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

REPLY BRIEF

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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.

In the *Answer Brief*, the State argues that defense counsel did not render ineffective assistance of counsel evident from the face of the record because: (A) counsel cannot be deemed ineffective for failing to refresh Kyle Hooper's recollection about a statement he made to the other co-defendants regarding blaming the murder on Appellant because Hooper actually testified that he told the co-defendants Appellant instructed Hooper to tell the police Appellant murdered the victim (AB.61-63); (B) defense counsel cannot not be deemed ineffective for arguing that Appellant was "guilty, guilty as hell" in closing because the "appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse" (AB.64-67); (C) defense counsel cannot be deemed ineffective for urging Appellant to tell the trial court during allocution whether he wanted "regular or extra crispy" was simply an attempt "to use levity to relax" Appellant (AB.69); and (D) defense counsel cannot be deemed ineffective for failing to argue that the projectile retrieved from the victim's remains did not match the bullets recovered from the cylinder of the murder weapon because Appellant admitted that the 0.22-caliber revolver was the murder weapon. (AB.71)

However, the State's arguments fail because: (A) Hooper's recollection in this case of the statement he made to the codefendants differed significantly from the statement he testified to in the trials of the other co-defendants as Hooper never told the other co-defendants that Appellant instructed Hooper to tell the police Appellant committed the murder; (B) there can be no conceivable justification for arguing to the jury with such inflammatory language that Appellant was "guilty, guilty as hell"; (C) defense counsel's direction to Appellant to tell the court whether he wanted "regular or extra crispy" was a direct reference to the fact that Appellant could opt to die by electrocution if sentenced to death; and (D) Appellant cannot "confess" that the victim was murdered with a 0.22-caliber revolver when Appellant testified he was not present for the murder and had no firsthand knowledge of who murdered the victim and with which of the two 0.22-caliber firearms found within the trailer.

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".

When questioned by defense counsel Holloman on rebuttal 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) Hooper claimed, "I remember saying that Mike had told me if the police came and things like that, to

tell him, -- to tell the police he had done it, yes, and that – and that's what I did…" (R39.1357) Defense counsel did not attempt to refresh Hooper's recollection or impeach Hooper with the statement.

While the State claims that defense counsel cannot be deemed ineffective for failing to refresh Hooper's recollection and impeach him with the transcript of the interrogation because Hooper "freely admitted making the statement", see AB.63, the statement that Hooper testified to on the witness stand was not the same statement that was admitted in his own trial. Detective Rhonda Stroupe did not testify that Hooper claimed Appellant told him to tell police Appellant committed the murder. Rather, Detective Stroupe testified during Hooper's trial that Hooper told Wright and Ely "'the only thing we have right now is to put this on Mike.'" See Hooper v. State, 39 Fla. L. Weekly D 1158 (Fla. 5th DCA 2014)[1] (testimony attached to *Initial Brief*).

In a criminal case where the circumstances surrounding the victim's death are as severe as those at hand, there is little evidence that can be more compelling than the testimony of an eyewitness – especially from an eyewitness who admits to playing a role in the murder. By failing to refresh Hooper's recollection with the statement and failing to call Detective Stroupe to testify regarding such, defense

[1] 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.

counsel's performance was "outside the wide range of professionally competent assistance." See Strickland v. Washington, 466 U.S. 668, 690 (1984). Appellant testified that he was innocent of murder and that Hooper admitted to murdering the victim but threatened to blame the murder on 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 642, 645 (Fla. 2d DCA 2002). Defense counsel failed to refresh Hooper's recollection of the statement, failed to impeach Hooper with the statement, failed to call Detective 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 v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

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 admitted 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 that Appellant was "**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.)

In the *Answer Brief*, the State suggests that defense counsel Holloman altered his trial strategy because Appellant made a last-minute decision to testify in his defense and perjured himself on the witness stand, see AB.64, 66, but points to no record evidence to support this outlandish and unsupported position. The State also argues that this Court has no way of knowing defense counsel's strategic decisions for arguing second degree murder from the cold record or if "counsel's alternatives were even worse." See AB.67. But the rationale behind this argument from the State is inconceivable and irrational as there can be no alternative worse than death by lethal injection or electrocution. But accepting the State's position as true for

argument's sake, there can be no justification for defense counsel Holloman's use of such inflammatory language which served only to incite the emotions of the jury.

From the viewpoint of an objective juror, the jury heard Appellant testify to and maintain his innocence, steadfastly maintaining that he was not present during the murder. Minutes later, the jury heard Appellant's lawyer call his own client a murderer in the most inflammatory way possible: "**guilty, guilty as hell…[t]here's no question about that. Why? Because that has been proven beyond and to the exclusion of every, single reasonable doubt."** See R40.1406-1408. The deficiency and prejudice resulting from this is unquestionable. 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 untruthful in the eyes of the jury. See Nixon v. Florida, 543 U.S. 175, 187 (2004). 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 v. Wainright, 507 So. 2d 1384 (Fla. 1987).

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".

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

> 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.)

Rather than simply conceding the obvious error on this issue, the State argues defense counsel attempted to relax Appellant and that "trial counsel's colloquial reference to two well-known choices when ordering fried chicken did not 'belittle' Bargo as Bargo now claims." See AB.69.

Defense counsel's argument was a clear and indisputable reference to the fact that Appellant has the option of dying by electrocution if this Court affirms his conviction. Section 992.104, Florida Statutes (2015), provides that a "person sentenced to death [may] affirmatively elect[] to be executed by electrocution."

There is no conceivable justification for defense counsel's statement to Appellant during allocution. Given the "sensitive and emotional" nature of a Spencer hearing, the deficiency and resulting prejudice from defense counsel's

inflammatory 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. While this may not have been the most opportune time for Appellant, who was just 21 years old at the time of allocution, to argue his innocence, this in no way excuses the actions of defense counsel. 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.

While the projectile recovered from the victim's remains was 0.22-caliber lead, round nose, and unjacketed bullet (R35.907), FDLE firearms expert Maria Pagan testified the ammunition recovered inside the cylinder of the recovered revolver was 0.22-magnum copper-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. However, defense counsel argued in closing that the photographs of the murder scene depict a second 0.22-caliber rifle that was not tested or taken into evidence. (R40.1402)

In the *Answer Brief*, the State argues that defense counsel Hollomon did not deprive Appellant of effective assistance of counsel by failing to argue that the projectiles recovered from the victim's remains did not match the ammunition recovered inside the cylinder of the alleged murder weapon because "Bargo [sic] admission that his handgun was the murder weapon left trial counsel with little reason to vehemently argue reasonable doubt based on the identity of the murder weapon." See AB.71. However, Appellant testified that he was not present at the time of the murder, but returned later when co-defendant Justin Soto relayed his version of events to Appellant. Accepting Appellant's testimony as true for argument's sake, Appellant was not a witness and had no firsthand knowledge of the events leading up to and following the murder. Appellant had no way of knowing for certain whether the victim was shot with the 0.22-caliber revolver or with the 0.22-caliber rifle.

If presented with this argument, an objective juror would reasonably infer that the 0.22-caliber revolver was not used to murder the victim. When presented with a

client facing the death penalty, any reasonable criminal defense lawyer would have argued that the lead, round nose, and unjacketed bullet projectiles recovered from the victim's remains were apples-to-oranges different from the copper, jacketed magnum bullets recovered in the revolver, especially when a second firearm of the same caliber was found at the crime scene but not entered into evidence. See generally Strickland, 466 U.S. at 690.

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.)

In sum, defense counsel Holloman's emotional, inflammatory, and insensitive language to the judge and jury, in addition to 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 Blanco, 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 rational trier of fact could have found Appellant guilty beyond a reasonable doubt.

In the *Answer Brief*, the State argues that the evidence was sufficient to convict Appellant of first degree murder because of (1) the "highly reliable text messages" between co-defendant Amber Wright and the victim, and (2) the testimony of co-defendant Kyle Hooper. See AB.72-82. Further, the State cites that the proper standard of review regarding sufficiency of the evidence is that sufficient evidence exists if, after viewing the evidence in a light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt. See AB.81 (citing Pagan v. State, 830 So. 2d 792, 803 (Fla. 2003)).

But as argued in the *Initial Brief*, no rational trier of fact could have found Appellant guilty beyond a reasonable doubt. As for the text messages, the State claims that these text messages were "wholly inconsistent" with Appellant's version of events. See AB.75. Contrary to the State's argument, the text messages are only

relevant to establishing that Amber Wright lured the victim into the trailer on the night of the murder. In these messages, the victim never questioned whether he would be ambushed by Appellant, Soto or Hooper specifically, rather he only expressed a general concern about being "jumpt". See R5.860-90. Further, the victim never expressed any fear of anyone as to indicate a desire or need to flee if attacked upon meeting with Wright.[2] While the text messages do establish that the victim was concerned about entering into a fight at the trailer, the messages do not evince a fear of Appellant or that the victim expected to be attacked by Appellant in particular. Rather, it was Hooper alone –not Appellant – who threatened to kill the victim just one week earlier and Hooper's blood alone found mixed with that of the victim at the crime scene. See R39.1353-55.

The State bases its argument solely on the testimony of Hooper but then readily admits in another section of the Answer Brief "[c]odefendants pointing the fingers at each other once apprehended by the police is nothing new to our criminal jurisprudence…" See AB.63. And while the State argues that "Hooper's testimony about the commission of Jackson's planned ambush murder was consistent with the State's evidence", see AB.77, the State makes no attempt to argue **with exactly what physical evidence** Hooper's testimony is consistent with.

[2] The State testimony during the penalty phase that the victim was a much taller, bigger, and more experienced fighter than Appellant. (R46.43) Also, the victim's father testified that Appellant had previously "got whooped" by the victim. (R46.20)

Rather, Hooper's testimony is inconsistent with almost all of the physical evidence presented in the case. Neither the State nor Hooper offered any explanation as to how Hooper's blood ended up mixed with the blood of the victim in the living room. The fact remains that the only blood of the victim found at the crime scene was mixed with Hooper's blood. Conversely, 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)

Neither the State nor Hooper offered any explanation as to how Appellant's blood was deposited on the kitchen ceiling and light fixture. Rather, Appellant testified that he and Hooper fought earlier in the evening in the kitchen over the revolver.

Neither the State nor Hooper offered any explanation as to how or why the ammunition found in the alleged murder weapon differed from the projectiles recovered from the victim's remains. While the projectile recovered from the victim's remains was 0.22-caliber lead, round nose, and unjacketed, the ammunition recovered from the cylinder of the 0.22-magnum Rough Rider was copper-unjacketed. See R35.907-11. FDLE firearms expert Maria Pagan was unable to determine whether the projectile recovered from the victim's remains was fired from the revolver. The State presented no DNA or fingerprint evidence recovered from the revolver. While the photographs depict a second 0.22-caliber rifle within the

trailer which was not entered into evidence, no second cylinder for the revolver was found at the murder scene. Moreover, Hooper never testified that Appellant nor anyone else somehow inexplicably reloaded the revolver before disposing of it in the air duct with completely different bullets than were used to shoot 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 rational 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). The sufficiency of the evidence is even more troubling given the fact that the jury never heard Hooper's statement to the other co-defendants surreptitiously recorded by police that he intended to "put it on Mike". See Hooper v. State, 39 Fla. L. Weekly D 1158 (Fla. 5th DCA May 30, 2014) (T.714). Because competent substantial evidence does not support Appellant's conviction for first-degree murder with a firearm, and because no rational trier of fact could have found Appellant guilty beyond a reasonable doubt, Appellant requests that this Court reverse 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.

In the *Answer Brief*, the State argues that the trial court did not abuse its discretion by denying Appellant's request for appointment of a crime scene investigator because the request was too general and Appellant has not demonstrated prejudice from that denial. See AB.82-85. Specifically, the State argues that locating and testing the second 0.22-caliber firearms depicted in the crime scene photographs (but not taken into evidence and tested by the State) would only "establish that the rifle had been touched or handled in the past by the person(s) whose prints were found on the rifle…[m]ost importantly, both Bargo's and Hooper's testimony established that Jackson was shot with Bargo's handgun making the existence of the rifle at the crime scene a non-issue." See AB.84. The State goes on to argue the expert testimony supported Hooper's testimony that the revolver was the murder weapon by "verifying that the bullet found in Jackson's remains had the same striation characteristics as Bargo's revolver – six grooves with right hand twist" and that any error was harmless given the overwhelming evidence of guilt. See AB.84-85.

First, the trial court did not deny the request as unspecifically pled but rather on the basis that the crime scene investigator would not be "useful" to the defense. The State fails to argue that the trial court applied the proper standard when it denied

appointment of a crime scene expert on the basis that such would not be "useful" to the defense instead of determining the reasonableness and necessity of a crime scene investigator. See IB.73; Fla. Stat. § 27.5304(1) (2013). 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.

Second, Appellant has gone above and beyond to establish the prejudice resulting from not being afforded a crime scene investigator – to the point of questioning the validity of the trial itself. While the State argues that FDLE firearms expert Maria Pagan "verified" that the bullet found in victim's remains had the same characteristics found in the revolver, see AB.84, Pagan testified that "[m]ost firearms will have five or six grooves". See R35.903. She added:

> Again, when I had it, it had six grooves with a right twist and correct dimensions. **I'm not saying it's specific for this revolver.** I'm just saying it's specific for this type of revolver, but **there may be other manufacturers and makes of firearms that have a similar six right twist grooves.**
> …
>
> **In this case I was not able to determine whether or not the bullet was fired from this particular gun and there just was not a significant degree or agreement or disagreement of individual characteristics of the striations. So I could not make a determination.**

R35.905-907. (Emphasis added.) Contrary to the State's argument, Pagan was unable to "verify" that the bullet found in the victim's remains was fired from the 0.22-caliber revolver.

Accepting Appellant's testimony as true for the sake of argument, he was not present for the murder and only knew what the other co-defendants told him about the events on the night in question; in other words, Appellant testified to a hearsay version of events. Appellant did not know for certain whether the victim was shot by the revolver, by the rifle, or both. Therefore, it was reasonable and necessary to Appellant's defense to have a crime scene investigator locate this additional firearm, with similar characteristics as the 0.22-revovler, and provide it for additional testing.

Finally, the State argues that the denial of the crime scene expert was "harmless in light of the overwhelming evidence of Bargo's guilt adduced at trial." See AB.84-85. The State either fails to acknowledge or fails to comprehend that the physical evidence does not correspond with the hearsay and eyewitness testimony, that the hearsay testimony was inconsistent, and that the eyewitness testimony of Hooper does not match the testimony of the only disinterested witness, neighbor Steven Montanez. 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."

In the *Answer Brief*, the State argues that the trial court did not abuse its discretion by excluding evidence of threats made by the victim against Appellant and his family because, "even if [the victim's] alleged threats did play a part in Bargo's motive to kill [the victim], such was based on Bargo's interest in getting revenge for Jackson's threats, not fear." See AB.88. Further, the State describes the victim's threats to Appellant as a "high school fistfight" and the victim was simply "a fifteen year old boy who was killed while on his way to what he believed to be an opportunity to rekindle his relationship with an ex-girlfriend from his neighborhood." See AB.88.

However, Section 921.141(5)(i) does not state that the CCP aggravating factor cannot be imposed only when the defendant claims he acted out of fear of the victim: rather, the statutes states, "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).

(Emphasis added.) The Standard Jury Instruction further clarifies that "[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). Neither the statute nor Standard Jury Instruction limits a "pretense of moral or legal justification" to instances where the defendant is afraid of the victim.

The relationship between Appellant and the victim went far beyond a "high school fistfight", see AB.88, as the victim threatened to rape Appellant's elderly grandmother, burn her house down, shoot her, and kill her. See R41.24. "[H]igh school fistfigt[s]" do not involve adults, like Appellant's father and employer, taking out restraining orders against fifteen year old boys, such as the victim, for his threats of violence. See R41.24.

Evidence that the victim threatened the people closest to Appellant (to wit: to rape Appellant's elderly grandmother, burn her house down, shoot her, and kill her, in addition to testimony about restraining orders taken out by Appellant's father and employer), was relevant to explain Appellant's 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 v. State, 473 So. 2d 1282, 1286 (Fla. 1985) (holding "any relevant evidence as to the defendant's character or the circumstances of the crime is admissible [during capital] sentencing" proceedings).

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.

In the *Answer Brief*, the State simply argues that Appellant presents no reason for this Court to overturn its existing precedent regarding the constitutionality of Florida's death penalty scheme. See AB.91-92. As the State presents no argument to which Appellant can reply, Appellant stands on and reiterates his argument that, 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 v. Arizona, 536 U.S. 584, 609 (2002). 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.

As for the proportionality of Appellant's death sentence, the State only attempts to argue that Appellant's case is distinguishable from a case cited by Appellant, while also arguing that Appellant's death sentence is proportionate to the other co-defendants, who received life sentences, because Appellant was more culpable and "killed Jackson by shooting him in the face". See AB.92-98.

But while the State spends considerable time attempting to distinguish Appellant's case from Crooks v. State, 908 So. 2d 350 (Fla. 2005), see AB.93-96, the fact remains that Appellant presented – and the trial court accepted – extreme mitigation evidence: brain damage to Appellant's frontal lobe; diminished control over inhibitions; disadvantaged and abusive home life; substance abuse problem which aggravated a neurological disorder; misdiagnosis and treatment of that disorder; existence of bipolar and schizoaffective disorder; and young age of 18 at

time of murder. Even in light of the nature of the murder, this extreme mitigation evidence outweighs the two aggravating factors and imposition of the death penalty.

Further, the State's argument that Appellant alone was responsible for the victim's death is not supported by the evidence. Because medical examiner Kyle Shaw testified that a gunshot wound and blunt-force trauma were "concurrent causes" of death, see R36.1007, and because Hooper admitted to hitting the victim over the head with a piece of wood, the evidence does not support the trial court's finding that Appellant "ultimately killed the victim by shooting him in the face." See R16.3125. As Hooper received life imprisonment for his actions, Appellant's death sentence is disproportionate to a co-defendant equally culpable for the victim's death and thus unconstitutional. See Wade v. State, 41 So. 3d 857 (Fla. 2010).

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

Because Appellant argued that the "general nature" of the death penalty is unconstitutional as opposed to "any specific protocols or matters that may render Bargo's death sentence unconstitutional in its application to Bargo," the State makes no attempt to answer to Appellant's argument that the death penalty is inherently cruel and unusual punishment violative of the Eighth Amendment. See AB.99-100.

But in the three short months since Appellant submitted his *Initial Brief* to this Court on September 25, 2014, the Death Penalty Information Center has added 3

more death-row exonerees to "The Innocence List": Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu.[3] According to this list, there have been more death-row exonerees in Florida than any other state, for a total of 25 death convictions overturned by acquittal, dismissal, or pardon.

And in the time between the *Initial Brief* and this brief, Maryland Governor Martin O'Malley commuted all remaining death sentences following the state's abolition of punishment. Further, at least one state appellate judge has called for the abolition of the death penalty. In Ex parte Panetti, No.WR-37, 145-04 (Tex. Crim. App. Nov. 26, 2014) (Appendix B), Judge Tom Price dissented from an order denying a motion to stay the execution and opined as follows:

> I am among a very few number of people who have had a front row seat to this process for the past four decades. I now repeat what I stated originally in my dissenting opinion in *Ex parte Graves*: **"We are the guardians of the process."** Based on my specialized knowledge of this process, I now conclude that the death penalty as a form of punishment should be abolished because the execution of individuals does not appear to measurably advance the retribution and deterrence purposes served by the death penalty; the life without parole option adequately protects society at large in the same way as the death penalty punishment option; and the risk of executing an innocent person for a capital murder is unreasonably high, particularly in light of procedural-default laws and the prevalence of ineffective trial and initial habeas counsel.

[3] Death Penalty Information Center, "The Innocence List (last exoneration December 9, 2014)". (Appendix A) Available at http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-

Id. at 5-6. (Emphasis added.)

As Judge Price reasoned, this Court is the "guardian[] of the process". See id. Especially in light of the ineffective assistance of counsel apparent from the face of the record in this case, compounded by the evidence never presented to the jury in this case (Hooper's statement to the co-defendants to "put this on Mike"), the risk of executing an innocent person for capital murder here is "unreasonably high". See id. The possibility of life without parole adequately protects society from any threat Appellant may actually pose should be found guilty again after afforded a trial with all Constitutional guarantees. See id. Because of the rapidly increasing number of death row exonerees, in addition to the arguments posed in Appellant's *Initial Brief* and by Judge Price, 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 8th day of January 2015:

Office of the Attorney General – Criminal Appeals Division
via electronic delivery to capapp@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

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing has been served upon the following on this 8th day of January 2015:

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APPENDIX A

Death Penalty Information Center, "The Innocence List (last exoneration December 9, 2014)"

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Innocence: List of Those Freed From Death Row

Last exoneration December 9, 2014 (#150)

For Inclusion on DPIC's Innocence List:

Defendants must have been convicted, sentenced to death and subsequently either-

a. Been **acquitted** of all charges related to the crime that placed them on death row, or

b. Had all charges related to the crime that placed them on death row **dismissed** by the prosecution, or

c. Been granted a complete **pardon** based on evidence of innocence.

For a fuller description of the criteria used in this list and the reasons why these criteria were chosen, see Section V of DPIC's most recent Innocence Report. See also an excerpt below from an article in the Baltimore Sun by Dan Rodricks regarding the use of the term "exonerated."

The list includes cases in which the release occurred 1973 or later.

NR*	NAME	ST	RACE	CONVICTED	EXONERATED	YEARS BETWEEN	REASON	DNA **
1	David Keaton	FL	B	1971	1973	2	Charges Dismissed	
2	Samuel A. Poole	NC	B	1973	1974	1	Charges Dismissed	
3	Wilbert Lee	FL	B	1963	1975	12	Pardoned	
4	Freddie Pitts	FL	B	1963	1975	12	Pardoned	
5	James Creamer	GA	W	1973	1975	2	Charges Dismissed	
6	Christopher Spicer	NC	B	1973	1975	2	Acquitted	
7	Thomas Gladish	NM	W	1974	1976	2	Charges Dismissed	
8	Richard Greer	NM	W	1974	1976	2	Charges Dismissed	
9	Ronald Keine	NM	W	1974	1976	2	Charges Dismissed	
10	Clarence Smith	NM	W	1974	1976	2	Charges Dismissed	
11	Delbert Tibbs	FL	B	1974	1977	3	Charges Dismissed	
12	Earl Charles	GA	B	1975	1978	3	Charges Dismissed	
13	Jonathan Treadway	AZ	W	1975	1978	3	Acquitted	
14	Gary Beeman	OH	W	1976	1979	3	Acquitted	
15	Jerry Banks	GA	B	1975	1980	5	Charges Dismissed	
16	Larry Hicks	IN	B	1978	1980	2	Acquitted	
17	Charles Ray Giddens	OK	B	1978	1981	3	Charges Dismissed	
18	Michael Linder	SC	W	1979	1981	2	Acquitted	
19	Johnny Ross	LA	B	1975	1981	6	Charges Dismissed	
20	Ernest (Shujaa) Graham	CA	B	1976	1981	5	Acquitted	
21	Annibal Jaramillo	FL	L	1981	1982	1	Charges Dismissed	
22	Lawyer Johnson	MA	B	1971	1982	11	Charges Dismissed	

23	Larry Fisher	MS	W	1984	1985	1	Acquitted	
24	Anthony Brown	FL	B	1983	1986	3	Acquitted	
25	Neil Ferber	PA	W	1982	1986	4	Charges Dismissed	
26	Clifford Henry Bowen	OK	W	1981	1986	5	Charges Dismissed	
27	Joseph Green Brown	FL	B	1974	1987	13	Charges Dismissed	
28	Perry Cobb	IL	B	1979	1987	8	Acquitted	
29	Darby (Jesse) Tillis	IL	B	1979	1987	8	Acquitted	
30	Vernon McManus	TX	W	1977	1987	10	Charges Dismissed	
31	Anthony Ray Peek	FL	B	1978	1987	9	Acquitted	
32	Juan Ramos	FL	L	1983	1987	4	Acquitted	
33	Robert Wallace	GA	B	1980	1987	7	Acquitted	
34	Richard Neal Jones	OK	W	1983	1987	4	Acquitted	
35	Willie Brown	FL	B	1983	1988	5	Charges Dismissed	
36	Larry Troy	FL	B	1983	1988	5	Charges Dismissed	
37	Randall Dale Adams	TX	W	1977	1989	12	Charges Dismissed	
38	Robert Cox	FL	W	1988	1989	1	Charges Dismissed	
39	James Richardson	FL	B	1968	1989	21	Charges Dismissed	
40	Clarence Brandley	TX	B	1981	1990	9	Charges Dismissed	
41	John C. Skelton	TX	W	1983	1990	7	Acquitted	
42	Dale Johnston	OH	W	1984	1990	6	Charges Dismissed	
43	Jimmy Lee Mathers	AZ	W	1987	1990	3	Acquitted	
44	Gary Nelson	GA	B	1980	1991	11	Charges Dismissed	
45	Bradley P. Scott	FL	W	1988	1991	3	Acquitted	
46	Charles Smith	IN	B	1983	1991	8	Acquitted	
47	Jay C. Smith	PA	W	1986	1992	6	Acquitted	
48	Kirk Bloodsworth	MD	W	1984	1993	9	Charges Dismissed	Yes
49	Federico M. Macias	TX	L	1984	1993	9	Charges Dismissed	
50	Walter McMillian	AL	B	1988	1993	5	Charges Dismissed	
51	Gregory R. Wilhoit	OK	W	1987	1993	6	Acquitted	
52	James Robison	AZ	W	1977	1993	16	Acquitted	
53	Muneer Deeb	TX	O	1985	1993	8	Acquitted	
54	Andrew Golden	FL	W	1991	1994	3	Charges Dismissed	
55	Adolph Munson	OK	B	1985	1995	10	Acquitted	
56	Robert Charles Cruz	AZ	L	1981	1995	14	Acquitted	
57	Rolando Cruz	IL	L	1985	1995	10	Acquitted	Yes
58	Alejandro Hernandez	IL	L	1985	1995	10	Charges Dismissed	Yes
59	Sabrina Butler	MS	B	1990	1995	5	Acquitted	
60	Joseph Burrows	IL	W	1989	1996	7	Charges Dismissed	
61	Verneal Jimerson	IL	B	1985	1996	11	Charges Dismissed	Yes
62	Dennis Williams	IL	B	1979	1996	17	Charges Dismissed	Yes
63	Roberto Miranda	NV	L	1982	1996	14	Charges Dismissed	
64	Gary Gauger	IL	W	1993	1996	3	Charges Dismissed	
65	Troy Lee Jones	CA	B	1982	1996	14	Charges Dismissed	
66	Carl Lawson	IL	B	1990	1996	6	Acquitted	
67	David Wayne Grannis	AZ	W	1991	1996	5	Charges Dismissed	
68	Ricardo Aldape Guerra	TX	L	1982	1997	15	Charges Dismissed	
69	Benjamin Harris	WA	B	1985	1997	12	Charges Dismissed	
70	Robert Hayes	FL	B	1991	1997	6	Acquitted	
71	Christopher McCrimmon	AZ	B	1993	1997	4	Acquitted	
72	Randal Padgett	AL	W	1992	1997	5	Acquitted	
73	Robert Lee Miller, Jr.	OK	B	1988	1998	10	Charges Dismissed	Yes
74	Curtis Kyles	LA	B	1984	1998	14	Charges Dismissed	
75	Shareef Cousin	LA	B	1996	1999	3	Charges Dismissed	
76	Anthony Porter	IL	B	1983	1999	16	Charges Dismissed	
77	Steven Smith	IL	B	1985	1999	14	Acquitted	
78	Ronald Williamson	OK	W	1988	1999	11	Charges Dismissed	Yes
79	Ronald Jones	IL	B	1989	1999	10	Charges Dismissed	Yes
80	Clarence Dexter, Jr.	MO	W	1991	1999	8	Charges Dismissed	
81	Warren Douglas Manning	SC	B	1989	1999	10	Acquitted	

82	**Alfred Rivera**	NC	L	1997	1999	2	Charges Dismissed	
83	**Steve Manning**	IL	W	1993	2000	7	Charges Dismissed	
84	**Eric Clemmons**	MO	B	1987	2000	13	Acquitted	
85	**Joseph Nahume Green**	FL	B	1993	2000	7	Charges Dismissed	
86	**Earl Washington**	VA	B	1984	2000	16	Pardoned	Yes
87	**William Nieves**	PA	L	1994	2000	6	Acquitted	
88	**Frank Lee Smith** - **died prior to exoneration**	FL	B	1986	2000 **	14	Charges Dismissed	Yes
89	**Michael Graham**	LA	W	1987	2000	13	Charges Dismissed	
90	**Albert Burrell**	LA	W	1987	2000	13	Charges Dismissed	
91	**Oscar Lee Morris**	CA	B	1983	2000	17	Charges Dismissed	
92	**Peter Limone**	MA	W	1968	2001	33	Charges Dismissed	
93	**Gary Drinkard**	AL	W	1995	2001	6	Charges Dismissed	
94	**Joaquin Jose Martinez**	FL	L	1997	2001	4	Acquitted	
95	**Jeremy Sheets**	NE	W	1997	2001	4	Charges Dismissed	
96	**Charles Fain**	ID	W	1983	2001	18	Charges Dismissed	Yes
97	**Juan Roberto Melendez**	FL	L	1984	2002	18	Charges Dismissed	
98	**Ray Krone**	AZ	W	1992	2002	10	Charges Dismissed	Yes
99	**Thomas Kimbell, Jr.**	PA	W	1998	2002	4	Acquitted	
100	**Larry Osborne**	KY	W	1999	2002	3	Charges Dismissed	
101	**Aaron Patterson**	IL	B	1986	2003	17	Pardoned	
102	**Madison Hobley**	IL	B	1987	2003	16	Pardoned	
103	**Leroy Orange**	IL	B	1984	2003	19	Pardoned	
104	**Stanley Howard**	IL	B	1987	2003	16	Pardoned	
105	**Rudolph Holton**	FL	B	1986	2003	16	Charges Dismissed	
106	**Lemuel Prion**	AZ	W	1999	2003	4	Charges Dismissed	
107	**Wesley Quick**	AL	W	1997	2003	6	Acquitted	
108	**John Thompson**	LA	B	1985	2003	18	Acquitted	
109	**Timothy Howard**	OH	B	1976	2003	26	Charges Dismissed	
110	**Gary Lamar James**	OH	B	1976	2003	26	Charges Dismissed	
111	**Joseph Amrine**	MO	B	1986	2003	17	Charges Dismissed	
112	**Nicholas Yarris**	PA	W	1982	2003	21	Charges Dismissed	Yes
113	**Alan Gell**	NC	W	1998	2004	6	Acquitted	
114	**Gordon Steidl**	IL	W	1987	2004	17	Charges Dismissed	
115	**Laurence Adams**	MA	B	1974	2004	30	Charges Dismissed	
116	**Dan L. Bright**	LA	B	1996	2004	8	Charges Dismissed	
117	**Ryan Matthews**	LA	B	1999	2004	5	Charges Dismissed	Yes
118	**Ernest Ray Willis**	TX	W	1987	2004	17	Charges Dismissed	
119	**Derrick Jamison**	OH	B	1985	2005	20	Charges Dismissed	
120	**Harold Wilson**	PA	B	1989	2005	16	Acquitted	
121	**John Ballard**	FL	W	2003	2006	3	Acquitted	
122	**Curtis McCarty**	OK	W	1986	2007	21	Charges Dismissed	Yes
123	**Michael McCormick**	TN	W	1987	2007	20	Acquitted	
124	**Jonathon Hoffman**	NC	B	1995	2007	12	Charges Dismissed	
125	**Kennedy Brewer**	MS	B	1995	2008	13	Charges Dismissed	Yes
126	**Glen Chapman**	NC	B	1994	2008	14	Charges Dismissed	
127	**Levon Jones**	NC	B	1993	2008	15	Charges Dismissed	
128	**Michael Blair**	TX	O	1994	2008	14	Charges Dismissed	Yes
129	**Nathson Fields**	IL	B	1986	2009	23	Acquitted	
130	**Paul House**	TN	W	1986	2009	23	Charges Dismissed	
131	**Daniel Wade Moore**	AL	W	2002	2009	7	Acquitted	
132	**Ronald Kitchen**	IL	B	1988	2009	21	Charges Dismissed	
133	**Herman Lindsey**	FL	B	2006	2009	3	Acquitted	
134	**Michael Toney**	TX	W	1999	2009	10	Charges Dismissed	
135	**Yancy Douglas**	OK	B	1995	2009	14	Charges Dismissed	
136	**Paris Powell**	OK	B	1997	2009	12	Charges Dismissed	
137	**Robert Springsteen**	TX	W	2001	2009	8	Charges Dismissed	
138	**Anthony Graves**	TX	B	1994	2010	16	Charges Dismissed	
139	**Gussie Vann**	TN	W	1994	2011	17	Charges Dismissed	

140	**Joe D'Ambrosio**	OH	W	1989	2012	23	Charges Dismissed	
141	**Damon Thibodeaux**	LA	W	1997	2012	15	Charges Dismissed	Yes
142	**Seth Penalver**	FL	W	1999	2012	13	Acquitted	
143	**Reginald Griffin**	MO	B	1983	2013	30	Charges Dismissed	
144	**Glenn Ford**	LA	B	1984	2014	30	Charges Dismissed	
145	**Carl Dausch**	FL	W	2011	2014	3	Acquitted	
146	**Henry McCollum**	NC	B	1984	2014	30	Charges Dismissed	Yes
147	**Leon Brown**	NC	B	1984	2014	30	Charges Dismissed	Yes
148	**Ricky Jackson**	OH	B	1975	2014	39	Charges Dismissed	
149	**Wiley Bridgeman**	OH	B	1975	2014	39	Charges Dismissed	
150	**Kwame Ajamu**	OH	B	1975	2014	39	Charges Dismissed	

Note: James Bo Cochran (AL) and Timothy Hennis (NC) were originally on this list but are excluded following further research and developments.

Average number of years between being sentenced to death and exoneration: 11.2 years

Number of cases in which DNA played a substantial factor in establishing innocence: 20

*The list is ordered by the year of the inmate's release. Occaionally new cases of earlier releases are discovered. Thus, the number assigned to a person above may differ from his or her number in various published DPIC reports.

**DPIC refers to the Innocence Project's (Cardozo Law School, NY) criteria for whether a post-conviction exoneration was the result of DNA testing.

The Innocence Project requires that both:

a) DNA testing played a role in the defendant's reversal, **AND**
b) the results of the testing were central to the inmate's defense and to the identity of the perpetrator.

Sources: DPIC uses a number of resources when adding cases to the above list, including court opinions, media coverage, and conversations with those directly involved in the cases. The earlier cases in the list are based heavily on the research of Hugo Adam Bedau and Michael L. Radelet. (See, e.g., Hugo Bedau and Michael Radelet, "Miscarriages of justice in potentially capital cases," 40 *Stanford Law Review* 21 (1987); M.Radelet, H. Bedau, and C. Putnam, *In Spite of Innocence*, Northeastern University Press (1992); see also M. Radelet et al., "Prisoners released from death rows since 1970 because of doubts about their guilt," 13 *Thomas M. Cooley Law Review* 907 (1996)).

Use of the term "exonerated": Columnist Dan Rodricks of the Baltimore Sun asked DPIC about its list of exonerated individuals. DPIC's Executive Director Richard Dieter responded, and that response was reprinted in Mr. Rodricks' column, July 5, 2009:

With respect to your question about our list of exonerated individuals, we use very strict and objective criteria for inclusion of cases on this list. Basically, the list is determined by the decisions of courts and prosecutor offices, not by our subjective judgment. As we state in a number of places on our Web site and in our reports, the criteria for inclusion on the list is:

Defendants must have been convicted, sentenced to death and subsequently either- a) their conviction was overturned AND

i) they were acquitted at re-trial or

ii) all charges were dropped

b) they were given an absolute pardon by the governor based on new evidence of innocence.

The list includes cases where the release occurred in 1973 or later, which was the time that states resumed sentencing people to death after the U.S. Supreme Court had struck down the death penalty. The list originated from a request from Congress asking us to identify the risks that innocent people might be executed. The original list that we prepared was published as a Staff Report of the House Subcommittee on Civil and Constitutional Rights. The list has been favorably referred to by Justices of the U.S. Supreme Court and other federal courts, as well as by many public officials around the country.

We believe the term "exonerated" is entirely appropriate to refer to the individuals on this list, which now numbers 150 individuals. Exonerate means to clear, as of an accusation, and seems to come from the Latin "ex" and "onus" meaning to unburden. That is precisely what has occurred in these cases. The defendants were convicted, given a burden of guilt, and then that burden was lifted when they were acquitted at a re-trial or the prosecution dropped all charges after the conviction was reversed. These are not individuals who received a lesser sentence or who remained guilty of a lesser charge related to the same set of circumstances. All guilt was lifted by the same system that had imposed it in the first place. Our justice system is the only objective source for making such a determination.

This notion of innocence, that an individual is innocent unless proven guilty, is a bedrock principle of our constitution and our societal protection against abusive state power. One does not lose the status of innocence merely because a prosecutor or other individuals retain a suspicion of guilt. Of course, it is true that this list makes no god-like determination of knowing exactly what happened in the original crime. Such perfect knowledge of past events is impossible, either to absolutely prove that a person did or did not do an act. We do not try to make a subjective judgment of what we think happened in the crime. We are merely reporting that in a great many cases the justice system convicted an individual and sentenced them to death, but when the process that

arrived at that conclusion was reviewed, the conviction and sentence were thrown out. The individual, who often came close to execution, could not even be convicted of a traffic violation. Surely, that should be a cause of concern in applying the death penalty.

Return to Innocence

IN THE SUPREME COURT
STATE OF FLORIDA

Case: **SC14-125**
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MICHAEL SHANE BARGO, JR.,
Appellant,

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On appeal from the Circuit Court of the Fifth Judicial Circuit,
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APPENDIX B

Ex parte Panetti, No.WR-37, 145-04 (Tex. Crim. App. Nov. 26, 2014), Price, J., dissenting

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-37,145-04

EX PARTE SCOTT LOUIS PANETTI, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION TO STAY THE EXECUTION IN CAUSE NO. 3310-D IN THE 216TH JUDICIAL DISTRICT COURT GILLESPIE COUNTY

PRICE, J., filed a dissenting statement.

DISSENTING STATEMENT

Having spent the last forty years as a judge for the State of Texas, of which the last eighteen years have been as a judge on this Court, I have given a substantial amount of consideration to the propriety of the death penalty as a form of punishment for those who commit capital murder, and I now believe that it should be abolished. I, therefore, respectfully dissent from the Court's order denying the motion for stay of execution and dismissing the subsequent application for a writ of habeas corpus filed by Scott Louis Panetti, applicant. I would grant applicant's motion for a stay of execution and would hold that his severe mental illness renders him categorically ineligible for the death penalty under the Eighth and Fourteenth Amendments to the United States Constitution.

My conclusion is not reached hastily. Rather, it is the result of my deliberative thought process from having presided over three death-penalty trials as a trial court judge and having decided countless issues related to capital murder and the death penalty as a judge on this Court. I have many reasons for reaching this conclusion, only a few of which I will discuss at this juncture, and will begin with the problems illustrated by the instant case.

The Supreme Court has determined that the execution of a mentally retarded person or of an insane person would violate the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986). The Court's general rationale is that evolving standards of decency weigh against the imposition of the death penalty on these offenders because the execution of such individuals would not measurably advance the retribution and deterrence purposes served by the death penalty. *Atkins*, 536 U.S. at 306, 318-20. It is inconceivable to me how the execution of a severely mentally ill person such as applicant would measurably advance the retribution and deterrence purposes purportedly served by the death penalty. And, yet, unless and until a federal court or the Supreme Court grants his application, applicant, who few dispute is severely mentally ill, will be executed, whereas a similarly situated mentally challenged person, such as one who is mentally retarded or one who is insane, will have his sentence commuted to life in prison. This artificial line divides life and death. I can imagine no rational reason for carving a line between the prohibition on the execution of a mentally retarded person or an insane person while permitting the execution of a severely mentally ill person. At a minimum, therefore,

I would hold that the execution of a severely mentally ill person violates the Eighth Amendment of the federal Constitution.

But carving out another group that is ineligible for the death penalty is a bandaid solution for the real problem. Evolving societal values indicate that the death penalty should be abolished in its entirety. Since Texas enacted life without parole as a punishment for capital murder, Texas district attorneys have significantly decreased their requests for the death penalty, and juries today often prefer that punishment to the death penalty. When I first joined it, this Court received a great number of death penalty appeals and writs, as compared to the number of these cases that reach this Court now. I believe that this decline is because District Attorneys and juries now (1) have the life without parole option and (2) are less convinced of the absolute accuracy of the criminal justice system.

Before the life without parole option, juries had no choice but to sentence a defendant to death if they wanted to ensure that he would never re-enter society. After the enactment of the life without parole option, juries are now assured that the public at large is forever protected from a capital murder defendant, who will never re-enter our society. Because the public at large is protected from a capital murder defendant regardless of whether he is executed or incarcerated for his lifetime, the life without parole option often satisfies societal desire for protection from a capital murderer.

Perhaps more importantly, society is now less convinced of the absolute accuracy of the criminal justice system. A 2012 study by the University of Michigan and Northwestern

University law schools ranks Texas number three nationally in wrongful convictions over the last twenty-four years, behind Illinois and New York. Furthermore, according to the National Registry of Exonerations, "2013 was a record-breaking year for exonerations in the United States," and Texas had the highest number nationally. In my time on this Court, I have voted to grant numerous applications for writs of habeas corpus that have resulted in the release of dozens of people who were wrongfully convicted, and I conclude that it is wishful thinking to believe that this State will never execute an innocent person for capital murder. These individuals who were exonerated proved that their convictions were erroneous based on DNA evidence that established their innocence, on the use of false evidence, or on other errors that occurred at their trials. I am convinced that, because the criminal justice system is run by humans, it is naturally subject to human error. There is no rational basis to believe that this same type of human error will not infect capital murder trials. This is true now more than ever before in light of procedural rules that have hastened the resolution of applications for writs of habeas corpus and limited subsequent applications for habeas relief. *See* TEX. CODE CRIM. PROC. art. 11.071. This Court has seen too many initial applications for writs of habeas corpus that were filed by ineffective attorneys, and yet applicants have not been permitted to file subsequent applications to challenge the ineffectiveness of those attorneys. *See Ex parte Graves*, 70 S.W.3d 103, 117 (2002). The lack of a guarantee of effective counsel in an initial application for habeas relief, combined with this Court's refusal to consider a subsequent writ that alleges the ineffectiveness of initial counsel, increases the

risk that an innocent person may be executed for capital murder based on the procedural default of a possibly meritorious issue. I conclude that the increased danger that a wrongfully convicted person will be executed for a capital murder that he did not commit is an irrational risk that should not be tolerated by our criminal justice system.

Some might argue that a victim's family deserves the finality that comes with the execution of an offender. This is a misguided sentiment as the instant case demonstrates. Applicant has been on death row for about twenty years. The victims' family has not gotten finality after twenty years due to the numerous appeals and writs filed by applicant in which he has contended that his mental status makes him ineligible for execution. And, perhaps, one would say that the answer is speeding up executions. But creating a more restrictive temporal limitation would only increase the risk of executing a wrongfully convicted person. In my experience, a victim's family is more likely to quickly experience finality through the criminal justice system when an offender is sentenced to life without parole than when he is sentenced to death.

I am among a very few number of people who have had a front row seat to this process for the past four decades. I now repeat what I stated originally in my dissenting opinion in *Ex parte Graves*: "We are the guardians of the process." Based on my specialized knowledge of this process, I now conclude that the death penalty as a form of punishment should be abolished because the execution of individuals does not appear to measurably advance the retribution and deterrence purposes served by the death penalty; the life without

parole option adequately protects society at large in the same way as the death penalty punishment option; and the risk of executing an innocent person for a capital murder is unreasonably high, particularly in light of procedural-default laws and the prevalence of ineffective trial and initial habeas counsel.

I would grant a stay of execution and file and set the application in order to grant applicant relief. I, therefore, respectfully dissent.

Filed: November 26, 2014

Publish