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IN THE SUPREME COURT
STATE OF FLORIDA

Case: SC14-125
LT No.: 2011-CF-1491-A-Z

MICHAEL SHANE BARGO, JR.,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On appeal from the Circuit Court of the Fifth Judicial Circuit,
In and For Marion County, Florida

INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF CASE

Appellee, STATE OF FLORIDA, charged Appellant, MICHAEL SHANE BARGO, JR., via *Indictment* with one count of first degree murder with a firearm (in violation of Sections 782.04(1)(a)1 and 775.087(2)(a)2, Florida Statutes (2011)), and one count of first degree murder (in violation of Sections 782.04(1)(a)1 and 777.011, Florida Statutes (2014)). (R1.1) Appellant pled not guilty to both charges. (R1.33) Thereafter, the State gave notice of its intent to seek the death penalty. (R1.66)

Following trial, the jury convicted Appellant of first-degree murder with a firearm. (R.1137) After the advisory sentence hearing, the jury recommended by a vote of 10 to 2 that Appellant be sentenced to death. (R.1234; R44.450) Following the Spencer hearing, the trial court found the existence of two aggravators, two statutory mitigators, and 50 nonstatutory mitigators, and sentenced Appellant to death. (R47.3-7) This appeal now follows.

STATEMENT OF FACTS

Pretrial Motions

Motion for Findings of Fact by the Jury: Appellant moved to have the jury to return findings of fact as to aggravating and mitigating circumstances in concert with the jury's recommendation as to the appropriate penalty in order to preserve meaningful appellate review. (R4.753)

Motion to Bar Imposition of Death Sentence as Violative of Ring v. Arizona: Appellant moved to bar the imposition of a death sentence, arguing that Ring v. Arizona prevents a trial judge from making the necessary factual findings to impose the death sentence. (R4.759)

Guilt Phase

Opening Statements: During opening statements, defense counsel argued as follows:

> "The evidence I feel like will be conclusively presented that who has the motivation, the strongest motivation, the emotional motivation, to go out and plan this crime and be the mastermind of this crime? And that person is none other than Kyle Hooper.
> …
> At the conclusion of this trial the only question you're going to be asking yourself is have they proven this beyond and to the exclusion of every single reasonable doubt and we submit there will be doubt. Based on that, we'll ask you to return a verdict of not guilty because of failure of proof or to consider the other alternatives that will be presented to you, known as lesser included offenses."

(R.480-82)

Sonia Jackson: As its first witness, the State called the victim's mother, Sonia Jackson, who testified that she last saw her son, Seath Jackson ("the victim"), on the night April 17, 2011. (R.32.487) She testified that Seath began dating Amber Wright in December of 2010 but the couple broke up in March 2011. (R32.487-88) However, Jackson testified that Seath and Amber continued to communicate via text messaging and continued to see each other. (R32.488-89) She stated that Appellant and the victim were acquaintances but had a failing out "[o]ver Amber" because Amber began dating Appellant. (R32.490) Approximately seven days before the victim's death, Jackson claimed that Seath was her home arguing with Appellant, at which time Appellant said to Seath, "I have a bullet with your name on it." (R32.492) Jackson admitted that Appellant immediately departed and the argument never became physical. (R32.492) Jackson also admitted that she did not call the police over the incident. (R32.499)

On the night in question, Jackson testified that the victim departed her home to see Will Samalot. (R32.493) About 9:15 p.m., Jackson stated that the victim sent her a text message about a ride home that evening, but that was her last communication with him and never returned home that evening. (R32.495) After the victim did not return home and did not respond to her communications, Jackson called the police. (R32.496)

Michael Proctor: Michael Proctor testified that he gave Appellant a 0.22 caliber revolver in exchange for Appellant helping him do some yard work and identified a firearm in court as the same firearm which he gave to Appellant. (R33.520; State's Ex.C)

William Samalot: Williams Samalot also testified that Wright began dating Appellant after breaking up with the victim. (R33.545) Samalot stated that he observed the verbal altercation between Appellant and the victim approximately 2-3 weeks prior to the murder. (R33.546) Samalot testified that both the victim and Appellant made threats during that altercation. (R33.546-47) Samalot also testified that Kyle Hooper called the victim wanting to fight the victim as well. (R33.548)

Samalot claimed that the victim received a "few calls" from Appellant wanting to meet up and fight because Appellant believed the victim physically abused Wright, but the fight never transpired. (R33.548-48) While walking behind Ely's home one day, Samalot claimed that he and the victim "heard a .22-caliber go off" so they both ran. (R33.549-50) However, Samalot admitted that he never observed a gun in Appellant's possession. (R33.550) He also admitted that he did not see who fired the gun that day. (R33.566)

On the night in question, Samalot testified that he observed the victim exchanging text messages with Wright. (R33.552) Samalot stated that he and the

victim left their friend's house around 9:00 p.m. and began walking towards the victim's home, eventually parting ways between 9:15 p.m. and 9:20 p.m. (R33.552)

The next day, Samalot stated that he was unable to contact the victim on his cellular telephone so he began to search for the victim along with the victim's family. (R33.556)

On cross-examination, Samalot clarified that Appellant never threatened to kill the victim during that altercation, but rather just to beat each other up. (R33.567) He also testified that Wright's brother, Kyle Hooper, was angry with the victim as well and that the two exchanged threats on Facebook. (R33.569)

Steven Montanez: Steven Montanez testified that he was staying at his grandparents' house across from Ely's trailer on the night in question. (R33.578) About 9:30 p.m., he went outside to smoke a cigarette and observed from Ely's trailer a "kid run out and a couple – a couple of dudes right behind him beat him up and brought him back in." (R33.584) Montanez clarified that he observed approximately two to three males beat the other male with their fists before picking him up and bringing him back into the trailer. (R33.585-87) Upon returning to the interior of his grandparents' home, Montanez testified that he did not hear gunshots. (R33.590) He further testified that he did not hear a gunshot before the victim ran out of the trailer. (R33.591) Montanez claimed that he did not call the

police "[b]ecause where I'm from to me it's just a normal beatdown." (R33.591)

Larry Jenkins: Larry Jenkins testified that he lived across the street from Ely's trailer. (R33.594) On April 17, 2011, Jenkins testified that he went outside to smoke a cigarette around 6:30 p.m. but did not observe anything burning in Ely's firepit. (R33.599) Around 7:00 p.m. to 7:30 p.m., Jenkins testified that he went outside to smoke another cigarette and observed two people – Appellant and a female – shooting around the firepit. (R33.599-600) Jenkins identified Ely as the girl he observed shooting around the firepit. (R33.600) He testified that he observed the female ask Appellant whether it was time to start the fire yet to which Appellant responded "no". (R33.601) Jenkins stated that he went to bed around 9:00 p.m. that night but heard "something that sounded like firecrackers." (R33.601) When he awoke around 4:00 a.m. to go to work, Jenkins testified that he observed burning ashes in the firepit. (R33.602) However, Jenkins admitted on cross-examination that he observed fires in the firepit regularly and that it was not unusual to see the firepit burning. (R33.603) He also admitted that he had never seen Appellant before the night in question. (R33.605)

Joanne Jenkins: Larry Jenkin's wife, Joanne, testified that, on the night in question, she walked her daughter and grandson outside around 9:30 p.m. (R33.629) At that time, she observed a bonfire outside Ely's trailer. (R33.629) The next morning, Jenkins testified she observed two people outside Ely's trailer

"moving wood around" around 9:00 a.m. (R33.631)

Starke Hearsay Witnesses: Five hearsay witnesses from Starke testified that Appellant told them he killed the victim for raping his sister, that he took apart the body, burned him, and disposed of the body in paint cans in a rock quarry near their home. (Kristin Williams R34.649-50; James Williams Jr. R37.1099-1102; James Williams Sr. R37.1126; Crystal Anderson R37.1111-17; and Joshua Padgett R37.1131)

James Havens: Although not his biological child, James Havens testified that he viewed Wright as his daughter because he dated Wright's mother for many years. (R34.660) On the night in question, Havens testified that Wright telephoned him and asked if he wanted to come to Ely's trailer "to hang out". (R34.664) Upon his arrival, Havens testified that Appellant, Wright, Ely, Charlie Ely, Justin Soto, and Hooper were present. (R34.664-65) At some point, Havens testified that Appellant spoke to the group about wanting to get Seath Jackson to the trailer to kill him. (R34.667-69) Havens claimed that he left the trailer because he did not feel comfortable. (R34.669) Later that evening, Havens claimed that Appellant telephone him to tell Havens that "[t]he deed is done." (R34.671) Havens stated that he hung up and went back to sleep without notifying the police. (R34.671)

The next day, Havens stated that he drove to Ely's trailer when Appellant

asked him to come to the dumpster "to come see it" but Havens refused. (R34.673) Eventually, Havens testified he observed three paint buckets in the dumpster. (R34.674) Havens claimed that Appellant and Soto removed the paint buckets from the red dumpster and placed them in the back of Havens's pickup truck along with three blocks. (R34.675)

From Ely's trailer, Havens drove Appellant and Soto to Hooper's work to get gas money from Hooper. (R34.676) After filling up with gas, he drove down a dirt road and the parties exited the truck. (R34.679) After walking down the dirt road, Havens testified that Appellant and Soto climbed a fence taking the buckets with them. (R34.679) Although he could not see Appellant and Soto, Havens claimed he heard a splash. (R34.679) Appellant and Soto returned to the truck and Havens departed the area with them. (R34.680)

Tracy Wright: Tracy Wright testified that her daughter, Amber Wright, and Charlie Ely came over to her house on April 18, 2011, but both were acting "[l]ike something was up." (R34.706) Wright testified that Appellant and Amber accompanied her to drive her son, Kyle Hooper, to work that morning and that the group was unusually quiet in the car. (R34.707-08) After dropping off Hooper, Wright testified that Appellant asked her in the car if she "would still love him if he did something wrong." (R34.709) She also stated that Appellant's said his face had been burned from something he threw in a burn barrel. (R34.712)

According to Tracy Wright, Appellant departed her house sometime later but Amber and Charlie Ely stayed the night. (R34.710) That night, Tracy Wright testified that her daughter laid on her bedroom floor in the fetal position while crying, rocking, and vomiting. (R34.710) Additionally, she testified that Hooper was "[v]ery upset, crying, and needed to talk to me." (R34.711)

Based on her children's behavior, Wright telephoned a friend at the Marion County Sheriff's Office, David Rasnick, who came to her home. (R34.711) Later, Tracy Wright testified that she accompanied her children to the sheriff's department. (R34.711)

David Rasnick: When he arrived at Tracy Wright's home, David Rasnick of the Marian County Sheriff's Department testified that he encountered Tracy Wright, Amber Wright, Sonia Jackson, Scott Jackson, and Charlie Ely. (R34.716) Based on what he was told, Rasnick filled out an FDLE missing child report form. (R34.717) Thereafter, he and other deputies searched the Jackson residence for the victim but were unable to locate him. (R34.717)

Michael Dodd: Detective Michael Dodd testified that he executed a search warrant upon the cellular telephones confiscated by Rasnick. (R34.726) Dodd told the court that he recovered the following: text messages between Amber Wright and the victim on the night in question (State's Ex.BB) ; and photograph from browsing live data from Kyle Hooper's phone (State's Ex.D). (R34.428-29)

Kathleen Schmidt: Forensic crime scene technician Kathleen Schmidt testified that she used Luminol to find blood on the bathroom floor, living room floor, and kitchen floor of Ely's trailer. (R34.785-87)

Schmidt photographed possible blood spatter on the bathroom wall (R34.792-94) and on the kitchen ceiling and light fixture. (R34.794; State's Ex.36) Schmidt recalled that she swabbed the suspected blood spatter. (R34.797)

Sergeant Billy Padgett: Sergeant Billy Padgett of the underwater dive team for the Marion County Sheriff's Office testified that he conducted an investigation of the flooded limerock quarry on April 20, 2011. (R35.857) Specifically, he testified that divers located two five-gallon buckets at the bottom of the quarry and brought them to the surface. (R35.858) Along a cliff on the side of the quarry, Padgett testified that the team recovered large amounts of charred material. (R35.867)

Victoria Lancaster: While searching Ely's trailer, crime scene technician Victoria Lancaster testified that she retrieved a loaded 0.22-caliber revolver along with two containers of live ammunition in the vent between the bathroom and two bedrooms. (R35.885, 890)

Maria Pagan: FDLE analyst Maria Pagan testified that the 0.22-caliber revolver retrieved from Ely's trailer was in working order. (R35.901) However, Pagan stated that she was not able to determine whether or not a shell casing

retrieved from the victim's remains was fired from the 0.22-caliber revolver found in the air vent. (R35.907) While Pagan testified that the bullet recovered from the victim's remains was a led, round nose, and unjacketed bullet (R35.907), she testified that the ammunition found in the cylinder of the revolver were 0.22 magnum cooper-jacketed. (R35.907-11)

Dr. Michael Warren: Forensic anthropologist Michael Warren opined that the decedent was male between the ages of "13 and 18 and most likely 14 to 18, 17, 18" based on the bone fragments recovered from the limestone quarry. (R36.931-37) According to Dr. Warren, the buckets recovered at the limerock quarry contained a large mass of burned tissue and a bone along with a human tooth. (R36.945) After radiographing the tissue, Dr. Warren discovered a projectile embedded in the soft tissue next to three lumbar vertebra. (R36.946) He also testified that a radiograph of part of a skull revealed metal fragments which suggested a gunshot wound. (R36.950-51) Ultimately, Dr. Warren determined that the bones found around the firepit at Ely's trailer and the bones recovered at the quarry belonged to the same individual. (R36.952)

Dr. Kyle Shaw: Medical examiner Kyle Shaw testified that he examined the remains received from Dr. Warren. (R36.987) From those remains, he identified a single burned or charred kidney, a small piece of liver, a portion of hip which was surrounded by charred muscle, several small fragments of rib cartilage,

several small fragments of charred muscle, a heart, and a tooth. (R36.987, 995) From the remains, Dr. Shaw took DNA samples from the kidney, muscle, rib cartilage, and liver for testing. (R36.999) Additionally, Dr. Shaw recovered a projectile from a mass of soft tissue. (R36.1000) From an x-ray of a skull fragment, Dr. Shaw was also able to identify "bright white spots in association with bone is consistent with a projectile or bullet impact." (R36.1003) Dr. Shaw opined that the metal flecks in the skull were consistent with a gunshot wound to the face or head. (R36.1004-1005) Ultimately, Dr. Shaw opined that the cause of death was a gunshot wound or blunt force trauma and classified the death a homicide. (R36.1005) On cross-examination, Dr. Shaw clarified that the gunshot wound and blunt-force trauma were "concurrent causes" of death. (R36.1007)

William Fockler: On the night of April 19, 2011, William Fockler testified that he turned himself into the Marion County Sheriff's Office for a violation of probation. (R36.1012) While in the booking area, he testified that officers brought in Appellant. (R36.1013) According to Fockler, he asked Appellant why his face was distorted, to which Appellant allegedly replied, "'Well, when I was burning that kid Seath's body, you know, I threw a paint can in and it blew up in my face and I was trying to make the fire hotter.'" (R36.1014) Fockler claimed Appellant said he killed Seath because "he raped by girlfriend'". (R36.1015) Further, Fockler claimed Appellant told him he hit the victim in the head with a two by four

upon walking through a door then lifted him up into a recliner and shot the victim three times in a recliner. (R36.1016) Thereafter, Fockler claimed Appellant told him he moved the victim into a bathtub, attempted to break his legs, then shot the victim a couple more times to make sure he was completely dead. (R36.1016) Fockler stated that Appellant told him they took the body from the bathtub and burned it behind the trailer. (R36.1016-17)

Ronald Lai: Forensic DNA Ronald Lai compared the DNA samples taken from the four soft tissue samples and compared those to the profiles of Sonia Jackson and Scott Jackson and testified he was unable to exclude the sample as coming from a child of Sonia Jackson and Scott Jackson. (R36.1036)

Nicole Lee: FDLE crime laboratory analyst Nicole Lee testified that she obtained five testable DNA sample from bone recovered from the crime scene. (R36.1049) From those samples, Lee testified she was able to determine that the sample taken from the firepit was consistent with a biological child of Sonia and Scott Jackson. (R36.1050)

As for the swab of Appellant's bracelet, DNA of the blood on the bracelet revealed the blood belonged to Appellant himself. (R36.1056) While samples taken from Appellant's t-shirts and jeans, Lee testified that she did see indications of another donor on the jeans but was unable to match that DNA to anyone related to the case. (R36.1056)

Regarding the DNA swab taken from a blood sample on the bathroom wall, she identified a mixture of DNA (a complete major and partial minor donor) to which she was able to match the partial minor donor to Charlie Ely. (R36.1059) Regarding the blood swab taken from a kitchen ceiling and light, she matched the DNA sample to Appellant. (R36.1060) As for the DNA swab taken from the blood sample on the living room floor, Lee identified a mixture from multiple individuals, and was able to include Kyle Hooper and the victim in that mixture. (R36.1059) On cross-examination, Lee clarified that the only sample of the victim's blood found within Ely's trailer was mixed with Kyle Hooper's blood on the living room floor. (R36.1062)

Detective Donald Buie: Detective Donald Buie testified that Appellant was the final suspect arrested in the murder of the victim. (R36.1075)

Lisa Alvarez: Forensic crime scene technician Lisa Alvarez testified that she photographed Appellant at the Marion County Sheriff's Office on April 20, 2011. (R37.1139) Specifically, Alvarez photographed a puncture wound on Appellant's right hand which Appellant claimed occurred from the hammer of his 0.22-caliber revolver. (R37.1144-45)

Motion for Judgment of Acquittal: After the State rested, defense counsel moved for a judgment of acquittal. (R37.1161)

Michael Shane Bargo, Jr.: Appellant testified that Amber Wright

introduced him to the victim as her boyfriend. (R38.1180) During their first meeting, Appellant testified that he and the victim got into a "minor disagreement". (R38.1182)

Sometime later, Appellant testified that Amber Wright broke up with the victim and her brother, Kyle Hooper, became very upset over the victim's treatment of Wright. (R38.1187) Appellant testified he overheard a telephone conversation between the victim and Wright during which the victim threatened to come after Appellant. (R38.1188)

When the victim came to Ely's trailer to pick up his belongings, Appellant testified that the victim had harsh words for Wright and Hooper. (R38.1189) One day, Appellant told the court that the victim sent Wright a text message indicating that the victim intended to come over to the trailer to confront Appellant. (R38.1190) When the victim eventually showed up, Appellant described the exchange as "talking trash". (R38.1191) According to Appellant, Hooper and the victim ended up pushing and shoving in an altercation. (R38.1192)

Appellant testified that he and Hooper repeatedly argued over Appellant's gun because Hooper wanted to buy the gun. (R38.1200) Appellant told the court that he did not want to sell the gun to Hooper because Appellant feared Hooper would pawn it for drugs. (R38.1201) Appellant told the court that he used the gun to shoot rats around the trailer. (R38.1208) Additionally, Appellant testified that

he taught the others in the trailer how to use to gun. (R38.1208) Appellant testified that he store the gun in the open in his bedroom where he allowed anyone to use it. (R38.1208)

Around April 14-15, 2011, Appellant testified that Hooper threw a cellular telephone because Hooper was upset because his girlfriend, Alyssa, broke up with him. (R38.1204) After Hooper departed the trailer to speak to Alyssa, Appellant stated that Hooper returned riding the victim's bicycle which Hooper stole because Hooper caught the victim having sexual relations with Alyssa. (R38.1206)

Appellant testified that an enraged Hooper made a "beeline for my room" and reached for the revolver. (R38.1208-1209) Appellant stated that he and Hooper struggled over the revolver and the hammer of the gun went straight through his hand. (R38.1209)

On the day of the murder, Appellant claimed that he and Soto gathered sticks to clean up the yard, as was their Sunday ritual. (R38.1217) Later that day, he stated that he was doing tricks on a BMX bicycle when he fell off and hurt his knee. (R38.1219) Around 7:00 p.m., Appellant testified that Amber wanted to light a bonfire but Appellant cautioned against it because of a local burn ban, telling her to wait until later so that the fire marshal would not ticket them. (R38.1219)

When Appellant went to retrieve a pill for his knee pain, he realized that his

revolver was no longer in its holster. (R38.1225) Appellant testified that he went back out into the main room to confront Hooper but Hooper denied taking the revolver. (R38.1227) Appellant told the court that Hooper punched him and that Appellant recoiled into the wall. (R38.1228) Eventually, Soto pulled Hooper away but then Soto and Hooper began to struggle. (R38.1229-30) Appellant testified that Ely and Wright became angry with him for fighting with Hooper. (R38.1232)

He testified that he felt his nose bleed and felt blood dripping over the rest of his body. (R38.1229, 1233) Appellant stated that he showered to clean himself up and then searched the entire trailer for the revolver but was unable to locate it. (R38.1237) While searching, he noticed that someone lit the bonfire in the backyard. (R38.1237)

Appellant departed the trailer with the intent of heading to his girlfriend's house[1] and returned sometime later when he observed a glow coming from the bonfire. (R38.1247) Upon entering the trailer, Appellant testified that observed Ely scrubbing the floor with bleach and Wright was crying. (R38.1248) With Soto's encouragement, Appellant went outside to speak with Hooper about getting his revolver back. (R38.1249) Appellant stated that he was nervous because he and Hooper had fought earlier in the evening. (R38.1250) Appellant testified that

[1] Taylor Strawn confirmed that she expected Appellant at her home that evening. (R39.1323)

he was dumbfounded at what Hooper told him. (R38.1252) According to Appellant, Hooper threatened to tell the police that Appellant "did it." (R38.1253) Appellant stated that he was afraid Hooper would burn him in the firepit as well. (R38.1253) Appellant told the court that Soto threw the gun underneath the trailer, so that Hooper could not find it again. (R38.1256)

The next day, Appellant testified that he called Kristen Williams looking for a place to stay so that he could get out of the trailer. (R38.1260) Before heading out, Appellant testified that Havens backed up his pickup truck to the dumpster then Soto and Havens loaded buckets into the truck bed. (R38.1261-62) Appellant loaded cinder blocks and a dog's leash. (R38.1262) While only intending to show Soto and Havens the location of the rock quarry, he admitted to carrying a cinder block to the quarry while Havens and Soto carried the buckets. (R38.1264) He testified that Soto and Havens threw the buckets into the quarry. (R38.1266) Appellant denied shooting the victim. (R38.1272)

Appellant stated that he told Crystal Anderson and James Williams Sr. that people were saying he killed the victim, but actually he told them that Hooper killed the victim because the victim raped Hooper's sister. (R38.1275)

Kyle Hooper: As the State's rebuttal witness, Kyle Hooper testified that he never heard Appellant threaten to kill the victim prior to the night in question. (R39.1336) On the night of April 17, 2011, Hooper testified that he and Appellant

talked about killing the victim. (R39.1338) Hooper admitted to having "issues" with the victim over his girlfriend, Alyssa, and his sister. (R39.1338) According to Hooper, Wright lured the victim to the trailer and the victim voluntarily sat down in a chair in the living room. (R39.1342) After Hooper "worked up the nerve", Hooper struck the victim with a piece of wood. (R39.1342) When the victim "started running toward the kitchen", Hooper claimed Appellant shot him. (R39.1342)

After the victim ran out of the trailer, Hooper claimed Soto tackled the victim and Appellant shot him again while outside. (R39.1342) Hooper testified that he helped bring the victim back into the trailer where they put him directly into the bathtub. (R39.1343) While in the bathtub, Hooper claimed Appellant beat the victim and shot him several more times. (R39.1343) According to Hooper, Appellant wanted the victim to still be alive so that the victim would know who shot him. (R39.1345) Thereafter, Hooper claimed Appellant and Soto put the victim's body in a sleeping bag before placing it in the bonfire. (R39.1344-45) Afterwards, Hooper stated that Appellant placed the gun into an air conditioning duct. (R39.1346) Hooper further admitted to tending the bonfire while the victim's body burned within it, commenting, "I really didn't think nothing of it at the time." (R39.1359)

On cross-examination, Hooper admitting to being angry and wanting to fight

with the victim after discovering the victim in bed with his girlfriend, Alyssa Masters. (R39.1353-54) Hooper also admitted stating he wanted to kill the victim just one week before the murder. (R39.1355) When questioned by defense counsel Holloman if he ever made a comment to the effect of "[t]he only thing we have left is to blame this all on Mike" in the interrogation room, Hooper testified as follows: "May I have? Yes, but there was a lot of things I don't remember, yes, sir." (R39.1357) Defense counsel did not attempt to refresh Hooper's recollection of the statement, did not attempt to impeach Hooper with the statement, did not call Detective Rhonda Stroupe to testify regarding the statement, and did not attempt admit the video recording of the statement into evidence.

On surrebuttal, Appellant testified that Hooper informed him of the events when he returned to the trailer. (R39.1367) Specifically, Hooper told Appellant that Hooper and Soto were in the bathroom doing drugs when they heard a noise in the living room. (R39.1367) Hooper exited the bathroom with Appellant's revolver in his waistband to find the victim sitting in the living room. (R39.1367) Hooper became angry and demanded that the victim leave but the victim refused. (R39.1367) After someone mentioned Alyssa, Hooper got mad and grabbed the victim to try to make him leave. (R39.1368) Hooper said the victim hit him and the two tussled on the ground with the victim on top of Hooper. (R39.1368) Hooper told Appellant that Soto hit the victim over the head with a stick, which

broke into two pieces. (R39.1368) After the victim picked up one of the pieces, Hooper told Appellant that he pulled the revolver on the victim and began shooting him, causing him to run out of the trailer. (R39.1368) Appellant testified Hooper told him Hooper shot the victim again in the front yard. (R39.1368) Hooper and Soto carried the victim back in the house and sat the victim on the kitchen floor before placing the victim in the bathtub. (R39.1368) While in the bathtub, Hooper told Appellant that he hit the victim a couple more times in the head. (R39.1369) When Appellant returned home, he testified that the victim's body was already burning in the bonfire. (R39.1369)

Closing Argument: While defense counsel acknowledged during closing that Appellant claimed he was involved only in disposing of the body rather than killing the victim, defense counsel argued to the as follows:

> Does that convince you that he didn't premeditate? Probably not because I'd never be able to convince you of that in that type of weather, so to speak. What it does is, shows a reasonable doubt that he was involved in the premeditation of this. And because of that reasonable doubt, that third element is not met because it's not met beyond and to the exclusion of every, single reasonable doubt.
>
> What would be met? What would your verdict have to be, **guilty, guilty as hell** of second-degree murder. There's no question about that. Why? Because that has been proven beyond and to the exclusion of every, single reasonable doubt.

(R40.1406-1408. Emphasis added.) He added:

> I am not going to stand up here and tell you that Michael Bargo is innocent because **he's not innocent**. He's guilty, but he's not guilty as charged because of that reasonable doubt and only because of that reasonable doubt. **He's guilty of murder in the second degree.** I'd ask you to return a verdict of guilty of murder in the second degree.
>
> Thank you.

(R40.1410-11)

After the jury retired, defense counsel told the trial court that Appellant "acquiesced" to arguing the lesser included offenses during closing in from of defense counsel Holloman, defense counsel Hawthorne, investigator Gary Roger, and Dawn Mahler. (R40.1436) Without hearing from the defendant or Hawthorne on the record, the trial court found that it was appropriate for defense counsel to argue the lesser included offense under the circumstances and that Appellant acquiesced to the argument. (R40.1436)

During allocution, Appellant told the court that he never agreed to defense counsel arguing second-degree murder. (R46.132) Appellant steadfastly argued to the trial judge that he never got to prove his innocence. (R46.136)

Verdict: The jury found Appellant guilty of first degree murder with a firearm as charged in the Indictment. (R.1137)

Penalty Phase

Motion in Limine: During the penalty phase, the State renewed a motion in limine to prevent evidence of the threats made by the victim against Appellant and his family, which the trial court granted on relevancy grounds. (R41.9) Defense counsel Hawthorne countered that the evidence was probative of Appellant's "rage" toward the victim. (R441.22-23) The trial court denied the evidence as irrelevant. (R41.23)

Appellant sought to proffer the testimony of Joseph Desy and Michael Bargo Sr. who took out temporary restraining orders against the victim as a result of the threats. (R41.24) Defense counsel sought to introduce the testimony of Appellant's grandmother, Virgie Waller, who was threatened by the victim (to rape her, burn her house down, kill her and shoot her). (R41.24) The trial court found the testimony was not relevant to the penalty phase and denied the introduction of that testimony. (R41.23-24)

Faith Christianson: Faith Christianson testified that she lived next door to the Bargo family in Michigan and that she and her husband were friends with Michael Bargo Sr. and his wife Tracey. (R41.42) Christianson testified that she babysit Appellant and his sister. (R41.43) Prior to the Bargos divorce in 2005, Christianson testified that Appellant was diagnosed with ADD/ADHD and that he

was having difficulty in school. (R41.43-44)

Around 2005, Christianson recalled that the Bargos separated and that she could hear them arguing and fighting. (R41.46) According to Christianson, Tracey Bargo (now Tracey O'Brien) took with her both Appellant and his sister. (R41.46) Christianson testified that Appellant was bitter over the divorce. (R41.48) Around 2005 when Appellant was about 15 years old, Christianson recalled that the police were called to the Bargo home because Appellant left out of a window. (R41.47) She stated that Appellant blamed his mother for the divorce and wanted to live with his father. (R41.49)

Lauren Bargo: Appellants 14-year-old sister, Lauren Bargo, testified that Appellant previously lived in Michigan with her and their mother. (R41.71) She stated that Appellant and their mother did not have a good relationship after their parents divorced. (R41.72) Lauren testified that their mother frequently disciplined Appellant and yelled at him "[a]ll the time." (R41.72) On one occasion, Lauren observed their mother throw a shoe at Appellant. (R41.72) According to Lauren, their mother had mood swings where she would yell and scream throughout the house which affected her and her brother. (R41.72-73) Lauren stated that sometimes their mother would belittle Appellant. (R41.79)

Regarding her brother's medication for ADD/ADHD, Lauren told the court that he would stop eating and sleeping while becoming lethargic as a result of the

medication. (R41.73) Lauren testified that Appellant wanted to live with their father in Florida. (R41.73) Lauren recalled that she and Appellant were ordered to go to counseling after their parents divorced. (R41.74) She stated that her parents' constant arguing upset Appellant. (R41.76)

Dr. Joseph Wu: Neuropsychiatry expert witness Dr. Joseph Wu showed the court a PET scan of Appellant's brain which revealed an abnormal right temporal lobe. (R41.125) In his expert opinion, Appellant's abnormal right temporal lobe was consistent with a history of multiple brain injuries which would manifest behavioral symptoms, including a history of "episodic mood dysregulation" such as depression. (R41.127) Because of this, Dr. Wu opined that Appellant suffers from complex partial seizure spectrum disorder, a type of partial complex epilepsy seizure. (R41.131) While suffering untreated from this disorder, Appellant would have problems being able to conform his conducts to the requirements of the law, exhibiting rebellion and acting out. (R41.132) Further, Dr. Wu testified that growing up in a stressful environment worsens symptoms of the disorder. (R41.133)

According to Dr. Wu, patients with an abnormal right temporal lobe are often misdiagnosed with ADD (attention deficient disorder), oppositional defiant disorder, and bipolar disorder. (R41.128) Dr. Wu stated he believed Appellant was misdiagnosed as a psychiatric patient when he was actually a neurological

patient, meaning Appellant was erroneously treated with antidepressants rather than anticonvulsants. (R41.128) The use of anticonvulsive could change a patient's personality completely, and instead of being oppositional all the time, could behave more appropriately. (R41.131)

On cross-examination, Dr. Wu clarified that the difficulties in controlling behavior associated with complex partial seizure-like spectrum were not limited to sudden impulses but could also manifest in the kinds of behavior exhibited in Appellant's case:

> **DR. WU:** …I think that a problem with mood aggression impulse, it can involve things that appear to be planned or orchestrated over an extended period of time, but I think that the issue is that the underlying realization and the ability to regulate the underlying impulse is broken, so to speak.

(R41.141)

Virgie Waller: Appellant's paternal grandmother, Virgie Waller, stated that she lived behind Appellant's house when he was a small child. According to Waller, Appellant's mother screamed at Appellant and hit him frequently starting at about two years of age: "Well, I've seen her slap him in the face, seen her hit him in the back. I've seen her knuckle him in places where it wouldn't show. And the last visit they came to my house for a vacation, I had to go between her and him. She had him on the couch beating him and she was hitting him in the back and she was hitting him in the legs and in the shoulders." (R41.162-63) At one

point, Waller described observing an entire handprint on Appellant's rib cage, which Appellant attributed to his mother hitting him. (R41.164) Waller told the court that Appellant's paternal grandfather, Chester Bargo, suffered from alcohol and psychiatric issues before committed suicide by shooting himself in the head with a shotgun. (R41.165)

Michael Shane Bargo Sr.: Appellant's father, Michael Shane Bargo Sr., testified that he brought Appellant cigarettes on the night of the murder. (R42.178) According to Bargo, he did not notice if Appellant had been drinking and he did not seem upset to his father. (R42.195)

Bargo recalled that Appellant had disciplinary problems through his school years, "…talking back, had a couple scuffles in the playground…" (R42.183) Bargo told the court that Appellant was suspended and expelled from school. (R42.184) Eventually, social welfare workers became involved and the family began seeing a psychologist. (R42.185) Bargo testified that Appellant was angry with his mother during that time for the way she treated Appellant: "[she] did a lot of yelling at him. She was physical with him." (R42.187) Bargo testified that he observed a shift in Appellant's behavior toward the end of the divorce and that he became very angry with his mother. (R42.188)

Michael Shane Bargo Jr.: Appellant testified that his parents' relationship began to deteriorate when was "seven, eight, nine years old". (R42.202)

According to Appellant, his parent would fight, throw objects, and call each other names. (R42.202)

As for his behavior, Appellant testified that he was prescribed Ritalin in the third grade for hyperactivity. (R42.203) According to Appellant, Ritalin "made me feel like crap", recalling that he could not eat or sleep because of the medication. (R42.204) All total, Appellant recalled he had been prescribed eight different drugs for ADD/ADHD: Adderall, Ritalin, Concerta, Strattera, Focalin, Lexapro, Trazodone, Seroquel. (R42.210) He stated that he was not taking any medication at the time of the murder but smoking marijuana and drinking heavily. (R42.210)

Appellant recalled that he starting getting in trouble around third or fourth grade. (R42.205) When Appellant would complain to his mother that he was getting picked on at school, Appellant stated that she would simply advise him to tell the teacher. (R42.205) After he told the teacher, Appellant stated that he got beat up again. (R42.205) Appellant recalled that his father encouraged him to fight back which is how his trouble in school started. (R42.206)

While Appellant attended public schools through sixth grade, then he was forced to attend an alternative school as his parents divorced. (R42.208) After a year or two of high school, he was expelled again, failed ninth grade twice, was arrested, and sent to boot camp. (R42.208)

As a child, Appellant told the court that he dreamed of working with animals and nature when he grew up, possibly as a park ranger or wildlife officer. (R42.220) He told the jury, "I mean, I came at 18 years old, never had a house, never had a car, never been married, never had kids. They're about to take something from me that I never even had…I wish [the jury] could have been there that night, I really do." (R42.221)

Tracy O'Brien: Appellant's mother, Tracy O'Brien, testified that she was just 18 years old when she got pregnant with Appellant and married Michael Bargo Sr., (R43.244) She recalled that Appellant's father drank heavily and daily. (R43.244) According to O'Brien, Bargo Sr. would be angry and explode for no reason when drinking. (R43.244) On one occasion, O'Brien recalled that Bargo Sr. broke a car window when Appellant was a baby and seated in the back seat. (R43.246) O'Brien claimed that Bargo Sr. was more of a friend than a father to Appellant, and that she ended up enforcing the rules in their home. (R43.246)

As a small child, O'Brien testified that Appellant was normal and playful. (R43.256) She stated that she disciplined Appellant with time-outs and occasional spankings. (R43.256) On one occasion, she admitted to hitting Appellant in the face. (R43.256) She denied physically abusing Appellant in any way. (R43.257)

Around fifth or sixth grade, O'Brien stated that Appellant was diagnosed with ADD/ADHD. (R43.248) This caused a fight between Appellant's parents

because Bargo Sr. did not want Appellant to take medication but Appellant's mother insisted upon it. (R43.248) O'Brien testified that Appellant's behavior problems began in his early teenage years. (R43.248) At one point, O'Brien called the police because of Appellant's explosive behavior and Appellant was sent to a boot camp facility. (R43.251-52) O'Brien claimed that Appellant's behavior toward her was because she was the disciplinarian in the family. (R43.258) However, O'Brien admitted that sometimes Appellant would exhibit bad behavior for no apparent reason, such as laying down in the middle of the road. (R43.260)

O'Brien testified at the sentencing hearing that it was the first time she had seen her son in four years. (R43.252) When she spoke to Bargo Sr., she claimed he told her that Appellant was fine and doing well in school. (R43.254) She stated that Bargo Sr. never told her that Appellant was bouncing from home to home, that he was drinking heavily, or that he was doing drugs. (R43.254)

Dr. Robert M. Berland: Dr. Robert Berland of the Florida Department of Corrections testified that he performs mental health evaluations for commitment facilities. (R43.266) Dr. Berland testified that he administered the MMPI test to Appellant and reviewed Appellant's medical, social, and school records. (R43.270) Dr. Berland testified that Appellant tested high on the paranoia scale (scale six) and high on the schizophrenia scale (scale eight) "so he has symptoms of psychosis…everything I have points to mental illness…" (R43.279) From his

evaluation, Dr. Berland found evidence that Appellant suffers from partial complex seizures. (R43.280)

Additionally, Dr. Berland testified that Appellant experienced delusional paranoid thinking. (R43.284) In sum, Dr. Berland's expert opinion was that Appellant "suffers from a biological, mental illness that I think he has a genetic predisposition toward, and brain injury has probably enhanced the symptoms." (R43.288) He further clarified that Appellant's drinking and drug use could have exacerbated or intensified symptoms of the psychotic disturbance. (R43.290)

Dr. Gregory Prichard: Clinical psychologist Dr. Gregory Prichard testified that he believed the MMPI tested conducted by Dr. Berland on Appellant was invalid. (R43.334) Specifically, Prichard testified that he believed Appellant suffered from a behavioral disorder, like ADD/ADHD, rather than a psychotic disorder because Appellant's counseling records described him in these terms: "oppositional, defiant, acting out, not listening, problems with authority, blaming everybody else, not taking responsibility, not accountable for his behavior…" (R43.338-41) Prichard added that the counseling record never indicated that Appellant was psychotic, hallucinating, delusional, or demonstrating disorganized thinking. (R43.341)

However, Dr. Prichard admitted that he was not an expert in partial complex seizures. (R43.349) He also admitted on cross-examination that he did not

administer any test to Appellant, but rather simply used a checklist to assess Appellant's behavior and personality. (R43.358) While Dr. Prichard did not agree with Dr. Berland's conclusions from the MMPI test, Dr. Prichard admitted that he did not administer his own MMPI test to Appellant. (R43.359) He further admitted that he does not interpret PET scans. (R43.564)

Following Dr. Prichard's testimony, Dr. Berland testified that he observed Dr. Prichard's interview with Appellant during which Appellant referenced having frightening auditory hallucinations that Dr. Prichard did not follow up on. (R43.379)

Advisory Sentence: By a majority vote of 10 to 2, the jury advised and recommended that the trial court impose the death penalty upon Appellant. (R.1234; R44.450)

Spencer Hearing

Scott Jackson: The victim's father, Scott Jackson, testified that Appellant never made any threats and never witnessed Appellant strike the victim. (R46.19) Jackson admitted that Appellant "got whooped…[p]robably by my boy." (R46.20)

Joseph Desy: Joseph Desy testified that he lived down the street from Appellant's grandmother, Virgie Waller. (R46.25) He testified that the police were called to the residence sometime around March or April 2011 but Desy did not observe Appellant strike or threaten anyone. (R46.26) However, Desy

testified that he heard another threaten Appellant but Appellant retreated from the threat into his home. (R46.27) He told the court that Appellant actually came to Desy's house and apologized for getting Desy in the middle of the issue. (R46.28) Desy told the court that he owns a small business at which Appellant would help out occasionally. (R46.27) Desy recalled that Appellant was always respectful to Desy and his clients. (R46.28)

Tracy Wright: Although she witnessed Appellant engage in verbal altercations with the victim, Tracey Wright stated that she never saw Appellant fight or make contact with the victim but she did observe Appellant with injuries such as a broken nose. (R46.31, 34) However, she stated that he was at her home when Appellant received threats, such as burning down Wright's home and wanting to beat up her children's father. (R46.35) Although others threatened Appellant that day, no one was arrested. (R46.36) When Wright observed her daughter come home with bruises, Wright described Appellant's reaction to such as angry, as was Amber's brother, Kyle Hooper. (R46.37)

Williams Samalot: William Samalot testified that he observed Appellant in fights with the victim in March 2011. (R46.39) However, Samalot denied that hearing anyone threaten Appellant. (R46.40) He described the victim as being taller, bigger, and a more experienced fighter than Appellant. (R46.43) However, Samalot recalled that the victim told him Appellant and two other boys "jumped"

the victim. (R46.46) Samalot told the court that Appellant and the victim intended to fight each other in early April 2011. (R46.52) On the same day, the victim and Samalot rode bicycles behind Ely's trailer when Samalot heard a gunshot coming from the trailer. (R46.52) However, Samalot admitted that he did not observe anyone shooting from the trailer. (R46.54)

After that, Samalot recalled that the victim received a telephone call from Amber Wright and Kyle Hooper where the two yelled at the victim but Appellant never got on the telephone. (R46.52-54) He admitted that he was aware of a conflict between Kyle Hooper and the victim as Hooper defended his sister during the breakup. (R46.55)

Detective Rhonda Stroup: Detective Rhonda Stroup testified that she conducted interviews with Kyle Hooper, Amber Wright, and Charlie Ely regarding the death of the victim on April 19, 2011. (R46.70) After Stroup left the room, she testified that she listened and observed the conversation. (R46.70) After the State objected on relevancy and hearsay grounds, the trial court sustained the objection. (R46.75) Defense counsel attempted to proffer the answer because Kyle Hooper told everyone in the room that he wanted to blame everything on Appellant. (R46.75-76) The trial court denied the proffer and ruled, "And that issue goes to whether your client is guilty or not guilty of committing first-degree murder. That issue has already been decided. The objection is sustained."

(R46.76) Defense counsel further argued that the testimony was relevant to Appellant's character that he may not have done the things Kyle Hooper claimed and that Kyle Hooper's testimony should be weighed in mitigation against Appellant's behavior; if Kyle Hooper intended to blame everything on Appellant, then Appellant's mitigation is stronger for a life sentence as opposed to a death sentence. (R46.76) The trial court ruled, "I find that statement by Kyle Hooper to be irrelevant. The objection is sustained." (R46.76)

Dr. Eric Mings: Forensic psychologist Eric Mings testified that he evaluated Appellant for approximately 4-5 hours. (R46.82) He considered Appellant's IQ to be "average" with a score of 105. (R46.84) Dr. Mings testified that many people tend to engage in impulsive behavior around 18 years of age. (R46.87) He stated that the brain is not fully developed until the "early, mid to late 20's in which your brain is not fully developed." (R46.86-87) During that adolescence, Dr. Ming testified that riskier decisions occur as a result of peer socialization and that teenagers are susceptible to peer influence. (R46.88)

Dr. Ming further testified that the development of the adolescent brain could be adversely affected by addiction and mental illness. (R46.96) Regarding Dr. Wu's diagnosis of partial complex seizure disorder, Dr. Ming stated that his testimony was not likely to support the diagnosis one way or the other. (R46.98)

Dr. Robert Berland: Dr. Robert Berland testified that people are generally

able to think like an adult where other parts of their brain become more involved in decision-making. (R46.112) In other words, while an 18 year old might be physically mature, he may not be mentally mature. (R46.115-16) Specific to Appellant, Berland opined that Appellant was influenced by his peers. (R46.117-18)

He added that the temporal lobe of the brain, which the PET scan revealed to be abnormal in Appellant's brain, is like the CEO of the brain because controls executive functions, anticipating consequences in your actions, planning, and controlling impulses. (R46.113) Because Appellant's right temporal lobe is enlarged, Berland stated that Appellant would have poor impulse control. (R46.118) Because the human brain does not mature until around age 25 and Appellant was only 18 when the murder occurred, Appellant's brain would have been functioning as an adolescent brain at that time (rather than an adult) inhibiting his ability to control his impulses and desires. (R46.120)

Michael Shane Bargo Jr.: During allocution, Appellant maintained his innocence:

> I shouldn't get the death penalty. I shouldn't get a life sentence. But I can't make that judgment. I didn't get a chance to even prove my innocence. I guess I can't really argue what I should get. I never got a chance to prove I was innocent. I never got the change to argue this.

(R46.136)

At the end of allocution, defense counsel Hollomon questioned Appellant as

follows:

> MR. HOLLOMAN: May I, Judge? If I could lead him with a question?
>
> THE COURT: Yes, sir.
>
> MR. HOLLOMAN: There are two choices here, basically. **Regular or extra crispy, so to speak.** It's either life without the possibility of parole or death by lethal injection. Now, this has been explained to you. It's logical for you to argue for life unless you want to be a death volunteer.

(R46.137. Emphasis added.)

Sentencing Pronouncement: The trial court sentenced Appellant to death on December 13, 2013. (R47.3-7) Stating that it gave the jury's recommendation "great weight", the court found that the State proved the following two statutory aggravating circumstances beyond a reasonable doubt:

1. the murder was especially heinous, atrocious, or cruel; and
2. the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R47.3-4) Further, the court ruled that "the aggravating circumstances in this case greatly outweigh the mitigating circumstances." (R47.5) The court added, "this is the most cold, calculated and premeditated case of murder I have ever seen." (R47.5)

Sentencing Order: In the sentencing order, the trial court found that the state proved two statutory aggravating factors beyond a reasonable doubt, found

two statutory mitigating circumstances were proven but afforded those "slight weight", and found that 50 nonstatutory mitigating circumstances were proven but afforded 6 moderate weight, 13 slight weight, and the remainders little weight. (R.3117) Specifically, the trial court awarded the following mitigating factors moderate weight: that Justin Soto participated in the murder; that Kyle Hooper participated in the murder; that Amber Wright participated in the murder; that Appellant was diagnosed with bipolar disorder; that Appellant suffered from bipolar disorder; and that Appellant suffers from schizoaffective disorder. (R3128-29). Even though accepting and affording moderate weight to circumstance four others participated in the murder, the trial court nonetheless refused to accept as a mitigating circumstance that Appellant did not act alone in the murder, finding that the testimony "established that the Defendant was the one who shot the victim multiple times and who ultimately killed the victim by shooting him in the face." (R.3125)

Related Cases: Kyle Hooper was convicted of first-degree murder and sentenced to life imprisonment with the possibility of parole after 25 years. Hooper v. State, 5D12-3466 (Fla. 5th DCA 2014). Charlie Ely was also convicted of first degree murder and sentenced to life imprisonment. Ely v. State, 5D11-3914 (Fla. 5th DCA 2013). Justin Soto pled guilty to first degree murder and was sentenced to life imprisonment. State v. Justin Soto, 2011-CF-1491-B (Fla. 5th

Jud. Cir. 2012).

While Amber Wright was convicted of first degree murder and sentenced to life imprisonment, her conviction and sentence were reversed and remanded for a new trial. Wright v. State, 5D12-3654 (Fla. 5th DCA 2014). James Havens has recently been restored to competency and awaiting trial on a charge of accessory after the fact. State v. James Havens, 2011-CF-1491-F (Fla. 5th Jud. Cir. 2014).

SUMMARY OF ARGUMENT

First, the cumulative deficiencies of defense counsel evident from the face of the record prejudiced Appellant by depriving him of a fair trial. Defense counsel deprived Appellant of effective assistance when he failed to refresh the recollection and impeach Kyle Hooper with his statement that he intended to "put it on Mike", failed to admit the video recording into evidence, and failed to call Detective Rhonda Stroupe to testify regarding the statement. As Appellant faced the death penalty if convicted by the jury, there can be little doubt that the outcome of the proceeding would have been different if the jury heard the State's only eyewitness, in his own voice and own words, tell the other co-defendants how he planned to blame the murder on Appellant.

Defense counsel also rendered ineffective assistance evident from the face of the record when he argued during closing that Appellant was "guilty, guilty as hell" to the jury. It is inconceivable and illogical that any defendant facing death

by lethal injection would "acquiesce" to his counsel conceding his guilt to the jury after the defendant maintained his innocence throughout the trial. Whatever intended strategy was actual behind counsel's tactic, arguing that Appellant was "guilty, guilty as hell" after counsel argued innocence during opening and Appellant testified to his innocence could do nothing more than portray Appellant, defense counsel Holloman, or both as proverbial big fat liars in the eyes of the jury. The deficiency and resulting prejudice are evident from the face of the record, rendering a remand to the trial court to address the issue a "waste of judicial resources".

Defense counsel rendered ineffective assistance evident from the face of the record when, during allocution at the Spencer hearing, that Appellant should tell the trial court whether Appellant wanted "[r]egular or extra crispy". Defense counsel made the statement in response to Appellant professing his innocence to the trial court, essentially belittling Appellant's plea to the judge that he never received a fair opportunity to prove his innocence. Given the sensitive and emotional nature of the Spencer hearing where the trial court has the critical role in determining Appellant's sentence, defense counsel's demeaning and insensitive statements could do nothing to assist Appellant in receiving a life sentence rather than death. Accordingly, defense counsel's deficiency and resulting prejudice are evident from the face of the record and remanded to the trial court for further

proceedings on the issue would be a waste of judicial resources.

Defense counsel also rendered ineffective assistance of counsel obvious from the face of the record when he failed to argue to the jury that the bullet recovered from the victim did not match the bullets recovered from the cylinder of the alleged murder weapon. As the State alleged Appellant used the 0.22-caliber revolver to murder the victim, there is a reasonable probability that bringing the jury's attention to the fact that a different type of bullet was used to shoot the victim than what was recovered in the cylinder – with no separate cylinder recovered from the crime scene –would have created a reasonable doubt in the minds of the jurors. Counsel's failure to argue this conflict in critical evidence falls outside the range of reasonable professional assistance and a reasonable probability that the argument would have cast reasonable doubt in the minds of the jury, rendering a different outcome in the trial.

Second, a rationale trier of fact could not find the existence of the elements of first-degree murder with a firearm beyond a reasonable doubt: the State's own evidence, conflicts in that evidence, and the lack of evidence created more than a reasonable doubt regarding Appellant's lack of involvement in the murder. Regarding conflicts in the evidence, five hearsay witnesses, a jailhouse informant, a disinterested neighbor, and a co-defendant Kyle Hooper all offered differing versions of events. While the only blood of the victim found at the crime scene

was mixed with that of co-defendant Hooper and Hooper offered to explanation as to how his blood mixed with the victim's, the State presented no explanation as to how Appellant's blood splatter ended up on the kitchen ceiling.

The State's firearms expert that she could not determine whether a projectile recovered from the victim's remains was fired from the 0.22-caliber revolver – the alleged murder weapon. She also testified that the evidentiary projectile was not the same type of bullet recovered from the cylinder of the revolver – in other words, the bullet recovered from the victim did not match the bullets found in the alleged murder weapon. Further, the State's photographs depict a second firearm – an apparent 0.22-caliber rifle – in a bedroom of the trailer yet no testimony about this rifle was offered into evidence.

Regarding the lack of evidence, the State failed to offer any explanation as to how Appellant's blood spatter ended up on the kitchen ceiling and light fixture, offered to fingerprints on the alleged murder weapon, presented no test indicating gunshot residue on Appellant's hands, no fingerprints from Appellant on the 0.22-caliber revolver, and no evidence conclusively linking the 0.22-caliber revolver to the murder of the victim. Given the lack of evidence, the conflicts in the evidence, and the State's own evidence that substantiated Appellant's version of events, no rationale trier of fact could have found that the State proved the elements of first-degree murder beyond a reasonable doubt.

Third, the trial court departed from the essential requirements of the law when it denied his request for appointment of a crime scene investigator that was reasonable and necessary to the preparation of his defense. By basing its decision on the previous trials of the other defendants and ruling that the investigator would not be useful to the defense, the trial court failed to determine whether the investigator was necessary and reasonable to an effective preparation of Appellant's defense. Given that the State alleged Appellant organized the other co-defendants to commit the murder yet Appellant maintained his innocence, and given the complexity of the forensic evidence, the necessity of investigating the crime scene for exculpatory evidence was without question. Appellant's Sixth Amendment right to effective representation outweighed any budgetary concerns in the case.

Fourth, the trial court abused its discretion by excluding evidence of threats made by the victim against Appellant and his family which would have been relevant to establishing that the murder was not committed "without a pretense of moral or legal justification." Evidence of prior instances of aggression or violence between the victim and Appellant, and between the victim and Appellant's family members, was relevant to whether the murder was committed "without any pretense of moral or legal justification". Evidence that the victim threatened to rape Appellant's elderly grandmother, burn her house down, kill her, and shoot

her, in addition to testimony about restraining orders taken out by Appellant's father and employer, was relevant to explain rage toward the victim – though insufficient to reduce the degree of murder – and thus rebutted any evidence that the murder was committed in a cold manner. Because this evidence was relevant and probative of Appellant's character and the circumstances surrounding the crime, the trial court abused its discretion in excluding the evidence.

Fifth, the trial court violated Appellant's constitutional rights when the trial court found the aggravating factors necessary to impose a death sentence, rather than the jury, when Appellant had no prior or contemporaneous violent felonies. The Sixth Amendment requires that the jury alone, and not the judge, determine the factual existence of any aggravating factors beyond a reasonable doubt in order to increase Appellant's sentence beyond life imprisonment. The jury did not find that Appellant committed a contemporaneous violent felony. The State did not allege that prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factors applied. Rather, the trial court usurped the venerated role of the jury as the finder of fact and made its own factual determination that the State proved beyond a reasonable doubt the murder was especially heinous, atrocious, or cruel and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Neither the jury's recommendation nor the fact that the trial court

afforded that recommendation "great weight" complied with Appellant's Sixth Amendment rights.

Sixth, Appellant's death sentence is disproportionate for first-degree murder where the trial court found the existence of 52 mitigators yet only two aggravators, including defendant's frontal lobe brain damage, diminished control over inhibitions, disadvantaged and abusive home life, substance abuse problem which aggravated mental deficiencies, and young age of 18 at time of murder. Only 18 years old at the time of the murder, Dr. Ming testified Appellant's brain was still functioning as an adolescent, susceptible to peer influence and risky behavior. Multiple witnesses testified about the effect upon Appellant of being medicated for ADD/ADHD, the effect of his parents' bitter divorce upon Appellant, how his small stature led to being bullied, and about how the victim beat Appellant in a previous confrontation. Further, experts offered unrebutted testimony that: Appellant has an abnormal frontal lobe; suffers from partial complex seizure disorder, schizophrenia and paranoia; had diminished control over his inhibitions and impulses; and had been mistreated for a behavior disorder (ADD/ADHD) rather than being properly treated for a neurological disorder (partial complex seizure disorder). Given that the trial court found the existence of 52 mitigating factors but only two aggravators, and given that Appellant's co-defendants received life sentences, the death penalty in this case violates the Eighth

Amendment's requirement of proportionality.

Finally, Section 921.141, Florida Statutes (2013), is unconstitutional because the death penalty is inherently cruel and unusual punishment. The basic constitutional principle violated by a death sentence is that it extinguishes the humanity out of the human. In essence, Death is an irrevocable punishment that turns the tables, transforming "We The People" into the role of the murderer and the convicted murderer into the victim. Even in the vilest of criminals remains a human being with basic human dignity who is worthy of the "inalienable right" to life. While "We The People" may permissibly condemn our fellow man to life imprisonment, the decision of when that man departs this Earth is not ours to make. The high rate at which innocent humans have been convicted and sentenced to death, in addition to the lengthy delays before exoneration, outweighs any conceivable constitutional arguments for its justification. Execution – the extinguishment of human life – permanently cuts off the opportunity for exoneration, irrevocably closed the door on a chance of redemption, violates Due Process, and amounts to the State-sponsored murder of human beings.

ARGUMENT

I. Under the Sixth Amendment, the cumulative deficiencies of defense counsel evident from the face of the record prejudiced Appellant by depriving him of a fair trial.

Under the doctrine of cumulative error, reversal is warranted if, as a result of the cumulative effect of the errors, the defendant was denied the fundamental right to due process of law and the right to a fair trial. Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999); State v. Townsend, 635 So. 2d 949, 959-60 (Fla. 1994).

Ineffective assistance of counsel is found when counsel's performance falls outside the range of reasonable professional assistance and when there is a reasonable probability that the results of the proceeding would have been different but for the inadequate performance. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). As a general rule, claims of ineffective assistance of counsel may not be raised on direct appeal. See Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001); Stewart v. State, 420 So. 2d 862, 864 n.4 (Fla. 1982); Corzo v. State, 806 So. 2d 642, 645 (Fla. 2d DCA 2002). However, "appellate courts make an exception to this rule when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable." Corzo, 806 So. 2d at 645. To obtain relief on the basis of ineffective assistance of counsel on direct appeal, the facts upon which the claim is based must be clearly evident in the record. Stewart, 420

So. 2d at 864. Moreover, the ineffectiveness must be so clear that "it would be a waste of judicial resources to require the trial court to address the issue." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

In this case, defense counsel Holloman deprived Appellant of his Sixth Amendment right to effective assistance of counsel and a fair trial by: (A) failing to refresh the recollection and impeach Kyle Hooper with his statement that he intended to blame Appellant for the murder; (B) arguing to the jury that Appellant was "guilty, guilty as hell" after Appellant testified to his innocence; (C) telling Appellant during allocution at the Spencer hearing that he should tell the trial court whether he wanted "[r]egular or extra crispy"; and (D) failing to argue to the jury that the bullet found in the victim's remains did not match the bullets recovered from the cylinder of the alleged murder weapon. The cumulative effect of these deficiencies, evident from the face of the record, deprived Appellant of a fair trial and fundamental due process of law.

A. Defense counsel deprived Appellant of effective assistance evident from the face of the record when he failed to refresh the recollection and impeach Kyle Hooper with this statement that he intended to "put it on Mike".

On rebuttal, the State's only eyewitness to the murder, Kyle Hooper, claimed that Appellant planned the murder, shot the victim multiple times, burned the victim's body in a bonfire, and then disposed of the remains in a limestone quarry. (R39.1338-45) However, Hooper admitted to being angry at the victim for

sleeping with Hooper's girlfriend and for the victim's treatment of Hooper's sister; he also admitted to saying he wanted to kill the victim just one week prior to the murder. (R39.1338) Hooper also admitted to striking the victim with a piece of wood inside the trailer and dragging the victim's body back into the trailer after the victim attempted to flee. (R39.1342) Hooper further admitted to tending the bonfire while the victim's body burned within it, commenting, "I really didn't think nothing of it at the time." (R39.1359) Hooper also admitted to telling Appellant that he wanted to kill the victim just one week before the murder. (R39.1355) The only DNA blood evidence of the victim recovered at the crime scene was mixed with the blood of Hooper, which Hooper failed to explain and thus contradicted Hooper's claims.

When questioned by defense counsel Holloman if he ever made a comment to the effect of "[t]he only thing we have left is to blame this all on Mike" in the interrogation room, Hooper testified as follows: "May I have? Yes, but there was a lot of things I don't remember, yes, sir." (R39.1357) Defense counsel did not attempt to refresh Hooper's recollection or impeach Hooper with the statement.

During the Spencer hearing, defense counsel Hawthorne attempted to elicit testimony from Detective Rhonda Stroup that she placed into a "soft" interview room Kyle Hooper, Amber Wright, and Charlie Ely and then observed the conversation. (R46.70) After the State objected on relevancy and hearsay

grounds, the trial court sustained the objection. (R46.75) Defense counsel attempted to proffer the answer because Kyle Hooper told everyone in the room that he wanted to blame everything on Appellant. (R46.75-76) The trial court denied the proffer. (R46.76)

Following a jury trial, Kyle Hooper was convicted of first-degree murder and sentenced to life imprisonment. See Hooper v. State, 39 Fla. L. Weekly D 1158 (Fla. 5th DCA 2014)[2]. During the trial, Detective Stroup testified that she heard Hooper tell Wright and Ely that "'the only thing we have right now is to put this on Mike.'" See id. at T.714 (attached as Appendix A).

Defense counsel Holloman's deficiency is obvious from the face of the record. Corzo, 806 So. 2d at 645. When Hooper responded that he might have made the statement indicating that he did not remember making the statement intending to blame the murder on Appellant, defense counsel should have refreshed his recollection and then impeached him with the statement. Further, defense counsel should have called Detective Rhonda Stroupe to testify regarding the statement and played the video-recording for the jury.

Appellant testified that he was innocent of the murder and that Hooper admitted to him to murdering the victim but threatened to blame the murder on

[2] Hooper's case is currently pending before this Court in case SC14-1203 but proceedings have been stayed pending the disposition of Horsley v. State, SC13-1938, and State v. Horsley, SC13-2000.

Appellant if he did not help dispose of the body. As Appellant faced the death penalty if convicted by the jury, there can be little doubt that the outcome of the proceeding would have been different if the jury heard the State's only eyewitness, in his own voice and own words, tell the other co-defendants how he planned to pin the murder on Appellant. See Strickland, 466 U.S. at 688. The prejudice caused by the failure to impeach Hooper with the statement and enter the statement into evidence is indisputable, and a tactical explanation for the conduct is inconceivable. See Corzo, 806 So. 2d at 645. Defense counsel failed refresh Hooper's recollection of the statement, failed to impeach Hooper with the statement, failed to call Detective Rhonda Stroupe to testify regarding the statement, and failed to admit the video recording of the statement into evidence: this ineffectiveness is so clear that "it would be a waste of judicial resources to require the trial court to address the issue." See Blanco, 507 So. 2d at 1384.

B. Defense counsel deprived Appellant of effective assistance evident from the face of the record when he argued to the jury that Appellant was "guilty, guilty as hell" after Appellant testified to his innocence and defense counsel argued Appellant's innocence in opening statements.

During opening statements, defense counsel Holloman argued Appellant's innocence. Appellant testified in his defense and maintained his innocence, claiming that Kyle Hooper murdered the victim while Appellant was away from the trailer. Appellant admitting only to helping dispose of the victim's body when he returned home. Appellant never confessed to police. During closing

statements, defense counsel Hollomon argued the following to the jury:

> Does that convince you that he didn't premeditate? Probably not because I'd never be able to convince you of that in that type of weather, so to speak. What it does is, shows a reasonable doubt that he was involved in the premeditation of this. And because of that reasonable doubt, that third element is not met because it's not met beyond and to the exclusion of every, single reasonable doubt.
>
> What would be met? What would your verdict have to be, **guilty, guilty as hell** of second-degree murder. **There's no question about that.** Why? **Because that has been proven beyond and to the exclusion of every, single reasonable doubt.**

(R40.1406-1408. Emphasis added.) He added:

> I am not going to stand up here and tell you that Michael Bargo is innocent because **he's not innocent**. **He's guilty**, but he's not guilty as charged because of that reasonable doubt and only because of that reasonable doubt. **He's guilty of murder in the second degree.** I'd ask you to return a verdict of guilty of murder in the second degree. Thank you.

(R40.1410-11. Emphasis added.)

After the jury began deliberations, defense counsel Holloman told the trial court that Appellant "acquiesced" to arguing the lesser included offense during closing in front of defense counsel Holloman, defense counsel Hawthorne, investigator Gary Roger, and Dawn Mahler. (R40.1436) Without hearing from the defendant or Hawthorne on the record, the trial court found that it was appropriate

for defense counsel to argue the lesser included offense under the circumstances and that Appellant acquiesced to the argument. (R40.1436) But during allocution, Appellant told the court that he never agreed to defense counsel arguing second-degree murder. (R46.132) Ultimately, defense counsel Holloman deprived Appellant of effective assistance because it is inconceivable that Appellant would "acquiesce" to defense counsel arguing to the jury that Appellant was "guilty, guilty as hell", "he's not innocent" and "[h]e's guilty of murder in the second degree" when Appellant testified that he was innocent of all charges.

Defense counsel "shall reasonably consult with the client as to the means by which [objectives] are to be pursued." R. Regulating Fla. Bar 4-1.2(a) (2013). Whether to plead guilty, waive a jury, testify in his own behalf, or take an appeal are all fundamental rights that belong solely to the defendant for decision. Jones v. Barnes, 463 U.S. 745, 751 (1983). Concerning those decisions, an attorney must both consult with the defendant and obtain his consent before pursuing any course of action. Nixon v. Florida, 543 U.S. 175, 187 (2004). Especially in capital cases, defense counsel must strive to avoid a counterproductive course. Id. at 191. When defense counsel concedes a defendant's guilt in a capital case, the Strickland standard for determining ineffective assistance applies.

It is inconceivable and illogical that any defendant facing death by lethal injection would "acquiesce" to his counsel conceding his guilt to the jury after the

defendant maintained his innocence throughout the trial. Instead, defense counsel Holloman's closing statements that Appellant was "guilty, guilty as hell", "he's not innocent" and "[h]e's guilty of murder in the second degree" amounted to the functional equivalent of a guilty plea to which Appellant did not consent. While the trial judge made a finding of consent after the jury began deliberations, the trial court did not inquire to Appellant directly nor to second-chair defense counsel Hawthorne. During allocution, Appellant was adamant that he never agreed to defense counsel arguing his guilt. (R46.132)

The deficiency and prejudice resulting from Appellant's defense counsel use of this inflammatory and emotional language, while speaking directly to the jury, to concede guilt is indisputable. See Corzo, 806 So. 2d at 645. Whatever intended strategy was actual behind counsel's tactic, arguing that Appellant was "guilty, guilty as hell" after counsel argued innocence during opening and Appellant testified to his innocence was a counterproductive strategy that could do nothing more than portray Appellant, defense counsel Holloman, or both as proverbial big fat liars in the eyes of the jury. See Nixon, 543 U.S. at 187. The deficiency and resulting prejudice are evident from the face of the record, rendering a remand to the trial court to address the issue a "waste of judicial resources". Blanco, 507 So. 2d at 1384.

C. Defense counsel deprived Appellant of effective assistance evident from the face of the record when, during allocution at the Spencer hearing, he

urged Appellant to tell the trial court whether Appellant wanted "[r]egular or extra crispy".

During allocution, Appellant maintained his innocence:

> I shouldn't get the death penalty. I shouldn't get a life sentence. But I can't make that judgment. I didn't get a chance to even prove my innocence. I guess I can't really argue what I should get. I never got a chance to prove I was innocent. I never got the change to argue this.

(R46.136) At the end of allocution, defense counsel Hollomon questioned Appellant as follows:

> MR. HOLLOMAN: May I, Judge? If I could lead him with a question?
>
> THE COURT: Yes, sir.
>
> MR. HOLLOMAN: There are two choices here, basically. **Regular or extra crispy, so to speak.** It's either life without the possibility of parole or death by lethal injection. Now, this has been explained to you. It's logical for you to argue for life unless you want to be a death volunteer.

(R46.137. Emphasis added.)

"It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge plays an extremely critical role." Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993). Once the jury returns a penalty phase verdict, the trial court shall hold a hearing prior to making a sentencing decision to afford the defendant an opportunity to be heard in person. Id.

Given the "sensitive and emotional" nature of a Spencer hearing, the deficiency and resulting prejudice from defense counsel's statement that Appellant should tell the trial court whether he wanted "[r]egular or extra crispy" is evident from the face of the record. Defense counsel made the statement in response to Appellant professing his innocence to the trial court, essentially belittling Appellant's plea to the judge that he never received a fair opportunity to prove his innocence. Because of the trial court's "extremely critical role" in determining Appellant's sentence, and because these were the final statements made before the conclusion of the Spencer hearing, defense counsel's demeaning and insensitive statements could do nothing to assist Appellant in receiving a life sentence rather than death. Accordingly, defense counsel's deficiency and resulting prejudice are evident from the face of the record and remanded to the trial court for further proceedings on the issue would be a waste of judicial resources.

D. Defense counsel rendered ineffective assistance by failing to argue to the jury that the projectile retrieved from the victim's remains did not match the bullets retrieved from the cylinder of the alleged murder weapon.

The FDLE firearms expert Maria Pagan testified that a 0.22-magnum Rough Rider single revolver was recovered from the crime scene. (R35.900) While the projectile recovered from the victim's remains was 0.22-caliber led, round nose, and unjacketed bullet (R35.907), the ammunition recovered inside the cylinder of the revolver was 0.22-magnum cooper-jacketed. (R35.907-11). She was unable to

determine if the projectile recovered from the victim was fired from the recovered 0.22-caliber revolver. (R35.907) No other cylinder was recovered from the crime scene.

Nonetheless, defense counsel Holloman failed to argue to jury that the bullets recovered from the cylinder of the revolver did not match the bullet recovered from the victim's remains. As the State alleged Appellant used the 0.22-caliber revolver to murder the victim, there is a reasonable probability that bringing the jury's attention to the fact that a different type of bullet was used to shoot the victim than what was recovered in the cylinder – with no separate cylinder recovered from the crime scene –would have created a reasonable doubt in the minds of the jurors. See Fla. Std. Jury Inst. 3.7 (2013) ("A reasonable doubt as to the guilt of the Defendant may arise from the evidence, **conflicts in the evidence**, or lack of evidence." Emphasis added.) Counsel's failure to argue this conflict in critical evidence falls outside the range of reasonable professional assistance and a reasonable probability that the argument would have cast reasonable doubt in the minds of the jury, rendering a different outcome in the trial. As the ineffectiveness is obvious from the face of the record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable, a remand to the trial court on the issue would simply waste judicial resources. See Corzo, 806 So. 2d at 645;

In sum, defense counsel Holloman's emotional, inflammatory, and insensitive language to the judge and jury, in additional his concession of guilt and failure to impeach Hooper with critical evidence and failure to argue that the bullets found in the victim did not match the bullets found in the alleged murder weapon, deprived Appellant of his Sixth Amendment right to effective assistance of counsel and a fair trial. See Strickland, 466 U.S. at 688. Defense counsel's ineffectiveness is obvious on the face of the record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable, so much so that "it would be a waste of judicial resources to require the trial court to address the issue." See c, 507 So. 2d at 1384; see also Corzo, 806 So. 2d at 645. The cumulative effect of these deficiencies, evident from the face of the record, deprived Appellant of a fair trial and fundamental due process of law.

II. Under Section 782.04, Florida Statutes (2014), the State presented insufficient evidence to convict Appellant of capital murder because no rationale trier of fact could have found Appellant guilty beyond a reasonable doubt.

Facts: Six hearsay witnesses and the two eyewitnesses offered differing stories of events. Five hearsay witness from Starke testified that Appellant told them each at different times that he killed the victim for raping his sister, dismembered his body, burned it, and disposed of the remains in a flooded limestone quarry near their home. A jailhouse informant gave a different version, claiming that Appellant told him Appellant personally hit the victim over the head

with a two by four once he entered the trailer, lifted him into a recliner, then shot him three times before shooting the victim in the bathtub and burning his remains.

Co-defendant and rebuttal witness Kyle Hooper testified: that Appellant planned the murder; Wright lured the victim into the trailer; the victim voluntarily sat down in the recliner; Hooper alone hit him over the head with a piece of wood; Appellant shot the victim inside the trailer; the victim ran out into the yard where Hooper and Soto tackled him; Appellant shot him again in the yard; Hooper placed the victim's body in the bathtub; Appellant beat the victim and shot him again in the bathtub; the group placed the body in a sleeping bag before burning it; and Appellant hid the gun in an air duct. (R39.1342-59) Meanwhile, Hooper admitted to being angry at the victim for having a sexual relationship with Hooper's girlfriend and admitted to stating he wanted to kill the victim one week prior to the murder. (R39.1353-55) The victim's best friend, William Samalot, testified that the victim received telephone calls from Kyle Hooper approximately 2-3 weeks prior to the murder indicating that Hooper wanted to fight the victim. (R33.548)

When asked if Hooper ever made a statement that he planned to blame the murder on Appellant, Hooper stated, "May I have? Yes, but there was a lot of things I don't remember, yes, sir." (R39.1357) While defense counsel did not question Hooper further, Detective Rhonda Stroup testified in Hooper's trial that she surreptitiously recorded Hooper tell Wright and Ely that they needed to "put in

on Mike". See Hooper v. State, 39 Fla. L. Weekly D 1158 (May 30, 2014) (T.714).[3]

Hooper's story differed significantly from disinterested eyewitness and neighbor Steven Montanez who testified that he observed "a kid run out and a couple – a couple of dudes right behind him beat him up and brought him back in." (R33.584) Montanez testified he did not see anyone shoot the victim while outside and did not hear gunshots before the victim ran outside. (R33.590) In other words, this disinterested eyewitness testified that he saw a total of three people run out of the trailer, while Hooper testified that four people ran out of the trailer.

While Appellant admitted to disposing of the body, Appellant testified that: he was not home when the victim was murdered; Hooper stole Appellant's 0.22-caliber revolver causing the two to fight earlier in the evening; Hooper confessed to the murder when Appellant returned home; Hooper threatened to blame Appellant if Appellant did not help dispose of the body; Appellant complied out of fear; and Soto hid the gun to prevent Hooper from using on anyone else. (R38.1227-75) There was no evidence that Appellant ever told police a differing version of events. According to Appellant, the hearsay witnesses misunderstood him when he told them that Hooper killed the victim because the victim raped

[3] Pursuant to Section 90.202(6), Florida Statutes (2014), Appellant requests that this Court take judicial notice of the record on appeal in Kyle Hooper v. State, 5D12-3466 (R10.714), and of all trial proceedings in State v. Kyle Hooper, 2011-CF-1491-D (Fla. 5th Jud. Cir. 2012)

Hooper's sister, Wright. (R38.1275)

Differing versions of events aside, the physical evidence told a different story. The only blood of the victim found at the crime scene was mixed with the blood of Hooper alone. (R36.1059) While the State offered no explanation for how Appellant's got there, DNA testing revealed Appellant's blood splatter was found in the kitchen ceiling and light fixture, which was consistent with Appellant's testimony. (R36.1060) This evidence suggests a fight rather than the State's explanation that Appellant was burned by the firepit. The State presented no fingerprint or DNA evidence found on the 0.22-caliber revolver and no test indicating gun residue on Appellant's hands. The FDLE firearms expert Maria Pagan testified that a 0.22-magnum Rough Rider single revolver was recovered from the crime scene. (R35.900) While the projectile recovered from the victim's remains was 0.22-caliber led, round nose, and unjacketed bullet (R35.907), the ammunition recovered inside the cylinder of the gun was 0.22-magnum cooper-jacketed. (R35.907-11). She was unable to determine if the projectile recovered from the victim was fired from the recovered 0.22-caliber handgun. (R35.907)

To that end, the State's own photographs from the crime scene depict what appears to be a second 0.22-caliber rifle which was not admitted into evidence. (R5.932, 954) The State elicited no testimony about this second firearm yet FDLE firearm expert Maria Pagan testified that 0.22-caliber "long, long rifle"

ammunition was recovered from the crime scene. (R35.908)

Law: A trial court's denial of a motion for judgment of acquittal is reviewed under a de novo standard and an appellate court will not reverse a conviction which is supported by competent substantial evidence. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). After viewing the evidence in the light most favorable to the State, if a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, then sufficient evidence exists to sustain the conviction. Id.

Pursuant to Florida Standard Jury Instruction 3.7 (2013), the jury was instructed as follows: "A reasonable doubt as to the guilt of the Defendant may arise from the evidence, conflicts in the evidence, or lack of evidence." (R40.1423-24)

Analysis: Under the standard jury instruction regarding reasonable doubt and the applicable standard of review, a rationale trier of fact could not find the existence of the elements of first-degree murder with a firearm beyond a reasonable doubt: the State's own evidence, conflicts in that evidence, and the lack of evidence created more than a reasonable doubt regarding Appellant's lack of involvement in the murder. See Pagan, 830 So. 2d at 803; Fla. Stand. Jury Instr. 3.7 (2013).

Regarding the evidence and conflicts in the evidence, co-defendant Hooper,

disinterested neighbor Montanez, the jailhouse information, and the five hearsay witnesses from Starke all offered differing version of events. FDLE firearm expert Pagan testified she could not ascertain whether the projectile recovered from the victim's remains was fired from the recovered revolver. Most importantly, she testified that the bullet retrieved from the victim's remains was a 0.22-caliber round-nose, led unjacketed projectile, yet the bullets recovered from the cylinder of the revolver were 0.22-caliber cooper-jacketed bullets. No other cylinder was found at the crime scene. In other words, the bullet recovered from the victim's remains did not match the bullets recovered from the cylinder of the alleged murder weapon. See R35.901- 907.

Given the testimony that the projectile recovered from the victim was not the same as the bullets found in the cylinder of the alleged murder weapon (0.22-caliber revolver), it is troubling that the State's own photographs of the crime scene depict a second firearm within a bedroom, but offered no testimony that the rifle was taken into evidence or tested; to this end, FDLE firearm expert Pagan testified that 0.22-caliber "long, long rifle" bullets were retrieved from the crime scene as well. See R35.908. Pagan did no testing to determine whether the evidentiary projectile potentially could have been fired from the rifle and offered no testimony that the evidentiary projectile was excluded as being fired from the rifle.

Further, DNA blood evidence revealed that the only blood of the victim found within the trailer was mixed with the blood of Hooper on the living room floor. Hooper offered no explanation as to how his blood ended up mixed with that of the victim. Rather, Appellant testified Hooper said the victim hit Hooper after Hooper ordered the victim to leave and the two tussled on the ground with the victim on top of Hooper. (R39.1368)

It is also troubling that no evidence or testimony about Hooper's statement that he intended to "put in on Mike" was ever offered to the jury. Upon his return home, Appellant claimed Hooper admitted to murdering the victim and threatened to blame Appellant unless he helped dispose of the body. This is consistent with Hooper's recorded statement that he intended to "put it on Mike". When Hooper testified that he might have said it but did not remember, defense counsel never attempted to refresh Hooper's recollection, impeach him, or admit the statement in Appellant's defense, despite the statement being previously admitted at Hooper's trial. Hooper admitted to being angry with the victim and admitted to wanting to kill him. It was Hooper's blood alone mixed with the victim's blood at the crime scene.

Regarding the lack of evidence, the State offered no explanation as to how Appellant's blood ended up on the kitchen ceiling. Appellant testified that he and Hooper physically fought over the location of the handgun in the kitchen and that

this fight caused him to leave the trailer that evening.[4] This blood evidence is consistent with Appellant's version of events. Further, the State presented no test indicating gunshot residue on Appellant's hands, no fingerprints from Appellant on the 0.22-caliber revolver, and no evidence conclusively linking the 0.22-caliber revolver to the murder of the victim.

Given the lack of evidence, the conflicts in the evidence, and the State's own evidence that substantiated Appellant's version of events, no rationale trier of fact could have found that the State proved the elements of first-degree murder beyond a reasonable doubt. See Pagan, 830 So. 2d at 803; Fla. Stand. Jury Instr. 3.7 (2013). Because competent substantial evidence does not support Appellant's conviction for first-degree murder with a firearm, Appellant requests that this Court vacate his conviction and sentence.

III. Under the Sixth Amendment, the trial court departed from the essential requirements of the law when it denied his request for appointment of a crime scene investigator that was reasonable and necessary to the preparation of his defense.

Facts: Defense counsel Hawthorne moved the trial court to amend the defense budget to include payment to a crime scene investigator. (R48.483) At the budget hearing, counsel argued that anc expert was necessary to answer anthropological questions and a crime scene expert would assist in preparing a defense as well as assisting counsel in helping the jury understand the complexity

[4] The State's photographs depict Appellant with facial injuries. (R6.1106-1108)

of the crime scene and any exculpatory evidence that was in existence around the crime scene. (RSupp3.8) The trial court found that the investigator would not be useful to the defense because, as revealed by the trials of the other co-defendants, the crime scene had been cleaned with bleach and counsel could depose the medical examiner about items recovered from the burnpit and rock quarry. (RSupp3.8-9)

Law: The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). Implicit in providing effective representation is payment of costs for investigators and experts which are reasonable and necessary to the preparation for the defense of an indigent defendant. See id.; see also Fla. R. Crim. P. 3.200(k) (2011). While an indigent defendant is not entitled to funds to provide any evidence or assistance he wishes, he is entitled funding to afford "an adequate opportunity to fully present claims fairly within the adversary system." Ross v. Moffitt, 417 U.S. 600, 612 (1974). "While we are sensitive to the court's budgetary concerns and the need to keep the courthouse doors open and thus preserve access to courts, these concerns must be balanced with the defendant's Sixth Amendment right to appointed, conflict-free counsel." Fletcher v. JAC, 109 So. 2d 1271 (Fla. 1st DCA 2013) (citing Gideon, 372 U.S. 335; Johnson v. State, 78 So. 3d 1305 (Fla. 2012)).

Under Florida law, private court-appointed attorneys are entitled to

reimbursement from the state revenue of "reasonable and necessary expenses". See Fla. Stat. § 27.5304(1) (2011). Such expenses include "[r]easonable pretrial consultation fees and costs." Fla. Stat. § 27.007(6) (2011). Although the JAC is the entity that provides compensation for such fees and costs, the trial court has the "primary authority and responsibility for determining the reasonableness of all billings for attorney's fees, costs, and related expenses, subject to statutory limitations." Fla. Stat. § 27.5304(1),(3) (2011).

When a private court-appointed attorney incurs investigative costs without prior authorization from the court, the attorney "run[s] the risk of having the subsequent request for reimbursement denied if the court finds that the costs incurred were not reasonable and necessary to his defense." Carrasquillo v. State, 502 So. 2d 505, 506 (Fla. 1st DCA 1987). However, it is improper for a court to deny a request for reimbursement of investigative costs without making a finding regarding the reasonableness and necessity of the costs incurred. See id. The finding of "reasonableness and necessity" must be made with respect to "the particular circumstances of th[e] case" for which the costs were incurred. See id. at 507; accord McMann v. Bd. of County Comm'rs., 707 So. 2d 871 (Fla. 4th DCA 1998) (granting a petition for writ of certiorari where the trial court cut approximately $8,000 from the bill for investigative costs based on its "inherent discretionary authority" rather than specific concerns about the items listed in the

bills). Although no specific finding is required, it must appear from the record that the trial court made the appropriate consideration with respect to the evidence presented. McMann, 707 So. 2d at 872.

Analysis: The trial court departed from the essential requirements of law by ruling that a crime scene expert would not be "useful" to the defense as the crime scene had been cleaned by bleach. The trial court made no finding that a crime scene investigator would be unnecessary or unreasonable. See Fla. Stat. 27.5304(1). Further, the trial court failed to base its decision on the particular circumstances of Appellant's case for which the costs were requested; rather, the trial court based its decision upon the trials of the other co-defendants, who were not charged with capital offense and did not face death if convicted. Given that the State alleged Appellant organized the other co-defendants to commit the murder yet Appellant maintained his innocence, and given

For instance, the State's own photographs of the crime scene depict a second firearm within a bedroom, but offered no testimony that the rifle was taken into evidence or tested; to this end, FDLE firearm expert Pagan testified that 0.22-caliber "long, long rifle" bullets were retrieved from the crime scene as well. See R35.908. Pagan did no testing to determine whether the evidentiary projectile potentially could have been fired from the rifle and offered no testimony that the evidentiary projectile was excluded as being fired from the rifle. Pagan also

testified that the bullet recovered from the victim was not the same as the bullets found in the cylinder of the alleged murder weapon (0.22-caliber revolver). A crime scene expert would have been able to assist Appellant's defense in locating and testing this rifle for fingerprints and to see if the bullet found in the victim could have been fired from this rifle. Given that the State offered no explanation as to how Appellant's blood splattered on to the kitchen ceiling or how Hooper's blood mixed with the victim's blood, these discrepancies demonstrate that a crime scene investigator would indeed have been "useful" to Appellant's defense.

Given the complexity of the forensic evidence, the complexity of the crime scene, and the second firearm not taken into evidence, the necessity of investigating the crime scene for exculpatory evidence was without question. Appellant's Sixth Amendment right to effective representation outweighed any budgetary concerns in the case. Accordingly, the trial court departed from the essential requirements of law by ruling a crime scene expert would not be useful to Appellant's defense.

IV. Under Section 921.141(5)(i) (2011), the trial court abused its discretion by excluding evidence of threats made by the victim against Appellant and his family which would have been relevant to establishing that the murder was not committed "without a pretense of moral or legal justification."

Facts: During the penalty phase, the State renewed a motion in limine to prevent evidence of the threats made by the victim against Appellant and his

family, which the trial court granted on relevancy grounds. (R41.9) Defense counsel Hawthorne countered that the evidence was probative of Appellant's "rage" toward the victim. (R441.22-23) The trial court denied the evidence as irrelevant. (R41.23)

Appellant sought to proffer the testimony of Joseph Desy and Michael Bargo Sr. who took out temporary restraining orders against the victim as a result of the threats. (R41.24) Defense counsel sought to introduce the testimony of Appellant's grandmother, Virgie Waller, who was threatened by the victim (to rape her, burn her house down, kill her and shoot her). (R41.24) The trial court found the testimony was not relevant to the penalty phase and denied the introduction of that testimony. (R41.23-24)

In the sentencing order, the trial court found the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R16.3117) However, the trial court abused its discretion during the penalty phase by preventing testimony of the victim's prior acts of violence because evidence of victim's behavior was relevant to establishing that the murder was not committed "without a pretense of moral or legal justification."

Law: A sentence of death may be imposed if the capital felony was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. Fla. Stat. § 921.141(5)(i) (2011). "A pretense of moral

or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder." Fla. Std. Jury Inst. 7.11(7) (2011). CCP focuses on the defendant's state of mind, intent and motivation. Spano v. State, 460 So.2d 890 (Fla. 1984). Accordingly, "any relevant evidence as to the defendant's character or the circumstances of the crime is admissible [during capital] sentencing" proceedings. Stano v. State, 473 So. 2d 1282, 1286 (Fla. 1985). Admission of evidence is reviewed for abuse of discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000).

Analysis: Evidence of prior instances of aggression or violence between the victim and Appellant, and between the victim and Appellant's family members, was relevant to whether the murder was committed "without any pretense of moral or legal justification". See Fla. Stat. § 921.141(5)(i). Evidence that the victim threatened to rape Appellant's elderly grandmother, burn her house down, kill her, and shoot her, in addition to testimony about restraining orders taken out by Appellant's father and employer, was relevant to explain rage toward the victim – though insufficient to reduce the degree of murder – and thus rebutted any evidence that the murder was committed in a cold manner. See Fla. Std. Jury Instr. 7.11(7). Because this evidence was relevant and probative of Appellant's character and the circumstances surrounding the crime, the trial court abused its discretion in

excluding the evidence. See Stano, 473 So. 2d at 1286.

V. Under Ring v. Arizona, 536 U.S. 584 (2002), the trial court violated Appellant's constitutional rights when the trial court found the aggravating factors necessary to impose a death sentence, rather than the jury, when Appellant had no prior or contemporaneous violent felonies.

Facts: Appellant moved pretrial to have the jury to return findings of fact as to aggravating and mitigating circumstances in concert with the jury's recommendation as to the appropriate penalty, but the trial court denied the motion. (R4.753) Appellant also moved to bar the imposition of a death sentence, arguing that the Sixth Amendment prevents a trial judge from making the necessary factual findings to impose the death sentence, but the trial court also denied the motion. (R4.759) Following the jury's verdict finding Appellant guilty of first degree murder with a firearm (R.1137), the trial court made determined that two aggravators necessary to impose the death penalty were proven "beyond a reasonable doubt": the murder was especially heinous, atrocious, or cruel; and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R47.3-4; R.3117) But when the trial court made findings of fact as to aggravating and mitigating circumstances necessary to impose the death penalty, the trial court violated Appellant's constitutional rights to have a jury determine the facts on which the legislature conditions an increase in his maximum punishment.

Law: The Sixth Amendment's jury trial guarantee, as applied to Florida by the Fourteenth Amendment (see also Fla. Const. Art. I §§ 9, 16), requires that the determination of any aggravating factors be entrusted to the jury. Ring v. Arizona, 536 U.S. 584, 609 (2002).

This Court has previously held that the Sixth Amendment is not violated where the jury convicted the defendant of a contemporaneous violent felony. See Douglas v. State, 878 So. 2d 1246 (Fla. 2004) (Section 921.141 not unconstitutional as applied to the defendant where jury convicted defendant of contemporaneous sexual battery). This Court has also held that Ring does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable. Victorino v. State, 23 So. 3d 87, 107-08 (Fla. 2009).

Based solely on a jury's verdict finding a defendant guilty of first-degree murder, the maximum punishment that a trial court may impose under Florida law is life imprisonment. See Fla. Stat. § 921.141(3) (2013). A trial court may only increase that sentence and impose the death penalty if it finds the existence of at least one aggravating factor which is not outweighed by mitigating circumstances. Id.

Analysis: The Sixth Amendment requires that the jury alone, and not the judge, determine the factual existence of any aggravating factors beyond a

reasonable doubt in order to increase Appellant's sentence beyond life imprisonment. See Ring, 536 U.S. at 609. The jury did not find that Appellant committed a contemporaneous violent felony. The State did not allege that prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factors applied. Rather, the trial court usurped the venerated role of the jury as the finder of fact and made its own factual determination that the State proved beyond a reasonable doubt the murder was especially heinous, atrocious, or cruel and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R47.3-4; R.3117)

When the trial court made findings of fact as to aggravating and mitigating circumstances necessary to impose the death penalty, the trial court violated Appellant's constitutional rights to have a jury determine the facts on which the legislature conditioned an increase in his maximum punishment. See Ring, 536 U.S. at 609. Neither the jury's recommendation nor the fact that the trial court afforded that recommendation "great weight" comply with the Sixth Amendment's guarantee that Appellant "enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed…" See U.S. Const. amend. VI. By a 10 to 2 vote, the jury simply recommended that the trial court sentence Appellant to death and made no finding that the murder was especially heinous, atrocious, or cruel, and the murder was

committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Accordingly, the death sentence imposed by the trial court violated Appellant's constitutional right to have a jury determine the facts on which the legislature conditioned an increase in his maximum punishment.

VI. Under the Eighth Amendment, Appellant's death sentence is disproportionate for first-degree murder where the trial court found the existence of 52 mitigators yet only two aggravators, including defendant's frontal lobe brain damage, diminished control over inhibitions, disadvantaged and abusive home life, substance abuse problem which aggravated a neurological disorder, misdiagnosis and treatment of that disorder, and young age of 18 at time of murder.

Facts: During the penalty phase, Appellant presented substantial mitigation evidence. First, Dr. Joseph Wu testified: that a PET scan of Appellant's brain revealed an abnormal right temporal lobe; that Appellant suffers from complex partial seizure spectrum disorder; that Appellant would have problems being able to conform his conducts to the requirements of the law because of this disorder; that growing up in a stressful environment worsens symptoms of the disorder; and that Appellant had been misdiagnosed and mistreated for ADD/ADHA, a psychiatric disorder, when in fact his issue was a neurological disorder. (R41.125-135)

Next, Dr. Robert Berland of the Florida Department of Corrections testified that Appellant suffered from schizophrenia and paranoia in addition to partial complex seizure disorder and that Appellant's drinking and drug use could have

exacerbated or intensified symptoms of the psychotic disturbance. (R43.279-90)

While clinical psychologist Gregory Pritchard opined that Appellant suffered from a behavioral disorder (ADD/ADHD) rather than a neurological or psychological disorder (schizophrenia or complex partial seizure spectrum disorder), he admitted that he was not a neuropsychologist and did not examine Appellant but simply conducted a checklist to arrive at his diagnosis. (R43.349-58)

Appellant was just 18 years old at the time of the murder. Dr. Eric Ming testified that Appellant's brain, at age 18, was still functioning as an adolescent brain rather than an adult brain, rendering Appellant susceptible to peer influence and riskier behavior. (R46.86-88) Multiple witnesses testified about the effect of his parents' divorce upon Appellant, about how social services was forced to intervened in the Bargo home, about the adverse effect of the medication he took for ADD/ADHD, about how Appellant was bullied in school, and about how they never overheard Appellant threaten anyone despite being confronted with aggression. Regarding Appellant's small stature, the victim's own father testified that Appellant "got whooped…[p]robably by my boy." (R46.20)

In the sentencing order, the trial court found that the state proved two statutory aggravating factors beyond a reasonable doubt, found two statutory mitigating circumstances were proven but afforded those "slight weight", and found that 50 nonstatutory mitigating circumstances were proven but afforded 6

moderate weight, 13 slight weight, and the remainders little weight. (R16.3117) Specifically, the trial court awarded the following mitigating factors moderate weight: that Justin Soto participated in the murder; that Kyle Hooper participated in the murder; that Amber Wright participated in the murder; that Appellant was diagnosed with bipolar disorder; that Appellant suffered from bipolar disorder; and that Appellant suffers from schizoaffective disorder. (R16.3128-29). Even though accepting and affording moderate weight to circumstance four others participated in the murder, the trial court nonetheless refused to accept as a mitigating circumstance that Appellant did not act alone in the murder, finding that the testimony "established that the Defendant was the one who shot the victim multiple times and who ultimately killed the victim by shooting him in the face." (R16.3125)

But in light of the substantial mental health mitigating evidence, diminished control over his inhibitions, his disadvantaged home life, substance abuse problems which aggravated the mental health issues, and his young age of 18 at the time of the murder, the trial court violated Appellant's constitutional rights because the punishment is disproportionate to the circumstances of the crime.

Law: "The Eighth Amendment succinctly prohibits 'excessive' sanctions." Atkins v. Virginia, 536 U.S. 304, 310 (2002) (applying proportionality review to determine whether execution of the mentally retarded is cruel and unusual). This

Court has held that the death penalty is reserved for only those circumstances where the most aggravating and least mitigating circumstances exist. State v. Dixon, 283 So. 2d 1 (1973).

Proportionality review of death sentences derives in part from due process considerations that flow from the nature of this "uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. . . . Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law." Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998). "In conducting its proportionality review, this Court must compare the totality of the circumstances in a particular case with other capital cases to determine whether death is warranted in the instant case." Rimmer v. State, 825 So. 2d 304, 331 (Fla. 2002). This entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." Urbin, 714 So. 2d at 416.

A death sentence is disproportionate punishment for first-degree murder where the murder was accompanied by extreme mitigation, including defendant's frontal lobe brain damage, diminished control over inhibitions, disadvantaged and abusive home life, substance abuse problem which aggravated mental deficiencies, and young age of 20 at time of murder. Crooks v. State, 908 So.2d 350, 358 (Fla. 2005).

Analysis: Appellant's death sentence is disproportionate to the crime of first-degree murder because of the substantial mitigation evidence presented during the penalty phase. Only 18 years old at the time of the murder, Dr. Ming testified Appellant's brain was still functioning as an adolescent, susceptible to peer influence and risky behavior. Multiple witnesses testified about the effect upon Appellant of being medicated for ADD/ADHD, the effect of his parents' bitter divorce upon Appellant, how his small stature led to being bullied, and about how the victim beat Appellant in a previous confrontation.

Further, the unrebutted mental health evidence established that Appellant had been misdiagnosed and treated for ADD/ADHD when he actually suffers from a neurological disorder in addition to schizophrenia and paranoia. Specific to the abnormal frontal lobe and complex partial seizure disorder, Drs. Wu and Berland agreed that the neurological disorder diminished Appellant's control over his inhibitions and impulses. See Crooks, 908 So.2d at 358.

Given the extreme mitigation presented on Appellant's behalf, the trial court violated Appellant's Eighth Amendment rights by ruling that the 52 mitigators did not outweigh the two aggravators. See id.; Dixon, 283 So. 2d 1.

On a final note, Appellant's death sentence is disproportionate to the sentences of the other co-defendants. When more than one person is involved in the commission of a crime, the court will consider the relative culpability of the

offenders in determining whether the death penalty is appropriate. Wade v. State, 41 So. 3d 857 (Fla. 2010).

While the State alleged that Appellant shot the victim multiple times, only one projectile was recovered from the remains and that bullet did not match the bullets found in the cylinder of Appellant's revolver (the alleged murder weapon). Further, Kyle Hooper admitted that he beat the victim over the head with a piece of wood, and that he and Justin Soto beat the victim when he fled into the front yard. Medical examiner Kyle Shaw testified that a gunshot wound and blunt-force trauma were "concurrent causes" of death. See R36.1007. This evidence regarding concurrent causes of death is completely inconsistent with the trial court's finding that Appellant's actions alone caused the victim's death. (R16.3125)

Justin Soto, Kyle Hooper, Amber Wright, and Charlie Ely all received life imprisonment. Given Dr. Shaw's testimony that either action (gunshot or blunt-force trauma) could have killed the victim, and that the other four co-defendants all assisted in the murder and contributed to his death but received life imprisonment, Appellant's death sentence is disproportionate to the co-defendants and thus violative of the Eighth Amendment. See Wade, 41 So. 3d 857.

VII. Under the Eighth Amendment, Section 921.141, Florida Statutes (2013), is unconstitutional because the death penalty is inherently cruel and unusual punishment.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are ***Life***, Liberty, and the pursuit of Happiness." Declaration of Independence (U.S. 1776) (emphasis added).

Death is inherently cruel and unusual punishment. The framers explicitly believed that the right to Life was an "inalienable right". See Declaration of Independence (US 1776). While the Eighth Amendment guarantees the right to be free from cruel and unusual punishment, there is no mention of death in the Bill of Rights. Rather, the plain language of the Fifth Amendment guarantees the right to life: ""No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…; nor shall any person be subject for the same offence to be twice put in jeopardy of ***life*** or limb; … nor be deprived of ***life***, liberty, or property, without due process of law…" (Emphasis added.)

Justice Thurgood Marshall wrote that he would not have hesitated to condemn the death penalty as cruel and unusual punishment but for its longstanding usage and acceptance in this country:

> "Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing

punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death…death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death…the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture…the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon. The fate of ever-increasing fear and distress to which the expatriate is subjected can only exist to a greater degree for a person confined in prison awaiting death.

…

The contract with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.' As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'"

Furman v. Georgia, 408 U.S. 238, 288-90 (1972), Marshall, J. concurring. (Internal citations and quotations omitted.)

Justice Marshall penned this concurrence in 1972, basing his acceptance of the death penalty on its longstanding usage in this country. But beginning in the following year, Justice Marshall's concerns about "human fallibility" were realized when the first of over 140 death sentences was overturned, with 24 of those occurring in Florida alone.[5] The average number of years between imposition of the death sentence and exoneration is 10.6 years, but sometimes as long as 30 years.

Moreover, Justice Marshall's fears over no guarantee of an "immediate and painless death" have been realized as well. See Furman, 408 U.S. 288-90. Most recently, it took almost two hours for Joseph Wood to die from lethal injection in Arizona in July 2014[6] and 25 minutes for Dennis McGuire to die by lethal injection in Ohio in January 2014.[7] Also, it took 43 minutes for Clayton Lockett to die by lethal injection in Oklahoma on April 29, 2014, spurring the United Nations

[5] Death Penalty Information Center, "The Innocence List". Available at http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110

[6] Brumfield, Ben, "Arizona execution raises questions over novel lethal injections", CNN.com, available at http://www.cnn.com/2014/07/24/justice/lethal-injection-controversy/

[7] Strauss, Gary, "Ohio killer's slow execution raises controversy", USAToday.com, available at http://www.usatoday.com/story/news/nation/2014/01/16/ohio-killer-executed-with-new-lethal-drug-combo/4512651/

High Commissioner for Human Rights to call for a ban on lethal injection as "cruel, inhuman, and degrading treatment" [8] violative of international law.[9] These recent incidents of prolonged and painful death demonstrate that the death penalty is inherently cruel and unusual punishment.

The basic constitutional principle violated by a death sentence is that it extinguishes the humanity out of the human. But yet Death at the hands of the State destroys an individual's very existence and forecloses the possibility of any redemption or exoneration. It is ordered by a judge and carried out at the hands of a government by the people and for the people. In essence, Death is an irrevocable

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[8] United Nations, "UN rights office calls on US to impose death penalty moratorium after botched execution", UN.org, available at http://www.un.org/apps/news/story.asp?NewsID=47706#.VCGt1_ldX3c

[9] While the United States is a party to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, these treaties do not expressly prohibit death by lethal injection. Rather, all three prohibit torture and cruel, inhuman, or degrading punishment apply to the manner in which executions are carried out. See "Preamble," Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 ("Section 6 states that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."); *Kindler v. Canada*, HRC, communication no. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993) (citing Soering v. United Kingdom, European Court of Human Rights) (noting that because the ICCPR does not prohibit the imposition of the death penalty in certain limited circumstances, capital punishment is not *per se* a violation of the prohibition on torture and other cruel punishment, but rather it is necessary to consider the facts and the circumstances of each case, including personal factors regarding the condemned person, conditions on death row, and "whether the proposed method of execution is particularly abhorrent.").

punishment that turns the tables, transforming "We The People" into the role of the murderer and the convicted murderer into the victim. Even in the vilest of criminals remains a human being with basic human dignity who is worthy of the "inalienable right" to "Life." While "We The People" may permissibly condemn our fellow man to life imprisonment, the decision of when that man departs this Earth is not ours to make.

The high rate at which innocent humans have been convicted and sentenced to death, in addition to the lengthy delays before exoneration and the recent instances of prolonged and painful death, outweighs any conceivable constitutional arguments for its justification. Execution – the extinguishment of human life – permanently cuts off the opportunity for exoneration, irrevocably closed the door on a chance of redemption, violates Due Process, and amounts to the State-sponsored murder of human beings. Accordingly, Appellant requests that this Court vacate his death sentence and hold that Section 921.141 violates the Eighth Amendment of the United States Constitution.

CONCLUSION

For the aforementioned reasons, Appellant requests that this Court reverse and/or vacate his conviction and death sentence.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing has been served upon the following on this 25th day of September 2014:

Office of the Attorney General – Criminal Appeals Division
via electronic delivery to crimappdab@myfloridalegal.com

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CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that the lettering in this brief is Times New Roman 14-point Font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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IN THE SUPREME COURT
STATE OF FLORIDA

Case: **SC14-125**
LT No.: **2011-CF-1491-A-Z**

MICHAEL SHANE BARGO, JR.,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On appeal from the Circuit Court of the Fifth Judicial Circuit,
In and For Marion County, Florida

APPENDIX

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TABLE OF APPENDICES

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In and For Marion County, Florida

APPENDIX A

Partial Transcript, State v. Amber Wright, State v. Kyle Hooper, 2011-CF-1491 (Fla. 5th Cir. 2013)

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IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA

CASE NO: 2011-001491-CF

STATE OF FLORIDA,

Plaintiff,

vs.

VOLUME I OF V

AMBER WRIGHT,

Defendant.
----------/

VOLUME I (Pages 1 through 200)

CD RECORDING of **JURY TRIAL** June 6, 7, 8, 11, 2012 and concluding on June 12, 2012; **SENTENCING** August 22, 2012 at the Marion Judicial Center, Marion County, Florida, before **The Honorable DAVID B. EDDY**, Circuit Court Judge. Transcribed by CAROLE A. ROGERS, Stenographic Court Reporter.

APPEARANCES:

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I N D E X

for identification as State's Exhibit five M's and as you --

THE COURT: M as in Mary?

ATTORNEY BERNDT: M as in Mary.

BY ATTORNEY BERNDT:

Q. And ask you if you recognize that.

A. Yes, ma'am, I do. It's the first interview. It's a copy of the first interview I did with Kyle Hooper.

Q. And how do you know that that's what that is?

A. Because I watched it and dated it and put my name and ID number on it.

Q. Is that a fair and accurate depiction of the relevant portions of the first interview you did with Kyle Hooper?

A. Yes, ma'am.

ATTORNEY BERNDT: Your Honor, at this time we move State's Exhibit five M's into evidence.

ATTORNEY MENGERS: No objection.

THE COURT: The exhibit marked for identification with five M's will be received in evidence as State's Exhibit 103.

(State's Exhibit No. 103 was received in evidence).

BY ATTORNEY BERNDT:

Q. I'm going to show you what's been marked for identification as State's Exhibit five N's as in Nancy. You can take that out. And ask you to look at that and do you recognize that?

A. Yes, ma'am. It's a copy of the second interview I did with Kyle Hooper.

Q. And how do you know that?

A. I recognize it because I dated when I watched it and put my name and ID number on it.

Q. Is that a fair and accurate depiction of the relevant portions of the second interview you did with Kyle Hooper?

A. Yes, ma'am.

ATTORNEY BERNDT: Your Honor, at this time we move State's Exhibit five N's into evidence.

ATTORNEY MENGERS: No objection.

THE COURT: The exhibit marked for identification with five N's will be received in evidence as State's Exhibit 104.

(State's Exhibit No. 104 was received in evidence).

BY ATTORNEY BERNDT:

Q. Now, you said you interviewed Kyle Hooper twice. During the first interview, was Kyle Hooper

untruthful with you?

A. Yes, ma'am.

ATTORNEY MENGERS: Objection. Calls for an opinion.

THE COURT: Sustained. The Jury is instructed to disregard that last answer.

BY ATTORNEY BERNDT:

Q. Did he give you a different story during the second interview that he gave you during the first interview?

A. Yes, ma'am.

Q. Okay. Now, after the individual interviews were conducted with Amber Wright, Kyle Hooper, Justin Soto and Charlie Ely, were they all placed in an interview room together?

A. Yes, ma'am.

Q. Were there any law enforcement officers in the room with them?

A. No, ma'am.

Q. Were they being recorded?

A. Yes, ma'am.

Q. Did you tell them they were being recorded?

A. No, I did not.

Q. And during that recording, did Kyle Hooper say anything about Michael Bargo?

A. Yes, ma'am, he did.
Q. What did he say?
A. He said the only thing that we have right now is to put this on Mike.
Q. And did he say anything about how he felt about Seath Jackson's death?
A. Yes. In that tape he says, "I don't feel bad about his death", and he also says, "He deserved it".
ATTORNEY BERNDT: I don't have any further questions, Your Honor.
THE COURT: Cross examination.
ATTORNEY MENGERS: No questions.
THE COURT: May this witness be excused at this time?
ATTORNEY BERNDT: Yes, Your Honor.
THE COURT: Subject to recall?
ATTORNEY BERNDT: Yes, Your Honor.
THE COURT: You are excused subject to recall.
ATTORNEY BERNDT: And, Your Honor, at this time we would ask that we be able to publish the two DVDs now entered into evidence containing Kyle Hooper's interviews.
THE COURT: That request is granted.

Ladies and Gentlemen, the totality of the DVDs lasts about an hour and 45 minutes. Is that correct, Counsel?

ATTORNEY BERNDT: Yes, sis.

THE COURT: What we're going to do is we're going to watch for about an hour, then we'll take a recess, come back and watch the remainder of the DVD.

You may publish that exhibit. Exhibit 103. The first DVD.

(DVD is played for the Jury starting at 1:26 p.m., until 2:21 p.m.).

THE COURT: Does that complete the first DVD?

ATTORNEY BERNDT: It does, Your Honor.

THE COURT: And Ladies and Gentlemen, this would be an appropriate time to take a recess. It's somewhat earlier than I had anticipated, but we'll take a recess at this time. We'll take an approximate 20-minute recess. We'll reconvene in the courtroom at 2:40 p.m. We'll make it 2:45 p.m. 2:45. You may now retire with the Bailiff. If you'll just put your notepads face down on your seat, please.

(Jury exits the courtroom at 2:21 p.m.).

Noting that the Jury has retired from the courtroom, we'll be in recess until 2:45 p.m.).

ATTORNEY MENGERS: Your Honor, may I approach?

THE COURT: Yes, sir.

(Sound system is turned off at 2:21 p.m. and Court is in recess; and reconvened at 2:45 p.m.).

THE COURT: I need Mr. Hooper back in the courtroom.

THE BAILIFF: Yes, sir.

THE COURT: Counsel, the issue we discussed at the bench before we adjourned for this last recess, please be prepared to address that at the next recess.

ATTORNEY MENGERS: Yes, sir.

THE COURT: If the State has some case law you want me to consider, you might want to make a telephone call or do you have?

ATTORNEY BERNDT: Do you want it right now?

THE COURT: Have you seen it, Mr. Mengers?

ATTORNEY MENGERS: I have not.

ATTORNEY BERNDT: I can give both the Court and Counsel a copy of the case law.

THE COURT: Any objection, Mr. Mengers?