2d at 472 ("[i]t is especially harmful for a

[3] (AB 53) ("Each of [Appellant's cited] cases concerned improper comments in closing")

[4] See e.g. Toler v. State, 95 So. 3d 913, 914-18 (Fla. 1st DCA 2012)

[5] See e.g. Jones v. State, 777 So. 2d 1127, 1128 (Fla. 4th DCA 2001)("the trial court erred in failing to grant a mistrial when a detective, during direct examination, made an improper comment on Jones's right to remain silent.") (overruled on other grounds)

[6] See e.g. First v. State, 696 So. 2d 1357 (Fla. 2nd DCA 1997) ("we reverse and remand for a new trial because the prosecutor's opening statement included an improper and prejudicial personal opinion that First's alibi witness was a "liar.")

[7] See e.g. Allen v. State, 38 Fla. L. Weekly S 592, 32-33 (Fla. July 11, 2013) ("On cross-examination of Dr. Wu, the prosecutor clearly attempted to elicit improper testimony about the possible future dangerousness of Allen. Both of the State's assertions, that the defense opened the door to this line of questioning by asking Dr. Wu if Allen's lack of impulse control could occur at any time, and that the State's questions were not to show future dangerousness but to discredit Dr. Wu's opinion that she lacked impulse control, are disingenuous. It is clear that the State was attempting to improperly allege Allen's future dangerousness, without a valid basis.")

police witness to give his opinion of a witness' credibility because of the great weight afforded an officer's testimony.") (citing Page v. State, 733 So. 2d 1079, 1081 (Fla. 4th DCA 1999).)

Assuming arguendo, that Appellee's arguments were correct, law enforcement and prosecution would be given the go-ahead to commit an array of constitutional infringements and play them in front of a jury. For instance, the police would be able to do or say whatever they wanted during an interrogation, regardless of the inappropriateness, prejudicial quality, or speculative nature of the comments, if the statements provoked even minor responses to tangentially relevant issues **and then the prosecutor would be allowed to present this nonsense to the jury as "proof" of guilt**. Such trampling of a defendant's constitutional rights is, of course, exactly what cases like Jackson and Sparkman have tried to prevent. Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991) ("It is well settled that due process requires the state to prove every element of a crime beyond a reasonable doubt…Accordingly, the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence.")

The error in allowing the jury to view Sheppard's interrogation, without so

much as a limiting instruction from the court, was fundamental in nature.[8] The state, in playing Sheppard's interrogation, shifted the burden of proof to Sheppard by stating that he had to raise a defense to the detectives, otherwise a jury would never believe him. (10 R 625.) Of course, it is the state's burden to prove beyond a reasonable doubt that Sheppard killed the victims. Sheppard did not have to prove anything. As in Jackson, the comments of the detectives played to the jury here led the jury to believe that Sheppard carried the burden of proof to raise a defense immediately upon questioning. In inferring to the jury that Sheppard had a duty to come forth with information, the prosecutor shifted the burden because a defendant never has a duty to prove anything. Hayes v. State, 660 So. 2d 257, 265 (Fla. 1995) ("The prosecutor's questions and statements in the instant case may have led the jury to believe that Hayes had an obligation to test the evidence found

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[8] The error in this case was not objected to by defense counsel, and thus the doctrine of fundamental error applies. However, it was not "invited" where the error came in through a state witness and state video exhibit on the prosecutor's direct examination. Failing to object "does not trigger the doctrine of invited error." United States v. Dortch, 696 F.3d 1104, 1112 (11th Cir. 2012). Furthermore, to the extent that Appellee argues that the error was invited by stipulation or otherwise, and thus, invited error trumps any fundamental error in this case, this court has previously not applied the invited error doctrine even where defense counsel **affirmatively agrees** to an improper course of action such as a flawed jury instruction. See e.g. State v. Montgomery, 39 So. 3d 252, 258 (Fla. 2010). As in Montgomery, the nature of the error in Sheppard goes to the heart of his due process rights where the state not only shifted the burden on proof but repeatedly suggested to the jury that Sheppard should be convicted because he is a liar, a gang member, a career criminal, and that he was guilty of the crimes. Jackson, 575 So. 2d at 188.

at the scene of the murder and to prove that the hair and blood samples did not match his own. Clearly, Hayes had no such obligation.")

The detective's repeated assertions that Sheppard was a liar are similarly prejudicial and inappropriate. (e.g. 10 R 609) ("Is everything out of your mouth a lie because so far you are lying and batting a thousand"); Wash. v. State, 687 So. 2d 279, 280 (Fla. 2d DCA 1997) ("It is 'unquestionably improper' for a prosecutor to state that the defendant has lied." Such a statement constitutes an improper opinion of a prosecutor) (citing O'Callaghan v. State, 429 So. 2d 691, 696 (Fla. 1983); First v. State, 696 So. 2d 1357 (Fla. 2nd DCA 1997) ("we reverse and remand for a new trial because the prosecutor's opening statement included an improper and prejudicial personal opinion that First's alibi witness was a 'liar.'")

Likewise, the detectives' inferences that Sheppard had an extensive criminal record (10 R 614) ("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") and that he was a gang member (10 R 612) ("I know you're PYC") (10 R 614) ("PYC, you didn't steal a car?) were unduly prejudicial as the jury was encouraged to convict Sheppard because he was a menace who should be removed from the streets. See e.g. Alcantar v. State, 987 So. 2d 822, 825 (Fla. 2nd DCA 2008) ("The probative value of this testimony [concerning defendant's criminal history] was far outweighed by the undue prejudice it was sure to create."); Love v. State, 971 So.

2d 280, 287 (Fla. 4th DCA 2008); United States v. Jernigan, 341 F.3d 1273, 1284-1285 (11th Cir. 2003) ("we do not wish to understate the prejudicial effect that evidence of a criminal defendant's gang membership may entail. Indeed, modern American street gangs are popularly associated with a wealth of criminal behavior and social ills, and an individual's membership in such an organization is likely to provoke strong antipathy in a jury."); Gomez v. State, 751 So. 2d 630, 632 (Fla. 3d DCA 1999).

The bottom line is that the state would not have been permitted, through any other vehicle, to reiterate over and over that the lead detective(s) in the case believed that Sheppard was guilty of murder, repeatedly call Sheppard a liar, to state that he had an obligation to come up with a defense upon interrogation or he should not be believed by the jury, inform the jury that Sheppard was a gang member and had a gang tattoo, or inform the jury that Sheppard has an extensive criminal history. Where the videotaped interrogation allowed the state to present all of this improper information to the jury and its only relevance was to link Sheppard to the driver's side of the car before he exited the vehicle and Evans drove away, the prejudicial nature of this tape substantially outweighed its probative value and it's publication to the jury as evidence during the trial constituted fundamental error. See §§ 90.402, 90.403, Fla. Stat.

ISSUE III

THE COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE PREJUDICE INQUIRY INTO PREMATURE JURY DELIBERATIONS RESULTING IN VIOLATIONS TO SHEPPARD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Appellee concedes that premature jury deliberations may lay the foundation for reversible error, but argues that a "little" premature jury deliberation is okay. (AB 58.) Sheppard disagrees. As articulated by this Court in its recent Matarranz opinion:

> **Maintaining the sanctity of the jury trial is both critical and integral to the preservation of a fair and honest judicial system.** It is also significant to the trust and confidence our citizens place in the judicial system.…Without the "[e]xercise of calm and informed judgment" by the jury, we cannot expect "proper enforcement of law." Id. **Consequently, a failure to ensure that our jury panels are comprised of only fair and impartial members renders suspect any verdict reached.**

Matarranz v. State, 2013 Fla. LEXIS 2074, 2-3 (Fla. Sept. 26, 2013) (emphasis added). The principals espoused in Matarranz, a juror bias case, apply with equal force to issues of juror misconduct. For the reasons articulated in Matarranz, the state and trial court had a duty, upon notification of juror misconduct in the form of Bostic's premature deliberation, to ensure that the jury was comprised of only fair and impartial members. Because such an inquiry did not take place, the verdict, as it stands, is suspect.

Even if it were true that a "little" premature deliberation is acceptable, we

have no idea whether there was a "little" or a "lot" of premature deliberation in Sheppard's case because the court failed to interview the entire jury about Juror Bostic's premature decision that Sheppard was guilty. (11 R 953.) This is highly problematic because "[e]very defendant has the right in a criminal prosecution to trial by an impartial jury… Juror impartiality is endangered when jurors engage in deliberations before they have heard both sides' evidence and the judge's instructions on the law of the case." United States v. Bradley, 644 F.3d 1213, 1276 (11th Cir. 2011) (referencing U.S. Const. amend. VI).

In Gianakos, an Eighth Circuit case cited by the Appellee, the court explained the seriousness of premature deliberations:

> In order to protect a defendant's Sixth Amendment right to a fair trial, as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt, a jury must refrain from premature deliberations in a criminal case. In re Winship, 397 U.S. 358 (1970). At a trial's beginning, judges typically admonish juries not to discuss the case among themselves or with anyone else prior to its conclusion. **If a jury contravenes that instruction, it is not a light matter.** A legitimate concern that a juror's impartiality is suspect cannot be ignored. "Matters which come to the attention of the trial judge after trial has commenced which may affect impartiality on the part of a juror or jurors command careful consideration." United States v. Rowell, 512 F.2d 766, 768 (8th Cir. 1975).

United States v. Gianakos, 415 F.3d 912, 921 (8th Cir. 2005) (emphasis added). In Gianakos, the Eleventh Circuit found that there was no error because the trial court, following an indication that one juror mouthed "he's guilty" to another juror, admonished the entire jury not to engage in premature deliberations. Id. at 922.

Conversely, the court in Sheppard's case, upon notice that Bostic openly told Nugent that Sheppard was guilty, whilst riding in the jury shuttle, only questioned Bostic and Nugent. The fact that Nugent denied her impropriety, despite sound information to the contrary, was a red flag that she was an untrustworthy juror who may have engaged in other such conversations. Yet, the court did not question the rest of the jury to ensure that no other such discussions had taken place and to ensure that Bostic had not engaged anyone else in similarly inappropriate discussions. Moreover, the court did not remind the entire jury, as in Gianakos, that premature deliberations violate the jury instructions and the defendant's right to a fair and impartial trial. While the Appellee guesses that the juror misconduct in Sheppard's case was limited to Bostic because the jury bus was "noisy," Appellee ignores that Bostic, who was dishonest with the court (11 R 929), may have poisoned other jurors at any time, not necessarily on the jury bus.[9] (11 R 916.) Moreover, despite the apparent noise, Juror Nugent admitted that she "ha[d] no idea" whether anyone else heard Bostic's comment. (11 R 917.)

Where, as stated in Ramirez, Sheppard put forth a prima facia showing that premature jury deliberations occurred, the burden shifted to the state to show that Sheppard was not prejudiced. Ramirez v. State, 922 So. 2d 386, 390 (Fla. 1st DCA 2006). This refutation of prejudice never occurred in Sheppard's case because the

---

[9] Court: Do you know if [Bostic] spoke with any other jurors?
Nugent: No, I don't. (11 R 916.)

state never asked for and the court failed to question each of the jurors about premature deliberations, or at the very least admonish the jury not to engage in such conduct.

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

Barrett's improper comments that she fled from the police because she assumed Wimberly's shooter would hunt her down and kill her and her children had no evidentiary value.

Appellee argues that Barrett's inflammatory, prejudicial comments before the jury were admissible because they were relevant to "anticipatorily rehabilitate" Barrett's credibility where she absconded from police custody after the crimes. (AB 7.) The problem with this argument is that defense counsel in opening statement made it very clear that he had no intention of questioning Barrett regarding her unpermitted disappearance from the crime scene (likely because he knew it would invite Barrett's prejudicial explanation). (9 R 407-08.) Defense counsel's focus was on Barrett's selective memory, not her erratic behavior. (9 R 407-408.)

Furthermore, where Sheppard never threatened Barrett, and Barrett's explanation that she feared for her life was dubious, at best – because she was safely ensconced in a squad car surrounded by officers – any relevance of Barrett's inflammatory testimony was substantially outweighed by the prejudice to Sheppard. The comments were not harmless where Barrett's fear became a theme of the case and the state, in closing argument, all but asked the jury to imagine how terrifying it would be to be in Barrett's position

I. **There was nothing to anticipatorily rehabilitate because Defense counsel never intended to discuss Barrett's flight from the police**

The Appellee overtly misrepresents the facts in stating that the defense, in opening statement, invited Barrett's later improper comments:

> During opening statement, Defendant indicated that a centerpiece of his defense would be the assertion that Barrett was not a credible witness. While Barrett called the police after witnessing the Wimberly murder and remained on the scene when the first officers arrived, she subsequently fled the scene before speaking to detectives. (Vol. 9 at 407-408)

(AB 63-64.) The whole of what defense counsel **actually said** about Barrett in opening statement stayed miles away from Barrett's flight from the police after Wimberly was killed:

> Defense: You're going to hear from Miss Barrett who was standing out in front of that apartment complex, and listen to her carefully and consider the circumstances that she found herself in. Listen to what she says I'm sure of with 1000 percent and what she's not sure of.

> She's going to tell you that the only time she saw anybody in that car was not when they were going down the street 'cause the windows were tinted too dark. But when a person sticks his head out and looks back, that's when she says she sees him for a brief couple seconds. She says she's 1000 percent sure.
>
> We asked her: Well, how many doors did the car have?
>
> I don't remember.
>
> What was the license plate on the car?
>
> Didn't see it.
>
> One digit, the first digit on the license plate?
>
> I don't know. I don't remember.
>
> That's the person who you're going to have to rely on.
>
> You're going to hear that in one of her initial conversations with Detective Bowers, she goes through a whole bunch of photos, whole bunch on the computer system. And she stops on one and she says, maybe this is him. It's not Billy Sheppard. And this is the person who, for a living, stops cars, looks at faces, sends them through. You have to depend almost exclusively on the few seconds she says she saw the person she now says is Billy Sheppard.
>
> You are going to hear from Michael Roberts…

(9 R 407-408.) Defense counsel did not mention Barrett's hightail from the crime scene, likely because counsel knew that Barrett's explanation was highly prejudicial to Sheppard's case.

Without any provocation from the defense, the state went immediately into

this issue on direct examination of Barrett:

State:	And at some point in time, did you, for lack of a better term, run off?
Barrett:	Yes.
State:	[W]hy did you do that?
Barrett:	'Cause I have kids and if – that gentleman shot a baby in broad daylight, I'm thinking what he going to do to me and my kids…I mean, to me they didn't think about whether he can come kill us or whatever.

(9 R 435.)[10] This questioning was not "anticipatory rehabilitation" where there was absolutely no indication that the defense would bring the matter up – the defense had every opportunity to discuss the issue in opening and declined to do so. If defense counsel had raised the issue on cross-examination, the state could have rehabilitated Barrett on re-direct.

Defense counsel's only reference to Barrett's flight from law enforcement **occurred in closing argument** and was a futile attempt to nullify the damage caused by the imagined massacre by Sheppard of Barrett and her family, while reminding the jury that she was a weak witness. (11 R 953-69.)

Even if it is permissible for a witness to explain her evasion of the police based on fear of the defendant, absent invitation from the defense, Sheppard's

[10] Appellee apparently acknowledges that the admissibility of Barrett's initial improper comment before the jury was debatable where she characterizes Barrett's subsequent improper comment as "more admissible." (AB 64.)

imaginary attack on Barrett's family was still irrelevant because it was make-believe and implausible. Each of the cases cited by the Appellee asserting that the testimony was appropriate to bolster Barrett's testimony are misplaced because those cases deal with **actual** threats or bad acts of the defendant. In Doorbal v. State, 837, So. 2d 940, 955 (Fla 2003), the first case cited by Appellee, this Court determined that the effect **of prior statements of the defendant**/appellant were admissible against him to explain why a witnesses evaded police out of fear of the defendant.[11] Id. In Bryan v. State, 533 So. 2d 744, 745-48 (Fla. 1988), this Court discussed the admissibility of the **defendant's prior bad acts** – William's Rule evidence. Doorbal and Bryan are inapplicable to the present situation because those cases dealt with actual bad acts of the defendant; those cases did not involve imaginary, make-believe, or fantastical scenarios concocted by a state witness, as in Sheppard.

II. Any probative value of Barrett's comments were outweighed by the danger of prejudice, confusion of the issues, and misleading the jury

Even if this court should find that Barrett's testimony was somehow relevant, the probative value of Ms. Barrett's testimony was substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading

[11] Furthermore, Sheppard is distinguishable from cases where witnesses waited months or years to come forward to the police with evidence, or did not voluntarily come forward at all. See e.g. Doorbal v. State, 837, So. 2d 940, 955 (Fla 2003). Unlike such cases, the state in Sheppard did not need to explain away a delayed prosecution.

the jury. See e.g. Delhall v. State, 95 So. 3d 134, 155 (Fla. 2012), see also § 90.402-.403, Fla. Stat. The law is clear that improper characterizations by the state or its witnesses, of a defendant as violent or having the propensity to commit violent acts, improperly inflames the passions and minds of the jury with elements of emotion and fear. Brooks v. State, 762 So. 2d 879, 900 (Fla. 2005). Morgan v. State, 603 So.2d 619, 620 (Fla. 3d DCA 1992) ("Evidence which demonstrates that a witness was threatened or in fear for his life is irrelevant and inadmissible if the prosecution cannot link the threats to the defendant.") (citing Duke v. State, 142 So. 886 (Fla.1932); Saunders v. State, 547 So.2d 193 (Fla. 3d DCA 1989), rev. denied, 562 So.2d 347 (Fla.1990); Reeves v. State, 423 So.2d 1017 (Fla.4th DCA 1982).)

Here, the probative value of Barrett's explanation for her actions is marginal where Barrett never met Billy Sheppard and had no personal experience with Sheppard to justify a fear that he would hunt her and her family down and kill them. Ms. Barrett's assertions that she feared the defendant even though she was inside of a patrol car surrounded by police officers is implausible – merely an excuse offered by Barrett to explain-away her unacceptable behavior in evading law enforcement. Her fears that Sheppard would find her family while she was being questioned by the police, even though he had no idea who she was or where she lived, is unbelievable.

III. The error was not harmless where it was pervasive and purposeful

Barrett's vivid description of her fear that Sheppard was going to kill her, and the state's reliance on the comment in closing argument, was not harmless, as argued by Appellee. (AB 66.) Barrett's statements that the police were not thinking of her safety and that Sheppard would "come and kill [me and my family] or whatever" was not isolated and was not accidental. (9 R 435.) The state purposefully brought this information before the jury because villainizing Sheppard and inserting fear into the deliberative process was helpful to the state's case.[12] The state's unprovoked questioning of Barrett regarding her alleged fear of Sheppard came on direct examination. (9 R 435.) Following Barrett's initial inflammatory remarks, the state marched on with this theme again:

> Barrett: I was really looking at him, making sure he wouldn't come kill me.

(9 R 445). Then, in rebuttal closing argument, the state's tour de force, the prosecutor stood before the jury and asked them to imagine themselves in Barrett's position:

> State: [Barrett] stood by, almost paraded in front of God and everybody out there on the street corner in the backseat of a police car, and she got scared. She didn't get scared

[12] It is apparent that one reason the state brought Barrett's inflammatory response before the jury was because her impermissible comment indirectly bolstered the later testimony of Roberts, the jailhouse snitch, that Sheppard attempted to hire him to kill Barrett. And Robert's testimony, in turn, bolstered Barrett's credibility that she had reason to fear for her life.

> because she didn't see anything. She got scared because when she was running out to see that boy on the side of the road and she hit the corner and hit the street to proceed up towards where the shooting happened, that man was looking out of a window this far away from her **(demonstrating)**, ten feet away. She looked at him eye-to-eye and she knew who it was. And that's why she was scared.

(12 R 1007) (parenthetical original) (emphasis added) (see contra, AB 66) ("the State never asked the jury to place themselves in anyone's position.") The tactic employed by the prosecutor in **pantomiming** Barrett's alleged experience not only re-emphasized Barrett's improper testimony on direct, but it was precisely the tactic the trial court previously warned against:

> Court: [I]f you-all [the state] address [Barrett's fear of the defendant] 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…

(9 R 464-65.) Whether one labels the state's tactic as a "golden rule violation" or something else, the desired effect of Barrett's comments and the state's later references to them was to "inflame the passions and prejudices of the jury with elements of emotion and fear," encouraging the jury to render a verdict based on "emotional response to the crime or the defendant rather than a logical analysis of the evidence in light of the applicable law." Brooks, 762 So. 2d at 900, Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985).

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 MIGITATED 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

In arguing that Sheppard deserves to die for Mr. Wimberly's death, Appellee ignores longstanding precedent that requires that **a crime must be both the least mitigated and most aggravated to warrant the death penalty**. See e.g. Almeida v. State, 748 So. 2d 922, 933 (1999).

I. Sheppard's case is highly mitigated

Appellee criticizes defense counsel's penalty phase performance in an attempt to minimized Sheppard's compelling mitigation.[13] (e.g. AB 71). However, **Sheppard's case is inarguably not one of the least mitigated** where the totality of the circumstances in his case include the loss of his father and resultant

[13] It is obviously not Sheppard's fault that his trial attorneys failed to present to the jury evidence that was later presented to the court in letters. In fact, based on the relatively close death recommendation, it is likely that the jury would have recommended life if it had heard all of the mitigation that counsel later put on. Regardless of the procedural vehicle in which this information came before the court, it was relevant and admissible in establishing the appropriate penalty and this Court must consider it in evaluating proportionality. Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996) (Mitigating evidence must be considered and weighed when contained "anywhere in the record, to the extent it is believable and uncontroverted.")

depression at a young age (13 R 1250), poverty (13 R 1256-57), developmental disabilities (e.g. 4 R 629-34; 13 R 1244), low IQ (4 R 633-34), a drug-addicted mother (13 R 1249-50, 1256-57) and resultant childhood instability (e.g. 13 R 1256); he had a middle school grade education (4 R 636, 638), a horrible living environment where gun violence was an everyday occurrence (13 R 1257), he was shot (13 R 1251), and his best friend was gunned down (4 R 633-34; 13 R 1259); he spent the better part of his youth in adult prison (13 R 1244) and became institutionalized in the process (13 R 1258); yet, he had a positive impact on others and bright outlook despite lifelong adversity (e.g. 13 R 1234-35); he fed and cleaned up after his sick family member (13 R 1245); he lost his step-father to cancer (4 R 633; 13 R 1251); Sheppard had drug problems and was high at the time of the crimes (4 R 676); his crime was directly related to his youth and immaturity; the jury came back with an 8-4 jury recommendation for Mr. Wimberly's death (despite that the jury did not even hear the most compelling mitigation in his case); and his co-defendant received a 27-year term rather than a death sentence for the same homicide.

II. **The age statutory mitigator should have been given great weight in this case**

The trial court erred in assigning little weight to the age statutory mitigator. Sheppard was only 21 years of age at the time of the crimes. Defense counsel linked Sheppard's youth and immaturity to the facts and circumstances of the

crime. As described above and in greater detail in the Initial Brief, those who knew Sheppard best described him as "slow" since birth, indicated that he had speech and coordination difficulties as a child, and was a follower. Sheppard spent his formative years incarcerated in adult prison rather than in school.

The court cursorily acknowledged Sheppard's difficult childhood and the fact that he missed major developmental milestones while incarcerated. (4 R 667.) The trial court admitted that Sheppard was likely slower than most individuals in terms of mental development and that Sheppard "had some sort of mental disorder and/or disability." (4 R 667.) However, after pointing out these critical factors, the court dismissed them and did not further discuss them in applying the age mitigator because Sheppard has a criminal history. (4 R 667.) The court allowed the single factor of criminality (which was likely due to Sheppard's exposure to violence, unstable upbringing, developmental delays, drug-addicted mother, and poverty) to overcome all of the other evidence indicating that Sheppard's crime was directly linked to his age and immaturity and likely would not have occurred if he was a normal 21-year-old young man. (4 R 667.)

The state spends several paragraph arguing that the trial court did not abuse its discretion in assigning little weight to this factor because most of the mitigation establishing this claim was not presented to the jury. (AB 71- 72.) However, the sentencing judge is required to consider <u>all</u> of the evidence presented in penalty

phase. Coday v. State, 946 So. 2d 988, 1016 (Fla. 2006) (sentence must consider all relevant mitigating evidence presented). Hearsay letters from Sheppard's family and friends published to the trial court were admissible for consideration in penalty phase and went uncontroverted by the state. Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996) (Mitigating evidence must be considered and weighed when contained "anywhere in the record, to the extent it is believable and uncontroverted"); Campbell v. State, 571 So.2d 415, 419 (Fla.1990) (the evidentiary rules are relaxed in penalty phase and mitigation must only be "reasonably established," not established beyond a reasonable doubt.) Based on the evidence before the trial court directly linking Sheppard's age and immaturity to the crime, the trial court erred in failing to give the requested mitigator great weight.

III. Appellee's contention that death is proportionate based on a comparison to Bolin is without merit

Appellee's contention that Sheppard's case is akin to that of Oscar Bolin, a convicted serial killer, is flawed. (AB 76.) In Bolin v. State, 117 So. 3d 728 (Fla. 2013), Bolin appealed his conviction and death sentence for the murder of Hillsborough County resident Stephanie Collins. Id. In support of the prior violent felony aggravator, the state established that: Bolin previously pleaded guilty, in an Ohio court, to the rape and kidnapping of Gennie Lynn Lefever. Id. at 733. Additionally, Bolin attacked an Ohio jail guard during his attempted escape from

his incarceration for the Lefever crimes. Id. Bolin also killed Teri Lynn Matthews, a Pasco County woman, who suffered blunt force trauma to her head and stab wounds and whose body was found on the side of the road. See Bolin v. State, 869 So. 2d 1196 (Fla. 2004). Bolin received a death sentence for Matthews' murder.[14] Id. Based on these facts, this Court found: "Although there is only one aggravating factor, both the nature of the Defendant's crimes and the underlying facts of those crimes are so egregious that the one aggravating factor far outweighs the mitigating factors in this case." Bolin, 117 So. 3d at 734.

The other single aggravator cases cited by Appellee to establish the proportionality of Sheppard's death sentence are also distinguishable. For instance, Lindsey, of Lindsey v. State, 636 So. 2d 1327 (Fla. 1994), committed **two** prior murders and presented only one nonstatutory mitigator of poor health. Id. at 1329. Mr. Rodgers, in Rodgers v. State, 948 So. 2d 655 (Fla. 2006), had a penchant for viciously murdering his love interests; he also previously committed a robbery. This Court relied on the brutality of his homicides and the fact that he committed the murder in the middle of a day care full of children to uphold the

[14] Bolin has now also been convicted (after three prior convictions and two reversed death sentences) to the second-degree murder of Tampa resident Natalie Blanche Holley. See Bolin v. State, 796 So. 2d 511 (Fla. 2001); Bolin v. State, 642 So. 2d 540 (Fla. 1994). However, this conviction was not final at the time of Bolin's sentencing in the Collins case, so it was not used in his list of prior violence felonies.

death penalty. Id. at 671-672. In Ferrell, the lone aggravator of a prior murder, and the fact that his first murder bore the same "earmarks" of the crime under appeal, outweighed the mitigation where the trial court only assigned "little" weight to each mitigating factor. Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996) (see contra, Sheppard, where the trial court assigned "some" weight to numerous mitigating circumstances such as the violence Sheppard witnessed growing up) (4 R 669).

In Duncan v. State, 619 So. 2d 279 (Fla. 1993), a single prior violent felony aggravator case referenced by the state, the defendant stabbed his fiancé to death and committed an aggravated assault on the fiancé's daughter, because the fiancé had "gone off with a guy" to buy beer. Id. Duncan had been previously convicted of stabbing to death a fellow inmate in prison in a similarly brutal manner. Id. Duncan presented nothing compelling in mitigation, as evidenced by the 12-0 recommendation for death. Id. Oddly, most of Duncan's proposed mitigating factors were based on the non-existence of aggravating factors – e.g. "the killing was not for financial gain."[15] In LaMarca v. State, 785 So. 2d 1209 (Fla. 2001) the

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[15] 1) Duncan's childhood and upbringing saddled him with an emotional handicap; 2) Duncan's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime (not proven — no weight) 3) Duncan was under the influence of extreme mental or emotional disturbance at the time of the killing (not proven — no weight); 4) the defendant was under the influence of alcohol at the time of the killing (not proven — no weight); 5) the killing was not for financial gain; 6) the killing did not create a great risk of death

defendant killed his son-in-law over a jealous rage because he was in love with his own daughter. Evidence was presented at trial that he had previously raped his daughter and wanted to run away with her. Id. The lone aggravator of prior violent felony was based on his attempt to rape a woman by knifepoint in a public bathroom, an attempt that was thwarted only because another woman entered the bathroom and caused appellant to flee. Id. at 1216. Unlike Sheppard, the mitigation in LaMarca was trivial: good behavior at trial (very little weight) and history of drug and alcohol abuse and that he suffers from mental disorders (very little weight). Id.

IV. The trial court erred in failing to consider Evans' 27-year sentence as mitigation in Sheppard's case

Appellee misconstrues Sheppard's argument in stating that because Sheppard is more culpable than his co-defendant, Evans, the gross disparity in punishments for these individuals can be ignored by this and the sentencing courts.[16] The thrust of Sheppard's argument here, and the argument by trial counsel

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to many persons; 7) the killing did not occur while Duncan was committing another crime; 8) the victim was not a stranger; 9) the victim was not a child; 10) Duncan was a good, dependable, and capable employee; 11) Duncan was a good listener and supportive friend; 12) Duncan had satisfactorily completed his parole and was discharged from parole; 13) Duncan confessed to the killing; 14) the killing came as a result of and subsequent to a domestic dispute; 15) Deborah Bauer chose Donn Duncan to be her husband.

[16] Contrary to Appellee's assertions, defense counsel did not concede disparity in culpability – rather defense counsel admitted that the state's theory assigned different culpability to the co-defendants. (4 R 616.)

below, is that regardless of any technical differences in culpability, the disparity in punishment as between Sheppard and Evans was **so extreme**, that the trial court should have considered Evans' 27-year sentence as a mitigating factor in Sheppard's case. Despite trial counsel's manifestly clear request for this court to consider Evans' term-of-years as mitigation in Sheppard's case (4 R 616),[17, 18] trial the court failed to do so. (4 R 656-678.) The trial court's utter failure to consider Evans' sentence as mitigation in Sheppard's case is subject to *de novo* review. Blanco v. State, 706 So.2d 7, 10 (Fla.1997) (citing Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990)) (The *de novo* standard of review applies where the trial court refuses to consider a factor as mitigation.)

This court should find and apply the disparity in Evans' and Sheppard's sentences as mitigation and, for this and each of the other reasons in the Initial Brief and above, find that the death penalty is disproportionate and commute Sheppard's sentence to life.

CONCLUSION

For the reasons discussed in the foregoing brief and the Initial Brief, this Court should reverse and remand for a new trial and sentencing and vacate

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[17] "While the Defense would concede that the level of culpability as argued by the State theory was different as to each defendant, **the severe disparity between the range of sentences should be gravely considered by this Honorable Court**." (4 R 616.)

[18] Sheppard was sentenced on March 30, 2013. Evans was sentenced on March 9, 2012.

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 email to cappapp@myfloridalegal.com, tamara.milosevic@myfloridalegal.com and via hand delivery to the Office of the State Attorney, 220 E. Bay St., Jacksonville, FL 32202, this 8th day October 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