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IN THE SUPREME COURT OF FLORIDA

LEON DAVIS, :

Appellant, :

vs. : Case No. SC13-1

STATE OF FLORIDA, :

Appellee. :

:

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

REPLY BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

KAREN M. KINNEY
Assistant Public Defender
FLORIDA BAR NUMBER 0856932

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellant objects to the state's imprecise generalizations throughout that are not supported by the citations given. Appellant also objects to page 5 of the State's brief because there are no record citations given, which is a violation of Florida Rule of Appellate Procedure 9.210(b)(3) and (c), mandating that "[r]eferences to the appropriate volume and pages of the record or transcript shall be made" and directing that the "answer brief shall be prepared in the same manner as the initial brief."

An example of the state's imprecision appears on page 1 of the Answer Brief where the state cites S6/869-71 for the following: "In late 2007, Defendant and his wife were experiencing financial difficulties, they had no income, they had reached credit limits on their credit cards and were behind on mortgage payments." At the cited pages, Victoria Davis was questioned about her own job and finances. She and her husband maintained separate bank accounts. She had reached her credit card limits, which were $500 and $300; "[t]hey weren't, like, extravagant." (S6/871). When asked about their overall finances, Victoria testified: "I'm sure they were a little tight, but I don't think it was we're-going-to-lose-everything tight." (S6/873). Elsewhere, the record shows that Leon Davis received a paycheck in the amount of $860 on December 6, 2007. It also shows that he had family members, his older sister, India Decosey, and his father, who were willing and able to provide financial help. His father had given him a lot of money in the past, and his sister had talked to him about providing a loan for "thousands." (S8/1236-37;

33/5694-95).

The State writes: "Defendant cancelled insurance on his Nissan Maxima because they could not afford it, but was paying the insurance for his wife's Nissan Altima. (S6. 872-74)." There is no testimony on the cited pages pertaining to Leon Davis making insurance payments for Victoria Davis's Nissan Altima. Elsewhere, the record reflects that she bought the car in 2004, and she had her own insurance policy, which was not with the Headley Insurance agency. (S6/870).

The State writes:

> Sometime after 8:00 p.m., Defendant came to the area where the BP station on Highway 557 was located and he backed his wife's Nissan Altima into a cattle gap area just north of the station. (S3. 407-09, 355-59, 385, 430).

(AB at 1). The evidence will not support this claim. No witness testified to having seen Leon Davis in the area of the BP station or Davis's Altima backed into a cattle gap area. Witnesses who testified at the listed pages are Jessie Brown, S3/407-09; Jonathan Adkinson, S3/355-59; William Finley S3/385; and Stephanie Chism S3/430. (See Initial Brief at 20-22). Each recalled using the I-4 exit or driving on Highway 557 at different times that night and briefly viewing a car parked down the street from the BP station. Not one of these witnesses saw Leon Davis or anyone else near the BP station. They variously described the car they saw, momentarily in the dark (S3/436-37) and from a pretty far distance (S3/397, 416), as: (1) a dark <u>blue</u> Nissan with a billet grill, between 7:00 and 10:00 (Jonathan Adkinson S3/357-362); (2) a dark-colored car of unknown size, make, or model, with silvery wrap-around plastic headlights backed up to a fence near a cattle gate

(William Finley S3/385-386, 399-400); (3) a black four-door compact parked in the bushes, between 7:45-8:15 (Jessie Brown, S3/409-410, 413); and (4) a dark sporty sedan with a rounded front end, that could have been black, dark green or dark midnight blue, around 9:00 (Stephinie Chism, S3/428-435). The testimony was in conflict: Jonathan Adkinson, who said the car had a billet grille, also said the car was "definitely" dark blue (S3/357,359,368); whereas, Jessie Brown said, "I know for sure" the car was black (S3/410). The state's assertion that these individuals viewed the car driven by Leon Davis cannot be shown by this record.

The State writes that Randy Black gave Davis "a handful" of ammunition. (AB at 1). Randy Black was questioned as to the amount of ammunition he gave Davis. The gun was not loaded when he sold it, and Black might have told Detective Navarro that he gave Leon two shells (S5/743-45). In response to the defense attorney's questions, Black stated, "It could have been two, it could have been three. All I know is I gave him – it wasn't a lot, is all I can tell you." (S5/745).

The State writes: "During the search of the vehicle [Stacy Greatens] found a black nylon jacket, black gloves, a Newport cigarette box, a vehicle registration on Victoria Campos' name and Defendant's FL driver's license. (S2. 267-72)". (AB at 29). The black nylon jacket (exhibit 120) in the trunk of the car was a size medium. (S2/267-268,294). A black-grey jacket (exh. 121) also in the trunk was a size 42-44, large (S2/281-282,295). Both jackets and the gloves belonged to Victoria Davis (S9/1479-80). Leon Davis wore a size 2X or 3X jacket (S9/1479, see also S2/294). The prosecutor conceded in his closing argument that the state

never recovered the clothing that the perpetrator was wearing at the BP station. (S9/1560-61(defense attorney),1608(prosecutor)).

ARGUMENT

ISSUE I: THE TRIAL COURT ERRED IN ADMITTING THE LAKE WALES EVENTS AS "INEXTRICABLY INTERTWINED" WITH THE BP GAS STATION EVENTS OF SIX DAYS EARLIER.

The State concludes its argument on this point by asserting that it never intended to rely on Williams rule to argue that the collateral crime evidence was admissible: "Defendant finally asserts that the State should not have been permitted to argue on appeal that the evidence was admissible under Williams rule theory. However, since the State never intended to rely on this theory, this argument is moot." (AB at 64, emphasis added). This Court should be mindful of the State's position when reviewing this issue and wary of the State's reliance on Williams rule cases to support the trial judge's ruling.

In its brief, the State first discusses the test for admission of Williams rule evidence, i.e., relevancy, and argues that the collateral crime evidence was "relevant to prove" certain aspects of the case. (AB at 58). This sounds like the analysis for admission of evidence under Williams rule: the collateral crime evidence must have some probative value before it can be admitted subject to the requirements in section 90.404(2)(d), Florida Statutes, and subject to the weighing against prejudice required by section 90.403.

The State cites three Williams Rule cases for its assertion that collateral crime evidence linking a defendant to a weapon is "routinely" allowed. (AB at 59). Remeta v. State, 522 So. 2d 825

(Fla. 1988), involved a series of murders and robberies throughout three states during a two week period where the same gun was used. The State filed a Williams rule notice and presented testimony from a survivor of a Texas robbery. This court rejected Remeta's Williams rule challenge to the admission of that testimony as cumulative, concluding that the testimony of the Texas robbery survivor was proper to establish Remeta's possession of the murder weapon and to counteract Remeta's statements blaming the crimes on his companion. 522 So. 2d at 827-828. Remeta is a Williams rule case that is not relevant to the inextricably intertwined ruling at issue here.

Amoros v. State, 531 So. 2d 1256 (Fla. 1988), also relies upon a Williams rule analysis. There the state linked two crimes that were both instances of domestic violence directed at the new boyfriends of Amoros's former girlfriends.

Hall v. State, 403 So. 2d 1321 (Fla. 1981), is another Williams rule case. The opinion does not cite Williams v. State, 110 So. 2d 654 (Fla. 1959); instead, it cites Smith v. State, 365 So. 2d 704 (Fla. 1978), which cites Williams. None of these Williams rule cases support the application of the inextricably-intertwined doctrine in the present case.

When the pretrial hearings on the admissibility of the collateral crime evidence were conducted in this case, the State was preparing for a jury trial, so by obtaining a favorable ruling under the inextricably intertwined theory, the State could avoid the limitations imposed under section 90.404(2)(d) when presenting and arguing the collateral crimes to the jury. The pretrial ruling set the stage for the collateral crimes to be the feature

of the state's case at the then-upcoming jury trial, which was later converted to a bench trial.

When examining the admission of inextricably intertwined evidence, this court has recognized that a trial court's discretion to admit evidence is limited by the evidence code. Wright v. State, 19 So. 3d 277, 291 (Fla. 2009). The admission of the collateral crimes in this case as inextricably intertwined circumvented the general prohibition of bad character evidence in section 90.404 of the Evidence Code and relieved the State of compliance with the other requirements for admission of collateral crimes in section 90.404.

The state acknowledges that courts generally recognize three "reasons for admitting inextricably intertwined collateral crime evidence: (1) it is necessary to establish the entire context out of which the charged crimes arose; (2) it is necessary to provide an intelligent account of the crimes charged; and (3) it is necessary to adequately describe the events leading up to the crimes." Holmes v. State, 91 So. 3d 859, 862 (Fla. 1st DCA 2012). The collateral crime evidence in this case does not fit into any of these reasons.

The Lake Wales events, occurring six days after the charged offenses, cannot describe the context out of which the charged crimes arose and cannot describe anything leading up to the charged crimes. The state relies on the reasoning that the evidence is necessary to provide an intelligent account of the crimes charged. This is a flawed argument because the Lake Wales facts do not help provide an intelligent account of the events in the instant case. The allegations concerning the BP station are

easy to understand by themselves without referencing any other crimes.

The state references the murder weapon, as though that justifies the inextricably intertwined ruling. It does not. There was no evidence showing that Davis was ever connected with the gun used to commit the crimes in this case. The State misrepresents the facts when it suggests otherwise, e.g. AB at 62-63 ("This ballistic evidence was highly probative to linking the gun Defendant bought from Black with the murders."). The fact that the state never showed that Davis possessed the gun used to commit the crimes is an important distinction between this case and others where a defendant is physically connected with a particular gun that was used in the charged offense.

For instance, in Amoros, the Williams rule case cited in the answer brief, the state had evidence showing that the defendant had possessed the gun that fired the bullets at the two different crime scenes. This Court stated, "[t]he focus in this instance was establishing Amoros' prior possession of the specific weapon which caused Omar Rivero's death." 531 So. 2d at 1260. The charged offense arose when Amoros murdered his former girlfriend's current boyfriend. The gun was later recovered. In the earlier Williams rule crime: "A fight erupted between Amoros and Coney, during which a shot was fired and Coney was killed. Amoros was seen holding the gun immediately following the shooting." Id. at 1257. On the issue of relevancy, i.e., linking the murder weapon to the defendant, this Court noted: "Simply allowing testimony that Amoros had possession of a gun does not serve to identify it as the same murder weapon. The possession of the weapon, the

firing of the weapon, the retrieval of the bullet fired from the weapon from Coney's body, and the comparison of the two bullets are all essential factors in linking the murder weapon to Amoros." (Emphasis added).

The instant case is factually distinguishable from Amoros because (1) the collateral crime here is not similar to the charged crime, (2) the collateral crime occurred after the charged offense (allowing time for the transfer of the gun in the intervening days), and (3) no gun was ever recovered by the State that was linked to Davis. Therefore, the link that made the gun relevant (for a Williams rule analysis) in Amoros is lacking in the present case. Simply allowing testimony that Davis had a gun that he obtained from his cousin does not serve to identify it as the murder weapon. Here, all that can be said is that Davis had access to a gun that he obtained from his cousin, which had the rifling characteristics of the gun used to commit the crimes, which were characteristics shared by countless other guns—both .357 and .38 caliber—manufactured for many years. The defense attorney explained this in closing:

> We don't know what gun committed this crime. It could have been a Dan Wesson .357; it could have been a Dan Wesson .38; it could have been a list of 20 plus manufacturers, millions of guns out there that have a similar twists, lands, and grooves. That's what the facts are. The facts are not that a gun owned by Mr. Davis committed this crime. A gun that he might have had, along with millions of other guns, could have committed -- could have been involved in that crime.

(S9/1555).

There is no evidence that the gun obtained from Randy Black was the gun used to commit the crimes, but the State asserts: "The

State's theory was that Defendant was the perpetrator at both crime scenes as he possessed and discharged the same gun which he previously obtained from Randy Black." (AB at 59-60). Proof of this theory would require some evidence linking the bullets from the crime scenes to the particular gun that Davis obtained from Black. Davis testified that he sold the gun he obtained from Randy Black before the Lake Wales crimes occurred; there was no evidence to refute that testimony. Because the State did not connect the gun obtained from Randy Black to either crime, the fact that Davis possessed a gun was not probative of whether he committed the charged crimes. See Moore v. State, 701 So. 2d 545, 549 (Fla. 1997) (finding error in admission of testimony that defendant possessed a gun two days after victim's death where there was no evidence that the gun had anything to do with the victim's death).

Furthermore, the gun obtained from Randy Black was not loaded, and Randy Black said that he gave Davis only two or three bullets (one of which was used for a test fire). Black had previously said that he gave Davis two bullets. The police tried, but never linked Davis or Black to the purchase of any ammunition. (S4/594;S6/970-72;S9/1555-56).

The State refers to a connection with a car viewed at both crime scenes. (AB at 53,61). This was not even argued by the prosecutor at trial. (S9/1527-49). No one saw the perpetrator at either scene driving a car. There is not competent substantial evidence to support a finding that witnesses identified Davis's car at either crime scene. There was some testimony about a Nissan Maxima being parked near the Headley Insurance scene

(S5/803), but no testimony that it was driven by the perpetrator.

The error of admitting the collateral crime evidence diverted the trial judge's attention to matters unrelated to whether Davis committed the crimes at the BP station. This Court has long recognized that evidence of other crimes requires special treatment because of the danger of prejudicing the defendant with the jury.

> "[C]ollateral crime" evidence is given special treatment because of the danger of prejudicing the jury against the accused either by depicting him as a person of bad character or by influencing the jury to believe that because he committed the other crime or crimes, he probably committed the crime charged. A verdict of guilt on a criminal charge should be based on evidence pertaining specifically to the crime. The jury's attention should always be focused on guilt or innocence of the crime charged and should not be diverted by information about unrelated matters.

Craig v. State, 510 So. 2d 857, 863 (Fla. 1987) (internal citations omitted). In this case, the judge's explanation of the facts he relied on to determine guilt demonstrates that the collateral crimes influenced the judge to be prejudiced against Davis because the collateral crime evidence depicted him as a person of bad character. The judge was influenced to believe that because Davis was convicted of the collateral crimes, he probably committed the charged crimes. The improper use of collateral crime evidence is frequently prejudicial error in a jury trial, and this case shows that it can be prejudicial error in a bench trial too.

ISSUE II: THE TRIAL COURT ERRED IN RELYING ON FACTS NOT IN EVIDENCE TO FIND DAVIS GUILTY, I.E., THE VERDICTS IN THE LAKE WALES CASE AND DETAILS OF EVENTS THAT OCCURRED INSIDE THE HEADLEY INSURANCE AGENCY.

The State objects to the term, "Analysis of Guilt," which is

directly from Judge Jacobsen's order. (AB at 65). Judge Jacobsen uses the term in setting forth the evidence he considered in finding Davis guilty of the charged offenses. To read the order any other way would require this Court to go beyond the plain meaning of the words in the order. The judge spelled out clearly his reliance on facts not in the trial record that he considered when he determined guilt.

The State suggests that Davis invited the court to consider facts outside the record. (AB at 65). Nothing can be further from the truth. Judge Jacobsen took judicial notice of the entire appellate record in the Lake Wales case after he concluded that the events in Lake Wales were inextricably intertwined with the instant charges. Because of that adverse ruling, Davis found it necessary to renew his objections to the admissibility of identity evidence presented in the Lake Wales case. Those objections had been the subject of lengthy pretrial hearings in the Lake Wales case. When the trial judge took judicial notice of the appellate record from the Lake Wales case, it was only for the purpose of adopting pretrial rulings. At that time, Davis had not yet waived his right to a jury trial. Taking judicial notice of the Lake Wales case was a matter of judicial economy that was necessitated by the erroneous ruling that the two cases were inextricably intertwined.

The State seeks to downplay the seriousness of the error by referring to the extra-record facts used to determine guilt as "de minimis." (AB at 66). This seems to be an attempt at a harmless error argument. A proper harmless error analysis considers whether the error contributed to the convictions. State v. DiGuilio, 491

So. 2d 1129, 1136 (Fla. 1986). The harmless error test is not an overwhelming evidence test, id., but even if it were, the State could not meet the test in this case because the evidence of guilt was circumstantial, vigorously disputed, and ultimately, inadequate. The trial judge's disclosed thought process demonstrates that he used the Lake Wales case to draw conclusions as to propensity and bad character and then he drew upon those conclusions to find Davis guilty. The error of considering the extra-record facts goes to the heart of the case and is, by its nature, harmful error that requires reversal of the convictions and remand for a new trial.

ISSUE III: THE TRIAL COURT ERRED BY ALLOWING IMPEACHMENT OF VICTORIA DAVIS WITH STATEMENTS THAT WERE NOT MATERIALLY DIFFERENT FROM HER TRIAL TESTIMONY AND BY USING THE PROSECUTOR'S IMPEACHING QUESTIONS AS SUBSTANTIVE EVIDENCE TO CONTRADICT THE TRIAL TESTIMONY REGARDING THE TIME THAT LEON DAVIS RETURNED HOME ON THE NIGHT OF THE BP SHOOTINGS.

The State posits that the prosecution admitted evidence of a prior inconsistent statement into evidence, but this is not the case. There is a difference between using a prior inconsistent statement as impeachment and admitting the statement as substantive evidence, which did not happen here. See State v. Sims, 110 So. 3d 113, 116 (Fla. 1st DCA 2013) ("The codefendant's lawyer questioned the witness about the statement but that is not the same as offering it in evidence.").

Victoria Davis never acknowledged having any memory of the statements she made before the grand jury, although she did not deny the statements attributed to her by counsel. Her responses are consistent with lack of memory and cannot be construed as an affirmation of the grand jury testimony. Saying, "I do not deny

that which I do not remember" is not an affirmation of an alleged prior statement, which is what the trial court and the State have attributed to her.

Since Victoria did not affirm the grand jury testimony, then the trial court could not credit it as substantive evidence. There were no grand jury statements offered by the State into evidence to be considered as substantive evidence, so when the trial judge said he could rely on her statements to the grand jury as substantive evidence, the trial judge either relied on facts not in evidence that he gleaned from a transcript that is not in the record, or relied on the questions posed by counsel for the State in his attempt to impeach Victoria. Either way, crediting grand jury testimony as substantive evidence that Davis returned to his house after 9:00 was improper because it was not in evidence.

This was not harmless error because, as the court's order demonstrates, use of Victoria's testimony as substantive evidence to show that Davis had the opportunity to commit the crimes was an important consideration in the trier-of-fact's analysis and finding of guilt. See DiGuilio.

ISSUE IV: THE TRIAL COURT VIOLATED DAVIS'S RIGHT TO DUE PROCESS WHEN IT SHIFTED THE BURDEN OF PROOF TO DAVIS, AS EVIDENCED BY THE COURT'S STATEMENT THAT DAVIS FAILED TO CORROBORATE HIS ALIBI.

The State is wrong to suggest that "the trial court made factual findings as to direct evidence that proved that Defendant was the perpetrator at the BP and Headley Insurance crime scenes." (AB at 78). Putting aside the problems with the evidence pertaining to the Headley Insurance case (addressed in

Issues VIII and IX), the state is incorrect when it suggests there was direct evidence offered showing that Leon Davis was the perpetrator at the BP station. The evidence is entirely circumstantial with regard to the identity element in the instant case. The prosecutor acknowledged in his closing that "[t]his case is a circumstantial evidence case." (S10/1606).

The State is also wrong in its assertions that Davis "voluntarily assumed a burden of proof by asserting an alibi defense," and that, "Defendant had the burden to present evidence in support of his alibi defense." (AB at 82) The State repeatedly describes Davis's testimony as having raised an affirmative defense. An "affirmative defense" is not an accurate description of an alibi, since an alibi does not concede any element of the crime.

> An "affirmative defense" is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, "Yes, I did it, but I had a good reason."

State v. Cohen, 568 So. 2d 49, 51-52 (Fla. 1990). "Once raised, the defendant carries the burden of proving the [affirmative] defense. It, nevertheless, remains impermissible to shift the burden of proof of an element of the offense to the defendant." Wright v. State, 920 So. 2d 21 (Fla. 4th DCA 2005) (internal citation omitted).

The State attempts to use Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991), to support its assertion that Davis voluntarily assumed a burden of proof when he testified that he was not at

the scene of the crime. According to the State, "since Defendant had the burden to present evidence in support of his alibi defense, the trial court properly commented on the lack of corroborating evidence in support of such defense." (AB at 81). The law is directly contrary to this assertion. When a defendant puts on evidence that another person could give relevant testimony to corroborate his alibi and that person is in a special relationship with the defendant, such that the person is not equally available to the State, this court has allowed the prosecutor to comment on the failure to produce the witness. See Lawyer v. State, 627 So. 2d 564, 567 (Fla. 4th DCA 1993), cause dismissed, 639 So. 2d 981 (Fla. 1994). But that limited exception does not apply here.

The state attempts to distinguish the cases cited in the initial brief, but the distinctions are procedural and not substantive. It is difficult to find a case in the same procedural posture of this case, where a trial judge, sitting as the fact-finder in a bench trial, remarks on the defendant's failure to produce witnesses to corroborate his alibi. But burden-shifting error arises frequently when a prosecutor invites a jury to do what the trial judge did here, use the lack of corroborating witnesses as a circumstance supporting the state's case. See Jackson, 575 So. at 188 ("[T]he 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."); see also Gore v. State, 719 So. 2d 1197 (Fla. 1998) ("The standard for a criminal conviction is not which side is

more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.").

The prosecutor asked Davis on cross-examination if he had any witnesses to corroborate his testimony as to his whereabouts on the night of the crime. It now improperly seizes upon Davis's negative response to the question as justification for the trial court's improper use of that testimony. The state cannot justify the burden-shifting error based on a question that it posed to Davis in cross. See Ramirez v. State, 1 So. 3d 383, 386 (Fla. 4th DCA 2009) ("The trial court abused its discretion when it allowed the State to shift that burden to the defendant through its questions and comments that implied the defendant should have produced photographic evidence and medical reports to support her version of events."); Jackson v. State, 832 So. 2d 773, 778 (Fla. 4th DCA 2002) (reversing for new trial where prosecutor's comment suggested that appellant had to present a witness to show that police detective was incorrect in his identification of appellant).

Any commentary that implies an obligation on the part of the defense to refute the state's evidence constitutes burden shifting and is a due process violation.

> As a matter of due process, the State is required to prove all elements of a crime beyond a reasonable doubt. Hayes v. State, 660 So. 2d 257, 265 (Fla. 1995)

> (citation omitted). It is error for a prosecutor to make comments that "shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." Gore v. State, 719 So.2d 1197, 1200 (Fla. 1998). A defendant is not obligated to present evidence or witnesses. Hayes v. State, 660 So.2d 257, 265 (Fla. 1995) (citation omitted). Although the State has the right to comment on testimony produced by the defense, such commentary is improper if it implies an obligation on the part of the defense to refute the State's evidence. See Ealy v. State, 915 So.2d 1288, 1291 (Fla. 2d DCA 2005). That type of implication constitutes improper burden-shifting. Id.

Cribbs v. State, 111 So. 3d 298, 300 (Fla. 1st DCA 2013).

The state claims to have "presented evidence rebutting Defendant's alibi hypothesis." (AB at 82). There was no evidence presented by the state that rebutted Mr. Davis's testimony. The state repeats this false notion, stating: "the issue concerns the trial judge commenting on the evidence when Defendant asserted an affirmative defense by claiming that he was at the shopping mall at the time of the murders and the State presented evidence that Defendant was in fact present at the crime scene." (AB at 82). The state actually presented no evidence that Davis was ever present at the crime scene.

ISSUE V: THE TRIAL COURT ERRED IN USING THE FACT OF DAVIS'S PRIOR THEFT CONVICTIONS AS CIRCUMSTANTIAL EVIDENCE OF HIS GUILT FOR ALL CHARGES BECAUSE THE PRIOR CONVICTIONS WERE ADMITTED FOR THE LIMITED PURPOSE OF PROVING ONLY ONE ELEMENT OF THE CHARGE OF FELON IN POSSESSION OF A FIREARM.

The State cites Justice Canady's concurrence in Orme v. State, 25 So. 3d 536, 553-54 (Fla. 2009), as authority for its assertion that Davis had an obligation to contest the sentencing order before raising this claim. The Orme concurrence is not authority for the State's preservation argument here because it does not represent a holding by the majority in that case. There,

Justice Canady concurred in the affirmance of the sentence but addressed the preservation of a claim involving consideration of remorse as a mitigator, stating that he would reject the claim on the basis that it was not preserved. 25 So. 3d at 553-54.

In this case, Davis had no opportunity to object to the trial judge's reliance on facts not in evidence because the trial judge did not reveal his thought process until he filed the final sentencing order. See Peterson v. State, 94 So. 3d 514, 532 (Fla. 2012) ("If a defendant disagrees with how a sentencing court weighed the evidence, the direct appeal of a sentencing order would be the first opportunity for a defendant to challenge the factual findings and credibility decisions within a trial court's sentencing order.").

The trial judge used the fact of Davis's prior felony conviction for grand theft to draw an inference that Davis's gun purchase was "very strange" in describing circumstances tending to prove his identity as the perpetrator. The error here is in using evidence that Davis was a convicted felon for a purpose other than that for which the evidence was admitted. The firearm possession charge was originally severed from the other charges to avoid a situation where a jury would use the evidence that Davis was a convicted felon improperly, as evidence of bad character and propensity, or for some purpose other than proving the firearm count. The trial judge did the very thing that the severance was designed to prevent a jury from doing.

Davis disagrees with the State's assertion that there was testimony through other sources that Davis was on felony probation at the time he purchased the gun. While there was reference to

Davis being on probation when he discussed the gun with his mother, there was no testimony that Davis was a convicted felon or that he was on felony probation. The error is not harmless because it had an effect on the trier of fact and influenced his verdict. The judge's order demonstrates that he used the fact that Davis was a convicted felon as evidence to infer that he committed the BP crimes.

ISSUE VI: THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO SHOW THAT DAVIS IS THE PERSON WHO COMMITTED THE CRIMES IN THIS CASE.

A recent case, State v. Sims, 110 So. 3d 113 (Fla. 1st DCA 2013), supports Davis's position that the circumstantial evidence of identity was insufficient as a matter of law in this case. Sims was charged with aggravated battery arising from a shooting incident. The shooting was preceded by a confrontation in a park earlier in the day when Sims and his codefendant, Webb, encountered five other men playing basketball. Webb got into a physical altercation with two of the men. The court described the circumstantial identity evidence that the State relied upon to place Sims at the scene of the later shooting incident:

> The five men who had been in the park encountered Webb once again about forty-five minutes later at a convenience store. By this time it was dark but they could observe Webb in the backseat of a car outside the store. The five men left the convenience store in their own car, and the car in which Webb was riding followed them. They arrived at a gas station a few minutes later and, at that point, Webb fired a gun from the backseat window. Shots from the gun struck and wounded two of the men.
>
> Crime scene technicians recovered shell casings from the parking lot of the gas station, but a subsequent forensic examination of the defendant's car, a

> dark blue four-door Pontiac G6, did not reveal any firearms, bullets, shell casings, or other evidence that a gun had been fired from the car.
>
> One of the victims said that the car he saw at the convenience store a few minutes before the shooting was similar to the blue Pontiac he had seen earlier at the park. Another of the victims described it as "their car," and yet another said that it was a dark blue Pontiac G6. They indicated that the car followed them from the convenience store to the gas station. However, a bystander at the gas station said that the car from which the shots were fired was a black, two-door car.

Sims, 110 So. 3d at 114-15.

The circumstantial evidence of identity that the State relied on in Sims is stronger than the identity evidence that the State relied upon in the instant case. Yet, the First District concluded the evidence was insufficient in Sims.

> The jury verdicts could be sustained only by stacking several inferences one on another. The state's contention that the shots were fired from the defendant's car runs contrary to the forensic evidence and the independent eyewitness testimony. But even if we were to accept the premise that the shots were fired from the defendant's car we would have to assume that the defendant was driving the car at the time of the shooting. There is no direct or circumstantial evidence to prove that point.

Sims, 110 So. 3d at 116.

In the instant case, the State draws upon testimony that Defendant was the perpetrator in the Headley incident to prove that he was the perpetrator at BP. First, the testimony of Brandon Greisman and Carlos Ortiz identifying Davis in the Headley case should have been suppressed, as this testimony was based on a tainted identification procedure (see Issue IX). But even if their testimony is credited to the State, the identification of Davis at the Headley scene does not show that he committed the earlier crimes at the BP gas station. The Sims case makes this point with regard to two events that occurred 45 minutes apart.

Instead of bullets and a gun being the common denominator in the two events, in Sims it was a car: "But even if we were to accept the premise that the shots were fired from the defendant's car we would have to assume that the defendant was driving the car at the time of the shooting." Sims, 110 So. 3d at 116.

The State discusses the gun that Davis obtained from Randy Black and portrays this as the murder weapon without acknowledging that this gun was never located by police and was never shown to be the gun used in the crimes charged. The State relies only on speculation when it portrays the Randy Black gun as the murder weapon. As with the car evidence in Sims, even if we are to accept that the same gun was used at both crimes, occurring six days apart, we have to assume that the defendant was in possession of the gun both times and there is no evidence to prove that point.

The State indicates that Davis's car was seen at the BP crime scene, but no one identified Davis's Altima at the BP station. It is speculative to conclude that the perpetrator, who was only seen on foot, was even connected to a car that was parked down the road from the BP station. The tracking dog used by the police did not pick up a scent at the bodies, and his handler had to circle the gas station before the dog headed north up the highway.

Even if one were to assume that the car viewed by the four passing motorists on December 7, 2007, belonged to the perpetrator, then the State fails to account for the forensic evidence that contradicts the State's theory that Davis was the driver: the shoe impressions leading to the tire tracks, and the male DNA on the unsmoked cigarette found on the ground near the shoe impressions. See Dausch v. State, SC12-1161 (Fla. June 12, 2014)

(noting that the State's theory that Dausch murdered the victim and stole his car was countered by the State's fingerprint evidence); Sims, 110 So. 3d at 116 (noting that "[t]he state's contention that the shots were fired from the defendant's car runs contrary to the forensic evidence and the independent eyewitness testimony").

The investigating detective in this case countered the State's theory when he determined that the shoe prints could not have been made by Davis's shoes (S7/1098-99, 1103-1105) and forensic testing countered the State's theory when it showed that the DNA on the unsmoked cigarette did not match Davis (S6/1034). The defense attorney emphasized this point in closing:

> And I will tell you that it is 100 percent logical that these shoe impressions that lead to an area where there's tire impressions were made by a perpetrator going to his car, her car. The African-American, the Indian man's car. I don't know. Nobody knows. And what I also know, based on the testimony of Detective Navarro and the testimony of the other witnesses in this case, is that when Mr. Davis turned himself in December 13th, 2007, they seized his shoes and took his shoes into evidence. They went to his home and seized every pair of shoes he had. They searched the car and found no shoes. What did Detective Navarro testify? The reason they didn't have the lab get into an examination of this is because even he could look at them and tell that the treads on these shoes, at this scene, going to the suspect vehicle, didn't match Mr. Davis' shoes.
>
> And I guess we're on a roll here because we've got another defense coincidence. A cigarette is found in the area right next to where those shoe impressions are. Ironically it's not smoked, yet they test it for DNA, and just to the left of these shoe impressions at number five is an unsmoked cigarette. They check it for DNA, comes up a male profile, but it's not Mr. Davis. An unknown male, cigarette found in a location where it's -- even the state has argued people just don't go, an unsmoked cigarette is found next to the shoe impressions that don't match Mr. Davis' shoes. Now, another one of these, you know, life coincidences, Mrs. Davis, Vicky Davis, had smoked Newport cigarettes, an empty box is found in her car. She quit smoking be-

> cause of her pregnancy. An incredible coincidence, and when the police found a Newport cigarette box and a Newport cigarette at an obvious crime scene area, bet they were pretty excited until the DNA evidence came back. It wasn't Vicky Davis. It wasn't Mr. Davis, it was an unknown male.

(S9/1561-62).

The witnesses who saw the parked car near the scene described it generically: as a blue Nissan with a billet grill, a dark-colored car with silvery wrap-around plastic headlights, a black four-door compact, and a dark sporty sedan with a rounded front end, that could have been black, dark green or dark midnight blue. (S3/357-362,385-386,399-400,409-410,413,428-435). These descriptions cannot be considered positive identification of any particular automobile. There was no forensic evidence or eyewitness testimony proving that Davis's car was ever at the BP scene. See Dausch, Slip op. at 11 ("[T]he State did not produce competent substantial evidence that even placed Dausch in Sumter County at or around the time of the murder.")

In his closing argument at this trial, the prosecutor conceded that no one could identify the person on the video recording made by the BP security camera: "One cannot identify, and there's been no testimony that anyone could identify, from the videotape who's at the door." (S9/1528). The prosecutor conceded that everything it relied on to identify Davis as the perpetrator could be explained as a coincidence, but he attempted to argue that he could stack otherwise meaningless coincidences together to prove identity: "Is it a coincidence that this is an attempted robbery and Mr. Davis happens to be having financial problems? Well, if all we presented to the court was that at this time Mr. Davis was having financial problems, and this is an attempted robbery, that

doesn't prove anything at all. In fact, it's meaningless." (S9/1543). The prosecutor correctly identified the problem with the State's evidence here, but then he went on to argue that stacking otherwise meaningless coincidences will add up to proof beyond a reasonable doubt, which is a fallacy.

In Sims, the court concluded that the identity evidence was insufficient to sustain the convictions. Summarizing the legal test, the court stated:

> The circumstantial evidence in this case raises a suspicion of guilt, but that is not enough under our system of justice. See Cox v. State, 555 So. 2d 352, 353 (Fla. 1989). "Evidence [that] furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction." Ballard v. State, 923 So. 2d 475, 482 (Fla. 2006). The circumstantial evidence must exclude every reasonable hypothesis of innocence. "It is the actual exclusion of the hypothesis of innocence [that] clothes circumstantial evidence with the force of proof sufficient to convict." Id. As our supreme court has explained, "[c]ircumstantial evidence must lead to a reasonable and moral certainty that the accused and no one else committed the offense charged." Cox, 555 So. 2d at 353 (quoting Hall v. State, 90 Fla. 719, 107 So. 246 (1925)).

Sims, 110 So. 3d at 117; see also Dausch v. State, SC12-1161, slip op. at 13 (Fla. June 12, 2014)(holding that circumstantial evidence was insufficient to establish appellant's identity as perpetrator, and stating: "At best, the evidence presented by the State creates a suspicion of guilt.").

The evidence in this case, as in Sims and Dausch, was not sufficient to survive a judgment of acquittal under the circumstantial evidence standard. The case must be reversed and the convictions vacated because the evidence does not satisfy the beyond a reasonable doubt standard. "A 'reasonable doubt,' at a

minimum, is one based upon 'reason.' Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury." Jackson v. Virginia, 443 U.S. 307, 317 (1979) (emphasis added). There is a failure of proof here that renders the convictions unconstitutional. Jackson, 443 U.S. at 321 ("[A] state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim."). This Court must reverse with directions to the trial judge to enter a judgment of acquittal.

ISSUE VII: THE EVIDENCE IS LEGALLY INSUFFICENT TO SHOW THAT AN ATTEMPTED ROBBERY OCCURRED.

The State writes, "Defendant has not carried his burden to show a lack of substantial, competent evidence of the attempted armed robbery of Prakashkumar Patel." This misstates the burden of proof and the standard of review. The burden was on the State to prove the attempted robbery charge. Davis challenged the sufficiency of the evidence when he moved for a judgment of acquittal. This Court must review the denial of that motion de novo.

The facts that the State uses to justify the attempted robbery charge do not shed light on the motive for the perpetrator's actions. The surveillance video demonstrates the ambiguity. Even if it is clear that the person on the video was intent on

committing a violent act, Davis can still challenge the State's failure to prove a robbery charge.

> The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. E. g., Mullaney v. Wilbur, 421 U.S., at 697-698, 95 S.Ct., at 1888-1889 (requirement of proof beyond a reasonable doubt is not "limit[ed] to those facts which, that if not proved, would wholly exonerate" the accused). Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.

Jackson v. Virginia, 443 U.S. 307, 323-24 (1979) (emphasis added).

The video does not reveal the person's motive for the shooting into the store. There is no overt action or speech to indicate that the perpetrator was trying to rob the store. It requires conjecture and speculation to draw a conclusion that the perpetrator was engaged in a robbery attempt. Because the State did not produce evidence that satisfied the circumstantial evidence standard to show beyond a reasonable doubt that an attempted robbery occurred, this Court should (1) reverse the conviction in count four and (2) reverse the death sentences for a life sentence because the record lacks competent substantial evidence to support the aggravating circumstance that the murders occurred in the course of an attempted robbery. See Amend. 8, 14, U.S. Const.

ISSUE VIII: THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY STATEMENT OF YVONNE BUSTAMONTE UNDER THE DYING DECLARATION EXCEPTION.

The state has made it clear in its answer brief that it "does not contest that [Yvonne] Bustamante's statements to Lt. Elrod were testimonial" (AB at 105). The state further asserts that the

trial court admitted Ms. Bustamante's statements "as a dying declaration and not under the forfeiture by wrongdoing doctrine" (AB at 105). Therefore, the only possible basis for allowing the prosecution to introduce Ms. Bustamante's unconfrontable out-of-court statements would be on the assumption that dying declarations are an "historical exception" to the Sixth Amendment's Confrontation Clause.

The state inaccurately suggests that the United States Supreme Court has already resolved this constitutional question in Crawford v. Washington, 541 U.S. 36 (2004) and Giles v. California, 554 U.S. 353 (2008)(AB at 103-104). Instead, the Court in Crawford, 541 U.S. at 56, n.6, expressly left the question open ("we need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations"). In Giles, 554 U.S. at 358, the Court recognized that two forms of testimonial statements (dying declarations and statements admitted under the forfeiture by wrongdoing doctrine) were admitted at common law even though they were unconfronted. It was the latter issue, forfeiture, which was before the Court in Giles; and the Court concluded that to the extent that the forfeiture theory accepted by the California Supreme Court was broader than the common law doctrine it could not provide a basis for the introduction of unconfronted testimonial statements. Giles does not resolve the question of whether unconfrontable, testimonial dying declarations can be introduced as an "historical exception" to the accused's Sixth Amendment right of confrontation. Three years after Giles the Court made it clear that that constitutional question was still open. Michigan v. Bryant, 131 S.Ct. 1143, 1151

n.1 (2011) ("We noted in Crawford that we 'need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations' [citation omitted]. Because of the state's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here" (emphasis supplied). See also Cobb v. State, 16 So.3d 207, 209 (Fla. 5th DCA 2009)(rejecting the state's suggestion that any dicta in Crawford amounts to a holding that dying declarations are an exception to the Sixth Amendment, and noting that the Crawford Court had found it unnecessary to determine that question in that case).

Moreover, while the Fifth DCA has concluded (incorrectly, for the reasons discussed in Davis' initial brief and this reply brief) that dying declarations are an "historical exception" to the Confrontation Clause, Cobb, 16 So. 2d at 210-12; White v. State, 17 So. 3d 822 (Fla. 5th DCA 2009), this Court has never had occasion to resolve the issue. See Hayward v. State, 24 So. 3d 17, 33 n.8 (Fla. 2009)("We have determined that Destefano's statement did not constitute a dying declaration. Therefore, we need not address whether a dying declaration might be an exception to the Confrontation Clause requirements set forth in Crawford")(emphasis supplied).

Davis and the state agree that there is a split of authority as to whether testimonial dying declarations are an historical exception to the right of confrontation under the principles of Crawford (AB at 104). Davis agrees that the majority of jurisdictions have concluded that dying declarations are indeed an historical exception to the right of confrontation. That doesn't

necessarily mean they are right. Cobb v. State, 16 So.3d 207,209 (Fla. 5th DCA 2009), People v. Monterroso, 101 P.3d 956 (Cal. 2004), and the admittedly numerous decisions in various states which follow Monterroso, are wrongly decided because they fail to analyze the relevant history, and fail to recognize the fundamental differences between the ecclesiastical common-law dying declaration exception as understood and applied in and before 1791, and the secular statutory dying declaration exception (based on considerations of (supposed) reliability and necessity) which exists today.

As for the state's harmless error argument, the trial court's sentencing order demonstrates its heavy reliance on the Headley events and the testimony concerning Yvonne Bustamonte's identification of Davis as a factor that contributed to the court's verdict. (34/5966) Under these circumstances, the error in admitting the evidence cannot be harmless error. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18 (1967). This court should reverse for a new trial.

ISSUE IX: THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE THE PRETRIAL AND IN-COURT IDENTIFICATIONS MADE BY BRANDON GREISMAN AND CARLOS ORTIZ.

Whether a pretrial identification procedure is unnecessarily suggestive refers to the circumstances which are arranged by law enforcement officers. See Perry v. New Hampshire, 132 S.Ct.716 (2012). The eyewitnesses themselves are not "apt to be alert for conditions prejudicial to the suspect", nor are they "likely to be schooled in the detection of suggestive influences." United States v. Wade, 388 U.S. 218, 230 (1967). Even subtle cues can influence

a witness' behavior, "[y]et the witness is often unaware that any cues have been given." State v. Henderson, 27 A.3d 872, 896-97 (N.J. 2011),

In the instant case, Ortiz and Greisman were heavily invested in the identifications they had made. If their identifications were aided by the numbers on the photopack, neither would have been likely to admit it (even assuming they were consciously aware of it). The crucial question of whether the photopack itself was impermissibly and unnecessarily suggestive turns solely on the "system variables"; i.e., the circumstances of the identification procedure which were within the control of law enforcement. See State v. Lawson, 291 P.3d 673, 685, 697 (Or. 2012); State v. Almaraz, 301 P.3d 242, 251-53 (Idaho 2013). If the police use an unnecessarily suggestive procedure, then the trial and reviewing courts go to the second prong of the test to determine whether (considering the various "estimator variables", including, inter alia, the witness' opportunity to observe, his or her degree of attention, and the accuracy of the witness' prior description of the suspect) the identification is sufficiently reliable to support a finding that it is solely the product of the witness' independent recollection, untainted by the suggestive procedures employed by law enforcement. Almaraz, 301 P.3d at 252-53.

Here, it was the Sheriff's department's choice to put the book-in numbers (which began with 2007 for Davis' picture and 93 or 94 for all the others) on the front of the photopack; it was Detective Townsel's choice not to crop or cover the numbers before showing the photopacks to Greisman and Ortiz. See People v. Velarde, 541 P.3d 107,109 (Colo. App. 1975)(photographic arrays

are a permissible part of investigative procedure if conducted within certain guidelines, including "(3) all numbers or other indications that pictures are mug shots must be covered"); Sims v. State, 469 N.E. 2d 554, 556 (Ohio App. 1984)(victim picked defendant's picture from a display of mugshots "with all the police numbers and arrest dates covered"); Kiser v. State, 2002 WL 31322776(Tex. App.–Beaumont 2002)(not designated for publication)(identification procedure was not impermissibly suggestive where, inter alia, "[t]he photos are similar 'book-in' style photos, with the dates blocked out").

The photopacks shown to Greisman and Ortiz were unnecessarily suggestive due to the inclusion of book-in numbers, only one of which (Davis') began with 2007. The suggestiveness was exacerbated by the fact that only two of the six individuals in the photospread were wearing a gray shirt (consistent with Brandon Greisman's prior description of the suspect); the other four were wearing white shirts (inconsistent with Greisman's description).

Proceeding to the second prong of the test, the following factors compellingly demonstrate the unreliability of Greisman's and Ortiz' identifications, time and opportunity to observe; degree of attention; stress; weapon focus; the cross-racial nature of the identifications; vagueness of the descriptions; and the inaccuracy of the only aspect of the description (the suspect's hairstyle, which both eyewitnesses clearly stated was different than Davis') which was not vague. These circumstances, coupled with the unnecessarily suggestive photopack, gave rise to a very substantial likelihood of irreparable misidentification, in violation of the Due Process clause of the Fourteenth Amendment.

Davis' convictions and sentences must be reversed for a new trial.

ISSUE X: THE TRIAL COURT ABUSED ITS DISCRETION AND DISTORTED THE WEIGHING PROCESS WHEN IT (1) IMPROPERLY DIMINISHED THE WEIGHT IT ASSIGNED TO TWO MITIGATING FACTORS AND, (2) DURING THE OVERALL WEIGHING OF FACTORS, ATTRIBUTED A GREATER WEIGHT TO ONE AGGRAVATOR THAN WAS PREVIOUSLY ASSIGNED.

A mitigating circumstance cannot "justify" a murder. With regard to stressors at the time of the incident, the State would like this court to regard financial stress as a circumstance that shows the identity of the perpetrator and that shows the motive for the BP shootings, but not be concerned when it is improperly discounted as a mitigating circumstance. The State contends that "[t]he trial court merely made a comment as to why it assigned little weight to this mitigator by noting that the stress Defendant was experiencing was not of such a great intensity to justify Defendant's actions." (AB at 118, emphasis added). Justification is not at issue; if it were the test, then every murder would require the death penalty.

Davis contests the circumstance of financial hardship as evidence of guilt, particularly given that financial stress tends to be a universally shared condition (and is a pervasive condition in a time of significant economic downturn). But if this Court accepts the State's argument as to the evidence of guilt, then it is incumbent on this Court to reverse the sentence because such a stressor that is relied on so heavily in the guilt phase should not be improperly diminished as a mitigating factor in the penalty phase.

The trial judge failed to correctly follow the process by which mitigators are assigned an appropriate weight before under-

taking the overall weighing of the established aggravating circumstances against the established mitigating circumstances. This is a structural error, given that assignment of weight to each aggravator and mitigator is a means of considering the unique circumstances in each capital case:

> The requirement to assign a weight to each aggravator and mitigator found both stems from, and advances, the constitutional requirement for individualized sentencing that compelled this Court to provide the Campbell guidelines in the first instance. See Campbell, 571 So.2d at 420 ("Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law."). The process, as clarified herein, will engender an analytical discipline at the trial court level that will, in turn, enhance the trial court's consideration of the unique circumstances surrounding each capital case and each individual defendant.

Fennie v. State, 855 So. 2d 597, 608 (Fla. 2003). By discounting a mitigator because it does not justify a murder, the trial court defeated the goal of promoting the uniform application of mitigating circumstances in reaching the individualized decision required by law. "As stated by a federal appellate court: 'The Florida sentencing scheme is not founded on 'mere tabulation' of the aggravating and mitigating factors, but relies instead on the weight of the underlying facts.' Francis v. Dugger, 908 F.2d 696, 705 (11th Cir. 1990), cert. denied, 500 U.S. 910, 111 S.Ct. 1696, 114 L.Ed.2d 90 (1991)." Terry v. State, 668 So. 2d 954, 965 (Fla. 1996). The death penalty must be "reserved only for those cases where the most aggravating and least mitigating circumstances exist. Terry, 668 So. 2d 954 (Fla. 1996)(emphasis added). When the trial judge here improperly discounted the weight he gave the mitigation, he circumvented the process required to maintain

uniformity in application of the death penalty. The error thereby violates the Eighth Amendment and requires reversal of the death sentence.

ISSUES XI & XII:

Appellant relies on the arguments made in the Initial Brief for Issues XI and XII.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Timothy Freeland at the Office of the Attorney General at Cappapp@myfloridalegal.com, on this 13th day of June, 2014.

CERTIFICATION OF FONT SIZE

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

Respectfully submitted,

Karen M. Kinney
/S/KAREN M. KINNEY
Assistant Public Defender
Florida Bar Number 0856932
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
kkinney@pd10.state.fl.us
mjudino@pd10.state.fl.us

HOWARD L. "REX" DIMMIG,II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

kmk