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IN THE SUPREME COURT OF FLORIDA

WILLIAM ROGER DAVIS, III,

Appellant,

vs.

CASE NO. SC13-6

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY

APPELLANT'S INITIAL BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

STATEMENT OF THE CASE AND FACTS

THE INDICTMENT

A grand jury in Seminole County returned an indictment charging the appellant, William Davis, with one count of premeditated murder (Count One), one count of kidnapping with the intent to inflict bodily harm, or to terrorize, or to facilitate sexual battery, accomplished by use of or threat to use a knife (Count Two), and one count of sexual battery accomplished by use of or threat to use a knife (Count III). (I 18) The alleged victim as to each count was Fabiana Malave, and all of the offenses were alleged to have taken place on or about October 29, 2009. (I 18)

OCTOBER 29, 2009

The State's proof at the guilt phase showed the following took place on October 29, 2009: Fabiana Malave was at work alone at Super Sport Auto, a used car lot in Longwood. (X 1127, 1164-65, 1170-74, 1179; see XI 1366) The defendant had bought a car there some days previously, and stopped by on the morning of the 29th and asked for the title. (X 1169, 1171-72, 1177-79) The nineteen-year-old Miss Malave called her employers, José and Rosa Hernandez, who told her to tell the defendant someone would be over in half an hour to transfer the title. (X 1171-72, 1180, 1182) When Rosa arrived at 12:10, the office was unlocked and

Miss Malave, her handbag, and her car were gone. (X 1172-74) José summoned police at 5:30; while he was speaking to an officer in the lot, he saw the defendant drive by "very slowly" in the Toyota 4-Runner he had bought there, which José identified by a prominent dent. (X 1196-97; XI 1212) Officers pursued but lost the 4-Runner. (X 1131-33) José joined the pursuit, and saw the 4-Runner pull into the lot of the Post Time Lounge, which is "a business or two away from" the car lot. (XI 1212; see X 1133-34) José flagged down an officer; the officer followed him to the Post Time, where José blocked in the 4-Runner. (X 1146; XI 1214)

Another officer approached after hearing radio chatter regarding the incident, and found the 4-Runner backed into a spot in the corner of the Post Time's lot, next to a Mazda that proved to belong to Miss Malave. (X 1134) That officer discovered her body in the 4-Runner; it had a blanket tucked around it and a plastic bag on its head. (X 1150-51) The body was cold and stiff to the touch. (X 1136) According to the officers, by the time "everybody" arrived at the scene after the body was discovered "the sun had been setting." (X 1127, 1138)

The defendant exited the 4-Runner when police arrived; he was told to put his hands on the car, and complied. (X 1149) He immediately asked to speak with an officer, and when an officer approached him, he said "secure me." (X 1149) That officer described his demeanor at that time as calm and unemotional. (X

1152) That officer handcuffed the defendant and put him in her patrol car. (X 1149) When Investigator Robert Hemmert of the Seminole County Sheriff's Office arrived, he moved the defendant to his unmarked car, where the defendant gave a statement which was taped and played for the jury. (XI 1353-58, XI 1360-XII 1424)

On the October 29 tape, when asked "what happened," the defendant responded "long story short, grabbed her, threw her in the car, took her to my house, raped her, killed her and brought her back here. Long story short." (XI 1363) He specified that he left the 4-Runner at the Post Time Lounge and walked to Super Sport Auto and asked for his title; when Miss Malave said he would have to wait, he showed her a knife he had brought with him, grabbed her by the neck with his hand and walked her outside, and directed her to enter her car. (XI 1366-70) He told her more than once that if she screamed he would kill her, and she put up no resistance at any time except to scratch him once, later on, on the back of the neck. (XI 1369-71, 1375, 1392, 1393) Mr. Davis explained that he transferred her to the 4-Runner, then drove her to his house in Pine Hills and raped her there, then killed her by choking her with his forearm. (XI 1370-72, 1373-75) He thought the abduction took place around 11:30 in the morning, and that he killed her within 25 minutes of getting her to his house. (XI 1367, 1374) Mr. Davis told Hemmert that

after the murder he wrapped the body in a blanket, backed the 4-Runner into the carport and wrestled the body into it, and had been driving the body around ever since. (XI 1376-78)

Also on the October 29 tape, Mr. Davis said he hoped the charge against him "would be capital murder so you just go ahead and kill me too. I don't give a fuck... I was trying to do that to myself for years. It doesn't seem to work out." (XI 1378-79) Asked why he had committed the crimes, he said "I don't really have an answer for that. I guess it's a cruel world...I kind of tried to figure out a way to fucking die by suicide by cop any fucking way so, why the hell not." (XI 1380) He also expressed the thoughts "I hate being here. I hate breathing" and "[I'm] just a poor schlep that doesn't want to be in the world." (XI 1388; XII 1417) He also explained he had been diagnosed with bipolar disorder twelve years earlier, at nineteen, and that for over a year he had been off the Lithium and Zoloft that had been prescribed to him. (XI 1380-81, 1388)

Asked if anything about the victim particularly attracted his interest, the defendant answered "no." (XI 1380) The following exchange also took place on the October 29 tape:

> OFFICER: When you went there today, obviously you said you parked here and walked over?

DEFENDANT: Yes.

OFFICER: Did you know what you were going to do?

DEFENDANT: No. No.

OFFICER: And what was the point in time when you realized that you were going to take her with you?

DEFENDANT: I don't know. Honestly, I don't know.

OFFICER: Just happened?

DEFENDANT: Yeah. Yeah. It was liberating, actually.

OFFICER: How about when you made the decision to kill her - when did you do that, prior to raping her or after you raped her it just happened?

DEFENDANT: Just did it.

OFFICER: Any thought in to it?

DEFENDANT: No, just did it.

OFFICER: Did you ever think about just putting her in the car and taking her back to the business and dropping her off and calling it a day?

DEFENDANT: I wasn't really thinking too far ahead, I don't guess.

OFFICER: You know, just asking.

DEFENDANT: I don't recall thinking much of anything, just doing it.

OFFICER: Did she know who you were? I mean, would she have recognized you when you walked through the door that day?

DEFENDANT: Oh, yeah, she would have known me.

OFFICER: So did you kill her because obviously she knew who you were and she could identify you later?

DEFENDANT: No, just did it.

(XI 1390-91) The defendant also explained that the knife he used was a plastic-handled steak knife he was keeping in the car to open oil cans because he did not have a purpose-built funnel. (XI 1394-95) Other remarks Mr. Davis made on the October 29 tape were "I'm a callous bastard, I really don't give a shit" and "it happened, can't change it." (XI 1378, 1385) The following also took place:

OFFICER: What if she was your sister?

DEFENDANT: She would be dead.

OFFICER: Doesn't matter?

DEFENDANT: No, it's one less person sucking up the oxygen in the world.

(XII 1418-19)

OFFICER: Have you ever killed before?

DEFENDANT: No, no, first time. Pretty interesting though.

OFFICER: In what respect?

DEFENDANT: Well, I don't know. Squeeze the life out of somebody. Kind of pissed me off that she pissed on me.

OFFICER: She pissed on you. You said you were choking her out?

DEFENDANT: Yeah, you lose control of your bodily functions at that point.

OFFICER: Do you have any remorse at all? I'm getting the feeling "no."

DEFENDANT: No, no. Zero.

(XI 1390)

OFFICER: You don't feel sorry?

DEFENDANT: No. No.

OFFICER: Do you feel good about what you did?

DEFENDANT: Good? No.

OFFICER: How would you describe it?

DEFENDANT: Just feel normal like I do every other day.

(XII 1421)

OFFICER: Would you do it again?

DEFENDANT: Oh, yeah. Oh, yeah.

OFFICER: Do you feel...empowered?

DEFENDANT: Oh, yeah.

OFFICER: Made you feel good inside? Strong? In control?

DEFENDANT: ...I don't know. I can't describe it. It was almost surreal.

(XII 1423)

A crime scene technician testified that the defendant had a small scratch to the back of his neck at the time of his arrest. (XI 1257-58) She also testified that she recovered a kitchen knife from the nightstand in the defendant's bedroom, and collected a balled-up sheet from the bedroom. (XI 1266, 1268) An analyst from the Florida Department of Law Enforcement testified that the defendant's DNA was unmistakably present on a vaginal swab taken from the victim, and that the defendant's DNA, and possibly the victim's DNA, were present on the sheet. (XI 1330-37)

THE MEDICAL EXAMINER'S TESTIMONY

Dr. Marie Herrmann, the chief medical examiner for Seminole County, testified in the guilt phase that she autopsied Miss Malave's body on October 30. (XI 1223, 1226) According to her testimony Miss Malave, who was 5'1" tall and weighed 95 pounds, died from pressure applied to her neck and a resulting lack of

oxygen to her brain. (XI 1237-38, 1232-33, 1236, 1238) There were hemorrhages in her neck muscles and bloody bruises to her esophagus. (XI 1232-33) Her neck was not fractured, she had no head injuries, and the visible injuries to the exterior of her body consisted of minor bruising to her face and neck, a cut and some bruising in the vaginal area, a scratch on one knee, and a torn thumbnail. (XI 1228-33) The bruising to her neck was not consistent with the use of a ligature or with the use of bare hands. (XI 1243, 1238) Based on her findings and based on something an officer told her the defendant had said, she concluded the victim had been killed with a chokehold applied by a forearm. (XI 1238, 1244-45)

Dr. Herrmann testified in the penalty phase that Miss Malave could have lost consciousness in as little as ten to thirteen seconds after the compression on her neck began, but that it could have taken longer if the pressure was incomplete. (XVII 2262-64) She would have been incapable of being resuscitated by the time three minutes elapsed. (XVII 2263) Since there was no other significant injury, the victim would have been conscious when the strangulation began. (XXVI 2265)

THE INSANITY DEFENSE

The defense conceded in its guilt-phase opening statement that the defendant had committed the acts charged in the information, and took the position that he was insane at the time. (X 1116-19, 1124) The defense called Investigator

Hemmert as its own witness, and showed through him that the defendant had initiated a second interview on November 2, four days after the first interview. (XII 1450) The defense introduced the November 2 tape into evidence, and played it for the jury. (XII 1447, 1453, 1454-1566) On the November 2 tape, the defendant said he had committed the abduction and rape because he had been commanded to do so by a man he calls Dr. Paul, who approached him out of the blue. Dr. Paul appeared to know all his personal business, and threatened that if the defendant did not follow his commands, bad things would happen to a woman named Jody that the defendant was then involved with. (XII 1459-71, 1500-10, 1514-23, 1563-64) Dr. Paul's specific command was that the defendant rape and kill one of three women: the girl from the car dealership, a girl from his neighborhood Auto Zone, or a co-worker. (XII 1467-68) The defendant also stated on the second tape that it was Dr. Paul who committed the murder and wrapped the body in a blanket. (XII 1472-73, 1486-89, 1553)

On the November 2 tape the defendant explained that he parked at the Post Time on October 29 because he did not want anyone at the dealership to know he was driving the car without having registered it. (XII 1524) He explained that as he walked there he did not know if he was going to follow Dr. Paul's commands or not. (XII 1525) He further explained that he had not reported Dr. Paul's

involvement on October 29 because he feared what Dr. Paul would do to Jody and her son. (XII 1551-52) Asked if he would still say the incident had been surreal, he responded "[m]y entire past week has been surreal.... Everything that goes by is there, but it's not." (XII 1559-60)

During its case the defense called psychologist Dr. Charles Golden. (XII 1578-XIV 1817) Dr. Golden testified that the defendant shows no sign of brain injury and has an IQ of 127. (XII 1588-89) Regarding Mr. Davis's history of mental illness, he specified that he has been diagnosed as bipolar on several occasions, has attempted suicide several times, and has experienced psychotic episodes which featured both delusional thinking and auditory hallucinations. (XII 1596-97) Dr. Golden himself diagnosed him as severely bipolar with psychosis. (XIII 1689)

According to Dr. Golden, the defendant joined the Army right out of high school, then a year later made his first documented suicide attempt; afterward military psychologists could not decide whether he was malingering to avoid service or was genuinely mentally ill. (XIII 1622, 1624) The defendant's documented mental health history picked up in Polk County, where he raped a girlfriend, was jailed, twice attempted suicide - once by hanging and once by cutting himself - and was admitted as an inpatient to the Peace River Mental

Health Center. (XIII 1629-31) Doctors at the PRMHC diagnosed him as bipolar and psychotic, recorded that he was experiencing delusions and auditory hallucinations, and recorded that on his admission he was curled up sucking his thumb and asking for "daddy." (XIII 1631, 1688) Mr. Davis was eventually released and placed on probation, which he violated by contacting the rape victim and abducting her at knifepoint. (XIII 1632-33) He was sent to prison for five years, where doctors diagnosed him as bipolar and recorded increasing hallucinations which ultimately diminished after he was successfully medicated. (XIII 1635)

Dr. Golden further recounted that the defendant was released from prison in 2008 and did not pursue further mental-health treatment. (XIII 1635-36) He met Jody after his release, and began a sexual relationship with her. (XIII 1636) Dr. Golden reviewed letters Mr. Davis wrote to Jody while she was in an alcohol rehabilitation facility, and characterized them as "the postal version of stalking." (XIII 1636-39) The last letter he wrote her was mailed October 26, 2009, three days before the abduction and murder of Miss Malave; Dr. Golden characterized the letter as showing a descent into irrationality and delusion. (XIII 1642-43, 1796) The defendant's letters to Jody were introduced into evidence and have been made part of the record on appeal. (XIV 1887-92; III 447-88) Dr. Golden elaborated that at the end of October Mr. Davis was experiencing "psychological

degradation." (XIII 1647)

Dr. Golden listened to the October 29 taped interview, and concluded from the "emotionally totally flat" demeanor Mr. Davis exhibited that he was experiencing dissociation, which is an abnormal reaction to unpleasant realities. (XIII 1653, 1687, 1713-14, 1784-86) Dr. Golden also listened to the November 2 taped interview, and gave his opinion that the Dr. Paul episode reflected magical thinking, which is typical of patients who have the defendant's diagnoses. (XIII 1645) He discussed the fact that hallucinations which are visual as well as auditory are unusual, and concluded that the defendant may have fantasized some portions of his interaction with Dr. Paul so as to make sense of the incident. (XIII 1645, 1797)

Asked about the possibility Mr. Davis was malingering to avoid responsibility, Dr. Golden responded that Mr. Davis has repeatedly expressed his desire *not* to avoid responsibility for the abduction and murder, asking instead whether he can't just be executed. (XIII 1656, 1798) Dr. Golden testified that he tested Mr. Davis's sincerity by suggesting scenarios that limited his culpability, but that unlike malingering patients he has dealt with, Mr. Davis rejected those scenarios. (XIII 1657) Dr. Golden also addressed the fact that the defendant's score on one aspect of the MMPI, which depends on reports of his own symptoms, is unusually

high, and that that score has been interpreted as indicating the defendant must be malingering. (XIII 1660, 1676-78) Dr. Golden gave his opinion that the apparently elevated score is accurate in view of the multiple documented mental-health problems the defendant has in fact experienced. (XIII 1677, 1744-48, 1756-70)

In addition to the bipolar-disorder diagnosis, Dr. Golden diagnosed Mr. Davis with borderline personality disorder. (XIII 1690) He testified that patients with that diagnosis are on the borderline of becoming psychotic, and that they often do experience psychotic symptoms such as hallucinations and delusions when under stress. (XIII 1704) Borderline patients experience rapid, intense, and dramatic mood swings which include swings into inappropriate, intense anger. (XIII 1703, 1699) Their mood swings can occur in the course of minutes or even seconds. (XIII 1703) In patients who are both bipolar and "borderline," the symptoms of each disorder magnify the symptoms of the other. (XIII 1702-03)

Dr. Golden also testified that during childhood and adolescence the defendant frequently fought with others and stole things, which he interpreted as signs of an undiagnosed bipolar disorder rather than as conduct disorder. (XIII 1613-15, 1617-18) In the absence of conduct disorder, he did not diagnose antisocial personality disorder, although he sees many aspects of that disorder in the defendant. (XIII 1706-08)

Dr. Golden concluded that the defendant suffers from a mental infirmity, disease, or defect, and that because of that condition he chose, based on a delusion, to obey the command hallucination issued by Dr. Paul. While he knew that what he was doing to Miss Malave would be wrong in most circumstances, he believed - based on a delusion - that what he was doing was right because it would spare Jody and her son from harm. (XIII 1710-12, 1786-95) On cross-examination, Dr. Golden agreed that a person can be psychotic and still legally sane. (XIII 1719)

REBUTTAL OF THE INSANITY DEFENSE

The State called two psychologists, Drs. Daniel Tressler and William Riebsame, to rebut Dr. Golden's testimony. (XIV 1823-1964) Both of them gave their opinions that the defendant's elevated MMPI scores reflect malingering. (XIV 1832-41, 1861-69, 1927-29, 1933-34, 1946-47) Both also gave their opinions that the defendant's reported interaction with Dr. Paul was a fabrication. (XIV 1846-47, 1873-74, 1884, 1925-26, 1941, 1952-53) Both Dr. Tressler and Dr. Riebsame concluded that the defendant, when he committed the charged offenses, knew what he was doing, knew the consequences of his acts, and knew that what he was doing was wrong. (XIV 1858, 1940-41, 1923-24)

Dr. Tressler diagnosed the defendant with both borderline personality

disorder and antisocial personality disorder, and testified that conduct disorder at an early age, which is a necessary predicate for the latter diagnosis, had been shown to his satisfaction. (XIV 1852-54, 1869-71) In his view those who suffer from antisocial personality disorder tend to hurt others and those who suffer from borderline personality disorder tend toward self-harm. (XIV 1853-54)

Dr. Riebsame diagnosed a personality disorder with both antisocial and borderline characteristics, noting he had not received enough information to warrant a finding of conduct disorder at an early age. (XIV 1934-37, 1955) Riebsame specified that contained rage which is occasionally released is typical of the defendant and typical of a borderline personality. (XIV 1938) Asked how the antisocial aspects of his personality disorder would affect the defendant's "respon[se] to events," Dr. Riebsame gave his opinion that "he'll be reluctant to genuinely accept responsibility. He will attempt to mislead others in terms of his involvement in the matter. He may be deceptive, not truthful. He will appear to place the responsibility of something going wrong on something outside of himself. He may deny involvement or deny memory. Anything that sort of minimizes his culpability or responsibility is typically [what] you see in an antisocial personality who has been involved in some sort of criminal activity." (XIV 1939)

Defense counsel asked Dr. Tressler, on cross-examination, whether his view

on malingering would change if he knew the defendant had sought to be executed. (XIV 1885) Tressler responded that his opinion would not change, because suicidal impulses can coexist with the desire for a favorable legal outcome. (XIV 1885-86) Dr. Riebsame explained, with regard to his opinion that malingering is present, that he was assuming the defendant's goal was to be found not guilty by reason of insanity. (XIV 1957-58)

Dr. Tressler gave his opinion that the defendant could not have been acutely psychotic in late October of 2009, because at that time "he was holding down a job as a telemarketer. He was able to do most of the activities of daily living. And he was able to negotiate the purchase of a car." (XIV 1846) Dr. Tressler listened to the October 29 taped interview, and concluded the defendant was experiencing detachment, which is a normal reaction to great stress, rather than dissociation, which is not. (XIV 1849-50, 1874-76) Tressler interpreted the letters to Jody as exhibiting "seething rage" based on her rejection of him, and he concluded that the defendant's acts against Miss Malave were an expression of displaced anger directed at the next woman who said "no" to him (regarding the car title not being ready). (XIV 1851, 1854-55, 1876-77) He likened the defendant's acts against Miss Malave to "kicking the cat" after a bad day at work. (XIV 1854)

Dr. Tressler also gave his opinion that if the command issued by Dr. Paul

had truly been hallucinated by the defendant, he still would not have reached the opinion the defendant was insane at the time of the charged offenses, because "if you say I have the right to kill another person to prevent somebody that I like better from being killed, I don't think that fits what the statute says constitutes insanity." (XIV 1878-80)

Dr. Riebsame, in his testimony, announced his opinion that Mr. Davis only "display[s] or report[s] or describe[s]" suicidal inclinations or other symptoms when it is to his advantage to do so, and that "[o]ther times you don't see them, you know. He doesn't rely on them." (XIV 1930) Dr. Riebsame further announced his opinion that "[a]t the time of the offense, he knows what he's doing, he's not psychotic. He is having other certain emotional and behavioral problems, but they don't explain or excuse the kidnapping and the rape and the strangulation." (XIV 1941)

THE GUILT PHASE VERDICTS

After deliberating for an hour and a half, the jury returned verdicts of guilty as charged on all three counts. (XV 2187-89; II 287-88; III 518-20)

PENALTY PHASE: MOTIONS

The defense moved, before trial, for an order directing the State to disclose what aggravating factors it intended to rely on. (I 49-52) At a hearing held on the

motion before the Honorable Donna L. McIntosh, Circuit Judge,[1] the State agreed to provide such a list. (XX 2798) The court ordered the State to provide the requested written notice within twenty days. (I 146-47) The record does not contain any such written notice, or any motion to compel or any other indication that the defense did not receive actual notice of the State's intentions.

Before trial, the defense argued that the standard jury instruction on the "especially heinous, atrocious and cruel" aggravating factor is unconstitutionally vague. (I 70-71; XX 2785-87) The State responded that this court has rejected that argument and approved the use of the standard instruction. (I 83-84) The court denied the motion. (I 155-56) The jury was instructed in accordance with the standard jury instruction as to the "especially heinous, atrocious and cruel" factor. (III 546; XVIII 2620-21) Fla. Std. Jury Instr. (Crim.) 7.11.

The defense also argued pretrial that the Florida death penalty is unconstitutional to the extent it allows a death sentence without the unanimous recommendation of the jury. (I 34-35, 67-68; XX 2798-99, 2842) The State responded that this court's decisions preclude reliance on this argument. (I 93-94) The court denied the motion, noting that "[w]hile this Court believes it would be advisable for

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[1] Judge McIntosh was succeeded in this matter by the Honorable John D. Galluzzo, Circuit Judge; Judge Galluzzo tried the case.

Florida's current capital sentencing scheme to be evaluated in light of recent legal developments, this court is bound by precedent." (III 156-57)

PENALTY PHASE: THE STATE'S CASE

The State established that the defendant was on probation for a felony on October 29, 2009, and that he had previously been convicted of burglary with an assault or battery, armed false imprisonment, and aggravated assault. (XIV 1821; III 432, 440; XVII 2268-69, 2273, 2286-87, 2290, 2294-95) The victim of all three of those offenses, Michael Hurst Redden, testified that she became involved with the defendant in 2002 while estranged from her husband, and that after she returned to her husband the defendant entered her house, raped her vaginally, and forced other sex acts on her. (XVII 2306-08) She further testified that in 2003 the defendant approached her in a parking lot, tried to force her into his car at knife-point, and threatened her preschool-aged children; she fled and escaped injury on that occasion. (XVII 2309-12) Those offenses were committed in Polk County. (III 432, 440)

Fabiana Malave's sister read the penalty-phase jury victim-impact statements which had been written by herself and their mother. (XVII 2321-41)

PENALTY PHASE: THE DEFENSE CASE

The defense called the defendant's stepmother, who testified that his

childhood had been marked by violence meted out unpredictably by his father, who was diagnosed as bipolar after the defendant left the family home. (XVIII 2445, 2451-52)

The defense also called a psychiatrist, Dr. Jeffrey Danziger, in the penalty phase. (XVII 2384-XVIII 2441) Dr. Danziger was retained by the defense a few days after the defendant was arrested, and met with him on November 4 and 13 of 2009, as well as later in 2010 and 2012. (XVII 2391) He was of the opinion that Mr. Davis was sane at the time of the offenses, and that his reported interaction with Dr. Paul was contrived. (XVII 2397-2401) He also gave his opinion that the defendant was at the time of the offenses acting under the influence of extreme mental and emotional disturbance. (XVII 2419-21) To support that opinion he pointed to the defendant's long and well-documented history of mental problems and to his behavior on October 29, when he "essentially allowed himself to be caught...did not try to hide the victim [and] did not try to flee." (XVII 2420-21, 2427)

Dr. Danziger diagnosed the defendant with bipolar disorder and a personality disorder with both borderline and antisocial features. (XVII 2409-10) He emphasized that patients with a diagnosis of borderline personality disorder have unstable and volatile moods that can change as rapidly as the wind changes

direction. (XVII 2411-12) Dr. Danziger detailed the defendant's mental health history, which began when he was treated with Lithium, Paxil, and Prozac from 1997 to 1999. (XVII 2402-03) From early 2003 through mid-2005, the defendant was in and out of the Polk County jail and the Peace River Mental Health Center. (XVII 2404-07) During that period he was confined pursuant to the Baker Act twice (XVII 2406) and was prescribed two antipsychotic drugs, i.e., Risperdal and Trophon, and seven drugs for mood disorders, i.e., Depakote, Zyprexa, Prozac, Zoloft, Lexapro, Buspar, and Tofranil. (XVII 2404-07) Jail records show that in both 2003 and 2005 he was observed either rocking and sucking his thumb or in a fetal position. (XVII 2404, 2407) Jail records refer on other occasions to his experiencing auditory hallucinations and racing thoughts. (XVII 2405, 2406-07) From 2005 to 2008, the defendant was in a Florida prison; the doctors there treated him with Lithium and Zoloft. (XVII 2409)

Dr. Danziger also testified that the documented history shows the defendant's father and brother have both been prescribed Lithium. (XVII 2403, 2415) In addition, the defendant's mother reported to Danziger that her brother, the defendant's uncle, was in and out of psychiatric hospitals, and that her uncle, the defendant's great-uncle, shot his wife and went to prison. (XVII 2415) Noting that mental illness has a strong genetic component, Dr. Danziger described that family

history as "extreme." (XVII 2415-16)

Dr. Danziger revealed, during cross-examination, that the defendant told him that while he was driving around with Miss Malave's body he stopped at the Cheesecake Factory in Winter Park Village and ate dessert, and went to the Guitar Center in the same area to look at guitars. (XVIII 2434) He testified that the defendant had no answer to the doctor's question why he did not dispose of the body. (XVII 2427)

The defendant testified in the penalty phase. (XVIII 2483-98) His testimony was that his father had whipped him and beaten him with his fists during his childhood. (XVIII 2484-85) He further reported that friends had commented on his mood swings in high school, and that while in the military he experienced rapid mood changes. (XVIII 2485, 2487) He testified that he was initially prescribed Risperdal in the Seminole County Jail while awaiting trial in this case, and that he was switched to Seroquel when he reported that Risperdal wasn't quieting the voices he hears. (XVIII 2490-91) At the time of the penalty phase he was also prescribed Lithium and Zoloft. (XVIII 2493) His testimony was that all of those drugs are working well for him. (XVIII 2493)

Mr. Davis testified that if had been taking that medication at the time of sentencing, he would not have committed the charged acts. (XVIII 2495) He

explained that he went off the medications he was prescribed after his first suicide attempt in the Army, both because they made him feel unreal and because his father had taught him mental health treatment was for weaklings. (XVIII 2489) He later went off other medications for financial reasons. (XVIII 2492) After he left the Department of Corrections in 2008, he discontinued taking medication because he often does well without it, but he now understands he needs the medication. (XVIII 2494-95)

Asked how he feels about the crimes he committed on October 29, 2009, he answered that he was ashamed. (XVIII 2496) Asked if had a statement for the jury, he responded as follows:

> I am for the death penalty one hundred and ten percent. I have been since as far back as I can remember.... [m]y attorney is going to let you know that I am the craziest guy under the sun. Okay, I'm not. There's nothing that I can do that will ever bring Ms. Malave back...and I firmly believe that you should give [a] recommendation to the judge giving me the death penalty. For several reasons - first of all, I've been in prison, in and out of prison several times. Not a nice place, okay. Tell you that right now. And if you're a nice guy in prison, you've got problems. I do not want to do the next forty or fifty years of my life - in fact, let me rephrase that. I will not do the next forty or fifty years of my life in prison. And to be perfectly honest with you, if you advise Judge Galluzzo to give me life, you're making a big mistake. That's it.

(XVIII 2496-98)

PENALTY PHASE: STATE'S REBUTTAL

The State recalled Dr. Riebsame to rebut Dr. Danziger's testimony. (XVIII 2501-19) Dr. Riebsame's opinion was that the defendant was not experiencing extreme mental or emotional disturbance at the time of the offenses; he pointed to the October 29 taped interview, and described the defendant's demeanor on the tape as "coherent," "logical," and "organized," as displaying no emotional distress, and as displaying no evidence of hallucinations or delusions. (XVIII 2502-03, 2505) He explained that in his view evidence of extreme mental disturbance would consist of symptoms of psychosis or "very extreme emotional disturb[ance]," which would in turn consist of "obviously very erratic, irrational, maybe disorganized" thought. (XVIII 2511-12) He admitted that making no effort to avoid detection "may" support a finding of extreme mental or emotional disturbance. (XVIII 2516)

PENALTY PHASE: CHARGE CONFERENCE

The penalty phase ended on August 7, 2012. (XVII 2377; XVIII 2528) The parties reconvened on the morning of August 8 for a charge conference. (XVIII 2528-46) At that time the following took place:

> THE COURT: [Aggravating factor] number four, the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. I assume that you're going

to argue that, but -

STATE: Where are you [reading], Judge?

THE COURT: Number four. It says the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. I know that always comes in when there's a murder.

(XVIII 2530-31)

THE COURT: And then number four, Mr. Caudill, any issues with regard to that?

DEFENSE COUNSEL: Well, as the court is aware, in order for that aggravating circumstance of the law it has to be the dominant motive for the murder and I would argue that has not been proven in this case.

THE COURT: All right. And counsel?

STATE: Well, the law is it can be proved circumstantially. It doesn't have to be the dominant motive expressed by the defendant, in any way. And the State's position is - let me find -

THE COURT: Maybe I can streamline this for you. I understand that the objection is being made. The State brought out some testimony that they can argue to the jury, the jury could determine circumstantially that the actions of Mr. Davis were in the nature of avoidance of arrest by the driving around, and that because he parked next to the vehicle they opined the possibility that he was intending on leaving the body and taking off. So I think that you have the ability to argue that because it was a sequence of events from the very beginning, plus because he's been charged with and convicted of the kid-

> napping and the rape, sexual battery, then because of the nature of those crimes alone, that it could be argued that he committed the murder to avoid arrest for those -
>
> STATE: If I could just add two more things?
>
> THE COURT: Yes, sir.
>
> STATE: He knew she could identify him. I mean, this was clear. Second of all, [there] was no provocation. She did nothing to provoke him to kill her.
>
> THE COURT: And your arguments are noted. Mr. Caudill, I note your objections for the record purposes, but I'm going to allow number four.

(XVIII 2543-45) After a pause, still on the morning of August 8, the parties began their closing arguments. (XVIII 2546-60)

PENALTY PHASE: CLOSING ARGUMENT

The State argued in closing that the murder was committed for the purpose of witness elimination. (XVIII 2564-68) In the course of that argument the State asserted "[h]e's waiting for something. Perhaps the onset of the evening hours or being able to transfer a body with some concealment of darkness would assist him." (XVIII 2566) The State also argued that "he said he found it liberating, empowering, and that he'd do it again. This was a heinous, extremely wicked, shockingly evil crime, one he enjoyed." (XVIII 2571) As to the proof of mitigation, the State asked the jury to "judge for yourself.... Was this extreme emotional

or mental distress, or was this in accordance with [the defendant's] character dysfunction." (XVIII 2576) On that point, counsel for the State concluded "[t]he defendant does have a long-standing bipolar mental issue, but that wasn't the reason for the crime. That's the State's position." (XVIII 2577)

THE JURY'S RECOMMENDATION

The jurors deliberated in the penalty phase for four hours and fifty minutes. (III 561-62) During that time they asked to hear the October 29 tape again, and they were allowed to do so. (XIX 2650-52) They also asked whether life in prison meant Mr. Davis would never be released, and were advised that that is indeed the case. (XIX 2642, 2645) The jury returned a recommendation of death, by a margin of 7-5. (XIX 2711)

THE SPENCER HEARING

The parties reconvened for additional testimony to be taken outside the jury's presence on September 10, 2012. At that time the defendant addressed the court as follows:

> I cannot sit here in good conscience and knowing what I've done, when everybody here is aware of what I've done, I can't sit here and ask you with a straight face to give me life in prison. I can't and I won't. Quite frankly, I think that it's rather asinine for anybody who is in this position to actually be given the alternative for life in prison.

> I know how I am when I'm off of my medication. I have always known how I am when I'm off of my medication, and yet it never fails, once I get to feeling better I quit taking it. When I quit taking it, bad things happen. It may not happen in a month, it could be a year, it could be two years. I can go long periods of time, but at some point something is going to happen and I will go completely off the handle.... I do hope that you will give more than great weight to the jury's recommendation.

COUNSEL'S SENTENCING MEMOS

In its sentencing memo, the defense argued that the evidence showed the defendant could adjust well to life in prison, and would present no significant danger to guards or other inmates if properly medicated. (III 591) The defense further argued that the mental-health-related mitigating evidence diminishes the strength of the State's position that the murder was especially heinous, atrocious, or cruel. (III 593) The defense memo also noted that "it is unknown...whether even a majority of the seven jurors who voted for death thought [the HAC factor] warranted the death penalty." (III 596)

In its sentencing memo the State argued that the "avoid arrest" aggravating factor was present in that "[t]here was no cause to kill Fabiana except for witness elimination." (III 571) The facts it relied on to support that theory were that she could identify him, she was small in stature and posed no physical threat to him, and she put up no resistance. (III 571, 572) The State elaborated that "the only

reasonable inference from the evidence" was that the defendant intended to baffle the authorities. (III 572) As to that theory it relied on the assertions that the defendant waited till dark to dispose of the body, and carefully wrapped the body to keep his car clear of evidence. (III 571-72)

As to the "especially heinous, atrocious and cruel" factor, the State again argued that the defendant's self-reported feelings of liberation and empowerment showed "the cruelty, wickedness and vileness of this murder." (III 575) It took the position that the aggravating factor was proved because "the victim's death was not instantaneous, nor terror free." (III 575) It also argued that the defendant's "mental health [should] not factor into an assignment of [weight] to the HAC aggravator." (III 577)

As to the "cold, calculated, and premeditated" aggravator, the State argued that the length of time between the initial abduction and the victim's death supported a finding of heightened premeditation. (III 577-78, 579-80) It also relied on the facts that the defendant knew the victim would be alone at work, and that he parked behind the Post Time Lounge and took a knife with him to the car lot. (III 578) It relied also on the defendant's demeanor on the night of October 29, arguing that the taped statement taken from him that night "reveals that [the] defendant was calm and reflective at the time of the killing." (III 579)

As to the proposed statutory mitigating factor of "under the influence of extreme mental or emotional disturbance," the State argued that the defendant's acts between the murder and his being taken into custody (cheesecake, shopping) fail to "indicate that he was under extreme mental or emotional disturbance on the day he murdered Fabiana Malave." (III 582)

As to the proof offered by the defense in non-statutory mitigation, the State argued as follows:

> STATE: Defendant offered evidence...that he is bipolar and responds well to medication; that he suffers from a borderline personality disorder; [and] that he would perform well in a structured prison setting.... While the State suggests that none of these mitigation factors are relevant...several of them merit further comment.
>
> The defendant in the Spencer hearing stated that as long as he takes his medications he is okay. In the next breath he stated that he would not on his own continue taking the medications for his bipolar condition. This offers little in mitigation, i[n] that what he must do to be "okay" he will not do. Even assuming his medications will make him safer, his long history of criminal violations prove that he will not maintain his medicated state.
>
> Several of the mental health experts diagnosed Defendant with borderline personality disorder.... The experts indicated that this disorder is more likely to cause an individual to be self-destructive rather than a danger to others. However, the experts also point out that the defendant has antisocial tendencies or has an antisocial personality disorder. This disorder is characterized

> by a pattern of disregard for, and violation of, the rights of others. This disorder appears to more accurately describe Defendant's long history of criminal acts which disregards and violates the rights of others and threatens their personal safety. It seems the antisocial characteristics swallow up Defendant's borderline personality disorder[,] causing him to be a danger to others more so than to himself.

(III 582-83)

THE SENTENCING ORDER

The judge found six aggravating factors were proved, and gave each great weight. (IV 636, 638, 640, 642, 644, 648) Those aggravating factors were that the defendant was on felony probation, that he had previously been convicted of a felony involving the use or threat of violence, that the murder was especially heinous, atrocious or cruel, that it was committed in the course of committing sexual battery or kidnapping, that it was committed to avoid arrest, and that it was cold, calculated, and premeditated. (IV 635-44)

As to the "cold, calculated and premeditated" aggravator, the judge found that the defendant "began his downward spiral" when he discovered Jody was seeing another man, and that during the days before October 29 the defendant "was obsessed with Jody and went through fits of anger and remorse." (IV 626) The judge further found:

It could be speculated that [the defendant] only went [to the car lot] to get his title and became angered by the owners not being there, but then it is illogical that he would have reacted the way he did and committed the crimes of kidnapping and sexual battery because he had to wait for the owner to arrive with it in a short period of time. It is more logical that he planned to do exactly what he did. His fabricated hallucinations about Dr. Paul were clearly an attempt by a man of intelligence who suffers from a diagnosed mental illness to justify his actions after he had time to reflect upon what he had done. And in that contrived attempt to avoid responsibility, he revealed sufficient details to know he not only thought about killing someone in advance of the act, even before he went to the car dealership, but that he was in fact making a choice between three women, a co-worker, an automotive supply store employee who had helped him or Fabiana Malave. He chose the woman who became his easiest and most accessible victim to funnel his rage against.

(IV 646)

The Defendant methodically executed his plan. He used the victim's car to travel to where he had left his own vehicle. He parked close enough to walk to where the victim was, but far enough away to not have his vehicle give rise to suspicion. He could have easily driven the victim in her own car to his house. However the Defendant consciously chose to drive it to where his vehicle was parked. His vehicle would not draw any notice at his own home. ...[I]n his state of mind the sexual battery would not satisfy his need to punish someone. He had sufficient time from the abduction, through the long drive to his home, through the sexual battery and after to reflect upon the effect of the victim's death. By his own words he was calm and reflective at the time of the killing and after.

(IV 646)

> It was in the defendant's words "pretty intense" ... he had "squeezed the life out of her." He stated that killing the victim was "pretty liberating" [and] that it had been "a hell of a day." Such comments are clear indications of a cold and callous mind, a planned killing where fear of identification was not an issue as death was the planned result.

(IV 647)

> He drove around for hours with her body that he had carefully wrapped and covered in cloth and plastic in an obvious attempt to prevent evidence from discovery in his vehicle and home.

(IV 647)

> He arrived on this late October day at about 5:30 p.m. where daylight would have normally been receding or gone. He clearly intended to use the cloak of darkness to transfer this victim back to her car and escape without detection.

(IV 647) The judge had earlier found that when the defendant drove by the car lot at approximately 5:30 p.m., he attracted the attention of the lot's owner. (IV 627)

The judge concluded that

> All the facts of this case evince a mind that was ruthless, cold, calculating, and that the premeditation was not short, but had been derived over time, even days as the end result of a planned kidnapping and sexual assault.... Even with the Defendant's mental illness, the Court still finds that this man of above average intelligence carefully planned and designed a killing of the victim over time.

(IV 647)

As to the "avoid arrest" aggravating factor, the judge found that "[t]he only reasonable inference from the evidence is that the dominant motive for the murder was to avoid arrest." (IV 644) The judge found that that aggravator was supported by the facts that the victim could identify the defendant, and did nothing to provoke the killing. (IV 643-44)

As to the "especially heinous, atrocious or cruel" aggravator, the judge found that the defendant's comments that the murder was "liberating" and "empowering" "showed enjoyment of an act considered vile." (IV 647)

As to statutory mitigation, the judge found that the factor of "under the influence of extreme mental disturbance" was not proved. (IV 651) He found that six non-statutory mitigating factors were shown, i.e., the defendant's history of mental illness, to which he gave some weight; his ability to control his behavior while medicated (some weight); his ability to adapt to imprisonment (little weight); his ability to hold gainful employment (some weight); remorse (some weight); and his cooperation during trial (substantial weight). (IV 651-55)

In rejecting the statutory mitigator, but finding the non-statutory mitigators that the defendant was mentally ill and can be controlled by medications, the judge specifically found as follows:

> [The defendant's] illnesses and conditions...do not in any way justify his intentional acts against this victim or against past victims but may seek to help explain that behavior.

(IV 652)

> The Court is reasonably convinced that the [evidence showed] the Defendant suffers from a mental illness, bi-polar and antisocial personality traits, that when he is medicated, can be controlled, but that those mental illnesses and antisocial traits were only contributing factors to his choices, and not the cause of his actions or that at the time of the murder his mental illness was so extreme that it was a major factor in an inability to control his behavior. His statement to the detective the night of the murder are the most telling of his calculating mind as well as his callous behaviors.

(IV 651)

The court further found, as to mental-health-related mitigation, that the defendant "was instructed and was supposed to continue his medications and seek counseling but he chose not to and was off his medications, sometimes self-medicating through the use of illegal substances, for many months prior to the murder." (IV 652) The court further found that

> [W]hen [the defendant] is medicated and stabilized his behavior improves. He follows the rules of his close confinement. That lends to the proposition that he is adaptable to long term incarceration. That of course would pre-suppose a desire and willingness to live one's life out in confinement. It would be of benefit to under-

> stand the defendant's realistic expectations for living the rest of his life in prison. As he told the jury in the penalty phase as well as this Court at the Spencer hearing, he has no intention of doing so. Further, that he recognizes that his behavior is adaptable if he continues his medications but further stated that he would within a few years stop taking his medications and would harm another again, and quite possibly himself, intimating the taking of his own life. He clearly let the jury and the Court know that in the future, he would not be amenable to life in prison and would find a way, perhaps by harming another, to control when his life sentence would end.
>
> The Court is reasonably convinced that th[e] mitigating circumstance of the defendant's ability to currently adapt to imprisonment has been proven but it is outweighed by the defendant's express recognition that it will not last and that he may very well harm another and or himself if [a life] sentence were imposed.

(IV 653) With respect to its finding of remorse, the court noted

> [The defendant knows] that he has no ability to control his behavior in the long run, that he will find a way to kill himself or harm others.

(IV 654-55)

THE SENTENCING HEARING, AND THIS COURT'S JURISDICTION

The court imposed a sentence of death on December 17, 2012. (IV 655; Vol. XXI) The judge did not read his entire order from the bench, but instead summarized it. (XXI 3007) While summarizing the nonstatutory mitigating circumstances it had found, the court noted a conclusion not memorialized in the sentencing

order, i.e., "the Defendant has, because of [his] illnesses, committed other acts in [the] past that may or may not have been within his control." (XIX 3013) Timely notice of appeal from the sentencing order was filed January 2, 2013. (IV 661)

SUMMARY OF ARGUMENTS

Point one. Where a judge assumes the role of the prosecutor, the defendant is deprived of his right to a fair and impartial tribunal. The judge did just that in this case when on the brink of penalty-phase closings, he surprised the parties by suggesting that the State should argue that the "avoid arrest" aggravator supports a death recommendation in this case. The defense was prejudiced when counsel for the State acted on the suggestion, and the error is therefore fundamental. Appellant's remedy should be resentencing before a different judge.

Point two. The trial court found that the proposed statutory mitigating factor of "under the influence of extreme mental disturbance" was not proved by the defense. That finding is not supported by competent, substantial record evidence. Further, that finding was reached by reliance on impermissible factors. As a whole, that aspect of the sentencing order does not reflect the "well-reasoned" weighing required by both this court's caselaw and federal caselaw.

Point three. The reasoning offered by the State in support of the "avoid arrest" aggravator is altogether inconsistent with the reasoning offered by it to support the "cold, calculated, and premeditated" aggravator. The "avoid arrest" factor should be struck for that reason. Further, the "avoid arrest" factor is not supported by substantial, competent evidence.

Point four. The "cold, calculated, and premeditated" aggravating factor was found in this case based on speculation rather than competent, substantial evidence. This court should strike that aggravating factor for that reason.

Point five. The State failed to show beyond a reasonable doubt that this case is *both* one of the most aggravated and one of the least mitigated death penalty cases to come before this court. This court has reversed the death penalty on proportionality grounds where, as here, significant mitigating evidence connects the defendant's mental illnesses to the charged conduct. Further, the doctors' testimony casts doubt on the strength of the aggravating factors found below.

Point six. The jury's 7-5 recommendation of death was rendered unreliable by the standardless instruction it received on the "especially heinous, atrocious, or cruel" aggravating factor. Since the instruction at issue does not have the effect of narrowing the class of persons eligible for the death penalty, relief is warranted.

Point seven. Ring v. Arizona, 536 U.S. 584 (2002), warrants relief in this case, notwithstanding this court's decisions to the contrary. While Ring by its terms does not require jury unanimity *as to proof of other convictions or proof of the defendant's legal status*, Appellant is harmed because unanimity was not required *as to the remaining three aggravating factors proved and argued below.*

ARGUMENT

POINT ONE

THE TRIAL JUDGE FAILED TO REMAIN NEUTRAL DURING THE PENALTY PHASE. THE DEFENSE WAS PREJUDICED; THE ERROR WAS FUNDAMENTAL. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, PROTECTED BY THE FEDERAL AND FLORIDA CONSTITUTIONS, WAS ADVERSELY AFFECTED.

Standard of review. Where the court in a criminal case assumes the role of the prosecutor, and the defendant is thereby prejudiced, the court's conduct amounts to fundamental error which may be raised for the first time on appeal. J.L.D. v. State, 4 So. 3rd 24, 26-27 (Fla. 2d DCA 2009). This is so even where the prejudicial conduct takes place outside the presence of a jury. Id. at 26.

Argument. This court's recent decision in Robards v. State, 2013 WL 1760428 (Fla. 2013), is apposite here. In Robards, a case involving a double murder, the trial court ordered the State before trial to disclose which aggravating factors it would rely on in the penalty phase. Robards at *11. The State filed a notice listing three aggravating factors. Before the guilt phase, the judge suggested in open court that the State pursue a fourth aggravating factor, i.e., that the defendant had committed a prior violent felony (based on the fact Robards had

killed two victims).[2] There was no objection, and before the guilt phase began the State filed an amended notice listing the proposed fourth aggravating factor. Id. at *11.

On direct appeal from Robards's conviction and death sentence, this court "strongly caution[ed]" the trial court that it must be and appear to be neutral, but held that any issue arising out of the judge's suggestion was unpreserved and did not amount to fundamental error since no harm resulted to the defense. Id at *11. This court specified that Robards was not harmed both because an amended notice was filed, and because the aggravating factor at issue consisted only of a fact that would have been proved in any event, i.e., that the defendant had killed two victims. Justice Labarga concurred, in an opinion joined by Justices Pariente, Quince, and Perry. The concurring justices noted that "although Robards cannot demonstrate that he was prejudiced by the State's amended notice, one can envision circumstances where such action could alter the trajectory of a penalty phase and sentencing." Id. at *18 (Labarga, J., concurring).

On the facts of the present case, the record shows the prejudice that was envisioned by the concurring justices in Robards. Judge McIntosh, before trial,

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[2] The first three aggravating factors were that the killing had been especially heinous, atrocious, or cruel, that it was committed for pecuniary gain, and that it was committed in the course of a robbery or burglary. Robards at *10.

ordered the State to notify the defense in writing which aggravating factors it proposed to rely on.[3] After the evidentiary portion of the penalty phase held in this case was complete, on the morning when penalty-phase closings began, the successor judge clearly surprised the parties by suggesting a new theory of aggravation. The court not only named the proposed new aggravating factor, but "streamlined" for the State just how to present its upcoming argument. Counsel for the State rose to the occasion, and argued the point at some length to the jury.

This court should distinguish Robards, and reverse the trial court's death sentence. Here the defense was actually surprised - on the brink of penalty-phase closing arguments - by presentation of an entirely new theory of culpability. Prejudice resulted in that the parties' penalty-phase closing arguments took a substantial detour from what counsel had rehearsed. When judicial neutrality is breached, the State has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict. Williams v. State, 901 So. 2d 357, 359 (Fla. 2d DCA 2005). The State cannot meet this burden given the altered trajectory of the penalty phase. See Robards at *18 (Labarga, J., concurring).

"The Due Process Clause entitles a person to an impartial and disinterested

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[3] No such written notice was filed, but the defense never indicated the State failed to give it actual notice of the proposed aggravating factors.

tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). The requirement of neutrality "preserves both the appearance and reality of fairness...by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." Id. In the criminal context, a trial before a judge whose impartiality may reasonably be questioned "would present grave due process concerns" because "proceedings involving criminal charges ... must both be and appear to be fundamentally fair." Steinhorst v. State, 636 So.2d 498, 500-01 (Fla.1994). Where a court assumes the role of the prosecutor, the defendant is deprived of the fair and impartial tribunal which is the cornerstone of due process. Cagle v. State, 821 So. 2d 443, 444 (Fla. 2d DCA 2002), *citing* Jerrico. Accord Johnson v. State, 2012 WL 3758650 *4 (Fla. 5th DCA 2012) and Sparks v. State, 740 So. 2d 33, 36 (Fla. 1st DCA), *rev. den.*, 741 So. 2d 1137 (Fla. 1999).

"The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." Jerrico at 242. Here some of the jurors may have relied on the reasoning the State argued in support of the "avoid arrest" aggravator, and some may have relied on the entirely disparate reasoning it argued in support of the

"cold, calculating and premeditated" aggravator.[4] Those contradictory arguments gave the jury a distorted view of the law's application to this case.

Appellant's remedy should be resentencing before a different judge. See Johnson, supra, 2012 WL 3758650 at *5, and McFadden v. State, 732 So. 2d 1180 (Fla. 4th DCA 1999). In Porter v. State, 723 So. 2d 191 (Fla. 1998), this court reversed a death sentence where it was shown in post-conviction proceedings that the trial judge had been actually prejudiced in favor of imposing that death sentence. Porter's case involved an override of a life recommendation; this court held that the defendant was entitled to retain the life recommendation, and entitled to a remand, before an impartial judge, for reweighing of the aggravating and mitigating factors. In this case, since the record shows the judge departed from the norm of neutrality by helping the prosecution out with its case, this court should hold that Appellant is entitled to retain the jury's 7-5 recommendation, and should remand for reweighing of the aggravating and mitigating factors by an impartial judge.

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[4] As will be argued below on Point Three, the two aggravating factors cannot coexist because the arguments supporting them are inconsistent.

POINT TWO

THE TRIAL COURT REJECTED THE STATUTORY MITIGATING FACTOR OF EXTREME MENTAL DISTURBANCE WITHOUT THE SUPPORT OF COMPETENT, SUBSTANTIAL EVIDENCE. THE COURT ALSO RELIED ON NONSTATUTORY AGGRAVATING FACTORS TO SUPPORT ITS RULING REJECTING THAT FACTOR. APPELLANT'S RIGHT TO RELIABLE SENTENCING PROCEEDINGS, GUARANTEED BY THE FEDERAL EIGHTH AMENDMENT, WAS ADVERSELY AFFECTED.

Standard of review. For this Court to sustain a trial court's final decision in its sentencing order, competent, substantial evidence of record must support the trial court's weighing process. Oyola v. State, 99 So. 3d 431, 446 (Fla. 2012), *citing* Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990), *receded from on other grounds in* Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000). In the context of an alleged constitutional violation, a sentencing order is subject to *de novo* review. Dempsey v. State, 72 So. 3d 258, 262 (Fla. 4th DCA 2011), *rev. den.*, 95 So. 3d 212 (Fla. 2012).

Argument. The trial court found that the defense failed to show that the proposed statutory mitigating factor of "under the influence of extreme mental or emotional disturbance" was present. In paragraphs 1(a) through 1(g) of the mitigation portion of his order, the judge summarized the testimony of the mental

health experts, and offered his own conclusions about the defendant's mental state at the time of the offenses, such as "[t]he anger over a few days continued to escalate" and "[h]e wanted his revenge for the rejection." (IV 648-51) In paragraph 1(h), the court announced its conclusion:

> The Court is reasonably convinced that the facts above establish that the Defendant suffers from a mental illness, bi-polar and antisocial personality traits, that when he is medicated, can be controlled, but that those mental illnesses and antisocial traits were only contributing factors to his choices, and not the cause of his actions or that at the time of the murder his mental illness was so extreme that it was a major factor in an inability to control his behavior. His statement to the detective the night of the murder are the most telling of his calculating mind as well as his callous behaviors.
>
> Therefore the Court is reasonably convinced that this mitigating circumstance has not been proven but the Court will give some weight to the components of his mental illness as a factor in mitigation.

(IV 651)

In paragraph (2)(a), the court gave some weight to the defendant's history of mental illness, and in paragraph (2)(b), the court gave some weight to his ability to be successfully medicated. The court wrote as follows on that second factor:

> The Defendant as agreed to by all experts has had long history of mental illness.... [These illnesses] do not in any way justify his intentional acts against this victim or against past victims but may seek to help explain that behavior. ...He was instructed and supposed to continue

> his medications and seek counseling but he chose not to and was off his medications, sometimes self-medicating through the use of illegal substances, for many months prior to the murder.

(IV 652-53)

In Oyola v. State, 99 So. 3rd 431 (Fla. 2012), this court required the trial court to reconsider a sentencing order that failed to expressly evaluate, in a well-reasoned fashion, how the evidence failed to support a proposed statutory mitigating factor. This court noted that the order in Oyola conflated statutory and non-statutory mitigation on mental-health issues, and that the order featured summary conclusions. 99 So. 3rd at 446-47. The order issued in this case has similar flaws: while discussing statutory mitigation, the court summarized the expert testimony generally, then leapt to the conclusions that mental illness not only was not the cause of the charged offenses, but was not even a major factor contributing to them. While discussing the non-statutory mitigating factor of amenability to medication, the court asserted that mental illness "do[es] not in any way justify [the defendant's] intentional acts." Those bald conclusions dominate the portion of the sentencing order devoted to weighing mental health-related mitigating evidence, and they do not reflect the "reasoned judgment" this court requires. See Oyola at 447.

Competent, substantial evidence of record must support the weighing process. Oyola, 99 So. 3rd at 446. Dr. Riebsame testified in the penalty phase that the statutory factor of extreme mental disturbance was not present, and testified in the guilt phase that the defendant's mental-health problems "don't explain or excuse the kidnapping and the rape and the strangulation." To the extent Dr. Riebsame opined that the defendant's mental-health problems did not *cause* the offenses, Appellant acknowledges that his testimony tends to support the court's order. See Merck v. State, 975 So. 2d 1054, 1065 (2007), *cert. den.*, 555 U.S. 840 (2008) (findings supported by expert testimony will be affirmed). However, none of the experts testified that mental illness *was not a significant contributing factor* to the offenses. Further, to the extent Dr. Riebsame opined that mental illness *does not excuse* the offenses, that testimony is well beyond the scope of his expertise and thus does not constitute the competent, substantial evidence required by Oyola and Campbell. See Adams Bldg. Materials, Inc. v. Brooks, 892 So. 2d 527, 529 (Fla. 1st DCA 2004) (where physicians' opinions were "conclusory assessments" beyond the scope of their expertise, competent substantial evidence did not support a ruling based on their testimony). See also Sieracki v. Pizza Hut, 599 So. 2d 678 (Fla. 1st DCA 1992) (where order appealed from highlighted factors largely irrelevant to the legal issues presented, appellate court remanded for reconsider-

ation).

Further, in weighing non-statutory mitigation, the trial court not only emphasized that the defendant "was instructed...to continue his medications...but... chose not to," but also emphasized that he "clearly let the jury and the Court know that in the future he would not be amenable to life in prison" but instead "will find a way to kill himself or harm another." (IV 652, 653, 654-55) The court's highlighting of those aspects of the proof amounted to both improper consideration of non-statutory aggravating factors and improper use of mitigating evidence to support aggravating factors.

Reliance on non-statutory aggravating factors violates the Eighth and Fourteenth Amendments. Espinosa v. Florida, 505 U.S. 1079, 1081 (1992); Proffitt v. Wainwright, 685 F. 2d 1227, 1266 (11th Cir. 1982), *cert. den.,* 464 U.S. 1003 (1983). In Miller v. State, 373 So. 2d 882 (Fla. 1979), this court reversed a death sentence where the trial court improperly considered the defendant's "incurable and dangerous mental illness" and the concomitant possibility that he might commit further acts of violence if ever released on parole. 373 So. 2d at 885-86. In Perez v. State, 919 So. 2d 347 (Fla. 2005), *cert. den.*, 547 U.S. 1182 (2006), this court distinguished Miller, holding that the trial court had reasonably considered the defendant's dangerousness in weighing the effect of the

nonstatutory mitigating factor of childhood sexual abuse. The trial court in Perez found that the abuse was not in fact mitigating, since its effects had warped the defendant into a dangerous man. 919 So. 2d at 375. This court held that the sentencing order in Perez did not run afoul of Miller, since in Miller the improper factors were "a controlling circumstance tipping the balance in favor of the death penalty," while in Perez the improper factor was merely referred to in the process of weighing an item of nonstatutory mitigation. 919 So. 2d at 375. Here improper factors surfaced repeatedly throughout the portion of the sentencing order devoted to mitigation, and the court ultimately gave less weight to mental health-related mitigation than it gave to the defendant's exhibiting respectful courtroom demeanor while medicated.

Using mitigating evidence to support aggravating findings has also been disapproved by this court. Walker v. State, 707 So. 2d 300, 314 (Fla. 1997). In Perez, the appellant relied on Walker; this court held that Walker did not entitle Perez to relief, because in the latter case the State conceded, and the trial court found, that the defendant's mental-health problems were in fact mitigating. Perez, 919 So. 2d at 376. In this case, as noted, the court's order returns repetitively to the defendant's refusal to stay on medication, his inability to adapt to life in prison, and his future dangerousness. The State, in its sentencing memorandum,

sounded the same series of notes. (III 582-83) Perez is distinguishable, since here the weighing of significant mental health-related mitigation prominently featured a recitation of aggravating facts.

The sentencing order's treatment of mitigating evidence thus is not supported by competent substantial evidence, relies on impermissible factors, and as a whole is not the "well-reasoned" order this court requires. The reliable sentencing proceeding guaranteed by the Eighth Amendment has not yet taken place in this case. See Proffitt v. Wainwright, supra; see generally Lockett v. Ohio, 438 U.S. 586, 601 (1978). As it did in Oyola, this court should reverse the sentencing order and remand for reweighing of the aggravating and mitigating factors. 99 So. 3rd at 447.

POINT THREE

THE "AVOID ARREST" AGGRAVATING FACTOR WAS NOT PROVED BEYOND A REASONABLE DOUBT BY THE EVIDENCE; THE ORDER FINDING ITS PRESENCE WAS BASED ON SPECULATION AND FAILED TO MEET THE REQUIREMENTS OF THE FEDERAL CONSTITUTION OR THIS COURT'S CASELAW.

Standard of review. This court reverses a trial court's finding that an aggravating factor is present when that finding is not supported by competent, substantial evidence. Cole v. State, 36 So. 3rd 597, 608 (Fla. 2010), *cert. den.,* 131 S. Ct. 353 (2010). Where the proof supporting an aggravating factor is circumstantial, that proof must be inconsistent with any reasonable hypothesis that might negate the existence of the aggravating factor. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

Argument. To support the "avoid arrest" aggravating factor, the State must show that the desire to eliminate a witness was "at least a dominant motive" behind the charged murder. Green v. State, 583 So. 2d 647, 652 (1991), *cert. den.,* 502 U.S. 1102 (1992). In Green the defendant admitted he took a knife to the home of the victims, who could identify him, and stabbed them in a dispute over $250. The court found in Green that the aggravating factor of "committed in the course of a robbery or burglary" had been shown, but that the State "clearly" failed

to show the killings were committed in order to avoid arrest for those crimes. Id. at 649, 652. In another case, where the victim of a convenience store robbery knew her killer well and did not oppose the robbery, this court disapproved the "avoid arrest" aggravator in the absence of a more concrete showing that witness elimination was the intention behind shooting her. Caruthers v. State, 465 So. 2d 496, 497 (Fla. 1985).

In support of finding this aggravating factor in its sentencing order, the court relied on the facts that the victim could identify her rapist and that she did nothing to provoke him into killing her. Those facts are insufficient to support the court's finding. Caruthers; Doyle v. State, 460 So. 2d 353 (Fla. 1984). In Doyle, the defendant strangled his victim after raping her; she could have identified him, and he was under a five-year suspended sentence which would automatically be imposed if he were caught for the rape. This court held that those facts failed to prove beyond a reasonable doubt that the killing was probably committed to thwart the authorities, since "[i]t is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection." Doyle, 460 So. 2d at 358.

In this case the defendant was patently candid to a fault in his October 29

statement, but he had no answer to the question why he had acted as he did. Dr. Danziger also reported that the defendant could not explain his motives. This court has held that where the record is silent, "[w]e cannot assume [the defendant]'s motive; the burden was on the state to prove it." Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979). The proof offered in support of the "avoid arrest" aggravator in this case was circumstantial, since the defendant's admissions stopped short of establishing his motivation. The proof was not inconsistent with the reasonable hypothesis that the killing and rape were both the result of "the same hostile-aggressive impulses." See Doyle, supra, 460 So. 2d at 358.

In a case where the defendant pleaded guilty to burglary and sexual assault, the victims knew their assailant, and the victims died from stab wounds inflicted in what this court characterized as a "frenzied attack," this court rejected the hypothesis that the killing was shown to have been committed so as to avoid arrest. Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986), *cert. den.,* 479 U.S. 914 (1986). This court reasoned that "[w]hile the fact that the victims knew Amazon could allow inference of the aggravating factor, when considered in light of the "frenzied attack" hypothesis, Amazon may well have not considered avoidance of arrest when he killed his victim." Id. Here, in light of the defendant's erratic actions after the killing, he "may well not have considered" avoiding arrest in this case.

The court's findings regarding those erratic actions appear in the portion of the sentencing order devoted to the "cold, calculated, and premeditated" aggravating factor. (IV 647) Those findings were that the defendant "carefully wrapped" the body "in an obvious attempt to prevent evidence from discovery in his vehicle and home," and that he returned to the Post Time Lounge "at about 5:30 p.m. where daylight would have normally been receding or gone. He clearly intended to use the cloak of darkness to transfer this victim back to her car and escape without detection." (IV 647) Those suppositions about the defendant's intentions are not supported by the record. The defendant reported that he stuffed the victim's body into the 4-Runner in his carport, and a crime scene technician testified that he left the knife he had used on his bedside table, and left a sheet with both the defendant's and the victim's DNA on it balled up in his bedroom. These acts do not reflect a plan to sanitize the scene of the crimes. He then "very slowly" drove by the car lot at 5:30 in full view of José Hernandez, who spotted him immediately. Further, arriving in a bar's parking lot during happy hour to transfer a body from one vehicle to another hardly indicates one has thought through a plan to escape detection.

In any event, on the facts of this case, as on the facts of Derrick v. State, 581 So. 2d 31 (Fla. 1991), the theory that the killing was done to eliminate a witness to

a completed crime is logically inconsistent with the theory that the killing was the result of a calculated plan to kill. In Derrick, the "avoid arrest" aggravator was supported by the defendant's admission that he had killed the victim because the victim had recognized him. This court held that the further finding that the murder had been the result of a cold, calculated and premeditated ambush was inconsistent with that reasoning, and held that the "avoid arrest" finding had not been proved. 581 So. 2d at 36-37. In this case, the finding that the killing was "cold, calculated and premeditated" was based on the judge's conclusion that before the defendant approached the car lot, "in his state of mind the sexual battery would not satisfy his need to punish someone." (IV 646) The reasoning offered in support of the "avoid arrest" factor is altogether inconsistent with that conclusion. The "avoid arrest" factor should be struck for that reason, as well as because it is not supported by substantial, competent evidence.

The proof failed to meet constitutional requirements as well. The Eighth Amendment requires that aggravating factors must be proved beyond a reasonable doubt. Lewis v. Jeffers, 497 U.S. 764, 780-83 (1990). The test on appeal is whether any rational trier of fact would have concluded the aggravator was proved beyond a reasonable doubt. Id. at 781. Viewed in this light, the record in this case does not contain competent, substantial evidence to support the "avoid arrest"

factor. Menendez; Doyle; Green; Caruthers. The trial court's finding that it was proved should therefore be struck by this court on constitutional grounds.

POINT FOUR

THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR WAS NOT PROVED BEYOND A REASONABLE DOUBT; THE COURT'S ORDER FINDING ITS PRESENCE WAS BASED ON SPECULATION AND FAILED TO MEET THE REQUIREMENTS OF THE FEDERAL CONSTITUTION OR THIS COURT'S CASELAW.

Standard of review. As noted above, this court reverses a trial court's finding that an aggravating factor is present when that finding is not supported by competent, substantial evidence. Cole v. State, 36 So. 3rd 597, 608 (Fla. 2010), *cert. den.*, 131 S. Ct. 353 (2010).

Argument. Four elements must be shown to establish cold, calculated premeditation. Walls v. State, 641 So. 2d 381, 387-88 (Fla. 1994), *cert. den.*, 513 U.S. 1130 (1995). The first is that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. The "cold" element generally has been found wanting only for heated murders of passion, in which the loss of emotional control is evident from the facts. Id. Second, the murder must be the product of a careful plan or prearranged design to commit murder before the fatal incident. Id. Third, the State must show "height-ened premeditation," which is to say, premeditation over and above what is required for un-aggravated first-degree murder. Id. Finally, the murder must have

been committed without any pretense of moral or legal justification. This court has repeatedly rejected claims that the purely subjective beliefs of the defendant, without more, could establish a pretense of moral or legal justification. Id.

To establish heightened premeditation, the evidence must show that the defendant had a "careful plan or prearranged design to *kill.*" Geralds, supra, 601 So. 2d at 1163. A plan to kill cannot be inferred solely from a plan to commit, or from the commission of, another felony. Id. "The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that [another felony] may have been planned is irrelevant to this issue." Id. (citations omitted). However, heightened premeditation can also properly be found where the State shows beyond a reasonable doubt that the defendant "had ample opportunity to release the victim but instead, after substantial reflection, "acted out the plan he had conceived during the extended period in which the events occurred." Turner v. State, 37 So. 3d 212, 225-26 (Fla. 2010), *cert. den.,* 131 S. Ct. 426 (2010) (citations and punctuation omitted).

Where "the evidence regarding premeditation...is susceptible to...divergent interpretations," this court holds that the State has failed to meet its burden of showing this factor beyond a reasonable doubt. Geralds v. State, supra, 601 So. 2d

at 1164. Accord Hall v. State, 107 So. 3rd 262, 278 (Fla. 2012). Where the State's theory in support of the CCP factor is based on speculation, this court strikes the aggravator. Hall at 277-78. Where the trial court relies on actions committed after the death takes place to show the CCP factor, this court rejects that reasoning. Id.

The trial court in this case found that the defendant, *by his own words*, was calm *and reflective* at the time of the killing. (IV 646) The defendant's October 29 statement supports the finding that he was calm, but not the finding that he reflected on his future actions; what he said on the tape was that he did not know what he was going to do to Miss Malave, and that he "just did it." (XI 1390-91)

The trial court also relied on the fact the defendant moved the victim from her car to his SUV before taking her to his house, attributing that move to a careful plan in which the defendant foresaw that "[h]is vehicle would not draw any notice at his own home." (IV 646) In light of the facts that shortly afterward the defendant stuffed the body into the 4-Runner in his carport, then drove "very slowly" past the car lot where he had abducted the victim in full view of her employers, then went to a bar's parking lot at happy hour to again transfer the victim, the court's theory is unsupported by the record.

The trial court also found that the defendant planned the October 29 offenses "over time, even days." (IV 647) The judge premised that finding on his

interpretation of the November 2 taped interview where the defendant reported the command hallucination delivered by "Dr. Paul;" the judge concluded that "the thoughts he tried to misrepresent as Dr. Paul's were of course his own" and that "he was in fact making a choice between three women, a co-worker, an automotive supply store employee who had helped him, or Fabiana Malave." (IV 650, 646) None of the experts gave an opinion to that effect; what Drs. Riebsame, Tressler, and Danziger testified was that they did not believe the "Dr. Paul" version of events at all. The trial court further concluded that the defendant's state of mind was such that "sexual battery would not satisfy [the defendant's] need to punish someone." (IV 646) Again, the conclusion is unsupported by the experts' testimony. This court should disregard the judge's speculations about the defendant's possible train of thought. See Hall, supra, 107 So. 3d at 277-78.

As a fallback to its conclusion that premeditation took place over the course of days, the trial court ruled that the defendant had sufficient time between the abduction and the killing to polish a newly-made plan to kill the victim. (IV 646) That theory is both speculative and inconsistent with the defendant's report that he did not think the matter through. This court should not reject that statement by the defendant as self-serving, since it was made in the midst of highly damaging and obviously candid admissions. The statement is not implausible on its face; as this

court noted in Doyle v. State, supra, "the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act." 460 So. 2d at 358.

The trial court further concluded that the defendant's state of mind was such that "sexual battery would not satisfy his need to punish someone." (IV 646) None of the experts gave an opinion to that effect; the conclusion is speculative and should be disregarded. Hall, supra.

The judge also relied on the defendant's statements that the killing was "liberating" and "intense" to support the cold, calculated and premeditated factor; he concluded "[s]uch comments are clear indications of a cold and callous mind, a planned killing where fear of identification was not an issue as death was the planned result." (IV 647) While the "cold" inference may be warranted, the leap to the conclusion that the killing was planned is not logically supported.

The proof failed to meet constitutional requirements as well. The federal Eighth Amendment requires that aggravating factors must each be proved beyond a reasonable doubt. Lewis v. Jeffers, supra, 497 U.S. 764, 780-83 (1990). The test on appeal is an objective one, i.e., whether any rational trier of fact would have concluded the aggravator was proved beyond a reasonable doubt. Id. at 781. Viewed in this light, the record in this case does not support findings that the

murder was committed in a calculated manner after heightened premeditation. The trial court's finding of this aggravating factor should therefore be struck by this court on constitutional grounds.

POINT FIVE

THE DEATH PENALTY IS NOT PROPORTIONATE IN THIS CASE.

Standard of review. This court undertakes a qualitative proportionality review in every capital case, in which it compares the totality of the circumstances in the case before it with those in other capital cases. Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998). The number of aggravating and mitigating factors is not dispositive of the proportionality question. Urbin, 714 So. 2d at 416. This court deems death to be a disproportionate remedy where the case is not *both* one of the most aggravated, and least mitigated, cases to come before it for review. Crook v. State, 908 So. 2d 350, 357 (Fla. 2005).

Argument. The trial court found six aggravating circumstances in this case, and assigned all of them great weight. In addition to the challenged "avoid arrest" and "cold, calculated and premeditated" aggravators, the court also found that the murder in this case was committed in the course of a kidnapping and a sexual battery, that the defendant had previously been convicted of a felony involving use of force, that he was on felony probation at the time of the killing, and that the killing was especially heinous, atrocious, or cruel. As noted above, the court rejected the statutory mitigating factor of "extreme mental disturbance," and gave

substantial weight to the defendant's courtroom demeanor; some weight to his showing of remorse, his employability, his mental illness generally, and his ability to be successfully medicated; and little weight to his ability to adjust peacefully to life in prison. In finding no statutory mitigation, the court gave short shrift to the substantial mental health-related expert testimony given below. That testimony, correctly viewed, both has significance in its own right and detracts from the strength of the aggravating factors the court relied on.

It was undisputed by the expert witnesses that Appellant has a long and well-documented history of treatment for mental health problems. He was first diagnosed with bipolar disorder after his first suicide attempt at age 19. Over the intervening twelve years before the events of October, 2009, he was on multiple occasions treated for psychotic symptoms, including auditory hallucinations, that arise out of that disorder. During that time he was confined pursuant to the Baker Act twice and has been prescribed multiple anti-psychotic drugs as well as multiple mood stabilizers. At the time of trial he was taking Seroquel, lithium and Zoloft. His illness is complicated by the additional diagnosis of borderline personality disorder, which causes abrupt mood swings. Where bipolar disorder and borderline personality disorder co-exist, each magnifies the effect of the other. A defense expert testified that at the time of the offenses the defendant was experi-

encing "psychological degradation."

Substantial mental imbalance and loss of psychological control are two of the weightiest mitigating factors in capital cases. Santos v. State, 629 So. 2d 838, 840 (Fla. 1994). Because death is a unique and final punishment, in order to support a death sentence a capital case must be among the least mitigated cases *as well as* among the most aggravated cases. Crook v. State, 908 So. 2d 350, 357 (Fla. 2005). Mental health-related mitigating evidence is particularly compelling where testimony directly relates the mental health problems to the brutal conduct. Crook at 359. Here the defendant testified that if in 2009 he had been taking the medications he was on at the time of sentencing, he would never have committed the charged offenses. Both parties' experts agreed that the defendant's behavior is stabilized by medication. (XIV 1869; XVII 2399)

This court has reversed the death penalty on proportionality grounds where, as here, significant mitigating evidence connects the defendant's mental illnesses to the charged conduct. In Clark v. State, 609 So. 2d 513 (Fla. 1992), this court held that death was a disproportionate penalty where "strong non-statutory mitigation" supported the judge's findings that the defendant was "a disturbed person" and that "his judgment may have been impaired to some extent" at the time of the murder. 609 So. 2d at 516. Similarly, in DeAngelo v. State, 616 So. 2d

440 (Fla. 1993), this court found death disproportionate based on nonstatutory mitigation showing the defendant was bipolar and psychotic, where those disorders were shown to cause chronic anger and where the victim was choked to death. 616 So. 2d at 441, 443-44.

In Crook, this court reversed a death sentence where testimony that related the defendant's brain damage to his conduct was, further, "essentially unrebutted." 908 So. 2d at 357-58 and n.5. Here the State's expert witnesses testified at length, during the guilt phase, that the insanity defense was unsupported, but those witnesses did not dispute that the defendant has a long history of treatment for psychotic symptoms. Dr. Riebsame's testimony in the penalty phase, offered in rebuttal to Dr. Danziger's penalty-phase testimony, was limited to his observation that the defendant's October 29 taped statement did not reflect active hallucinations or disordered thought; that testimony assumes that the defendant's disorders manifest themselves solely in those symptoms. Here as in Crook, the jury asked whether a life recommendation meant the defendant would never be released, and the ultimate death recommendation was 7-5. Crook, 908 So. 2d at 352.

This case, like the cited cases, is not among the least mitigated cases this court has reviewed. Further, the mental health-related mitigation in this case diminishes the strength of the aggravating factors found below. As to the defen-

dant's prior record and probationary status, the judge at sentencing - although he did not memorialize this thought in his sentencing order - noted that the defendant's past transgressions "may or may not have been within his control." As to the "especially heinous, atrocious and cruel" factor, the State in its argument to the jury emphasized the defendant's statements that the charged conduct was "liberating" and "empowering;" it took the position that those comments reflect "shockin[g] evil" rather than the rapid bipolar swings explained by Dr. Danziger. The defendant's erratic behavior after the murder casts doubt on both of the alternative theories that the killing was well thought out in advance and that it was deliberately committed to eliminate a witness. Viewed in this light, the case is neither among the most aggravated nor the least mitigated known to this court. As it did in Crook, DeAngelo, and Clark, this court should conclude that the death penalty is not proportionate here.

POINT SIX

THE STANDARD JURY INSTRUCTION DEFINING THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING FACTOR LACKS OBJECTIVE STANDARDS. APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND THE GUARANTEE OF RELIABLE SENTENCING PROCEEDINGS, PROTECTED BY THE FEDERAL AND FLORIDA CONSTITUTIONS, WERE ADVERSELY AFFECTED ON THE FACTS OF THIS CASE.

Standard of review. Generally speaking, the standard of review of rulings affecting jury instructions is abuse of discretion; however, as with any issue of law, discretion is strictly limited by case law. Lewis v. State, 22 So. 3d 753, 758-59 (Fla. 4th DCA 2009), *rev. den.*, 43 So. 3rd 690 (Fla. 2010). Reversible error occurs when an instruction is not only an erroneous or incomplete statement of the law, but is also confusing or misleading. Id.

Argument. Appellant acknowledges that this court has rejected challenges to the constitutionality of Florida's current, post-1992 standard jury instruction defining the "especially heinous, atrocious, and cruel" aggravator. Hall v. State, 614 So. 2d 473 (Fla. 1993), *cert. den.*, 510 U.S. 834 (1993). Giving that instruction over the defense objection in this case was nevertheless, by federal standards, error which adversely affected Appellant's rights to due process and heightened reliability in penalty-phase proceedings.

The instruction at issue does not have the effect of narrowing the class of persons eligible for the death penalty. The language employed is subjective; such terms as "wicked," "evil," "shocking," "outrageous," and "vile" appeal to emotion rather than reason. In Shell v. Mississippi, 498 U.S. 1 (1990), the United States Supreme Court rejected instructions which defined "heinous, atrocious or cruel" in just those terms; Florida responded by adding that the crime must exhibit "additional acts" which are "torturous to the victim." See State v. Breedlove, 655 So. 2d 74 (Fla. 1995), *cert. den.,* 516 U.S. 1031 (1995). The "additional acts" rider does not, however, effectively operate as a narrowing factor; it directs jurors that they may find the HAC factor in those cases where "additional acts" that are "conscienceless or pitiless" and "unnecessarily torturous to the victim" are shown. "Pitiless" and "conscienceless" are as broad and subjective as the terminology that was rejected in Shell, and the jury is not clued in, by the standard instruction, to this court's rule that the "torturous" clause refers only to the victim's subjective experience rather than the defendant's subjective intent. See generally Hernandez v. State, 4 So. 3rd 642, 669 (Fla. 2009), *cert. den.,* 558 U.S. 860 (2009).

Claims of vagueness directed at jury instructions on aggravating factors are analyzed under the Eighth Amendment. Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). The question is whether the instruction leaves the jury with the

kind of open-ended discretion held invalid in Furman v. Georgia, 408 U.S. 238 (1972). Id. Under the Florida capital sentencing scheme, both the jury, in reaching its recommendation, and the trial court, in determining the ultimate sentence, must be guided by standards which narrow the class of persons eligible for execution. Espinosa v. Florida, 505 U.S. 1079, 1081 (1992). While a trial court's sentencing decision is presumed to reflect narrowing constructions placed on an aggravating factor by the state's supreme court, juries, in contrast, are not equipped to recognize legal errors in their instructions. See Sochor v. Florida, 504 U.S. 527, 535, 538 (1992). The jury's 7-5 recommendation of death in this case was rendered unreliable by the standardless instruction it received on the "especially heinous, atrocious, or cruel" aggravating factor.

The error in giving the instruction was not harmless on this record. The State, in its penalty-phase argument to the jury, relied on the defendant's statements that he had found the act of killing to be liberating and empowering; it took the position that those statements showed the defendant had enjoyed committing an "extremely wicked" and "shockingly evil" crime. That argument invited the jury to reach a decision on emotional grounds. The State's proof in support of the

HAC factor, while legally sufficient under this court's caselaw,[5] was not overwhelmingly strong; the medical examiner testified that the victim could have lost consciousness in as little as eleven seconds. Cf. Breedlove, supra, 655 So. 2d 76-77 (error in giving discredited pre-1992 HAC instruction was harmless where victim drowned in his own blood and expert witnesses found no mental mitigation); Henderson v. Singletary, 617 So. 2d 313, 315 (Fla. 1993), *cert. den.,* 507 U.S. 1047 (1993) (same error was harmless where HAC was established "beyond a reasonable doubt under any definition of the terms" and where mitigation was "of comparatively little weight.") Here the mental health-related mitigation was significant, and, as argued above, the case in aggravation should not have included reliance on the "avoid arrest" and "cold, calculated and premeditated" aggravating factors. Reversal for a new penalty phase, where the jury can be properly instructed, is warranted.

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[5] See, e.g., Orme v. State, 25 So. 3rd 536, 551-52 (Fla. 2009), *cert. den.*, 130 S. Ct. 3391 (2010); Preston v. State, 607 So. 2d 404, 409-10 (Fla. 1992), *cert. den.,* 507 U.S. 999 (1993).

POINT SEVEN

THE TRIAL COURT ERRED IN DENYING RELIEF BASED ON RING v. ARIZONA.

Standard of review. Review of a purely legal question is *de novo.* Jackson v. State, 64 So. 3rd 90, 92 (Fla. 2011).

Argument. This court holds that where, as here, the aggravating factor of a prior violent felony conviction is present, the defendant is entitled to no relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). E.g., Martin v. State, 107 So. 3rd 281, 322 (Fla. 2012), *cert. den.*, 2013 WL 1687330 (2013). The same is true as to the aggravating factors of "on felony probation" and "committed in the course of a felony." Martin; Belcher v. State, 961 So. 2d 239, 253 (Fla. 2007), *cert. den.*, 552 U.S. 1026 (2007). The United States Supreme Court has not clarified how Ring should be applied to Florida's sentencing scheme. While Ring by its terms does not require jury unanimity *as to proof of other convictions or the defendant's legal status*, Appellant is harmed because unanimity was not required *as to the remaining aggravators proved and argued below.* The seven jurors who voted for the death penalty may have not have agreed unanimously that *any* of the other three aggravators found below were present. That fact may have profoundly affected Appellant's sentence, in light of the great weight accorded jury recommendations.

This court should therefore reverse the order appealed from, and remand for a new penalty phase where the trial court instructs the jury that its recommendation must be unanimous as to those aggravating factors which do not merely reflect the defendant's prior record and legal status.

CONCLUSION

Appellant has shown that this court should reverse the sentencing order and remand for a new penalty phase, based on the arguments made above on points six and seven.

If that relief is denied, Appellant has shown this court should reduce his death sentence to a life sentence, as a result of striking aggravating factors or proportionality analysis.

If that relief is denied, Appellant has shown that this court should reverse the sentencing order appealed from and remand for a new judge to reweigh the mitigating and aggravating factors.

If that relief is denied, Appellant has shown that this court should reverse

the sentencing order and remand for Judge Galluzzo to reweigh the mitigating and aggravating factors.

Respectfully submitted,

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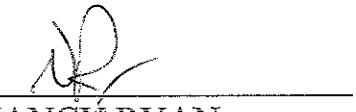

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Attorney General Pamela Jo Bondi, crimappdab@myfloridalegal.com, and mailed to William Davis, DOC #H17413, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026-1000, this 3rd day of July, 2013.

Nancy Ryan

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan