Filing # 20192910 Electronically Filed 11/04/2014 04:12:11 PM

RECEIVED, 11/4/2014 16:13:46, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

KHADAFY KAREEM MULLENS, :

Appellant, :

vs. : Case No. SC13-1824

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

On September 4, 2008, the Grand Jury for the Sixth Judicial Circuit for Pinellas County filed an indictment charging Appellant, Khadafy Kareem Mullens, and a co-defendant, Spencer Peeples, with two counts of the first-degree murder of Ronald Hayworth and Mohammad Uddin, and one count of the attempted first-degree murder of Albert Barton. (1:R5-8) The date of the offenses was August 17, 2008. Id.

On September 25, 2008, the State filed a notice of intent to seek the death penalty. (1:R14) On March 16, 2011, pursuant to a suggestion of incompetency filed by Mr. Mullens' counsel, the Honorable Philip J. Federico signed an order directing Dr. Peter M. Bursten, Ph.D., to evaluate Mr. Mullens for competency to proceed. (1:R31-34, 35) On March 29, 2011, the court also appointed an expert for the State. (1:R41-43) After a hearing, which took place over several months between June 23 and September 16, 2011, Judge Federico ruled on the record that Mr. Mullens was competent to proceed. (1:R80-150; 2:R151-284, 286-345; 3:R346-467, 469-547; Supp. R2371-78, 2383-2429) No written order was filed. (2Supp. R2463)

On April 29, 2013, Mr. Mullens pleaded guilty as charged to two counts of first-degree murder and one count of attempted first-degree murder before Judge Federico and was adjudicated accordingly. (5:R864-65; 6:R866-67; 15:R2254, 2259-70; 15:R2282)

Mr. Mullens waived his right to a jury recommendation regarding sentencing, and over the State's objection, the court accepted the waiver. (15:T2255-56) Mr. Mullens was 29 years old at the time of the plea. (15:R2259)

On May 13-15, 2013, Judge Federico presided over the penalty phase. (6:R881 through 10:R1526) During the penalty phase, over defense objection, the State introduced still photographs made from video recordings from the convenience store security system where the murders occurred. (Exhibit Nos. 3, 5A-K, 7A-D, 9A-C, 12, 13A-D, 14A-D) (6:R923-24, 925-27, 929-30, 932, 934, 935, 935-36, 939; 11:R1657-60; 12:R1989-90; 13:R1991-2001, 2005-15, 2019-22, 2025-27, 2032-40) The only foundation testimony for the authentication of the photographs came from St. Petersburg Police Detective Rodney Tower who testified that the photographs "fairly and accurately" represented what he saw on the video.

Over defense objection of lack of foundation for authentication, the State introduced seven video recordings taken from a surveillance system at the scene of the offenses. The only foundation testimony came from Detective Tower, who was not present at the time of the offenses. (6:R946-51) Although Tower did not download or copy the videos from the surveillance system, the court found that there was "a sufficient nexus," and the video recordings were played in court. (6:R953, 954-92)

The State presented victim impact statements from Mr. Uddin's wife, Shahana Zamin, and his daughter, Nadia, in the form of email communications, and letters from Mr. Hayworth's ex-wife,

Terri Hayworth, and his daughter, Tasha Guggia. (6:R1042-46; 8R:1291-98, 1299-1301; 13:R2104-2107)

Appellant waived a Spencer hearing. (6:R1047-48; 10:R1520-21) On August 23, 2013, the court sentenced Mr. Mullens to death for the murders and to life imprisonment for the attempted murder and filed a written sentencing order. (11:R1591-1609, 1612-18; 15:R2286-2325)

The court found the following three aggravating circumstances, according each "great weight": (1) Appellant was previously convicted of a felony involving the use or threat of violence to a person or another capital felony; (2) the capital felony was committed while Appellant was engaged in or flight from an armed robbery; and (3) the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest. (11:R1594-98) The court also found that the capital felonies were committed for pecuniary gain but did not consider the aggravating factor because of "improper doubling." Id.

The court found two statutory mitigating circumstances: (1) that the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance, and (2) the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (11:R1598-1604)

Appellant listed 35 nonstatutory mitigating circumstances. (10:R1573-77) The court grouped the nonstatutory mitigation into eight categories, and declined to consider the circumstances

listed as 1 through 15, and 21, because the order addressed those circumstances as statutory mitigation.

The court considered eight nonstatutory mitigating circumstances, and found that six were proven and were mitigating: (1) Appellant's mental illness can be successfully treated (some weight); (2) Appellant is immature, impulsive, and easily manipulated (little weight); (3) Appellant was acting under the domination and control of his co-defendant, Spencer Peeples (some weight); (4) Appellant has a low IQ and poor academic achievement scores (little weight); (5) Appellant took responsibility for the offenses (little weight); and (6) Appellant had a loving and supportive family (little weight). (11:R1604-1608)

The court found that, although Appellant proved that he was named after Muammar Gaddafi, that circumstance was not mitigating. (11:R1607) Consequently, the court assigned it no weight. Id. The court found that Appellant failed to prove two mitigating circumstances: 1) that he was sexually abused as a child and while in prison; and 2) that he was "too far gone to be helped" by age ten, and gave those circumstances no weight. (11:R1604, 1607)

THE OFFENSES AND THE ARREST

On August 17, 2008, Appellant, Khadafy Mullens, and Spencer Peeples robbed the Central Food Mart on Central Avenue in St. Petersburg, which was owned by Mohammad Uddin. (6:R914) Six video

recordings from video surveillance cameras inside the store and one from outside the store showed that Spencer Peeples entered the store first, followed by Appellant. (14:R2194-2200)[1] Peeples was wearing a black T-shirt with writing on it, long jeans, and a "do rag," and Mr. Mullens was wearing a green tank top and shorts. Id.

After the men entered the store, Mr. Mullens went to the counter and purchased something while Peeples went to the coolers and got something in a can and placed it on the counter. (14:R2194, 2195, 2196, 2197, 2199) While Peeples placed more things on the counter, Mr. Mullens walked away. He stood by the front door facing the counter, watching Peeples and rubbing his hands together. (14:R2195, 2198, 2199) He glanced out the door only a couple of times, and seemed to be focused on Peeples. Id.

While Mr. Mullens stood there, Peeples took a long-barreled revolver out of his pants, pointed it at Mr. Uddin, and told him to put his hands up and to get down. (6:R933; 14R2195, 2196, 2199, 2200) Mr. Mullens went behind the counter and Peeples went around it. (14:R2198, 2199)

While the men were behind the counter with Mr. Uddin, Mr. Hayworth walked into the store and stood at the counter. (14:R2194, 2198, 2199) Mr. Mullens walked back around to the customer side of the counter and let Peeples deal with Mr. Uddin. (14:R2196, 2199) Mr. Hayworth watched impassively as Peeples made Mr. Uddin open the cash register. (14:R2199) Peeples grabbed the

[1] Volume 14 consists of seven video recordings from the

money from the register and placed it in his pants pocket. (14:R2195, 2196) Peeples also checked one of Uddin's pockets. (14:R2195)

Peeples went to the door and Mr. Mullens went behind the counter. (14:R2199) Peeples took out the gun and went over to Mr. Uddin and got the keys to the store. (14:R2199) Peeples brought the keys to Mr. Mullens who used them to lock the door. (14:R2195, 2198) Peeples put the gun back in his pants. (14:R2195, 2198)

Peeples said something to Mr. Uddin and Mr. Uddin pointed to a video recording device near the ceiling in one of the isles. (14:R2194, 2196, 2199) Peeples told Mr. Uddin, "You go," or "Let's go," and said, "I need the tape." (14:R2195) Peeples took Mr. Uddin into one of the aisles to the get the VCR and they took it down. (6:R932; 14:R2194) During that time, Mr. Mullens was behind the counter and unplugged something. (14:R2195) Mr. Mullens got a plastic store bag and Peeples handed the VCR to Mr. Mullens who placed it in the bag. (14:R2195, 2196, 2198)

Peeples asked Uddin where his car keys were. (14:R2198) Peeples went behind the counter with the gun and began stuffing lottery tickets into a plastic bag. (14:R2196) Peeples held the gun under his arm while he took the tickets. (14:R2196) During that time, Uddin was saying something to Peeples. (14:R2195) Mr. Mullens stood near the door with the VCR, trying to put the wires into the bag with the unit. (14:R2198)

(..continued)
surveillance cameras at the Central Food Mart.

Peeples handed the gun to Mr. Mullens who pointed it at Mr. Uddin and asked him where his keys were. Mr. Mullens made Uddin get on the floor. (14:R2195, 2196, 2197, 2198, 2199) While he held the gun on Mr. Uddin, Mr. Mullens repeatedly looked back at Peeples and Uddin addressed Peeples. (14:R2197) Meanwhile, Peeples was behind the counter. Mr. Hayworth asked Peeples for something and Peeples handed it to him. (14:R2194) Hayworth moved toward the door and stood there. (14:R2195, 2196, 2198)

Peeples began taking apart the lottery display and stuffing the tickets in a bag. (14:R2196) Peeples went over to Mr. Mullens and retrieved the gun, pointed it at Uddin, and repeatedly asked him, "Where the keys at?" (14:R2197) While that was happening, Mr. Mullens walked behind the counter and picked up lottery tickets. (14:R2195, 2196)

Uddin pointed toward the counter and Peeples told Mr. Uddin, "Move." He took Mr. Uddin behind the counter and told him, "Open the drawer" or "open that." (14:R2196) Mr. Uddin opened a drawer under the cash register and Peeples grabbed the money sitting in the drawer and put it in his pocket. (14:R2195, 2196, 2199) Meanwhile, Mr. Mullens had his back to them, taking lottery tickets. (14:R2195) Peeples asked Uddin where his car keys were and Mr. Mullens inspected Uddin's back pockets. (14:R2196) Mr. Mullens left the counter area and wandered around the store and put something in a bag. (14:R2199) He took the gun from Peeples for a few moments. (14:R2198, 2199)

Peeples pointed the gun at Uddin and repeatedly asked Mr. Uddin, "Where the keys at?" and "Where the car keys at." (14:R2194, 2197, 2199) Peeples and Uddin left the counter area and continued to argue about the car keys. (14:R2197) Peeples and Uddin went behind the counter and Mr. Uddin gave Peeples his car keys, which were in his pocket. (2199) Peeples handed Mr. Mullens the gun, gave him some instructions, and left the store. At that point, Mr. Mullens stood at the end of the counter so that Uddin could not follow Peeples. (14:R2196, 2198) He did not point the gun at Uddin. Id. They spoke to one another in calm voices. Id.

Mr. Mullens went to the door and looked out. Mr. Uddin picked up the phone and punched some numbers. (14:R2195) Mr. Mullens turned around after Uddin finished dialing and saw Uddin with the phone. (14:R2195) Mr. Mullens jumped and approached Uddin who threw the receiver, which bounced and landed on the floor. (14:R2195) Mr. Mullens pointed the gun at Uddin and argued with or yelled at Uddin. He pointed to the phone and indicated to Uddin that he get down. (14:R1295) He told Uddin to pick up the receiver. (14:R2195)

Uddin reached down to pick up the phone. Uddin hit or pushed Mr. Mullens' arm to move the gun away from his face. Uddin became frantic and began waving his arms in Mr. Mullens' direction and weaving to stay away from the gun. (14:R2195) Mr. Mullens shot Mr. Uddin in the head as Mr. Uddin was moving. (14:R2195) Mr. Mullens then went around the counter and grabbed Mr. Heyworth by

the wrist and turned him around. Heyworth said, "Let me go" and Mr. Mullens shot him in the head. (14:R2199)

At that point, Mr. Mullens picked up a bag and went to open the door. Mr. Barton entered the store and immediately tried to back out. (14:R219) Mr. Mullens grabbed him by the arm, ripping his sleeve, and pulled him inside the store. (14:R2199) The two men struggled while Mr. Barton said, "Wait a minute. Wait a minute." The gun discharged three times hitting Mr. Barton. After the first shot, the cylinder fell out of the gun and Mr. Mullens bent down to retrieve it and place it back in the gun. (6:R919; 14:R2195, 2199) After the final shot, Barton continued to struggle and Mr. Mullens pushed him to the floor. (14:T2195)

Mr. Barton, who was alive and still moving and making noises, was trying to get up. (14:R2195, 2196, 2198) Meanwhile, Mr. Mullens calmly picked up a bag overflowing with lottery tickets and stuffed them back inside the bag. Mr. Mullens walked out of the store. He began to jog toward the right and got into the back seat of a car stopped on the street that intersected Central Avenue. (14:R2200) Later, a witness told the police that she recognized Mr. Uddin's 2002 gray Camry and saw it make a U-turn and go back toward the store, but there was no evidence regarding where the car was parked. (6:R919, 1035)

Mr. Barton got up and walked out the door to flag down the police after looking behind the counter at Mr. Uddin. (14:R2197, 2199) The time between the first shot that killed Mr. Uddin and

the last shot aimed at Barton was approximately 36 seconds. (14:R2194-2200)

Peeples was arrested that night in Mr. Uddin's car, and the cylinder of a gun and one piece of ammunition were found in the car. (6:R942) The police searched Peeples' apartment and found clothing that matched the clothing worn in the robbery. They also found lottery tickets and a VCR that matched those items taken from the store. (6:R943) Mr. Barton's DNA was on the khaki pants and shirt found in the apartment. (6:R1002-1003) The police arrested Appellant in an alley near Peeples' apartment in the early morning hours of August 18, 2008. (6:R920) Appellant had two lottery tickets in his pants' pocket, which were found to have come from the convenience store. (13:R2052-53)

St. Petersburg Police Sergeant Brian Taylor testified that after Mr. Mullens was arrested, Taylor asked him his name and he told him to "fuck off." (6:R1020) He also asked Taylor, "What the fuck did I do?" (6:R1020) Taylor told him he needed his name and Mr. Mullens said "Fuck, it's Khadafy." (6:R1020) Taylor asked him his last name and he told the officer to "fuck off" and again asked him what he did. (6:R1020)

EVIDENCE OF MITIGATION

Khadafy Kareem Mullens was born in 1983. He is the third of the four children of his mother, Cassandra Washington. Ms. Washington admitted that she drank heavily and smoked marijuana during Appellant's childhood and that she suffered from major

depression. Appellant's father, Mohammad Ibrahim, also testified and admitted that when Appellant was a child he was a heroin and cocaine addict, and he abused marijuana and alcohol. (8:R1265) Ibrahim testified that he is Bipolar, and that he had been diagnosed as psychotic. (8:R1264) Ibrahim is also a Marine veteran who suffers from PTSD. Id. At the time of the hearing, he was seeing a psychiatrist and getting treatment. (8:R1264)

Appellant has many relatives who were mentally ill or alcoholics. His mother's father was an alcoholic, and many of his mother's relatives suffered from alcoholism and died from cirrhosis of the liver. (7:R1105-1106; 8:R1209) His maternal great-grandmother had a nervous breakdown and tried to kill one of her children. His mother's uncle was paranoid schizophrenic who resorted to illegal drugs to self-medicate. (8:R1209) Appellant's paternal grandmother was an alcoholic, and his paternal grandfather was mentally ill. (8:R1184)

Appellant's mother worked during Appellant's childhood and she left Appellant's sister to care for her siblings. (8:R1190) The children were left to fend for themselves, and they often went hungry or stole to get something to eat. (8:R1190, 1220, 1223, 1247) They did not have adequate clothing and they had poor hygiene. (8:R1220, 1222) Other children at school picked on them because they were desperately poor. (8:R1223) Appellant's family never had adequate living conditions. At one time Appellant's parents lived in a one-bedroom apartment with their four children

on the south side of St. Petersburg. (7:R1110) They were evicted from there and were homeless for a couple of months. (7:R1111)

The children did not have any positive role models at home. (8:R1223) Before Ibrahim left the family when Appellant was five years old, he was extremely violent and verbally abusive. Ibrahim would beat Appellant's mother and take the family's money to support his habit. (8:R1266) When he would steal the rent money to buy drugs, the family would be evicted or their utilities would be shut off. (7:R1119; 8:R1250, 1266) Ibrahim also took their food money and food stamps, and as a result, the children went hungry. (7:R1119; 8:R1266) One time, Sandra and Wesley were watching television when their father unplugged it and carried it off to sell it for drugs. (8:R1251, 1267)

Appellant's older sister, Sandra Washington, remembered that Appellant's father was violent and obnoxious. (8:R1247) He would drag their mother around and threaten to kill her. He would also strangle her. (8:R1248, 1249) He would get enraged by little things. For example, if there was no cornbread with a meal, he would get loud and violent. (8:R1248) Many times, the violence came without warning, and Sandra remembered that Ibrahim was violent four days out of every week. (8:R1249) Ibrahim was also insulting, degrading, and belittling; he called their mother stupid, dumb, and a fat bitch, and said that she was a bad mother and a dumb whore. (8:R1249)

When Sandra was eight or nine, Ibrahim would take her to the store and instruct her to get items from the shelves and

bring them to him in the front of the store. (8:R1250, 1251) He would give her a bag to put the groceries in and they would leave without paying. (8:R1251)

Ibrahim admitted in court that he did all these things. (8:R1266-69) Between fixes he was violent and beat Appellant's mother in front of the children while Khadafy cried loudly, begging him to stop. (8:R1268) Even though Appellant was five years old or younger, he would take his baby sister, Kendra, out of the way of the violence. (7:R1118)

Ibrahim admitted that he also beat his children and he was verbally abusive toward his family and the neighbors. (8:R1268-69) He was "drugged out" and he didn't really care about what was going on in the house because he was rarely at home. (8:R1269-70) He did not care that his children were home alone while their mother worked and he was out doing drugs. (8:R1270-71)

Ibrahim's birth name was John Mullens, but he changed it when he converted to Islam in prison. (7:R1106; 8:R1263) Ibrahim was frequently in jail or in prison, and he went to prison when Appellant was five years old. In 1989, he was convicted of murder and served a 10-year sentence in New York. (7:R1120; 8:R1271-72) Ibrahim named Appellant "Khadafy" because thought it was cool and because he admired Muammar Gaddafi for standing up to the Reagan Administration and refusing to be bullied. (8:R1263-64)

After Ibrahim left, Appellant's mother married a man named Levi McClendon in 1988; however, they later divorced because McClendon was an alcoholic. (7:R1112-13) In 1993 Appellant's

mother bought a house, which relatives described as a "shack," and the family lived in it until she lost the house to foreclosure. (7:R1114; 8:R1189, 1198, 1221) The house was filthy and bug infested and located in a dangerous neighborhood filled with drug activity and violence. (8:R1189, 1198, 1220, 1221, 1274)

Appellant's family and friends testified that Appellant was a sweet and affectionate child who was desperate for approval. (7:R1122, 1163; 8:R1221, 1252, 1272) He was doggedly devoted to his younger sister, Kendra, who was three years younger than he. Appellant shared his food with her and stole food for her. (7:R1123, 1129, 1163; 8:R1254, 1273) Appellant would dress Kendra and comb her hair and protect her. (8:R1254) He also loved his father. (8:R1272)

When he was a child, Appellant had an imaginary friend he called "pig." (7:R1130) He had the same girlfriend, Charlotte Berry, a Juilliard graduate, from the second grade until high school. (7:R1131, 1161) Appellant was kind to her and he protected her. (7:R1163)

Witnesses corroborated the fact that Appellant is, and has always been, impulsive and that he never understood consequences. (7:R1124; 8:R1194) He has always been gullible and easily manipulated. (8:R1273) It is easy to persuade him to do something or talk him out of something. (8:R1194-95, 1272) Appellant's sister, Sandra, testified that Appellant was an affectionate and

generous child who was always a follower and susceptible to peer pressure. (8:R1253)

Sandra admitted that she would get Appellant to steal candy for her when he was eight years old. (8:R1223, 1254) Appellant's friends and his brother Wesley got him to steal for them. (7:R1128) Wesley got him to steal bicycles from a neighbor's garage. (7:R1128) In the process, the boys destroyed the cosmetics that the neighbor had for sale. Id. Appellant stole some of the cosmetics and wrapped them up for his mother's Christmas present. (7:R1128)

Appellant never understood social convention and he said things that were grossly inappropriate. For example, when he was a teenager, Appellant's mother worked for an agency dealing with adolescent pregnancy. Appellant's girlfriend did not want to have sex with him, so he asked his mother to talk to her about birth control to convince her to have sex with him. (7:R1132) She had to explain that it would be inappropriate for her to convince Charlotte to have sex with him. Id.

Appellant's uncle, Kenneth Mullens, described Appellant as extremely sensitive and emotional. (8:R1186-87) Mullens lived in Fort Lauderdale, and the children would come to visit him during the holidays and summer vacations. (8:R1185, 1186) Appellant's uncle testified that Appellant "loves hard," and explained that Appellant attacked a child who threatened his son while they were playing. (8:R1203, 1187-88)

Kenneth Mullens noticed that Appellant's reading skills were poor and his comprehension was not very good. (8:R1189) He and his wife discussed the possibility of taking the children into their home, but decided it was too dangerous because the children were aggressive street kids. (8:R1192) Appellant stayed with his uncle during the summer when he was ten years old. (8:R1185, 1186) Mullens would not use corporal punishment on Appellant because he was afraid Appellant would retaliate even though he was only a child. (8:R1195) Mr. Mullens tried to talk to Appellant's mother about the situation, but she was very defensive. (8:R1192) Mullens explained that as an adult, Appellant lacked maturity; he had the mind of a child and he seemed unable to understand consequences or authority. (8:R1193)

Sharon Mullens, Appellant's aunt on his father's side, had been in the military on active duty for 30 years by the time of the hearing. (8:R1216) She testified that Appellant's stepfather, Levi McClendon, was "flamboyant" and he would grab Appellant around the waist and make him sit on his lap. (8:R1217-18) Ms. Mullens was also convinced after talking to Appellant's father that Appellant was raped in prison. (8:R1224) Ms. Mullens also testified that Appellant and his younger sister were gullible and easily influenced. (8:R1222)

Appellant's cousin, Jimmy Mullens, who was close in age to Appellant, testified that Appellant always had emotional extremes and he would get upset at trivial things. (8:R1202) Appellant was gullible and easily influenced and manipulated. (8:R1204) In

hindsight, Jimmy Mullens realized that Appellant was "slow," and he remembered that Appellant would often say odd things. (8:R1207)

Atari Russ grew up with Appellant. (8:R1228) Because it was a predominantly white neighborhood at the time, they would be called "nigger" and other things. (8:R1229) Appellant was a happy child and Russ described him as "goofy" and likeable. (8:R1230) Russ stated that Appellant was gullible and easily influenced. (8:R1230) Because they knew Appellant would do it, they told him to go pick some fruit off a tree even though they weren't supposed to. (8:R1231)

Russ described Appellant's brother Wesley as a bully who would pick on Appellant in front of his friends. (8:R1231-32) Wesley was the leader and Appellant was the follower. (8:R1234) One time Wesley put Appellant in a chokehold and choked him until he passed out. He hit and punched Appellant and put him down and criticized him. (8:R1232-34)

Russ explained that Appellant started talking to himself when he was 14 or 15 years old. (8:R1235, 1836) Appellant seemed to be lost in his own world, and one time, Russ saw Appellant having a conversation and laughing in the yard but there was no one else there. (8:R1235-36) They started drinking alcohol and smoking marijuana around that time. (8:R1236-37) They did ecstasy and cocaine together and they would put crack cocaine in a marijuana blunt. (8:R1237) Appellant and Russ had a friend who

was selling drugs and who was robbed and murdered when they were 17 or 18. (8:R1237, 1238)

Ibrahim returned to the family when Appellant was about 15 years old. (7:R1121) Soon after his return, the stealing, manipulating and abuse started again. (7:R1121) He and his sons fought. Ibrahim admitted that he tried to kill Wesley a couple of times and he beat Appellant for moving too slowly. (9:R1282)

Appellant started showing signs of mental illness when he was a teenager. By the time he was 15, Appellant had anger issues. He was depressed and hyper or manic. (7:R1137) Appellant's mother threw him out of the house when he was 15, and Appellant ended up living in a drug-infested hotel in St. Petersburg. (7:R1138)

Appellant was sent to adult prison when he was only 16. (7:R1138; 8:R1257) When he got out of prison in 2001 at age 18, he was angry and paranoid. (7:R1139; 8:R1224; 13:R2075-76) He was convinced that people were after him and that they wanted to sexually abuse him. (7:R1139) Even though he had always been meticulous about his appearance, he would not bathe or comb his hair. (7:R1139; 8:R1257, 1257) He would spend hours staring into space, and sometimes he would watch television all day and night without sleeping. (7:R1139-40)

After prison, Appellant could not focus on anything and he would not listen. (7:R1140) His mother tried to get him on medication but he refused, and since he was 18, she could not force him. (7:R1141) Appellant's behavior was so bizarre that the

residents of the neighborhood petitioned to get him to leave. (7:R1141) Appellant's behavior was so confrontational and irrational, that his own mother hoped that someone would kill him and put him out of his misery. (7:R1142) In fact, she even considered poisoning him. (7:R1142)

Atari Russ testified that when Appellant got out of prison, he was completely different. (8:R1238) Russ noticed that Appellant was paranoid and disengaged and he did not know what was going on around him. (8:R1239) Appellant would not talk and he was hyper-vigilant. (8:R1238-39) He was missing a tooth and his lips were swollen. (8:R1240)

Ibrahim testified that after Appellant's release from prison he was "shell shocked" and he was detached and unsociable. (8:R1275, 1276) One time when he woke him, Appellant jumped up and started screaming. (8:R1275) Ibrahim explained that the behavior was typical of someone who was sexually abused in prison. (8:R1275)

Appellant went back to prison and was released in September of 2007. (7:R1114; 8:R1257; 13:R2075-76) He was medicated in prison. (7:R1143) Appellant's mother testified that after his release Appellant was still "hyper," but he seemed more focused. (7:R1143) The prison gave him a referral to a program, but he was ultimately dropped from the program for non-compliance because he had transportation problems. (7:R1143-45) Appellant's mother tried to get him into Suncoast, but was unable to do so. Appellant stopped taking his medication and he became very

aggressive. (7:R1145, 1146) He began drinking and using cocaine and marijuana. (7:R1145)

Appellant's sister, Sandra, testified that after Appellant was released from prison in 2007, he was "crazy." (8:R1257) He could not focus and nothing he said made sense. (8:R1258) His habits were strange and his hygiene was even worse. (8:R1258) He would talk to himself, laugh and clap, and he acted as if he were hearing voices. (8:R1258-59) She described him as "rigid and shaky" and said that when he would wake up, he acted as if he were still in prison and defending himself. (8:R1259)

Anthony Washington, Appellant's uncle on his mother's side, testified that he took Appellant to an appointment on the bus after Appellant got out of prison in 2007. (8:R1210-11) Appellant said something inappropriate about a woman walking on the street. (8:R1211) Appellant would also laugh to himself at inappropriate times. On Christmas day in 2007, Appellant started talking about getting a "blowjob" from a girl in front of the family, and they had to tell him to stop. (8:R1211)

Appellant lived with Michael Wonka during the two months before he was arrested for these offenses. (8:R1285) Wonka testified that during that time, Appellant would burst out laughing for no reason and it was clear Appellant was mentally ill. (8:R1286) Appellant would play with decorative figurines as if they were Army men. (8:R1286) Wonka testified that Appellant is childlike and he cannot cook or drive a car or otherwise take care of himself. (8:R1286-87)

Wonka testified that Appellant would help him around the house. (8:R1287) Wonka and Appellant snorted powder cocaine and smoked crack cocaine regularly, but Appellant never took any prescription medication during that time. (8:R1287) On the day Appellant was arrested, Wonka took him to 34th Street and Central Avenue to a convenience store around 12:40 in the afternoon. (8:R1288) As he got out of the car, Appellant asked a man for 50 cents so he could get a beer. (8:R1288)

Reginald Moorer testified that Appellant is "slow." (7:R1084) In the weeks before the robbery, Appellant was acting "goofy" and "crazy." (7:R1084) Moorer saw Appellant at Peeples' house on the night of the robbery. (7:R1085) Appellant was snorting cocaine, drinking gin, and smoking marijuana. (7:R1085) He was very nervous and "jittery" and he was scratching a lot of lottery tickets. (7:R1085-86)

Ali Sultan, another convenience store owner from St. Petersburg, testified that he knew Spencer Peeples as "Smoke" and that he saw "Smoke" almost every day. (7:R1091) Peeples had a reputation in the community for violence and intimidation and he was not allowed in Sultan's store. (7:R1091-92, 1100) If someone said the wrong thing to Peeples he would "snap" and "go off." (7:R1091) Peeples used violence to get what he wanted and Sultan was afraid of Peeples. (7:R1092)

On the day of these offenses, Peeples went to Sultan's store looking for him. (7:R1093) Peeples was enraged because he sold Sultan's son a bike for a couple of dollars, and the boy made a

profit by selling the parts to repair other bicycles. Peeples demanded more money from Sultan's son and Sultan intervened. (7:R1093) Peeples came into the store after the homicides looking for Sultan, but another man was working that day. (7:R1094)

Sultan testified that it was well known that Appellant needed drugs and that he would do whatever it took to get his drugs. (7:R1098) If he had to, he would steal something or do an errand for someone or steal something for someone, and he would do whatever someone told him to do if he thought it would get him drugs. (7:R1098) Peeples had trespass warnings for many of the stores in the area, but Appellant did not. (7:R1101)

Russell Watson told police that earlier on the day of the robbery, he saw Peeples, whom he knew as "Smoke," and that Peeples lifted his shirt and showed him a firearm in his waistband. (6:R1033) Watson said that Peeples told him he was going to rob the convenience store at the corner of 22nd and Central and he invited Watson to participate. (10:R1033-34) Watson said "no thanks" and went on his way. (6:R1033-34) Watson said he stayed in the area and he later saw Peeples go into the store and leave the store at the time of the homicide. (6:R1034-35)

These offenses occurred a few days after Appellant's step-father, Levi McClendon, died. (7:R1122) McClendon's funeral was held the day after these offenses. Id.

When Appellant was first incarcerated for these charges he was uncommunicative and combative. (7:R1147) He was unstable and

he said incomprehensible and insane things. (8:R1279) Ibrahim would meet him in the chapel and try to explain to him that he had to get along with the deputies and act respectfully. (8:R1278) It led to arguments and their fights almost came to blows in the chapel. (8:R1278)

Appellant's family members all agreed that since Appellant was medicated in the jail, he was a different person. (8:R1279) When he was first incarcerated, his conversations were rambling and incoherent and he seemed agitated. (8:R1213, 1260) However, once he was properly medicated, Appellant was able to focus and they were able to have coherent conversations with him. (7:R1148; 8:1214; 8:R1260) Sandra Washington, Appellant's sister, noticed that he was more calm and talkative and he displayed a sense of humor. (8:R1260) Ibrahim testified that since Appellant has been on medication, he can carry on an intelligent conversation and he is respectful and calm. (8:R1279) His letters make sense, and he is in a better frame of mind. (8:R1279)

Appellant's family members all testified that they still loved Appellant and that they would support him and continue to visit him in prison. (8:R1207, 1214, 1221, 1224, 1261, 1280) Charlotte Berry still loved Appellant and visited him in jail. (7:R1163) Wonka visited Appellant in jail before the hearing and he would continue to support him if he were sentenced to life in prison. (8:R1289)

Dr. Scot Machlus, Ph.D., a forensic psychologist, began evaluating Khadafy Mullens for the purposes of mitigating

circumstances on October 19, 2010. (9:R1324) At that time, Machlus questioned Appellant's competency to stand trial, and he evaluated Appellant for competency as well as for mitigation. (9:R1324) Dr. Machlus interviewed Appellant on numerous occasions. He met with Appellant's parents and his sister, Sandra Washington, and his Aunt, Sharon Mullens; however, he did not get to speak to his sister, Kendra. (9:R1325-26) She died from cocaine toxicity sometime between Appellant's arrest and the hearing. (8:R1222; 9:R1367-68)

Dr. Machlus reviewed police reports from the incident, along with Appellant's prior record and school records. (9:R1326) He read an evaluation from the DJJ, along with DOC and Pinellas County Jail medical and disciplinary records. (9:R1327) He reviewed Appellant's medical records from Suncoast Center Community Mental Health and Gulf Coast Community Care. (9:R1327)

Dr. Machlus testified that Appellant suffers from Bipolar I Disorder, with his most recent episode being "mixed," meaning that he had symptoms of both depression and mania at the same time, and that Appellant was both depressed and agitated. (9:R1328-29) He also has severe psychotic symptoms. (9:R1334)

Bipolar disorder and schizophrenia tend to run in families. (9:R1366-67) People who are Bipolar are impulsive and do not act rationally. (9:R1376) They make poor decisions and break the law. Id. Dr. Machlus opined that Appellant's disorder may have started when he was 14 or 15 years old, when Appellant reported that he was hearing voices. (9:R1337)

Appellant also suffers from a personality disorder NOS, meaning "not otherwise specified." He does not fit clearly into one of the specified personality disorders because he has features of many of them. (9:R1328) He displays characteristics of paranoid and antisocial personality disorders and he has histrionic personality disorder, which is excessive emotionality and attention seeking. (9:R1344) Histrionic personality disorder occurs in people who have felt neglected and feel that caretakers were not paying attention to them. (9:R1345) Appellant also shows aspects of borderline personality disorder, which would include impulsivity, suicidal threats, affective instability and paranoid ideation. (9:R1345) Dr. Machlus explained that personality disorders arise in childhood as survival strategies and differ depending on the person's inherent temperament. (9:R1345-46)

Dr. Machlus also concluded that Appellant suffers from polysubstance abuse and that cocaine was his drug of choice. (9:R1328, 1346) Appellant probably started using cocaine when he was 11 years old, and by 2007, he was using 3.5 grams daily. (9:R1346) He began drinking when he was either 9 or 13, and by age 13 or 14, he was huffing aerosol cans until he passed out. (9:R1347) Appellant also started using marijuana while he was a teenager, and when he got out of prison, he experimented with ecstasy. (9:R1347) Dr. Machlus explained that people who suffer from Bipolar Disorder in addition to substance abuse are six times more likely to commit a violent criminal act as those with just Bipolar Disorder. (9:R1377)

Dr. Machlus determined that Appellant has an IQ of 83, which is the low average range. (9:R1348) His major deficits are in his verbal comprehension and working memory. (9:R1349) Achievement tests showed that Appellant's verbal skills are on a fourth grade level, equivalent to that of a nine year old child. (9:R1351) His reading skills are at a sixth-grade level with an age equivalent of 11.10, and his mathematics skills are at an 8.5 grade level with an age equivalency of 13.11. (9:R1351) His written language is at a fifth grade level and equivalent to that of a child of 11 years and three months. (9:R1351) Appellant's math calculation achievement is at a grade level of 9.6, which is equivalent to age 15. (9:R1351) His written expression is the equivalent of the fifth grade or 10.5 years of age. (9:R1351) His academic skills grade level is 7.5 or equivalent to an 11 year old. (9:R1352) His academic fluency score was at a 6.6 grade level with an age equivalency of 11.11 years. (9:R1352) His "academic applications" score was equivalent to a 6.3 grade level and age level of 11.8. Id. Appellant was categorized as "at risk" for dropout as early as the fourth grade; however, he dropped out of dropout prevention. (9:1375)

Dr. Machlus explained that it was difficult to diagnose Appellant because, at times, he was in the active phases of Bipolar Disorder. (9:R1329) Laughing inappropriately was part of his mania. (9:R1331) Appellant was irritable and angry and got into altercations with staff and fellow inmates at the jail. (9:R1332) He would go without sleep for days and then sleep for

three days in a row. (9:R1332) At times during the evaluations, Appellant talked nonstop and his speech was circumstantial and tangential, which reflected his thought process. (9:R1332) Jail records showed that Appellant engaged in excessive masturbatory activity in front of other inmates. (9:R1332-33) Dr. Machlus opined that he had no control over his urge to masturbate because he masturbated whether or not anyone was looking. Id.

Correctional officers in the jail noticed as early as 2001, when Appellant was 18 years old, that Appellant's behavior was unusual, which is consistent with Bipolar Disorder which usually emerges in the teenage years or early twenties. (9:R1335, 1336) Other inmates called him a "bug" because he acted crazy. (9:R1335) When Appellant was medicated, all of his symptoms decreased and he was more stable, and when he stopped taking the medications, he became more agitated and his symptoms increased. (9:R1334-35) However, he was totally unmedicated until 2006, when the DOC diagnosed him with schizoaffective disorder and antisocial personality disorder. (9:R1338) In September of 2006, Appellant was given Remeron, an antidepressant, and records showed that by April of 2007, Appellant was taking Risperdal, an antipsychotic. (9:R1339)

When Appellant was released from prison in 2007, DOC referred him to Gulf Coast Community care. (9:R1340-41) Gulf Coast diagnosed him with Bipolar Disorder, most recent episode depressed, schizophrenic paranoid type. (9:R1341) He was also diagnosed with avoidant personality disorder and independent

personality disorder and he was continued on Remeron and Risperdal. (9:R1342) However, after Appellant began to miss appointments, Gulf Coast discharged him in early 2008 for failing to follow through with his treatment. (9:R1342)

Dr. Machlus concluded that Appellant was suffering from Bipolar Disorder on August 17, 2008, when these offenses occurred. (9:R1343) At the time of the offenses, Appellant was also using cocaine very heavily, along with alcohol and marijuana. (9:R1348)

In November of 2011, while Appellant was in jail on these offenses, the jail gave him an anti-psychotic, Trilafon, that is also used for Bipolar Disorder. (9:R1363) On May 14, 2012, the jail doubled the dosage. (9:R1364) Before he was medicated, appellant was masturbating, singing rap songs, playing games, and asking for kisses during his evaluations with Dr. Machlus; however, after he was sufficiently medicated, that behavior stopped and Appellant was more focused. (9:R1364, 1360) Dr. Machlus testified that after Appellant was properly medicated, it was as if he were "a different person." (9:R1364)

Dr. Machlus concluded that Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired. (9:R1364-65) He also concluded that the homicides were committed while Appellant was under the influence of extreme mental or emotional disturbance. (9:R1381) Dr. Machlus believed that Appellant acted under extreme duress or under the substantial domination of Spencer Peeples, but that it did not

rise to the level of the legal definition required for the statutory mitigator. (9:R1382-83) Dr. Machlus also thought Appellant knew the difference between right and wrong. (9:R1403)

Dr. Machlus explained that Appellant had a genetic predisposition to substance abuse based on his family history. (9:R1368) He explained that the greatest predictor of psychopathology aside from genetic causes is parental conflict, and all reports indicated Appellant's father physically, verbally, and mentally abused Appellant's mother. (9:R1369) Parental conflict and parental neglect increases the likelihood of criminal and violent behavior in individuals. (9:R1369) Research also shows that residential instability and lack of consistency contribute to juvenile delinquency, and poverty and lack of sufficient food increases the likelihood of teen violence and convictions for violent offenses. (9:R1374)

Adolescents who are incarcerated in adult facilities, as was Appellant, develop severe psychological problems including anxiety and post-traumatic stress disorder. (9:R1376) Appellant had symptoms of hyperarousal and avoidance, which match his symptoms of paranoia. (9:R1376) Appellant was sexually abused on eight separate occasions in prison. (10:R1401) He also reported that he was sexually abused by his stepfather, Levi McClendon. Id.

Dr. Machlus stated that other people with the same challenges do not commit these types of crimes if they have "protective factors," which Appellant did not have. (9:R1378)

These factors include being female, being of average intelligence, having a resilient temperament, and having positive role models. (9:R1378) Appellant is a male of low intelligence; he did not have positive role models and he does not have a resilient temperament. (9:R1378) Appellant has difficulty dealing with any type of stress and he tends to react rather than think before acting. (9:R1378)

Dr. Machlus opined that the fact that Appellant's father went to prison when he was five years old would not mitigate the damage that was done up to that point, and the fact that Appellant knew his father was in prison would have a significant impact on him. (9:R1384)

SUMMARY OF THE ARGUMENT

I. The trial court erred in admitting the video recordings, and still photographs made from the recordings, from the store's surveillance system because the State failed to lay a foundation for the authentication of the evidence. The State did not present any witnesses who were present in the convenience store at the time of the murders. For that reason, a foundation had to be laid under the "silent witness" theory, which requires, in addition to testimony identifying the people in the recordings, a showing that the process and the equipment with which the recordings were made were reliable and accurate. That showing should include testimony regarding the installation, testing, and operation of the recording device, along with testimony explaining how the images were downloaded or transferred to tape or DVD discs. There must also be testimony verifying that the recordings have not been altered in any way.

In this case, law enforcement could not access or download the video recordings and the detective who testified had no idea how the system worked or how the recordings were transferred to discs or converted into photographs. Nevertheless, the State did not present the technician who was employed by the company that installed the system and who accessed the recordings and transferred them to a format that law enforcement could use.

The error is not harmless because the court's order

sentencing Appellant to death for the two murders was based almost entirely on the court's review of the video recordings.

II. The circumstantial evidence is insufficient to support the "avoid arrest" aggravator because the evidence is not inconsistent with the theory that Appellant acted impulsively or instinctively, or out of rage or panic, when he turned around and saw Mr. Uddin on the telephone. The video recordings show that Appellant was surprised that Mr. Uddin was on the phone. He reacted angrily and became agitated. Because the murders and the attempted murder occurred in less than a minute, there was no evidence that Appellant's sole or dominant motive was witness elimination, and mere speculation regarding Appellant's metal state cannot support the aggravator.

III. The trial court erred in disregarding Appellant's nonstatutory mitigating circumstances on the grounds that the evidence was considered in the court's analysis of statutory mental mitigation. The statutory mental mitigation in sections 921.141(b) and (f), pertains to the defendant's mental state at the time of the offense. However, nonstatutory or "catch-all" mitigators are reasons peculiar to the defendant's background that would "mitigate against imposition of the death penalty." See §921.141(6)(h), Fla. Stat. In this case, the mental and childhood mitigation are factors that reasonably may serve as a basis for imposing a sentence less than death.

The court also failed to address two of Appellant's nonstatutory mitigating circumstances entirely and improperly

rejected the mitigator that he was sexually abused as a child and while in prison. The court also overlooked expert testimony, that people with Bipolar Disorder act impulsively, when weighing one of Appellant's mitigating circumstances.

IV. In light of the substantial mitigation presented in this case, Appellant's death sentences should be vacated and remanded to the trial court for the imposition of life sentences. Appellant's mitigation included a dismal childhood of extreme poverty and alcoholic and drug-addicted parents, who left Appellant in the care of older siblings. The evidence also established that Appellant was Bipolar with psychotic symptoms and that he was actively mentally ill and abusing drugs at the time of these offenses.

V. The case has to be remanded to the trial court because the court failed to enter a written order finding Appellant competent as required by Fla. R. Crim. P 3.212(b).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING VIDEO RECORDINGS FROM THE SURVEILLANCE CAMERAS, AND PHOTOGRAPHS TAKEN FROM THEM, BECAUSE THE STATE FAILED TO PROPERLY AUTHENTICATE THE RECORDINGS AND THE PHOTOGRAPHS.

Because the State failed to lay a proper foundation, the trial court erred in allowing the State to introduce seven video recordings, and the still photographs taken from the video recordings, from the convenience store.

The only foundation evidence presented by the prosecution was the testimony of Detective Tower, who was not in the store at the time of the robbery and murders. He was not a technician or employee of the company that installed or tested the equipment, and he did not retrieve the recordings from the store's system or convert the recordings to still photographs.

When the police were unable to access and download the video recordings, they enlisted the help of a technician named Robert Dematti from Able Solutions, the company that installed the system. Dematti accessed the recordings for law enforcement and transferred them into a format that would allow viewing by law enforcement and the court. At the penalty phase hearing, the State made no claim that Mr. Dematti was unavailable to testify. The State simply chose not to call him as a witness.

Although the detective could identify the interior of the store, and arguably, the perpetrators, he was not qualified to

testify that the acts depicted on the video recordings were a "fair and accurate" depiction of the events surrounding the crimes. Although Mr. Barton, the third victim who survived, could have authenticated the portion of the video recordings from the time he entered the store, the State did not present his testimony. The State also could have presented the testimony of the officers who entered the store after the robbery and who were depicted on the recordings. None of those officers were called to testify.

The State had the burden of providing a foundation to authenticate the video recordings taken from the store. See T.D.W. v. State, 137 So. 3d 574, 577 (Fla. 4th 2014) ("As the proponent of the evidence, the State had the burden of establishing [the surveillance video's] admissibility."); Self v. State, 55 So. 3d 677, 679 (Fla. 5th DCA 2011) (stating that the State had the burden, as the proponent of the evidence, to prove the admissibility of business records); U.S. v. Sarro, 742 F.2d 1286, 1292 (11th Cir. 1984) ("It is well settled law that the party introducing a tape into evidence has the burden of going forward with sufficient evidence to show that the recording is an accurate reproduction of the conversation recorded."); U.S. v. Capers, 708 F. 3d 1286, 1305 (11th Cir. 2013) (same).

The State offered the videotape as substantive evidence (as opposed to a demonstrative aid) to prove Mr. Mullens' actions during the offenses, and they formed the basis for the court's decision to impose the death penalty. Section 90.901, Florida

Statutes (2013), states: "Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[2]

> Videotapes and motion pictures are admissible on the same basis as still photographs; they are generally admissible when a foundation has been laid that the videotapes or motion pictures are a fair and accurate representation of a material fact or issue in the law suit. Any witness with knowledge can testify and lay the necessary foundation to authenticate them; the videotape operator or photographer need not testify. In the absence of the testimony of a witness with knowledge, the surrounding circumstances may be sufficient for the court to find that the videotape is a fair and accurate representation of a material fact.

Ehrhardt, Charles W., Florida Evidence (2014 Ed.), § 90.401. (Footnotes omitted.)

In other words, the foundation for authentication of a video recording can be laid by someone who actually witnessed the events portrayed in the video recording. However, if the proponent of the evidence does not produce testimony from a person who has personally witnessed what a videotape or a photograph depicts, the evidence may be authenticated by using the "silent witness" theory. See Bryant v. State, 810 So. 2d 532, 536 (Fla. 1st DCA

[2] It should be noted that section 90.901 differs from the Federal Rules of Evidence in that Rule 901(b)(4) of the Federal Rules specifically allows authentication by "distinctive characteristics and the like," which include "the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."

2002).

> There are two theories upon which photographs, motion pictures, videotapes, sound recordings, and the like are analyzed for admission into evidence: the 'pictorial communication' or 'pictorial testimony' theory and the 'silent witness' theory. [3 James H. Chadbourn, *Wigmore on Evidence*, § 790 (1970 & Supp. 1991)]; [2 John W. Strong, *McCormick on Evidence* § 214 (1992)]; and [William A. Schroeder, et al., *Alabama Evidence*, § 11-3 (1987 & Supp. 1988)]. The 'pictorial communication' theory is that a photograph, etc., is merely a graphic portrayal or static expression of what a qualified and competent witness sensed at the time in question. *Wigmore*, supra, § 790, and *McCormick*, *supra*, § 214. The 'silent witness' theory is that a photograph, etc., is admissible, even in the absence of an observing or sensing witness, because the process or mechanism by which the photograph, etc., is made ensures reliability and trustworthiness. In essence, the process or mechanism substitutes for the witness's senses, and because the process or mechanism is explained before the photograph, etc., is admitted, the trust placed in its truthfulness comes from the proposition that, had a witness been there, the witness would have sensed what the photograph, etc., records.

Ex parte Fuller, 620 So. 2d 675, 678 (Ala. 1993).

In Dolan v. State, 743 So. 2d 544, 545-46 (Fla. 4th DCA 1999), the Fourth District explained the same concepts:

> There are two methods of authenticating photographic evidence. The "pictorial testimony" method requires the testimony of a witness to establish that, based upon personal knowledge, the photographs on tape fairly and accurately reflected the events or scene. The second method is the "silent witness" method, which provides that the evidence may be admitted upon proof of the reliability of the process which produced the tape or photo. See Hannewacker v. City of Jacksonville Beach, 419 So. 2d 308 (Fla. 1982).

See also Wagner v. State, 707 So. 2d 827, 830 (Fla. 1st DCA 1998) ("Under the 'silent witness' theory, photographic evidence may be admitted upon proof of the reliability of the process which produced the photograph or videotape.").

Under a "silent witness" theory, videotapes and photographic evidence may be admitted as substantive evidence, rather than merely as demonstrative evidence. Edwards v. State, 762 N.E.2d 128, 136 (Ind. Ct App. 2002).

> Under the "silent witness" theory, which was originally put forward with respect to the admissibility of X-rays (which capture a state of affairs not directly observable by a witness) and films taken by surveillance cameras with no humans present, the photographic evidence is said to "speak for itself": "Given an adequate foundation assuring the accuracy of the process producing it, the photograph [or videotape] should then be received as a so-called silent witness or as a witness which 'speaks for itself.'"

16 AMJUR Proof Of Facts 3d 493, §5 (citing Molina v. State, 533 So. 2d 701, 710 (Ala. Cr. App. 1988) (citing Wigmore, 3 Evidence § 790 (1970)). However, because a "silent witness" cannot be cross-examined, there must be a strong showing of authenticity and competency, including proof that the video recording has not been altered in any way. See id. (citing Bergner v. State, 397 N.E.2d 1012, 1017 (Ind. Ct. App. 1979)).

In Florida, the requirements for a foundation to authenticate evidence under the silent witness theory is explained in Wagner:

> [R]elevant photographic evidence may be admitted into evidence on the "silent witness" theory when the trial judge determines it to be

> reliable, after having considered the following:
>
> (1) evidence establishing the time and date of the photographic evidence;
>
> (2) any evidence of editing or tampering;
>
> (3) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product;
>
> (4) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and
>
> (5) testimony identifying the relevant participants depicted in the photographic evidence.

707 So. 2d at 831. See also Bryant, 810 So. 2d at 536; Dolan, 743 So. 2d at 546.

In Wagner, an officer had a female informant make drug purchases from an automobile equipped with a hidden video camera. The appellate court held that videotapes of the transactions were admissible based on the "silent witness" theory even though the informant who was present during the sales did not testify, explaining:

> Officer Duncan gave a detailed explanation as to the installation and operation of the camera. He explained the manner in which he mounted a Sony recording device in the trunk of a county-owned vehicle, attached by wire to a camera and microphone positioned on the rear window tray of the vehicle. The camera and lens were covered by a blanket containing a small hole through which the camera lens protruded. He further testified that he tested the apparatus and that it was in good order and was working properly during the time of the drug investigation.

707 So. 2d at 829.

In Dolan, 743 So. 2d 544, the issue was whether enhanced still photographs taken from video recordings made by surveillance cameras in a lingerie shop were properly authenticated. There was no objection to the foundation establishing the authenticity of the video recordings themselves. In Dolan, unlike in this case, a forensic video analyst testified regarding the "step by step" process she used to transfer the images from the video recordings to a computer. She also explained what she did to enhance the images and transfer them to still prints. Citing Wagner, the court stated that the admissibility of the photographs was contingent on the admissibility of the video recordings, writing:

> The state established that the original videotape accurately reflected the store through the shop owner. Where there is testimony as to the nature of the store's video security system, the placement of the film in the camera, how the camera worked, the circumstances of removal of the tape and chain of possession of the tape, such testimony is sufficient authentication of the tape. See Wagner. Once the tape is authenticated and the forensic analyst explains the computer enhancement process and establishes that the images were not altered or edited, then the computer enhancements become admissible as a fair and accurate replicate of what is on the tape, provided the original tape is in evidence for comparison.

743 So. 2d at 546.

In this case, there was no testimony from the store owner and there was no testimony regarding the placement of the

cameras, or how the video system operated. In addition, there was no testimony regarding how the still photographs were made or who made them.

In Bryant, 810 So. 2d 532, the State introduced an edited and enhanced version of a time-lapse videotape from a day care to prove charges of child abuse. The original time-lapse videotape was not introduced at trial, but the State presented the testimony of the day care operator who installed the camera. The State presented testimony from an expert who testified about the nature of the enhancements to the original time-lapse videotapes and demonstrated that the enhanced videotape was, in essence, a "duplicate" of the original. Nevertheless, the appellate court reversed because neither counsel nor the court had the opportunity to compare the enhanced video with the original, which had been obviously altered.

In Dragani v. State, 759 So. 2d 745 (Fla. 5th DCA 2000), *approved in part, quashed in part on other grounds*, State v. Dragani, 791 So. 2d 1083 (Fla. 2001), the State presented the testimony of a bank officer who testified regarding the installation and operation of a video camera that recorded a bank robbery. The bank officer also testified regarding his directing the camera at the defendant during the robbery, suggesting that he was also an eyewitness.

In Florida, the foundation necessary to authenticate an audiotape recording is similar to that of a videotape. In order for an audio tape recording to be admissible the State must show

to the trial court's satisfaction that: (1) the recording device was operating properly, (2) the device was operated in a proper manner, (3) the recording was accurate, and (4) the voices of the persons speaking were identified. Jackson v. State, 979 So. 2d 1153, 1155 (Fla. 5th DCA 2008) (citing Hernandez v. State, 919 So. 2d 707, 710 (Fla. 5th DCA 2006); Holland v. State, 528 So. 2d 36, 38 (Fla. 4th DCA 1988); Parnell v. State, 218 So.2d 535 (Fla. 3d DCA 1969)). See also Vilsaint v. State, 127 So. 3d 647 (Fla. 4th DCA 2013) (noting that "there is no specific list of requirements for authentication, and each case must be determined on its own merits. Nevertheless, for the admissibility of recordings, courts have developed a list of requirements, including (1) the recording device was operating properly, (2) the device was operated in a proper manner, (3) the recording was accurate, and (4) the voices of the persons speaking were identified.") (citations omitted).

In Jackson, the defendant argued that the audiotape of his conversation with a fellow inmate was inadmissible because the State did not properly authenticate it. The State produced testimony from the other inmate regarding his conversation with Jackson in a holding cell. An officer testified that he installed the recording equipment in the cell and another officer testified that he retrieved the recording from the cell. Both officers testified that the voices of Jackson and the other inmate were on the recording.

In Justus v. State, 438 So. 2d 358 (Fla. 1983), this Court

declared that there is "no specific list of requirements" in determining whether the evidence submitted is sufficient to authenticate an audio recording. See id. at 365. However, the Court noted the extensive evidence presented to authenticate a tape recording of the defendant's confession:

> [O]ne of the police detectives present at the confession identified the tapes and testified that he and another detective operated the tape recorder and that as each of the three tapes was finished he punched out little tabs on them which would prevent them from being erased, recorded over or changed. He also testified that the portions of the tapes to which he had listened accurately represented what had been said during the interview of appellant. This showing was sufficient to establish that the tapes were what the state claimed them to be.

Id. Clearly, in Justus, the tape was not being authenticated under the "silent witness" theory because the State presented the testimony of a detective who was present during the event that was recorded. It should also be noted that in Justus the evidence was introduced after the defense objected to the officer's testimony as to the contents of the confession, arguing that the recording itself was the "best evidence" of the confession.

In D.D.B. v. State, 109 So. 3d 1184 (Fla. 2d DCA 2013), the juvenile was found to have committed the delinquent act of placing a false 911 call. Over objection, the State introduced an audio recording of two calls allegedly made by the child to the 911 system. The State presented the testimony of a police officer who identified the child's voice based on hearing the child's voice when she arrived at the house. Although the officer saw the

child on the phone, she did not see the child dial the phone and she did not hear the content of the call.

The appellate court reversed because the State failed to authenticate the recording, basing its decision on Knight v. State, 20 So. 3d 451, 452 (Fla. 5th DCA 2009) ("Authentication . . . of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). The court correctly concluded that identification of the child's voice was insufficient, writing that "authentication would also require other predicate evidence, including that the recording was of a telephone call received and handled by the 911 system on the relevant date." D.D.B., 109 So. 3d at 1185. It should also be noted that in D.D.B., the child was tried by a court and, as in this case, there was no jury.

In other jurisdictions, courts have formulated multi-prong tests to authenticate video recorded evidence under the "silent witness" theory. For example, in a case similar to this case, Ex parte Rieber, 663 So. 2d 999 (Ala. 1995), the Alabama Supreme Court held that the prosecution set out a sufficient foundation for authentication of a video recording of a robbery and murder at a gas station convenience store. The prosecution presented extensive and detailed testimony from an employee of the company that installed the camera. The employee explained how the camera worked and where it was located. He explained that the system had

been tested and that it worked as designed after the event in question. The court repeated the seven-prong test found in Fuller, which requires:

> (1) a showing that the device or process or mechanism that produced the item being offered as evidence was capable of recording what a witness would have seen or heard had a witness been present at the scene or event recorded,
>
> (2) a showing that the operator of the device or process or mechanism was competent,
>
> (3) establishment of the authenticity and correctness of the resulting recording, photograph, videotape, etc.,
>
> (4) a showing that no changes, additions, or deletions have been made,
>
> (5) a showing of the manner in which the recording, photograph, videotape, etc., was preserved,
>
> (6) identification of the speakers, or persons pictured, and
>
> (7) for criminal cases only, a showing that any statement made in the recording, tape, etc., was voluntarily made without any kind of coercion or improper inducement.

663 So. 2d at 1008-1009 (citing Fuller, 620 So. 2d at 678).

In Sarro, 742 F.2d 1286, the Eleventh Circuit declared: "In order to authenticate a taped recording, the government, in a criminal case, must show: (1) the competency of the operator; (2) the fidelity of the recording equipment; (3) the absence of material deletions, additions, or alterations in the relevant part of the tape; and (4) the identification of the relevant speakers." Id. at 1292 (citing United States v. Biggins, 551 F.2d 64, 66 (5th Cir. 1977), and noting that the agent who recorded the meeting

testified that the recording device was functioning properly and that nothing was added or deleted, and provided a complete chain of custody).

In Capers, 708 F.3d at 1305-1306, the court reiterated the Biggins test and noted that, with regard to one set of recordings, the DEA agent testified that he supplied the informant with audio-only and audio/video equipment and that the audio/video equipment was operating correctly. He also testified that he compared the "audio-only" recording to the audio/video recording and that it matched and was consistent with the surveillance that he observed that day. See id. at 1305-1306.

However, in Capers, the court also held that the trial court erred in admitting audio and video recordings depicting a co-defendant (Little) with the informant because the government failed to lay a proper foundation. The officer testified only that he gave the recording equipment to the informant before the drug purchase and recovered it after the event and then gave it to a colleague for conversion to a disc. The court held that the video portion was properly authenticated because agents independently observed the meeting. However, noting that "the government offered little proof of the fidelity of the recording equipment," the court held the audio portion should have been excluded "because there was no testimony about the fidelity of the audio equipment . . . and no independent evidence of the accuracy of the audio recordings." Id. at 1308.

In Washington v. State, 961 A.2d 1110 (Md. Ct. App. 2008),

the prosecution entered a video surveillance tape from a bar into evidence to prove the defendant was at the bar on the night of the shooting. The appellate court held that the trial court erred in admitting the videotape and still photographs made from the tape into evidence, writing:

> In the instant case, the State offered the videotape and still photographs as probative evidence in themselves, and not as illustrative evidence to support the testimony of an eye-witness. The evidence was offered by the State to demonstrate that petitioner was present at Jerry's Bar on the night of the crime. Here, the foundational requirement is more than that required for a simple videotape. The videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape. There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures. The State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath. Without suggesting that manipulation or distortion occurred in this case, we reiterate that it is the proponent's burden to establish that the videotape and photographs represent what they purport to portray. The State did not do so here.
>
> Mr. Kim, the owner of the bar, testified that he did not know how to transfer the data from the surveillance system to portable discs. He hired a technician to transfer the footage from the eight cameras onto one disc in a single viewable format. Mr. Kim did not testify as to the subsequent editing process and testified only that the surveillance cameras operated "almost hands-free" and recorded constantly. Detective Vila's testimony also failed to authenticate the video. He testified that he saw the footage only after it had been edited by the technician. We hold that the trial court erred in admitting the videotape and still photographs without first requiring an adequate foundation to support a

> finding that the matter in question is what the State claimed it to be.

Id. at 1117-18.

In this case, before the State introduced the seven DVD recordings, which purportedly came from the store's surveillance system, Appellant's counsel objected, arguing that Detective Tower "cannot lay the proper foundation to authenticate these videos and they should not be introduced through him." (6:R946) Counsel suggested that the proper person to lay a foundation might be Mr. Dematti. Id. The court overruled the objection, finding that "there is a sufficient nexus." (6:R953)

The State's foundation consisted solely of leading questions to Detective Tower that revealed that Mr. Dematti from Able Solutions downloaded a hard drive so that the images could be viewed from a standard DVD or a personal computer. (6:R946-47) Tower could say only that he viewed the bodies at the scene and the photographs from the scene, and he saw the trail of blood purportedly left by Mr. Barton, which matched his viewing of the video. (6:R947-48)

Tower agreed that the interior and exterior of the store matched the videos. (6:R949-50) Tower agreed that the clothing items worn by the perpetrators in the video and the items taken from the store matched the items found in Peeples' apartment. (6:R948-50) Tower did not identify the car as Mr. Uddin's car, although he testified that the video of the exterior showed an individual walking toward a car at the corner. (6:R949)

Detective Tower admitted on voir dire that he was not in the Central Food Mart on August 17, 2008, when the victims were shot. (6:R951) He also admitted that he had no idea how the surveillance system in the Central Food Mart worked. (6:R951) He contacted Able Solutions and spoke with Jodi Lambert who put him in touch with Robert Dematti. (6:R952) Law enforcement did not know how to download the video images. (6:R952) The equipment was sent to FDLE, but Tower did not know if they could do it. (6:R952) Tower was at the police department later when Mr. Dematti made copies of the surveillance equipment, but he did not know what Dematti did in order to remove the actual footage from the surveillance equipment. (6:R952-53)

This case is unlike People v. Taylor, 956 N.E. 2d 431 (Ill. 2011), in which the detective could lay a foundation. In Taylor, the detective installed a motion-activated video camera in the office of the dean of students at a high school after it was discovered that money had been taken from the dean's desk drawer. The detective testified about the installation, operation, and testing of the equipment. He testified that he determined that the motion sensor was working by attaching the camera to a monitor, and he also explained why the video skipped forward when it failed to sense motion in the room. The detective in Taylor copied the footage to a VHS tape from the hard drive, removed the tape's recording tab, and secured the tape in his desk until it was given to the evidence locker.

In this case, the sentencing order contains information about

the video surveillance system that was not presented to the court. The order states, "Weeks prior, Uddin installed a multi-camera security surveillance system, which was fully operational at the time of the offense." (11:R1592) However, there is no record evidence regarding when the system was installed or who installed it, and there was no evidence that the system was "fully operational at the time of the offense." (11:R1592) Those facts were obtained from the State's sentencing memorandum, and there is no record support for them. (10:R1530) In fact, there was no testimony that the offenses occurred at 6:39 p.m., as stated in the State's memorandum and repeated in the court's order. If that fact was gleaned from the video recordings, there was no evidence that the time was accurate.

The video recordings were obviously excerpted from a larger recording, yet there was no testimony regarding how that occurred. On some of the recordings, the video camera freezes and the timers stop recording. There is no explanation regarding why the images stop while the sound continues and no testimony asserting that the audio portion of the videos is reliable. Additionally, there was no testimony explaining why the video from the outside of the store fails to show Mr. Barton entering the store or why it fails to record Appellant looking out the door when Mr. Uddin picked up the telephone.

Because the video recordings were improperly admitted, the still photographs from the video recordings were inadmissible. The foundation was also insufficient because the State did not

present a witness to explain how the photographs were made or who made them.

Before the State introduced the video recordings, it introduced still photographs, which it claimed were taken from the video recordings. (6:R923-24, 925-27, 929-30, 934, 935, 935-36) To lay a foundation Detective Tower testified only that the photographs "fairly and accurately" represented what he saw on the video recordings. (6:R923, 925, 929, 933-34)

Defense counsel objected, arguing that the video recording had not been introduced. (6:R923) Counsel also argued that the State failed to lay a proper foundation for the introduction of the photographs because the officer was not there and he "had no idea what actually happened during the course of the crime." (6:R923-34) Counsel argued that the standard was not whether a photograph was a "fair and accurate depiction," and asked the court if she could voir dire the witness regarding the foundation. (6:R923-24) The court refused to allow voir dire and received the exhibit over defense objection. (9:R924)

Counsel renewed her objection to the still photographs admitted as State's Exhibits 5A-K, 7A-D, 9A-C, and 13A-D (6:R923-24, 925-27, 929-30, 934, 935, 935-36). In renewing the objection, counsel argued that Detective Tower did not download the video and law enforcement had no idea how the technology worked. (6:R935-38) Counsel also argued:

> I don't think this officer can testify to the contents of the video, but also it's improper foundation for him to testify as to the still photographs being a representation of the video

> when he has no actual, firsthand knowledge of what occurred on August 17, 2008, between the certain hours on the video, and he has no idea what Mr. Dematti or Able Solutions did to acquire that video from this surveillance system.

(6:R939)

Based on Dolan, 743 So. 2d 544 (argued above), the foundation for authentication was insufficient because the detective did not create the photographs from the video recordings. Cf. Symonette v. State, 100 So. 3d 180, 183 (Fla. 4th DCA 2012) (finding that photographs of text messages taken from the defendant's cell phone were properly authenticated because the State presented testimony from the officers who took the photographs, along with evidence that the phone was seized from the defendant, and the sender of the message verified that the messages were the ones exchanged with the defendant).

Detective Tower's testimony that the photographs fairly and accurately reflected the contents of the video also invaded the province of the fact finder. It is improper for law enforcement to compare the contents of a videotape with other evidence when the officer is in no better position than the trier of fact to make the comparison. For example, in Proctor v. State, 97 So. 3d 313, 313-315 (Fla. 5th DCA 2013), the court reversed convictions for uttering and grand theft because the trial court allowed a detective to identify the defendant as the man cashing two stolen checks after he compared the bank's surveillance video with Proctor's photo and signature found in a state driver's license

database. The appellate court concluded that "[t]he jurors should have been allowed to determine for themselves whether Proctor was the person shown in the surveillance video." In this case, the court should have determined whether or not the photographs accurately represented the video recordings.

If this Court decides that the State's presentation in this case was sufficient to authenticate the video recordings, the current law regarding authentication would be stood on its head. The burden will shift to the opposing party to determine if the machinery, which is most likely in the hands of the victim or the police, was working properly and that nothing was changed or deleted, or accidentally lost, damaged, or erased when the information was copied from the recording device. It will be left to the opposing party to hire an expert to determine if the evidence is genuine and that it is what the proponent of the evidence claims it is. In the case of cell phone videos which are uploaded to the Internet, that task might be impossible or cost prohibitive. If cell phone recordings are used by the defense, will it be sufficient that a witness who was not present identifies the location where the video was taken and the people in it?

These errors cannot be harmless because Appellant's death sentence is based almost entirely on the video recordings. At the penalty phase hearing, the prosecutor conceded that there were issues regarding whether Appellant's actions as recorded in the videos support the aggravating factors. (6:R886-87) In its

sentencing memorandum, the State argued that the surveillance videos proved that Appellant acted in concert with Peeples and that the murders were committed to avoid arrest. (10:1532, 1536-39) However, in his sentencing memorandum, Appellant argued that the video recordings showed that Appellant acted instinctively or out of impulse and not to avoid arrest or eliminate witnesses. (10:R1563-65) In the sentencing order, the court's statement of facts relies heavily on the video recordings. (11:R1592-93)

Based on his review of the video recordings, the trial judge decided to accord the prior violent felony aggravator great weight because "the robbery was all but completed and the Defendant deliberately returned and perpetrated the homicidal violence." (11:R1595) Because no witnesses testified, those facts could be gleaned only from the video recordings.

The court's finding that the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest was based entirely on the video recordings: "[I]t is clear from the surveillance videos that the murders of Uddin and Hayworth were solely motivated for the purpose of evading capture." (11:R1597)

The court also used the video recordings in weighing the statutory mitigating factor that the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance. (11:R1599-1601) The court discounted the mitigator, according it only moderate weight, based on its review of the recordings, writing:

> [T]he Court finds that the Defendant's actions of August 17, 2008, demonstrate that he

> was not so overcome by his "emotional disturbance" that he could not act rationally. As the armed robbery developed, the Defendant removed what he believed to be the store's operating surveillance system. This was an intelligent, rational action taken to prevent being caught by law enforcement. Thereafter, as the robbery concluded, the Defendant leaned out of the store's front entrance doors, seeming as though he was exiting the store. However, the Defendant then turned back into the store, walked directly towards Uddin, pointing the revolver in Uddin's face and pulled the trigger, killing Uddin as he pleaded for his life. The Defendant then turned and grabbed Hayworth by the arm, twisted him around and fired a single shot into his head, killing Hayworth as he too begged the Defendant to let him live. As he began to exit the store, the Defendant encountered Barton. As Barton tried to run from the store, the Defendant violently grabbed and dragged him into the store and shot him multiple times in an attempt to murder him as well. These actions further demonstrate that the Defendant was acting deliberately with the intent of eliminating any evidence that tied him to the scene.
>
> Such rational, thought-out actions belie the Defendant's claim that his mental illness and substance abuse caused him to act completely irrationally.

(11:R1600-1601)

With regard to the statutory mitigating factor of impaired capacity to appreciate the criminality of the conduct or to conform the conduct to the requirements of law, the court relied heavily on the video recording in concluding that Appellant appreciated the criminality of his conduct and was "cognizant of the nature of his actions." (11:R1602)

In its analysis of the nonstatutory mitigating circumstance that Appellant was "acting under the domination and control of co-defendant Spencer Peeples," the court relied on the video in

deciding to give the mitigator "some weight." (11:R1605-1606) The court found that:

> The videos make it plainly evident that the Defendant and Peeples repeatedly brandished the revolver; both threatened and intimidated Uddin until he handed over the keys to his car; both stole merchandise from the store; and both communicated with each other to complete the armed robbery. The Defendant alone, however, made the decision to aggravate an armed robbery into a double homicide.

(11:R1606)

An appellate court reviews a trial court's decision to admit evidence under an abuse of discretion standard; however, that discretion is limited by the rules of evidence. Hudson v. State, 992 So. 2d 96, 107 (Fla. 2008). Because the State failed to properly authenticate the video recordings, Appellant's sentence should be vacated and the case remanded to the trial court for a new penalty phase hearing.

ISSUE II

THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO SUPPORT THE "AVOID ARREST" AGGRAVATOR BECAUSE THE EVIDENCE DOES NOT CONTRADICT THE THEORY THAT APPELLANT SHOT THE VICTIMS IMPULSIVELY IN A RAGE OR PANIC AFTER HE SAW THE STORE OWNER ON THE TELEPHONE.

The State failed to prove that the murders were "committed for the purpose of avoiding or preventing a lawful arrest" as provided in section 921.141(5)(e), Florida Statutes, because the circumstantial evidence does not exclude the reasonable hypothesis that Appellant shot the victims instinctively or on impulse, prompted by rage or panic, when he turned around and discovered Uddin on the telephone.

First, because the murders are on videotape and no witnesses testified regarding the murders themselves, the trial court has no special advantage, and this Court does not have to rely on the trial judge's assessment of the videos. See Almeida v. State, 737 So. 2d 520, 524 n.9 (1999) (noting that the Court's independent review of the audiotaped statement clearly showed that the defendant asked a question, and stating that "the trial court had no special vantage point in reviewing this tape"); Cuervo v. State, 967 So. 2d 155, 160 (Fla. 2007) (stating that the Court conducted its own review of the audiotape of the interrogation); Banks v. State, 46 So. 3d 989, 998 (Fla. 2010) (indicating that the Court made an independent review of the surveillance video of the defendant's prior violent felony). Because the video

recordings do not provide a clear motive for the murders, this Court should make an independent review of the tapes.

Where the victim is not a police officer, the evidence supporting the avoid arrest aggravator *must prove that the sole or dominant motive for the killing was to eliminate a witness*, and mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Calhoun v. State, 138 So. 3d 350, 361 (Fla. 2013) (citing Buzia v. State, 926 So. 2d 1203, 1209–10 (Fla. 2006)) (emphasis in original). Proof of the requisite intent to avoid arrest and detection must be very strong to support this aggravating circumstance when the victim is not a law enforcement officer. Riley v. State, 366 So. 2d 19, 22 (Fla. 1978); Wilcox v. State, 143 So. 3d 359, 384 (Fla. 2014) ("[P]roof of the intent to avoid arrest or detection must be very strong, and mere speculation on behalf of the State that witness elimination was the dominant motive is insufficient to support the aggravating circumstance.").

The mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt. Jones v. State, 963 So. 2d 180, 186 (Fla. 2007); Hurst v. State, 819 So. 2d 689, 696 (Fla. 2002); Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996).

The State is required to establish the existence of all aggravating circumstances beyond a reasonable doubt. Smith v. State, 28 So. 3d 838, 866 (Fla. 2009) (citing Geralds v.

State, 601 So. 2d 1157, 1163 (Fla. 1992)). Where the evidence in the case is entirely circumstantial, the State can satisfy the burden of proof only if the evidence is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds, 601 So. at 1163; Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984). "The standard of review applicable to this issue is whether competent, substantial evidence supports the trial court's finding." Geralds (citing Conde v. State, 860 So. 2d 930, 953 (Fla. 2003)). Although aggravating circumstances can be proven by circumstantial evidence, the evidence must be competent and substantial. Hunter v. State, 660 So. 2d 244 (Fla. 1995).

Even logical inferences drawn by the trial court will not suffice to support a finding of a particular aggravating circumstance when the state's burden has not been met. See Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993) (citing Clark v. State, 443 So. 2d 973, 976 (Fla. 1983)). When deciding the applicability of the avoid arrest aggravator, this Court cannot assume the defendant's motive. Davis v. State, 39 Fla. L. Weekly S602 (Fla. Oct. 9, 2014), Case No. SC13-6 (citing Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979)).

In this case, Appellant made no statements evincing his intent behind the murders. Because there was no direct evidence to support the aggravator, the evidence was entirely circumstantial. The court inferred Appellant's intent base on his actions as depicted in the videotapes, finding, "[I]t is clear

from the surveillance videos that the murders of Uddin and Hayworth were solely motivated for the purpose of evading capture." (11:R1597)

The video recordings show that just before the murders occurred, Peeples left the store to get Mr. Uddin's car. Appellant was standing by the door with the gun down at his left side talking to Mr. Uddin, who said something about his car. Appellant looked as if he were preventing Uddin from following Peeples, but otherwise he was calm, and he was not acting aggressively. Appellant moved toward the door and opened it as if he were looking for Peeples. Mr. Uddin must have thought Appellant was leaving the store because he picked up the phone and dialed it.

Appellant turned back toward Uddin and saw him with the telephone to his ear. One of the video recordings clearly shows that Appellant jumped as if surprised. (14:R2195 at 6:45:27) Appellant rushed over to Mr. Uddin, aimed the gun at him, and directed him to hang up the phone, which had fallen to the floor when Mr. Uddin tried to hang it up. Appellant seemed angry. (14:R2195, 2196) Both men were highly agitated, and Uddin grasped Appellant's hand and arm. Appellant, who was pointing the gun at Mr. Uddin, argued with, and yelled at, Mr. Uddin and pointed to the phone on the floor. (14:R2195)

Uddin reached down to pick up the phone with Appellant leaning over him with the gun. Uddin pushed Appellant's left arm, which was holding the gun. (14:R2195, 2196) There is a sound as

if the gun went off, which would have sent a bullet toward the wall. At that point, Mr. Uddin became frantic and began waving his arms in Appellant's direction and screaming. Uddin weaved to stay away from the gun, but Appellant shot Mr. Uddin in the head as Mr. Uddin was screaming and moving. (14:R2195, 2196)

The shootings occurred very rapidly. Mr. Uddin was shot less than 20 seconds after Appellant discovered him on the phone. (14:R2195 at 6:45:27 to 6:45:45) Appellant shot Mr. Hayworth approximately 9 seconds later (14:R2195 at 6:45:54). Mr. Barton entered the store approximately 6 seconds after that (14:R2195 at 6:46:00). The first shot aimed at Barton occurred during the scuffle and the last shot aimed at Mr. Barton (14:R2195 at 6:46:21) occurred only 36 seconds or so after Uddin was shot and within a minute after Appellant saw Mr. Uddin on the phone.

The mental mitigation also supports the inference that the murders were an impulsive reaction. The evidence was uncontroverted that Appellant had Bipolar Disorder at the time of the offenses. He was off his medication and consuming alcohol and illegal drugs. Dr. Machlus testified that people with both Bipolar Disorder and substance abuse act impulsively. They are six times more likely to commit violent crimes than people who suffer from Bipolar Disorder alone. Witnesses who knew Appellant testified that he was impulsive and easily enraged, and that he acted without having any consideration for the possible consequences of his actions, and the court found that Appellant's impulsivity was established as nonstatutory mitigation.

(11:R1605) Witnesses also testified that Appellant would misperceive situations and become overly aggressive at minor provocations.

Because the shootings occurred in such a short amount of time after Appellant saw Uddin on the phone, the evidence is consistent with a conclusion that the murders were the product of impulse or instinct, incited by rage or panic and perpetrated by an impulsive young man who is mentally ill, drug addicted, and of low intelligence, and has a history of irrational behavior, reactive thinking, and low tolerance for stress. The evidence is also consistent with a theory that the irrational impulse lasted for around a half a minute and did not dissipate until Appellant pushed Barton to the floor and began picking up the bag containing items stolen from the store.

In support of the "avoid arrest" aggravator, the trial judge reasoned that Mr. Uddin had not resisted the robbery: "Uddin had not resisted the Defendant or Peeples during the entire course of the robbery, he was positioned in a confined space behind the front counter, and did not pose any kind of threat to the Defendant whatsoever." However, the order fails to acknowledge that Peeples and Appellant were angry with Uddin when he frustrated their attempts to steal his car. They had to threaten him and ask him repeatedly for the keys, and although they pointed a gun at him, Uddin would not relinquish the keys. The court also overlooked the fact that Mr. Uddin's dialing the phone was an act of resistance that Appellant was not expecting.

In Geralds, 601 So. 2d 1157, the evidence showed that the victim was bound at the wrists. She was then beaten and stabbed during a robbery in her own home. Because Geralds worked around the victim's home, the victim knew him and could have identified him. Nevertheless, the Court found that the circumstantial evidence did not exclude the reasonable hypothesis that Geralds killed the victim in sudden anger after becoming enraged with her for withholding the location of money hidden in the house, or that he killed the victim when she struggled to escape.

In Wilcox, 143 So. 3d 359, the trial court erred in finding the avoid arrest aggravator because the circumstantial evidence was not inconsistent with a theory that the defendant committed the murder to prevent retaliation against his family for a prior burglary. See id. at 384-85. The fact that the surviving witnesses testified that the victim seemed to know the gunman who robbed them was not dispositive.

In Urbin v. State, 714 So. 2d 411 (Fla. 1998), the defendant robbed and killed a man outside a bar. The defendant told his accomplices and another witness that he had killed the man because he "bucked," meaning that he resisted the robbery. The defendant also told one witness that he killed the man both because he resisted and because the man had seen his face. The Court held the evidence was insufficient to support the avoid arrest aggravator even though one witness stated that Urbin killed the victim because he had seen his face. The Court reasoned that the fact that the victim could identify Urbin was

"a corollary, or secondary motive, not the dominant one." Id. at 416.

In Livingston v. State, 565 So. 2d 1288 (Fla. 1988), the defendant shot and killed a convenience store clerk, shot at another woman in the store, and took the cash register. The Court held that the avoid arrest aggravator had not been proven beyond a reasonable doubt. The Court declined to find that witness elimination was the dominant motive for the killing even though the surviving witness testified that Livingston said, after shooting the first victim, "now I'm going to get the one in the back [of the store]." Id. at 1292.

In Cook v. State, 542 So. 2d 964 (Fla. 1989), the defendant and two co-defendants attempted to rob a closed Burger King. The defendant confessed that he entered the restaurant and ended up shooting the couple who were the midnight cleaning crew. Cook stated that he shot the husband after the husband hit him with a metal rod. He turned to leave, but the man's wife grabbed him around the knees. Cook told police that he shot the woman "to keep her quiet because she was yelling and screaming." See id. at 966, 970.

In Cook, the trial court imposed a life sentence for the murder of the husband and the death penalty for the murder of the wife, finding that the murder was committed for the purpose of avoiding arrest. On appeal, the Court held that Cook's statement was not sufficient to overcome the theory that Cook shot the

woman "instinctively" and not with a calculated plan to eliminate her as a witness. See id. at 970.

In Perry v. State, 522 So. 2d 817 (Fla. 1988), there was evidence that Perry may have "panicked" and "blacked out" during the murder and attempted robbery. For that reason, the Court found that the avoid arrest aggravator was not proven. See id. at 820. In Robertson, 611 So. 2d 1228, the defendant killed a couple during a robbery. The Court held that even though Robertson admitted that the wife clearly saw him after he shot her husband, the evidence was not inconsistent with a theory that Robertson shot the wife instinctively and without a plan to eliminate her as a witness. In Garron v. State, 528 So. 2d 353, 360 (Fla. 1988), the fact that one of victims, Garron's step-daughter, was shot while she was on the telephone calling the police was insufficient for the trial court to infer that Garron killed her to eliminate her as a witness to the shooting of his wife.

Although the victim in Consalvo, 697 So. 2d at 819-20, reached for the telephone, this case is not like Consalvo. In Consalvo, the victim threated to call the police and reached for the phone. She was killed to prevent her from making the call. In this case, Mr. Uddin already had the phone to his ear when Appellant saw him.

In this case, Peeples left the store first to get the car. Obviously, it would have taken time to find the car, start it, and bring it to the store. Therefore, it made sense that Peeples would have Appellant stay behind to watch Uddin until they were

ready to leave. In fact, in his statement to police, which was introduced into evidence by the prosecution, Peeples said: "Well, he supposed to stay in the store until I crank the car up. And then let them go." When asked if Appellant was going to hold them until he got the car, Peeples said, "Until I got in the car and got – pulled the car up some. But . . . I was going around to, like – turned the corner right there and then turned around in the alley and came back." (13:R2126)

If the men had intended to eliminate Uddin and Hayworth as witnesses, they would have killed them and left together to get the car. Instead, Appellant was left behind to watch Uddin and Hayworth to allow Peeples time to bring the car closer to the store so Appellant could jump into it.

There is absolutely no evidence on the videos that Appellant saw Peeples with Uddin's car when he looked out the door. The outside video does not show Peeples in Uddin's car. (14:R2200) The camera is frozen at the time Appellant looked out the door and Uddin grabbed the phone. Uddin can be heard screaming, but the camera image does not move. Therefore, the court's finding that Appellant could have simply left to join Peeples at that time is unsupported. ("At that point, had the Defendant not intended to murder Uddin and Hayworth he would have simply left the store entirely and joined Peeples in Uddin's car." (11:R1597))

It is also important to note that Appellant did not kill Mr. Barton. Even though Mr. Barton was shot, it is clear from the

video that he was not incapacitated. Barton fought and struggled with Appellant even after he was shot. Appellant pushed Mr. Barton away from him and to the floor and then broke off the attack. Barton was still very much alive. He was moving and making sounds, and Appellant would have seen that Mr. Barton was trying to stand up. (14:R2197, 2199)

Nevertheless, Appellant seemed unconcerned that Mr. Barton was still alive. He calmly stopped the attack, slowly and deliberately picked up a shopping bag filled with lottery tickets, and walked to the door. (14:2195, 2199) It took approximately 9 seconds for him to stuff the items back in the bag and head for the door. In fact, Appellant took the time to bend down and picked up something he dropped in the process. (14:R2195 at 6:46:28 to 6:46:37 and 6:46:40) He did not begin to jog until he left the store and saw Peeples at the corner in the car.

If these murders and the attempted murder were committed to eliminate witnesses, Appellant would have killed Mr. Barton. In Rembert v. State, 445 So. 2d 337 (Fla. 1984), the Court found that the avoid arrest aggravator was not proven beyond a reasonable doubt because the victim was still alive when Rembert left the premises. In this case, Appellant could have killed Barton because, as Peeples said in his statement, there was a bullet left in the revolver, which is consistent with the fact that police found one bullet in the car. (6:R942; 13:R2129-30)

The error is not harmless because, as explained in Issue III, the court improperly disregarded a substantial amount of nonstatutory mitigation, which must be reconsidered and reevaluated against the aggravating factors. In addition, without this aggravator, Appellant's death sentences are disproportionate (see Issue IV), and should be vacated and remanded for the imposition of life sentences.

ISSUE III

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE COURT COMMITTED A CAMPBELL VIOLATION BY FAILING TO CONSIDER APPELLANT'S NONSTATUTORY MENTAL, BACKGROUND, AND CHARACTER MITIGATION, AND BECAUSE THE COURT MADE FACTUAL ERRORS THAT CAUSED IT TO REJECT OR IMPROPERLY WEIGH THE MITIGATION IT DID CONSIDER.

The court erred in failing to consider Appellant's mitigating factors numbered 1 through 15, 21, 32, and 33 as nonstatutory mitigation because, whether or not they support the statutory mitigation found by the judge, they were specifically listed by Appellant in his sentencing memorandum and are evidence of factors "in the defendant's background that would mitigate against the imposition of the death penalty." See § 921.141(6)(h), Fla. Stat.

When a court imposes a death sentence, section 921.141(3) requires that the court make specific written findings of fact based upon aggravating and mitigating circumstances and upon the records of the trial and the sentencing proceedings. See Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), *receded from in part in* Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding from language in Campbell prohibiting trial courts from according no weight to a mitigating factor). See also Butler v. State, 842 So. 2d 817, 831 (Fla. 2003) ("Section 921.141(3), Florida Statutes . . . requires specific findings as to both aggravating and mitigating factors.").

A trial court must expressly evaluate all statutory and nonstatutory mitigators a defendant has proposed. Oyola v. State, 99 So. 3d 431, 444 (Fla. 2012) (citing Ault v. State, 53 So. 3d 175, 186 (Fla. 2010)); Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995) ("The sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant."); Campbell, 571 So. 2d at 419 ("When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.") (footnote omitted).

Appellant listed 35 circumstances as nonstatutory mitigation in his sentencing memorandum; however, the sentencing order states that Appellant "asserted thirty-one nonstatutory mitigating factors." (10:R1573-77; 11:R1604) The court refused to consider the circumstances in paragraphs 1 through 15 and paragraph 21 in Appellant's sentencing memorandum as nonstatutory mitigation, stating that because they had been addressed in the two statutory mitigators, they would not be considered again. (11:R1604)

Appellant also listed as nonstatutory mitigating circumstances that he was "protective and nurturing to his younger sister Kendra Mullens" (number 32), and that he "was kind and helpful to Michael Wonka while living in his home" (number

33). (10:R1577) The court failed to address these circumstances entirely, and they were not mentioned in the sentencing order.

The nonstatutory mitigating circumstance listed by Appellant but dismissed by the court were: (1) Appellant was born with a genetic predisposition to psychological disorders; (2) Appellant is genetically predisposed to substance abuse; (3) Appellant was exposed to severe parental conflict; (4) Appellant was exposed to and victimized by child abuse and neglect; (5) Appellant had poor parental attachment; (6) Appellant was exposed to family drug and alcohol abuse; (7) Appellant was exposed to family criminal behavior; (8) Appellant suffered from violence inflicted by his older brother, Wesley Mullens; (9) Appellant suffered from residential instability; (10) Appellant was raised in poverty; (11) Appellant performed poorly in school; (12) Appellant was incarcerated in an adult penal facility as a juvenile; (13) Appellant suffers from Bipolar I Disorder; (14) Appellant suffers from the psychological disorder of Polysubstance Abuse; (15) Appellant suffers from a personality disorder; and (21) Appellant was taught by his father to commit crimes by the time he was five years old. (10:R1573-74)

The court erred in failing to consider the mitigation in paragraphs 1 through 15 and 21 as nonstatutory mitigation because nonstatutory or "catch-all" mitigators are reasons peculiar to the defendant's background that would "mitigate against imposition of the death penalty." See § 921.141(6)(h), Fla. Stat. Whereas, as noted by the court in the sentencing order, the

statutory mental mitigators (that the murders "were committed while the Defendant was under the influence of extreme mental or emotional disturbance" and that the "capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired") apply specifically to the mindset of the defendant during the crime itself.

Extreme mental or emotional disturbance as used in section 921.141(6)(b), is interpreted as less than insanity but more than the emotions of an average man, however inflamed. Duncan v. State, 619 So. 2d 279, 283 (Fla. 1993) (citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973)). And substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, as used in section 921.141(6)(f), refers to mental disturbance that interferes with but does not obviate the defendant's knowledge of right and wrong. Id. Both require a connection to the murders. See, e.g., Bolin v. State, 117 So. 3d 728 (Fla. 2013) (finding that Bolin had failed to establish his lack of capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law because there was no testimony linking Bolin's mental condition to the events on the night of the murder).

A mitigating circumstance can be any aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less

than death. Campbell, 571 So. 2d at 420 n.4 (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)); Crook v. State, 813 So. 2d 68, 74 (Fla. 2002). Valid nonstatutory mitigating circumstances include but are not limited to the following: 1) Abused or deprived childhood; 2) Contribution to community or society as evidenced by an exemplary work, military, family, or other record; 3) Remorse and potential for rehabilitation and good prison record; 4) Disparate treatment of an equally culpable codefendant; and 5) Charitable or humanitarian deeds. Campbell, supra.

The United States Supreme Court has held that a sentencing jury or judge may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death. Trease, 768 So. 2d at 1055 (citing Lockett, 438 U.S. at 604). See also Hitchcock v. Dugger, 481 U.S. 393 (1987) (vacating a death sentence because the trial judge refused to consider nonstatutory mitigation).

Even though a proposed mitigating circumstance does not reduce culpability for the defendant's crime, it can be mitigating in the sense that it might serve as the basis for a sentence less than death. See Skipper v. South Carolina, 476 U.S. 1, 7 (1986); see also Ault, 53 So. 3d at 190 (finding that the trial court erred in rejecting proposed nonstatutory mitigation that Ault could adjust to life in prison and that he suffered from pedophilia). "Clearly, Florida law does not require that a

proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight." Cox v. State, 819 So. 2d 705, 723 (Fla. 2002).

Although statutory mental mitigation may require a nexus to the criminal behavior, nonstatutory mental mitigation does not. For instance, in Victorino v. State, 23 So. 3d 87, 105 (Fla. 2009), the Court approved the trial court's acceptance of the defendant's mental health problems as nonstatutory mitigation, and also approved its rejection of the same evidence as statutory mitigation because the trial court found no nexus between the defendant's mental defect and the crime.

Clearly, the overlooked factors listed in this case are common factors which are considered to be nonstatutory mitigation. For example, in Snipes v. State, 733 So. 2d 1000, 1002-03 (Fla. 1999), the trial court found as nonstatutory mitigation, among other things, that Snipes had a sweet and loving nature; that he used drugs and alcohols at a very young age; that Snipes had a difficult childhood; that he had a dysfunctional family; that he had a personality disorder (impulsiveness and feeling of inadequacy); that he had a behavioral disorder based on his dysfunctional family and lack of proper role models; that he suffered childhood trauma; that he had some emotional disturbance; and that he suffered from stress.

To enable proper appellate review, a sentencing order must expressly consider each proposed mitigating circumstance, determine if the circumstance exists, and, if the circumstance

does exist, what weight to allocate it. Oyola, 99 So. 3d at 446 (citing Campbell, 571 So. 2d at 420). The trial court's sentencing order must reflect "reasoned judgment" by the trial court as it weighed the aggravating and mitigating circumstances. Oyola, 99 So. 3d at 446. (citing Lucas v. State, 568 So. 2d 18, 20 (Fla. 1990)). When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). All "believable and uncontroverted" mitigating evidence contained in the record must be considered and weighed in the sentencing process. Crook, 813 So. 2d at 74 (citing Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996)).

In Ault, 53 So. 3d 175, the trial judge considered Ault's brain damage and neurological impairment in rejecting the two statutory mental health mitigators, and for that reason, the court did not address those circumstances as nonstatutory mitigation. This Court held that it was error for the court to fail to consider the proposed circumstances as nonstatutory mitigation. See id. at 189-91.

In Oyola, 99 So. 3d 431, this Court reversed and remanded a sentencing order which failed to evaluate each nonstatutory mitigating circumstance, some of which were also asserted by Oyola as evidence of the statutory mitigator outlined in subsection 921.141(6)(f), that the defendant's ability to conform

his conduct to the requirements of law was substantially impaired.

In this case, in addition to rejecting mental mitigation as nonstatutory mitigation, the court failed to address the mitigation in paragraphs 32 and 33 altogether. A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006).

Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation. Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987) (citing Lockett, 438 U.S. at 604-05). Therefore, Appellant's kindness and helpfulness to Michael Wonka and the fact that he was protective and nurturing of his baby sister should have been considered by the court.

The error in segregating the statutory mental mitigation from the nonstatutory mitigation also colored the court's evaluation of the nonstatutory mitigators which were actually addressed by the court. For example, in Section C of the nonstatutory mitigation in the sentencing order, "the Defendant is immature, impulsive and easily manipulated," the court totally overlooked the fact that Dr. Machlus testified that people who suffer from Bipolar I Disorder are impulsive and do not act with rational judgment. (9:R1376) In other words, Appellant's impulsivity is part of his mental illness, and the court should

not have excluded Appellant's mental condition in weighing this mitigator simply because the fact that he is Bipolar was considered as statutory mitigation.

In Section A of the nonstatutory mitigation, "The Defendant was sexually abused as a child and also while in prison," the court rejected the mitigator as unproven without mentioning that Dr. Machlus testified that Appellant was sexually abused on eight separate occasions in prison and that Appellant reported he was sexually abused by his stepfather when he was a child. (10:R1401) This evidence should have been considered because it was uncontroverted and the prosecution did not object to this evidence. It was admissible as substantive evidence pursuant to section 90.803(4), as an exception to the hearsay rule, because the statements were made to Dr. Machlus for purposes of his diagnosis and evaluation of Appellant and Appellant knew that this information was being used for such purposes. See Begley v. State, 483 So. 2d 70, 73-74 (Fla. 4th DCA 1986) ("While statements admissible under this exception need not be made to a physician, at a minimum, there must be a showing (a) that the statements were made for the purposes of diagnosis or treatment, and (b) that the individual making the statements knew the statements were being made for this purpose.").

Taken as a whole, the errors in the sentencing order are not harmless. There were 18 nonstatutory aggravating circumstances that were not considered, one that was improperly weighed (impulsivity), and one that was improperly rejected (sexual

abuse). As argued in Issue II above, the court erred in finding that the murders were committed in an attempt to avoid arrest. Therefore, the court would be left with two aggravators to be reweighed against substantial mitigation.

At the end of the hearing, Appellant's counsel argued to the court, "[Y]ou can't get much more broken than Khadafy Mullens is. . . . We're only asking for a sentence that fits the whole person who did these terrible deeds." (10:R1510) A trial court must consider all factors that mitigate against the possibility of the death penalty. Therefore, in this case, the court must consider whether the death penalty is appropriate punishment for someone who suffered through a bleak and deprived childhood and mental illness, all of which he did not choose, and none of which was ameliorated by outside intervention. Because Appellant had no external or internal resources to compensate for the damage done to him by his family and his heritable mental illness, after he got out of prison in 2007, he most certainly needed intensive institutionalized help along with psychiatric medication in order to function responsibly. Ironically and tragically, he got that help only after he committed these horrific crimes and was placed on the proper medication in a controlled residential setting, which turned out to be a county jail.

Because the court failed to address Appellant's nonstatutory mitigation, Appellant's death sentences must be vacated and remanded to the trial court for reevaluation of the mitigation and the sentence. See Coday, 946 So. 2d at 1005. However, because

Appellant's death sentences are disproportionate (Issue IV), he should be sentenced to life without parole for these offenses.

ISSUE IV

APPELLANT'S DEATH SENTENCES ARE DISPROPORTIONATE BECAUSE OF THE SUBSTANTIAL AMOUNT OF STATUTORY MENTAL MITIGATION AND OTHER NONSTATUTORY MITIGATION.

Because of the substantial mitigation presented in this case, Appellant's death sentences are disproportionate and should be vacated and remanded for imposition of a life sentences.

In this case, the court found three aggravating circumstances had been proven: that Appellant was previously convicted of a felony involving the use or threat of violence or a capital felony, that the murders were committed during a robbery, and that the murders were committed for the purpose of avoiding or preventing a lawful arrest.[3] However, as argued above, the evidence supporting the "avoid arrest" aggravator was insufficient and it should be stricken.

The court found the existence of both of the statutory mental mitigators, and accorded them moderate weight. The court also found extensive nonstatutory mitigation, including the fact that Appellant's proven mental illness can be successfully treated, that he was immature, impulsive, and easily manipulated, that he was acting under the dominion and control of Co-defendant Peeples, that Appellant has a low IQ and poor academic achievement, that Appellant took responsibility for his crimes by entering a guilty plea, and that Appellant had a loving and supportive family.

[3] The court found that the "pecuniary gain" aggravator had been

"Our law reserves the death penalty only for the most aggravated and least mitigated murders." Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999) (citing Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993)). See also Crook v. State, 908 So. 2d 350, 357 (Fla. 2005) ("[B]ecause death is a unique and final punishment, the death penalty must be reserved only for those cases that are the most aggravated and least mitigated."). In determining whether death is a proportionate penalty, this Court has explained:

> "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

Williams v. State, 37 So. 3d 187, 205 (Fla. 2010) (quoting Offord v. State, 959 So. 2d 187, 191 (Fla. 2007)).

In Almeida, the Court vacated a death sentence and imposed a life sentence even though Almeida committed two other murders in the weeks before the crime. In Crook, 908 So. 2d 350, the Court opined that the murder was one of the most aggravated due to the three aggravators -- that the murder occurred during a sexual battery, that the murder was committed for pecuniary gain, and that it was heinous, atrocious, or cruel. Nevertheless, the Court

(..continued)
proven, but it was not considered.

vacated Crook's death sentence and remanded for a life sentence because the evidence showed substantial mental health mitigation, including brain damage. The Court stated that the mitigation placed the case "squarely in the category of cases where we have reversed death sentences as being disproportionate in light of the overwhelming mitigation, especially the mental mitigation related to the circumstances of the crime." Id. at 358 (citing Hawk v. State, 718 So. 2d 159 (Fla. 1998), *abrogated on other grounds in* Connor v. State, 803 So. 2d 598 (Fla. 2001)).

In Hawk, because of substantial mitigation, the Court remanded for a life sentence for a murder committed during a brutal beating of an elderly couple, in spite of the contemporaneous conviction for the attempted murder of the victim who did not die. In Larkins v. State, 739 So. 2d 90 (Fla. 1999), the Court vacated a death sentence despite the fact that the aggravators included a prior violent felony and pecuniary gain because the record contained substantial statutory mental mitigation along with nonstatutory mitigation. In Urbin, 714 So. 2d 411, the Court remanded for a life sentence after finding that the avoid arrest aggravator had not been proven, leaving as aggravators the fact that the murder was committed during a robbery and that the defendant had a prior violent felony. The mitigation in Urbin included the defendant's youth, his impaired capacity, and his deprived childhood.

In this case, the evidence firmly established that Appellant's childhood was bleak. Appellant was raised by an

alcoholic mother who left him and his brother and sister in the care of an older sibling while she worked. Appellant's father was a practicing drug addict who beat Appellant's mother and the children and stole the family's money to buy drugs, leaving them hungry, and at times, without shelter or utilities. During Appellant's childhood, Appellant's father was verbally abusive with an explosive temper, and he was eventually convicted of murder and sent to prison when Appellant was a child. Appellant's father is Bipolar, which is a heritable condition.

Appellant's family lived in extreme poverty. The most stable residence the family had was described as a bug-infested and dirty shack. During his childhood, Appellant lacked proper food, clothing, and hygiene, and the children were taught to steal food to feed themselves. Appellant's older brother was physically and emotionally abusive toward Appellant, and Appellant stole things at his brother's behest. Except for during short vacations with an uncle, Appellant had no appropriate role models.

Appellant's academic achievement was extremely poor and his IQ is below average. He started exhibiting signs of mental illness when he was in his early teens, and there were indications that he began to hallucinate around that time. He also started drinking, huffing, and using drugs about the same time as his mental illness was emerging.

Appellant was sent to adult prison when he was only 16 years old, and the evidence is uncontroverted that when he emerged, he exhibited signs of debilitating mental illness. By the time he

left prison in 2007, his mental health had deteriorated to such a degree that his own mother thought he would be better off dead and she considered poisoning him.

Appellant suffers from Bipolar I Disorder with psychotic symptoms and he has traits of several personality disorders that he acquired as dysfunctional survival mechanisms. He has trouble dealing with stress and he tends to react instead of thinking things through. Appellant is also addicted to drugs, and the evidence was unrefuted that he would do anything if he thought it would result in his getting drugs, a trait he seems to have inherited from his drug-addicted mentally-ill father. In fact, substance abuse runs in Appellant's family. His grandparents were alcoholics and Appellant's youngest sister died from a drug overdose while Appellant was awaiting trial.

Appellant's expert testified that people with Bipolar Disorder act impulsively. In corroboration, Appellant's family members testified that Appellant has always acted impulsively and without an innate understanding of consequences. They also testified that he is a follower, that he is easily manipulated, and that others have used him to steal for them.

Witnesses testified that, although Appellant had been prescribed medication in prison, at the time of the murders, he was not taking the medication. Instead, he was both snorting and smoking cocaine and using alcohol. In the weeks before the murders he was exhibiting signs of mental illness, and after his arrest, Appellant's thought processes were incoherent. Before he

was properly medicated, Dr. Machlus was unable to evaluate him because his behavior was absurdly inappropriate and compulsive.

For these reasons, this case has substantial mitigation and cannot be consider as among the least mitigated. Therefore, Appellant's death sentences are disproportionate and should be vacated for the imposition of sentences of life without parole.

ISSUE V

WHETHER THE CASE HAS TO BE REMANDED TO THE TRIAL COURT FOR A WRITTEN ORDER OF COMPETENCY TO STAND TRIAL.

Although the court found Mr. Mullens competent to proceed on September 16, 2011, the court failed to file a written order finding him competent to proceed. Rule 3.212(b) of the Florida Rules of Criminal Procedure states that "if the court finds the defendant competent to proceed, the court shall enter its order so finding and shall proceed." Therefore, this Court must remand the case to the trial court. See Flowers v. State, 143 So. 3d 459 (Fla. 1st DCA 2014); Corbitt v. State, 744 So. 2d 1130 (Fla. 2d DCA 1999) ("[W]here the trial court has entered an oral finding that the defendant is competent, but no written order of competency has been entered, the proper remedy is to affirm the judgment and to remand the case to the trial court for entry of a *nunc pro tunc* order finding the defendant competent to stand trial."). Therefore, this case must be remanded for a written order.

CONCLUSION

In light of the foregoing arguments and authorities, Appellant requests that this Honorable Court vacate his death sentence and remand his case to the trial court the imposition of sentences of life imprisonment. In the alternative, Appellant asks that this Court remand his case for a new penalty phase and a reevaluation of his nonstatutory mitigation.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Attorney General's Office at capappTPA@myfloridalegal.com, and U.S. mailed to the Appellant, Mr. Khadafy Kareem Mullens, Inmate No. R17884, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026, on this 4th day of November, 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,

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