IN THE SUPREME COURT OF FLORIDA

SEAN ALONZO BUSH,

Appellant,

vs. CASE NO. SC18-227

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR SAINT JOHNS COUNTY

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

THE CHARGES

Appellant was indicted in September, 2011 for the first-degree murder of his estranged wife Nicole Bush, on both felony-murder and premeditation theories. (R 70) The underlying felony, charged separately, was burglary of a dwelling while armed and with an assault or battery committed therein. (R 70) Both offenses were charged as having taken place on or about May 31, 2011. (R 70)

DISCOVERY OF THE BODY

Nicole Bush's friend Tracy Walker testified in the guilt phase of the trial that she received a call from Nicole about 6:15 on the morning of May 31. (T 76-79) Tracy heard Nicole gasping and saying "help" she called their mutual friend Lenora Jerry, who lived closer to Nicole, and asked Lenora to check on her. (T 77-80) Lenora phoned Nicole, who whispered for help and said she could not get to the door. (T 96-97) Lenora and her husband drove to Nicole's home, finding the garage door open and the kitchen door ajar. (T 97-100).

First responders Deputy Graham Harris and Michelle Grant were dispatched to the scene; Harris arrived at 6:52. (T 134, 112-13) They found Nicole partially nude and face down in blood pooled on her upstairs bedroom floor. (T 116-19, 135-39) Blood covered her face and eyes. (T 138) Ms. Grant described Nicole as

wearing only a bra and underwear up around her waist, torn at the crotch. (T 135-36) When Harris asked Nicole who did this, she referred to her assailant as "him" and said that she did not know who he was. (T 121, 138) Nicole was airlifted and died in the hospital at 8:51 am. (T 487-88) Testing of a rape kit proved negative for any DNA except Nicole's. (T 819-21, 968-69)

Crime scene technician Stefanie Whittington saw possible tool marks on the kitchen door and frame, and damaged wood hanging from that door. (T 191, 209-12) She also saw a trash bin at the curb in front of Nicole's home. (T 208) Downstairs, she saw a couch with a sheet and a pillow on it across from a TV, near a portable phone base unit. (T 212-214, 236) Upstairs, blood and a jewelry box were on the floor just inside the bedroom doorway. (T 160-61) Whittington saw blood spatter and defects in a bedroom wall, with red matter in some of the defects. (T 180-82) She collected a blue towel lying on the threshold to the bathroom. (T 224)

THE DYING DECLARATIONS

Before trial the defense moved to determine admissibility of two statements Nicole made to first responders Harris and Grant. (R 507-11) The motion recited that before Nicole denied knowing her assailant, she said, in response to a question about her children, that they were with their father. (R 508) The State agreed with

the defense that "I don't know who shot me" would be admissible as a dying declaration, but opposed admission of "the boys are with their father." (R 5013-17) Its theory was that the statement about the boys "does not concern the physical cause or the instrumentalities of her death." (R 5015) The defense took the position that the statement about the boys should come into evidence as well, to establish that Nicole was "conscious and cognizant of her situation" when she said she did not know her assailant. (R 510) The motion was denied. (R 986-87)

THE MEDICAL EXAMINER'S PROOF

Pathologist Dr. Jesse Giles testified that Nicole had five gunshot wounds to her head and another to her left elbow, plus sharp and blunt force injuries. (T 452-53) The elbow wound may have been defensive. (T 464) One of the shots left stippling. (T 460-61) Nicole swallowed one bullet, which had entered through her eyebrow and right eye ending in her mouth; it would have blinded her right eye but did not penetrate her skull. (T 459-60). While she might have been unconscious for a short time, she likely re-awakened during what Dr. Giles believed must have been a time-consuming attack. (T 466, 476-77) There were multiple instances of blunt force trauma about Nicole's head and body, with at least three blows to the top of her head; some split her scalp and bruised her brain. (T 466-67) Dr. Giles believed that a baseball bat could cause such wounds. (T 467) Nicole suffered at

least three more blows to her left shoulder area and arm, and he observed marks to her right knee consistent with a rod-like impact. (T 469-72) Four sharp force injuries occurred, to her kneecap, breast, and arms. (T 473-75) Dr. Giles could not determine which injuries occurred when, except that he thought the sharp force injuries occurred late in the process, because little blood flowed from them. (T 476-77)

LAW ENFORCEMENT'S TIMELINE

Sharon Bennett, who dated Appellant after he and Nicole separated, gave him a New Year's Day 2011 ultimatum to get a divorce. (T 1145-46)

On May 31, 2011, Appellant's roommate Kathy Phillips left for work between 6:15 and 6:30 a.m.; she noticed then that his van was not at their house. (T 691-95, 699) Brenda Daniels, Appellant's friend "with benefits", awakened between 6:00 and 6:30 a.m. She never saw Appellant at or near her home that morning. (T 938, 941-43). Sometimes she garage-parked her car. (T 943) Tracy Walker went by Appellant's home at 6:50 or 7:00 in case he was needed to let them into Nicole's house; his van was there, but she ended up not knocking on his door. (T 81-83) Appellant dropped the boys off at school near Nicole's home in St. Johns County at 7:40. (T 560-64)

State Attorney's Investigator Thomas Marmo drove the 26-mile distance

from Appellant's Jacksonville home to Nicole's home and back, on a Thursday at 5:00 a.m. with light traffic. He obeyed the speed limit, and it took him 30 minutes to traverse the route each way. (T 945-47) He admitted that traffic varies day to day. (T 951-52) From aerial photographs of Nicole's gated and almost completely walled community, CST Shawn Vollmer described how roadless wetlands and thick woods limited egress by foot from the development, except for an area by a building outside the back gate. (T 636-38) Detective George Harrison supervised collection of recordings from cameras at both gates; none of the recordings showed Appellant's van. (T 608-12)

PHYSICAL EVIDENCE AT THE SCENE

A firearms examiner testified that three holes were shot into a pillow found in Nicole's bedroom, all from different angles. (T 1348-50) His view was that a pillow can act as a moderately effective silencer. (T 1347, 1351, 1358) He examined two damaged fragments found at the scene, and identified them as coming from .22 caliber bullets. (T 1340-46)

Detective George Harrison found jewelry and a laptop underneath a dresser drawer in the master bedroom. (T 589-92) None of Appellant's fingerprints were on that laptop, or on the jewelry box found at the scene, and only Nicole's DNA was on the jewel box. (T 664-65, 974-76) Detective Harrison also found a baseball

bat in a crevice within the couch downstairs; he encountered resistance when removing the bat. (T 593-94, 603-06, 613-15) Afterward, CST Shawn Vollmar swabbed inside the couch for DNA, but the crevice was so tight he did not want to contaminate the scene by reaching into the space. (T 626-628) Nicole's cell phone showed that she last heard from Appellant at 7:30 p.m. on May 30, and that at 10:37 p.m. she called "Enrique" and talked for 54 minutes. (T 532-33)

THE DNA EVIDENCE

State witness Emily Martin analyzed DNA from the scene. She recited from her report that DNA swabbed from the blue towel and the laptop computer found at the scene each showed a minor contributor in addition to Nicole, and that Appellant was not either of those minor contributors. (T 976-78, 982-93) The prosecutor then asked:

> Q ... [S]ince 2011 have FDLE's policies changed in terms of how it reports out results such as this?
> A Yes. Well, our - - as I said our testing kit has changed where we're looking at more areas on the DNA molecule now and our reporting has changed quite a bit, yes.
> Q Okay. And if this result had been reported out today, what would you have put in the report.
> A If this had been reported out today I would have still reported out the major contributor as matching Nicole Bush, but the minor results would have been reported out as limited DNA results, not interpretable, meaning I wouldn't have used them for inclusion or exclusion

(T 978-79) Defense counsel immediately objected to a discovery violation; he

specified that Ms. Martin's last answer was never disclosed in any report or in her deposition. Counsel for the State responded that no new testing had occurred, that defense counsel could have asked more searching questions during the deposition, and that Ms. Martin's testimony had not changed significantly, in that the defendant was still excluded from the result. (T 979-81) The defense noted that the deposition had occurred years earlier and that the State appeared to have violated its duty to disclose new information. (T 978-79) The court found no discovery violation, and ruled that had a violation occurred, it was inadvertent and trivial and therefore not "unfairly prejudicial" to the defense. (T 981)

Swabbing the bat handle yielded a mixed DNA profile, with Nicole being the major contributor; according to Ms. Martin, the evidence regarding the minor contributor was insufficient to identify any individual. (T 985-87) A second analyst from a private lab used a more advanced test on the swabbings from the bat; her results showed that two males' DNA is present. Appellant was a possible source of that DNA, but given the limitations of the test she used his profile could not be distinguished from that of his eldest son, who lived with Nicole. (T 1005-29) That analyst explained that skin fragments are easily transferred by skin-to-skin or skin-to-glove contact, and that DNA accumulates on a couch and gravitates its way into crevices. (T 1036-44) She also explained that DNA lasts longer in a temperature-

controlled home without exposure to high humidity, mold, or direct sunlight. (T 1037-38)

THE SHOE IMPRESSIONS

Law enforcement collected five pairs of Timberland shoes from Appellant's home. (T 710-13, 729-30) One pair tested presumptively positive for blood, but it could not be determined whether the blood came from a human source. (T 717-19, 983-84, 991-93, 998-1000) An FDLE footwear impression analyst, Lynn Ernst, compared the shoes with bloody footprints from Nicole's house. (T 733-53) She testified that Appellant's shoes were the same size as the shoes that left the prints, and that their general design also was similar. (T 736-38, 750-52) She noted that residue had been left on all of the footprints by a paper towel or fabric of some kind, and that accordingly she could not compare the shoes' individual, or "randomly acquired," characteristics with the footprints. (T 763-70) The most Ms. Ernst could say was that it was "possible" that any of the five shoes left the impressions at the scene. (T 767-770) On cross-examination, she admitted that she knows that for over 20 years Timberland has used the outsole design left on the wood flooring in over 1000 different styles of Timberland footwear. (T 759) She further admitted that she often sees Timberland shoes in her lab, and that popular shoe brands are illegitimately copied by other manufacturers (T 761)

THE BURGLAR ALARM

Nicole had a burglar alarm which was adjusted at 10:01 the night before her death in "stay mode," which activates exterior door and window sensors and disables interior motion sensors. (T 1076-79) At 5:47 the next morning someone entered a master code to disarm the system, then six minutes later changed to "away mode," which activates the interior sensors. (T 1081-82) Another six minutes later, the sensor detected interior motion; at that time an alarm should have sounded and the system should have contacted a central station. (T 1084). It was discovered after the murder that the power cord to the system had been cut at a location near the kitchen table. (T 1117-18) A digital log showed that "stay mode" was habitually disabled at around 6:00 a.m. on weekdays. (T 1105-08)

APPELLANT'S VERSION OF EVENTS

At trial the State introduced recordings of several interviews between Appellant and law enforcement. (T 273-340, 352-424, 848-59, 885-930, 1196-1228, 1248-1314) In an interview on May 31, officers photographed his entire body, finding no injuries. (T 404-05) Appellant noted his DNA should be everywhere in Nicole's home, because he customarily cleaned the place. (T 358-61)

He explained they had separated in 2008 or 2009, and that they had remained

friends without intimacy. (T 289-90). Nicole bought her home within the year before her death; he never lived there, but he watched the boys there whenever she worked late, entering with a key she hid in her garage (T 290-93). They planned to divorce, and he had signed away rights to her new home. (T 323-26) The Friday before she died, Nicole had a stress "meltdown" over the boys, so he took them for the weekend. (T 293-95) Their plan was for him to take the boys to school Tuesday morning after the long holiday weekend. (T 301)

Appellant originally reported that he left the boys alone at home briefly to check gas prices before driving to school (T 321-22) Confronted by Detective Eugene Tice, who noted that Appellant's roommate Kathy Phillips had reported his absence from their shared home on the morning of May 31, Appellant explained he had actually engaged in a "stalk thing" by checking on the whereabouts of Brenda Daniels, a girlfriend who lived in Jacksonville about 10 minutes from his home. (T 923-27)

Tampa Police officer Ramone Gregory, who is married to Nicole's sister, also recorded phone calls with Appellant. (T 1237-38) On one of their calls he asked why Appellant was telling police he didn't know Nicole kept a bat by her bed; Appellant responded that his primary cleaning duties were in the bathrooms, and that the boys may have had a baseball bat that was kept in her bedroom. (T 1302-

11) Mr. Gregory admitted at trial that throughout their conversations Appellant maintained he was innocent of the murder. (T 1319-20)

THE OFFICERS SET A TRAP

After their initial work at the scene was over, detectives installed light-sensitive video-recording devices in Nicole's home and gave Appellant a key. (T 787-88, 838-43) The cameras were fixed on the dresser in Nicole's bedroom, and on the couch downstairs. (T 788, 795-96) Detective Vincent Russo explained at trial that changes in light levels activated the recorder. (T 788-91) Russo testified that at 11:47 on the resulting recording, he sees either passing headlights or use of a flashlight in Nicole's bedroom. (T 802-03) None of the recordings showed Appellant. (T 800) Sharon Bennett, Appellant's girlfriend, testified that he told her he went to the house after receiving the key, and that while he was there he looked for and found the handset to the downstairs portable phone. (T 1156-75) Detective Tice confronted Appellant about the results of the hidden camera; Appellant denied repeatedly that he had gone near the upstairs dresser, and explained that he had only approached the couch to look under it for the phone handset. (T 1200-02, 1210-19, 1225)

Detective Russo created a digital exhibit using "before" and "after" images from the recording of the couch, taken early and late on the evening Appellant visited the house. (T 805-07) He and a video engineer concluded that the couch cushion had been moved upward 2.31 inches between the time the two images

were created. (T 822-33) The exhibit overlaid the two images "into a movie" that showed the cushion moving upward. (T 805-07)

THE JURY HEARS THE OFFICERS' OPINION AS TO GUILT

Before the interviews between Appellant and law enforcement were played at trial, the court read standard instruction no. 2.8, as follows:

> [t]he recorded interviews contain opinions and statements by law enforcement officers to the defendant. These opinions and statements are pertinent only to explain the reactions and responses they elicit. You are not to consider these opinions and statements by the police officer as true, but only to establish the context of the defendant's reactions and responses.

(T 273, 350, 847, 882, 1196, 1247-48) Defense counsel sought, in writing, an expanded limiting instruction which would have included the following:

> [w]hile statements, questions, comments, observations, or opinions of one or more law enforcement officers may have been recorded, [they] were made...to obtain information. Law enforcement officers are permitted under the law to engage in a false or misleading subterfuge during an interview...if [it] is performed with the intent...to elicit facts.... [Y]ou are not to consider as substantive evidence of guilt in this case any recorded...opinions of law enforcement officers. The statements...have not been introduced into evidence to prove the matters asserted.

(R 3456; T 263-64, 350, 847, 1194) None of the recordings include a confession by Appellant, but they do include the following questions and comments by officers:

> We need to talk to you. I think you understand...[y]ou probably seen enough on TV, and enough in the news, to know that when a wife...is killed we always want to talk to and remove the boyfriend, or the husband, as fast as we can from any suspicion.
> (T 274)

> Like I told you, you've seen enough on the TV and in the news, you know if a spouse gets killed and it's a suspicious nature you always start with the surviving spouse. It's just the way it is.

(T 379-80)

> I'm going to read you your rights...because there's some possible discrepancies.

(T 887)

> OFFICER: Your phone has an auto-locator on it which automatically stores where the phone is or isn't...that portion was deactivated on the 28th and then turned back on, on June 1st. So why deactivate it unless you're trying to hide your movements?
> DEFENDANT: I did not deactivate it.
> OFFICER: ...it was deactivated on May 28th and reactivated on June 1st, and you're the only one that's been in possession of that phone...that's a major issue for me.

(T 913-14)

> OFFICER: The same thing with the computer. I told you on the 31st I needed it and on June 1st everything is reinstalled. Why would you work on the computer...I can't fathom why would you even work with a computer when you knew that was a way to clear you from the table as a potential suspect...and you went and altered that. Now what do you think that makes it look like?
> DEFENDANT: It looks bad.
> OFFICER: What am I supposed to think? I'm a cop for 18 plus years...what is a law enforcement officer of one day going to think? Doesn't take 18 and a half years of experience to figure out this isn't right.
> DEFENDANT: I didn't do anything to the phone. I know that doesn't hold water but I didn't do anything to the phone...just like the computer...I was only trying to fix it and I was trying to do it on my own. I messed it up.

(T 916-21)

> OFFICER: We put cameras in [Nicole's] house because we knew whoever had committed this murder left items behind in specific locations...well, you went in there and you went to those locations...you went to the couch, where one of the murder weapons was, and you went upstairs under the dresser, where the laptop and the jewelry was hidden...I'm kind of hoping you can explain that to me.
> DEFENDANT: ...The only thing I took was dog food.
> OFFICER: ...Why go to the couch? Why did you reach down in the couch?
> DEFENDANT: I didn't reach down in the couch...I didn't go under the dresser.

(T 1200-02)

Before trial, the defense had moved to redact from the recordings any expression of personal opinion by police. (R 885-89) The judge announced his view that the caselaw in this area is chiefly concerned with hearsay accusations against suspects being recounted in the jury's presence. (R 6045) Defense counsel objected, unsuccessfully, to the recorded statement that murder investigations always start with the spouse. (R 6059) The defense also objected to the jury hearing the officers tell Appellant that he was caught on camera looking for something inside the couch; the State responded that officers may bluff suspects. The defense counter-argued that the State's theory of admissibility depends on the defendant making a significant admission in response to the bluffing. (R 6092-94) The judge ruled "I'll allow that...I think law enforcement's allowed to bluff." (R 6096) During trial, Detective Tice admitted he had lied during the interview in order to obtain a statement consistent with his own views on what had

occurred.(T1230-31)

APPELLANT'S COMPUTER

Detective Tice collected Appellant's desktop tower shortly after the murder. Appellant reported then that his laptop was out for repair, and he delivered the laptop to law enforcement later that day. (T 428-30) Detective Kevin Kier analyzed the laptop and found random remnants of a non-functioning operating system on a Toshiba hard drive; it appeared to him that someone had deleted the operating system and attempted to reinstall it at 3:02 pm on June 1, 2011. (T 537-39) Kier admitted that deleting and reinstalling the operating system is a common method of defeating a virus. (T 551-52) Kier reinstalled the hard drive in the laptop and gave it back to Appellant. (T 546) Later he inspected what appeared to be the same laptop, which by then contained a Seagate hard drive with a working operating system. (T 548-50) Keir copied the Seagate hard drive and provided it to an analyst, who testified that replacing a hard drive is a very simple operation. (T 1368-1407) The analyst reported that the user of the Seagate hard drive had searched the terms "homemade silencer/suppressor" and "build a .22 caliber suppressor" in January, 2011. (T 1374-87) The user who searched those terms deleted the data. (T 1385-87) On July 20, 2011, the Seagate hard drive was used to research the Minnesota Life insurance company. (T 1455-57).

FINANCIAL MATTERS

Nicole had a $815,240 Minnesota Life group policy through her employer, with Appellant named as the primary beneficiary (T 1122-25, 1139). On July 20, 2011 Appellant called Minnesota Life; the jury heard the call, which indicates Appellant was unsure if he were a beneficiary. (T 1129-31, 1136) On July 26, he applied for the benefit. (T 1125-27) On August 24, 2011, Appellant told Detective Tice he had learned of Nicole's life insurance policy after her death. (T 1202)

Sharon Bennett tesitified that she had heard Appellant receive a call from one of Nicole's co-workers about his need to check on a workplace insurance policy (T 1151-52)

Twice in 2011, per his roommate Kathy Phillips, Appellant paid his rent late; in April, his church paid the rent. (T 688-89) In an interview with Detective Tice, Appellant said his June rent had also been late because he was waiting for payments to begin from unemployment insurance. (T 903-06) The jury heard that as of the end of May, 2011, Appellant's bank accounts were overdrawn or nearly empty. (T 1326-29)

MOTION FOR JUDGMENT OF ACQUITTAL

After the State rested, Appellant sought judgment of acquittal, arguing that the State's case as to identity of the perpetrator rested on an on an impermissible

stacking of inferences derived from circumstantial evidence, and arguing that Appellant had provided a reasonable hypothesis of innocence (T 1462-64). The State argued that the DNA evidence from the baseball bat constitutes direct evidence when coupled with the fact that Appellant denied knowledge of the bat located in Nicole's room. (T 1465-68) The trial court ruled most of the evidence was circumstantial in nature, except for the DNA result from the bat and Appellant's statement that he was away from his home at the time of the murder. (T 1468-69).

THE MISSING UNDERGARMENT AND ADVERSE INFERENCES

As noted, first responders testified that when they arrived at the scene they saw Nicole wearing panties which were torn and hanging by the waistband. (T 126, 135-36) The underwear was not referred to again in the jury's presence. The defense, in writing, sought a jury instruction that would have read as follows:

> Any evidence that was lost or otherwise not preserved by the State or its agents (including all police agencies) may be considered by a juror either as exculpatory or favorable evidence that would show that Sean Bush is not guilty of the crime charged.
> Evidence that Nicole Bush's undergarments were lost or not preserved by the State or its agents (including hospital staff and all police agencies) may be considered by a jury as sufficient and exculpatory evidence that would have shown that Sean Bush is not guilty of the crime charged.

(R 3531, 3537)

During the charge conference, the defense noted that discovery showed the

underclothing was never collected from the hospital and thus could not be tested for the presence of DNA. (T 1537-38) The State argued that no facts *in evidence* support an inference that the underwear was lost, and that the jury would therefore be confused by the proposed instructions. (T 1538-39) The judge stated he was unfamiliar with spoliation instructions being used in criminal cases, and denied the motion. (T 1537-39)

ARGUMENT TO JURY

During its initial closing argument, the State relied on the life insurance proceeds as motive. (T 1614-15) Defense counsel, in response, suggested that the phone call Appellant received which prompted him to inquire about that benefit might have come from law enforcement, specifically noting "it may not [have been] a Good Samaritan [but instead] detectives fabricating evidence." (T 1667-69) The State objected to speculation; at sidebar Defense counsel pointed out that the evidence showed the detectives had engaged in significant deceptive behavior in this case. (T 1669) The trial court sustained the objection and instructed the jury to disregard the defense argument. (T 1669-70) During its final closing, the State returned to the subject, arguing his personal view that Appellant had known about the insurance policy all along. (T 1697-99)

JURY INSTRUCTIONS AND VERDICT

The jury was instructed in accordance with the standard instructions for use in criminal cases, and it returned a verdict of guilty as charged on both counts. (R 3549-65, 3572-74)

ARGUMENT ON AGGRAVATING FACTORS

Before trial, the defense filed motions arguing that each of the five aggravating factors that were ultimately instructed on fails to narrow the class of persons eligible for the death penalty. (R 173, 174 (defendant convicted of a prior violent felony); R 185, 208 (felony-murder was involved); R 398, 399 (murder was especially heinous, atrocious, or cruel); R 216-17, 252-53 (murder was cold and calculating, and exhibited heightened premeditation); R 316, 317 (murder was committed for financial gain)) At a 2015 hearing counsel argued the motions, and the State responded, as to each, that this court had rejected similar arguments. (R 4669-71, 4646-48, 4576-78, 4644-46, 4606-08) The court denied each of the motions in a written order entered without findings or other comment. (R 966-71)

ARGUMENT ON MITIGATION

The defense moved to preclude any instruction or argument which would indicate that the defense carries any burden of proof on mitigation. (R 1515-18) The defense argued that the cases which establish such a burden are poorly

grounded, and that this court and the Supreme Court should reevaluate their views in light of legal developments. (R 5607-09; see R 1516-18) Judge Maltz denied the motion in a written order entered without comment. (R 1577) The State argued, in its penalty-phase closing, that the defense bears the burden of proof on mitigation, and the court so instructed the jury. (R 7579; 7652, 3861)

Appellant further moved for amendments to the interim standard jury instructions regarding their treatment of sympathy and mercy. He sought removal of language admonishing that the deliberations should be free of invidious prejudice *or sympathy.* (R 1508-10) He sought inclusion of language expressly advising that as to the ultimate decision, "[y]ou may always consider mercy in making this determination." (R 1557) The State took the position that defense counsel is always free to argue for mercy provided the argument is tied to a specific mitigating circumstance; it further argued that the interim instructions correctly reflect this court's decisions. (R 5597-5605) The judge concluded that the interim instructions are sufficient, because they set out that mitigation may include "the existence of any...factors in [the defendant's] character, background, or life, or the circumstances of the offense, that would mitigate against imposition of the death penalty." (R 1596, 1598)

The State moved to exclude proposed penalty-phase testimony from

psychologist Janice Wilmoth about the effect of a death sentence on surviving children. (R 3584-86, 5421-31) The defense proffered Dr. Wilmoth's testimony, which was that children affected by death-row litigation suffer guilt, stress, insomnia, and stigma, all of which flare as court dates and execution dates loom. (R 7528-32) The State asserted that such evidence is "wholly irrelevant" and "overly prejudicial," in that it could logically be introduced only as a bid for sympathy, or else

> to guilt the jury into reducing what they might otherwise conclude is an appropriate punishment to spare children emotional pain that was, in fact, instigated and caused by the defendant himself. Such a deflection of blame and responsibility from the defendant to the jury is inappropriate and misplaced.

(R 3586) Defense counsel argued to the court that jurors can find mitigation "anywhere," and that mitigation consists of reasons to vote for a life sentence. (R 5424, 5426) The court excluded the proffered testimony because it did not relate to the defendant's character or record or to the crime. (R 7536)

ARGUMENT ON VICTIM IMPACT EVIDENCE

Before trial, Appellant sought an order invalidating Section 921.141(8) [1] of the Florida Statutes, which allows the State to prove "victim impact." (R 163-72, 320-33) The defense acknowledged that this court has held that section is

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[1] Formally Section 921.141(7)

constitutional, but argued that it has done so in error. (R 165-66) Counsel emphasized that allowing victim impact proof creates a risk of arbitrary imposition of the death penalty, where the jury is not instructed how to apply such evidence. (R 4673-74) The court declined to rule the statute is unconstitutional (R 972); as a fallback, the defense sought an order limiting the number of "victim impact" witnesses to one, noting that such testimony should not become a feature of the penalty phase and should not distract the jury from its primary "weighing" role. (R 320, 325) Judge Maltz ruled three witnesses could testify to the impact caused by the loss of Nicole Bush. (R 5587, 5443-45, 6695-6716, 6773)

The defense requested redactions to the three proffered victim impact statements; the court granted some of the requests and denied others. (R 6695-6716) Over objection, Nicole's sister was permitted to testify that Nicole's youngest child had asked if there is a "back" button on the gun used in the murder that he could push so "she won't be dead anymore." (R 6696-98) A reference to Nicole's "tragic death" was allowed to remain, although "ruthlessly taken" was excluded. (R 6699-6701) The statement "our story's ending was dreadfully rewritten to alter the course of my life" was admitted over a defense objection that it encouraged an emotional response. (R 6701-02)

ARGUMENT ON JURY "RECOMMENDATION"

The defense moved to preclude any instruction or argument which might indicate that the jurors' role is advisory. (R 1512-14) The State noted that this court, in the interim penalty phase instructions, had by and large removed the terms "recommend" and "advisory," but that "recommend" still appears twice. (R 5593-95) The judge granted the motion "to the extent the State cannot talk about a recommendation." (R 5596, 1581-82)

PENALTY PHASE: THE STATE'S CASE

After the guilt phase verdict, the parties, court, and jury reconvened on August 14, 2017. (R 3616) To establish that Appellant was convicted of a prior violent felony, the State called his former wife, Cherise Conte-Bush. She testified that in 2000, while she and Appellant were living in New Jersey, he lured her into the bathtub with the promise of a romantic interlude, whereupon he lobbed an electrically charged metal rod into the tub. (R 6737-43) She escaped the water, whereupon he attempted to choke her. (R 6743-44) She went to the authorities, who charged him in the matter and accepted a plea to aggravated assault. (R 6746, 6752) A certified copy of the New Jersey judgment came into evidence. (R 6752, 686-91) Ms. Conte-Bush testified that she had a $100,000 life insurance policy in effect at the time, that Appellant was the beneficiary, and that he knew about the policy. (R 6747)

To establish heightened premeditation in the Florida case, the State called Sharon Bennett, a girlfriend of the defendant's. She testified that some time before the murder the defendant, while upset about Nicole's divorce plans, asked Sharon if she knew where he could get a gun to kill Nicole. (R 6754-57)

The State called Nicole's mother, sister, and best friend to read their previously-redacted victim impact statements. (R 6774-92) Her mother Cynthia and her sister Kim both told the jury that their hearts had been ripped out, or apart. (R 6778, 6786) Kim recounted the anecdote she had proffered, that the victim's young son thought his mother could be returned to life through use of a "back" button. (R 6782) Nicole's friend Tracy, who referred to herself as Nicole's "prayer partner," described the strong relationship Nicole had with God; Kim also invoked God's grace and might, which were allowing the family to work through their feelings. (R 6788, 6783) Tracy also described mental-health and relationship problems she has experienced since learning of Nicole's death. (R 6790-91)

PENALTY PHASE: THE DEFENSE CASE

Counsel announced to the court that the defense would not prove any of the statutorily-enumerated mitigating factors, but only mitigation covered by the "catchall" provision in Section 921.141(7)(h), Florida Statutes (2017). (R 6923-27) In her opening statement, defense counsel advised the jury that mitigation consists

of any reason to vote for a life sentence, and that mitigation can be found anywhere in the proof. (R 6799, 6802-03)

The defendant's brother Mark described how as children they frequently lived on the streets with uncertain access to food and to adequate clothing. Their mother Dorothy provided little stability, as she displayed chronic symptoms of mental illness. (R 6812-55, 6870-76) Mark testified that Appellant was sexually battered by an older teenaged boy on one occasion. (R 6864) Mark also established that Appellant graduated from a technical high school, obtained at least one technical degree or certification afterward, and for some considerable time had steady work in internet technology. (R 6885) Mark himself lives on the streets, at least at times. (R 6819)

A witness presented graphs about socioeconomic deprivations that would have accompanied life on the Newark streets in the 1970's and 1980's. (R 7260-7306) Dr. Jethro Toomer testified about the psychological costs of adverse childhood experiences. (R 7328-7416) A second psychologist, Dr. Janice Wilmoth, testified to specific stressors experienced by children of mentally ill parents. (R 7456-7507) She specified that such children have significant difficulties with attachment and empathy, and possibly self-control, in adult life. (R 7456-74, 7505-06)

The Appellant's oldest child, his 22-year-old son Amir Bush, testified that his father is generous, affectionate, and supportive. (R 6890-26) Appellant's cousin Noel Chambers testified that Appellant as an adult supported Dorothy, and became a mentor to Noel. (R 6974-84) Noel established that Appellant knew, before Nicole's death, that she carried life insurance, but Noel testified that he himself had only recently learned the dollar amounts involved. (R 7008-10)

Juliet Hart, who taught one of the Bush sons in elementary school, testified that Appellant regularly volunteered in the classroom. (R 7035-57) Jack LaLonde testified that his son Daniel was detained in the county jail with Appellant, and that Appellant became a mentor to Daniel. (R 7072-78) James Aiken, a former prison warden, testified that after interviewing Appellant and reviewing his jail records, he concluded Appellant would continue to be an easily manageable inmate who could be of benefit to younger inmates. (R 7082-7119)

THE PLUCHINO INCIDENT

During the mitigation showing in the penalty phase, juror Paul Pluchino asked the court to speak outside the presence of the jury. (R 6938) In the presence of the court, counsel, and the defendant, Mr. Pluchino announced that the jurors' time is valuable and was being wasted, in that the mitigation had nothing to do with the murder. (R 6942-43) Asked if he had shared his views in the jury room, he

assured the court he had not. (R 6946-47) Mr. Pluchino was dismissed; an oral motion to interview the jurors was denied, and was not followed by a written motion. (R 7020-22, 4429-30)

PENALTY PHASE: JURY INSTRUCTIONS

The defense sought to continue the trial until after the interim penalty-phase instructions this court proposed in 2017 were finalized. (R 2700-01, 3587-92, 5993-97) The judge denied the requested relief, and announced he would read the interim instructions. (R 5997, 5400-04) The defense filed with the court, and asked it to substitute, a competing set of proposed instructions submitted to this court by the Florida Public Defenders' Association. (R 3620-41, 5400-04, 6717-18, 7128-34) Specifically, the defense argued that this court's proposed instructions improperly allocated to the defense the burden of proving mitigation, led the jurors to believe their role is merely advisory, and directed them to resist being swayed by sympathy. (R 3587-88, 3628-30, 3634, 3640)

The judge read this court's interim preliminary instruction, no. 7.10. (R 6721-26; *see* R 3594-96) The 2017 version of 7.10 referred to the jury's upcoming choice between *recommending* life imprisonment or death. (R 6723, 3594). It also touched on whether sufficient aggravating factors would justify *recommending* imposition of the death penalty. (R 6725, 3595) 7.10 also included the following:

> Should you find sufficient aggravating factors do exist...it will then be your duty to determine whether the aggravating factors that you unanimously find to have been proven beyond a reasonable doubt outweigh the mitigating circumstances that you find to have been established.
> Unlike aggravating factors, you do not need to unanimously agree that a mitigating circumstance has been established. A mitigating circumstance...may include any aspect of the defendant's character, background, or life or any circumstance of the offense that reasonably may indicate that the death penalty is not...appropriate.

(R 3595, 6725)

> A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proven by the greater weight of the evidence.... If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive.

(R 3595-96, 6726)

After the evidence was in, the judge read the interim final instructions. (R 7641-78, 3855-65) Those instructions included the following:

> A mitigating circumstance can be anything in the life of the defendant which might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that may **reasonably** indicate that the death penalty is not...appropriate.

(R 7646, 3857-58) (emphases added)

> It is the defendant's burden to prove that mitigating circumstances exist. As explained before these proceedings, the defendant need only establish a mitigating circumstance by the greater weight of the evidence.... If you determine by the greater weight of the evidence that a mitigating

> circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive.... Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case. Further, any juror may consider a mitigating circumstance found by another juror....

(R 7652, 3861)

> The law contemplates that different factors or circumstances may be given different weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance.

(R 7653, 3862)

> Regardless of the result of each juror's individual weighing process - even if you find that the sufficient aggravators outweigh the mitigators - the law neither compels nor requires you to determine that the defendant should be sentenced to death.
>
> Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant....

(R 7653-54, 3862)

> Your decisions should not be influenced by feelings of prejudice, racial or ethnic bias, or **sympathy**.

(R 7658, 3864)(emphasis added)

PENALTY PHASE: CLOSING ARGUMENT AND VERDICT

In penalty-phase closing argument, counsel for the State began with this:

> Usually what happens in cases like this, there's a lot of time that's spent talking about the case, the crime that was committed, which is important.... We spend a lot of time talking about the defendant, which is also important. But a lot of times what gets lost in all of that is the victim...[w]hat gets lost is

> that at the end of the day, this case is about an actual human being who was born into this world, who lived a number of years, who lived a life, who had children, who had family, who had friends. At the end of the day, Nicole Bush is what this case is about.

(R 7552-53) Counsel closed out the argument as follows:

> Remember, at the end of the day, this case is about a person, a real flesh and blood person, who was born into this world, that walked in this life, and who is no longer here. And at the end of the day, your question is "what is the appropriate punishment for the person who snuffed her life out?"

(R 7605)

As noted, the defense presented as mitigation both the defendant's difficult childhood and the fact he overcame it through formal education and hard work. The State's response, in closing, was that consistent employment in adulthood "cuts against the other mitigating circumstances concerning a bad childhood.'" (R 7586) The defense objection was "arguing that mitigators are aggravators." (R 7586) The objection was overruled. (R 7586) The State went on as follows:

> STATE: Sympathy plays no part in this...the families in this particular case are victims too, there is no question about that, but whose fault is that? Whose fault is that? It's the defendant's fault. He's the one who placed everyone in this position.
>
> DEFENSE: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> STATE: And you have to stop and think about how twisted that is. How can an act, a premeditated, intentional, volitional act that was committed by this defendant - he made the choice. He's the one that decided to get a gun, to go

to Nicole Bush's house, to go inside of her house, to shoot her, beat her, and stab her. Those were choices that he made. How can those choices that he made, that negatively impacted all of these other people, how can that be a mitigator for his crime?

DEFENSE: Objection, Your Honor, he's arguing a non-enumerated aggravator.

THE COURT: Overruled.

STATE: ...What invariably happens when you're thinking about the family that's damaged by his bad choices, what begins to happen in the jury room is you begin to think about your decision, about how that's going to impact other people. And again, sympathy - as the judge says - cannot be a part of this process. And what happens is it shifts the responsibility of the consequences of his decision from his shoulders to you.

DEFENSE: Objection, Your Honor. He's arguing a non-enumerated aggravator, and he's trying to argue that the mitigation evidence is an aggravator in this case.

THE COURT: Overruled. I just want to hear the legal objections, not speeches. The objection is overruled.

STATE: It shifts it to you, and that's not fair to you.

(R 7588-90) Later the following took place:

STATE: So let's talk about some of the other mitigating circumstances. He has a special bond with and love for his children. A bond between a child and a father is important. But what it is also important is the bond that a child has with his or her mother. And that bond is especially important at a young age. The defendant ripped that bond apart.

DEFENSE: Objection, arguing a non-enumerated aggravator.

THE COURT (at sidebar): ...I'm going to sustain that objection. Let's stay away from that. (In jury's presence): That objection will be sustained. The

jury is to disregard the last comment.

(R 7591-92)

STATE: You heard evidence for mitigating circumstances that the defendant was attacked as a teenager - you should ask the question "who should know better the pain of being the victim of senseless violence than" -

DEFENSE: Objection, Your Honor. Arguing that a mitigator is an aggravator.

THE COURT: Overruled.

STATE: Who should know better? It stands to reason that the defendant would have learned that the pain that he felt from being the victim of violence would be the same pain that someone would feel as a result of his intentional act of violence.

(R 7594)

STATE: He displayed kindness to others and cared for animals. What about Nicole? How does his care for animals compare to his concern for human life?

(R 7595)

STATE: You heard evidence that he will adjust well in prison...how does that mitigate? Again, you're weighing. You're weighing that against the aggravating circumstance of his brutally killing his wife. How does that mitigate it?

(R 7596-97)

STATE: [T]he right decisions in life are often hard, and they require courage...I'm asking each of you to do the hard thing but the right thing, to have the courage to return a verdict [calling for a death sentence.]

(R 7606) Counsel for the State also noted, in closing, that aggravating factors guide

the jurors in their life-or-death *recommendation.* (R 7556)

Defense counsel, in her closing, told the jurors that mitigation cannot properly be used in aggravation. (R 7620) The jury deliberated for some three hours (R 7680, 7684) and returned verdicts reflecting it had unanimously found, beyond a reasonable doubt, that all five proposed aggravating factors are present; the aggravation is sufficient to warrant a death sentence; and the aggravation outweighs the mitigation. (R 7686-87, 3871-72, 7693-94, 3883) The jury further found unanimously that the defendant should be sentenced to death. (R 7693-94, 3883) As to 34 proposed mitigating circumstances, the jury found 24 to be present, in a verdict form that listed the numerical count of jurors in favor of, or against, each mitigator. (R 7687-93, 3872-82)

SPENCER HEARING

The parties reconvened before Judge Maltz outside the jury's presence in November, 2017. (R 7711-94) At that time the defense introduced more proof of Appellant's non-violent conduct while in county jail awaiting trial, and more proof about the effect death penalty proceedings have on the witnesses. (R 7715-53) The State introduced more victim-impact statements. (R 7759, 4239-46)

The prosecution argued that this court's opinions establish that three of the aggravators found by the jury - prior violent felony, CCP, and EHAC - are among

the weightiest factors recognized by the governing law. (R 7791-92) In its sentencing memorandum, the State again argued that the prior violent felony, EHAC and CCP aggravators are "among the weightiest in Florida's sentencing calculus," and argued that for that reason the trial court should give them great weight. (R 4149, 4155, 4159)

SENTENCING ORDER

Judge Maltz pronounced a sentence of death on the murder charge, and a concurrent life term on the burglary charge, when he filed his sentencing order in December, 2017. (R 7799-7812, 4318-66) The judge agreed with the jury that a prior violent felony aggravator was proved; he assigned that factor great weight, noting that this court treats it as one of the most weighty Florida recognizes. (R 4326) The court also agreed that the felony-murder aggravator was proved, finding that Appellant's intent when he entered the home was to kill; he assigned that factor great weight. (R 4327) The court agreed that financial gain was the ultimate motive, and expressly found that no impermissible "doubling" exists between felony-murder and financial gain in this case, in that the offense to be committed during the burglary was violent rather than monetary. The "financial gain" aggravator received great weight. (R 4329-30) As to EHAC and CCP, the court found both were proved and both deserved great weight; as to EHAC, the court

again noted that this court deems that factor a weighty one. (R 4330, 4332, 4334)

The court in its order went on to agree with the jury that the aggravating factors are sufficient to warrant a death sentence. (R 4335) It found that all 34 proposed mitigating factors had been proved, and assigned each of them either moderate, slight, or less than slight weight. (R 4336-58) In conclusion, the judge - noting that he was not bound by the jury's verdict, and that the death penalty is reserved for the most aggravated and least mitigated cases - found that the mitigation in this case "pale[d] in comparison" to aggravators which are "among the heaviest the law recognizes." (R 4362-64)

SUMMARY OF ARGUMENTS

POINT I: The trial court correctly ruled that most of the proof that tends to show Appellant was the murderer is circumstantial; its error was in ruling that the case against him is not *entirely* circumstantial. Appellant's hypothesis of innocence is reasonable vis-à-vis the evidence, and reversal of his convictions for murder and burglary should follow.

POINT II: Appellant's theory of defense relied on proof that Nicole did not recognize her assailant, that another man's DNA was found on a blue towel on Nicole's bathroom floor, and that a third man's DNA was found on her laptop computer. During trial the State for the first time elicited from its DNA analyst that she would now characterize the results from the towel and the laptop as uninterpretable. That answer, never previously disclosed to defense counsel, undercut a significant facet of Appellant's theory of defense. The trial court found that no discovery violation occurred and that if one did occur, it was inadvertent and trivial. The court abused its discretion in so ruling.

POINT III: The State conceded that Nicole was aware of her impending death when she said both her boys were with their father and that she did not recognize her assailant. The State further conceded that the statement that she did not know her attacker should come into evidence, but it opposed admission of the

slightly earlier statement. The court agreed with the State; that ruling was clearly erroneous.

POINT IV: Appellant challenged introduction of a video that purported to graphically link digital photographs which were taken before and after Appellant was given access to the murder scene. Here the State admitted that its exhibit had a strong impact, in that it "actually show[s] to the jury that the couch cushion actually moves upward." Enhanced images are admissible if they have not been manipulated to impermissibly alter the images. The State, in the quoted argument, effectively admitted its exhibit *had* been manipulated so as to alter what was originally visible. The video was created so as to fool the jury into believing it had direct, rather than circumstantial, evidence of the defendant's guilt, and thus the ruling admitting it was thus not harmless.

POINT V: The State was allowed, over objection, to air for the jury its investigating officers' view that Appellant is guilty of the murder charged in this case. Florida's courts have reversed convictions where similar evidence was admitted. While the standard limiting instruction was read when the recorded interrogations containing the statements were played, a more detailed limiting instruction was requested and should have been given. The combined rulings amounted to significant error.

POINT VI: The requested adverse-inference instruction should have been read to the jury. Florida's criminal discovery rules broadly allow discovery sanctions to be imposed by "such order...as [the court] deems just under the circumstances." While Florida's standard criminal jury instructions do not expressly address spoliation, the requested instruction accurately reflects the law. Under the broad discovery laws, the undergarments the victim wore when she was killed would naturally have been preserved for testing and produced but for their being discarded or destroyed. Any uncertainty about what examining the garments would have proved should be resolved in favor of the party that had no control over the missing item.

POINT VII: The defense established that detectives engaged in considerable deceit to obtain evidence in this case. Appellant's counsel sought to argue to the jury that detectives might have gone undercover to induce him to apply for an insurance payout when he had not done so for several weeks after Nicole's death. The trial court abused its discretion in sustaining the State's objection to that line of argument.

POINT VIII: This case was tried in December, 2017, after this court issued interim penalty-phase jury instructions and before this court finalized those instructions. The interim preliminary instruction included two outdated references

to the jury's upcoming "recommendation" to the court. Appellant's jurors heard those references, and they also heard the State, in its penalty-phase closing, refer to their upcoming "recommendation." Any reference in a capital jury's presence to an advisory or recommended verdict misleads them into believing that true responsibility for the life-or-death determination lies elsewhere; when a capital jury is so misled, the outcome is deemed tainted under both federal and Florida law.

Florida's interim instructions also directed Appellant's jurors not to allow themselves to be influenced by invidious prejudice, or by sympathy. The 2018 final instructions removed "sympathy" from that list of improper considerations. Further, the defense in this case requested an instruction which would have clearly allowed an exercise of mercy. The 2017 and 2018 standard instructions, while they set out that juries are neither compelled nor required to vote for death, do not expressly refer to "mercy." Precluding consideration of sympathy, in the absence of a clear mercy instruction, amounts to structural error not subject to harmless-error analysis, since the impact on the jury cannot be ascertained from the record.

The defense further argued below that it should not bear the burden of proving mitigation. Appellant here submits that both this court and the United States Supreme Court should re-evaluate their holdings on this subject.

POINT IX: The interim penalty-phase instructions also included two unobjected-to errors. First, the 2017 and 2018 instructions both state that mitigation consists of any aspect of the defendant's character or life, or any circumstance of the offense, which *reasonably* may indicate that the death penalty is not appropriate. Given that language, an outnumbered juror's views might well be dismissed if they fail to satisfy the majority's perception of what is *objectively* reasonable. Second, the 2017 instructions did not make clear that the jurors *as individuals* must make findings on mitigation, as well as individually weigh the proof.

POINT X: Objected-to comments by the State in closing, and additional comments which were not objected to, combined to deny Appellant a fair penalty phase proceeding.

POINT XI: The trial court denied a motion to declare unconstitutional the statute that allows juries to hear victim impact testimony, and overruled defense requests to redact specific language from proffered statements. Emotional victim-impact testimony was ultimately heard by the jury; its effect was exacerbated by the State closing, which suggested that the victim impact testimony overrode mitigation and aggravation both in significance.

POINT XII: In death-penalty cases, it is of vital importance both to the

defendant and the community that the sentencing decision be, and appear to be, based on reason rather than caprice or emotion. Those goals were not reached in this case; reversal of the sentence is warranted based on cumulative error in the penalty phase.

POINT XIII: A capital sentencing scheme, either through legislatively enumerated aggravating factors or through legislatively mandated guilt-phase findings, must genuinely narrow the class of persons eligible for the death penalty. The scope of Florida's capital-sentencing scheme has broadened over the years, and the scheme as a whole now fails to suitably narrow the class of eligible persons.

POINT ONE

THE TRIAL COURT REVERSIBLY ERRED IN FINDING THE EXISTENCE OF DIRECT EVIDENCE OF GUILT SUFFICIENT TO DENY APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL UNDER THE CIRCUMSTANTIAL EVIDENCE STANDARD.

Preservation. The point now argued was preserved for appeal. The court denied Appellant's oral motion for a judgment of acquittal.

Standard of review. In a circumstantial evidence case involving a denial of a defendant's motion for judgment of acquittal, the standard of review on appeal is *de novo*. Pagan v. State, 830 So.2d 792, 803 (Fla. 2002).

Argument. The trial court correctly ruled that most of the proof that tends to show Appellant was the murderer is circumstantial; its error was in ruling that the case against him is not *entirely* circumstantial. Appellant's hypothesis of innocence is reasonable vis-à-vis the evidence, and reversal of his convictions for murder and burglary should follow.

When any conviction is challenged as being unsupported by the evidence, the appellate court, to affirm, must conclude that competent, substantial evidence supports each element of each charged offense. It must further conclude that the proof was such that a rational trier of fact could have found that every element was proved beyond a reasonable doubt.

Wright v. State, 221 So. 3rd 512, 520-21 (Fla. 2017). In a case where the perpetrator's identity is proved only by circumstantial evidence, that evidence must - in addition - be inconsistent with any reasonable hypothesis of innocence proposed by the defense. Id. at 521.

Direct evidence is "evidence which requires only the inference that what the witness said is true to prove a material fact." Circumstantial evidence is "evidence which involves an additional inference to prove the material fact." Kocaker v. State, 119 So. 2d 1214, 1224-25 (Fla. 2013). In this case, the two items the court found to constitute direct evidence of guilt were the presence of Appellant's DNA on the baseball bat that was hidden in the home after the murder, and his admission that he was away from his home at the time of the murder. He did not admit he entered or approached Nicole's home, but instead told police that at the time he was elsewhere, in Jacksonville, where he lives. Neither item of proof constitutes direct evidence of Appellant's guilt of the charged offenses.

In Wright, *supra*, this court reversed a conviction where the State showed the defendant had a financial motive for murder, and also showed opportunity in that it was *possible* for him have driven to the scene during the relevant time frame. This court held that the State's proof of opportunity did not amount to direct proof of guilt. 221 So. 3rd at 523. The same is true as to the proof of opportunity in this

case.

Wright also establishes that the presence of DNA at a crime scene is not in itself direct evidence of the donor's guilt, but instead a circumstance which may or not lead to a direct inference that the donor is the guilty party. 221 So. 3rd at 523-24. This court held that the presence of Wright's DNA on a glove found at the murder scene in that case was circumstantial rather than direct evidence, in that inferences had to be stacked to connect the glove both to the defendant *and* to the murder. The DNA could have belonged either to Wright or his son, and so inferences had to be stacked to connect the defendant with the DNA on the glove. Further, the trier of fact in Wright's case had to infer that the DNA was left at the time of the murder, *and* had to infer that the glove was used in the murder. Id. at 524. Here, the DNA evidence did not exclude as a possible donor the defendant's son, who resided at the scene, and the skin cells the State relied on could have been deposited before or even after the murder, when the bat was thrust into the couch.

The circumstantial-evidence standard thus applies here. *See* Wright; *accord* Knight v. State, 186 So. 3rd 1005 (Fla. 2016) and Dausch v. State, 141 So. 3rd 513 (Fla. 2014). Under that standard, it is not sufficient that proof is consistent with guilt, or that it creates a strong probability of guilt. Wright, 221 So. 2d at 521. Even a deep suspicion that the defendant is the guilty party is not sufficient to sustain a

conviction. Id. The hypothesis of innocence in this case, that another individual - possibly the Enrique who had a long phone conversation with Nicole the evening before her death - was the guilty party, here as in Wright, was not unreasonable in light of the dearth of evidence placing Appellant at the scene at the relevant time. *See* Wright, 221 So. 3rd at 523.

Denial of Appellant's motion for judgment of acquittal denied him due process of law. The due process clause of the federal constitution requires the States to prove every element of the crimes they charge beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358, 361 (1970). The constitutional question is whether a rational trier of fact could have found that every element of each charged offense was proved beyond a reasonable doubt. *See* Coley v. State, 616 So. 2d 1017, 1018 (Fla. 3rd DCA 1993). This court has held that the protection set out in Winship "ha[s] long been incorporated in Florida constitutional law," citing Article I, Section 9 of the Florida Constitution. State v. Cohen, 568 So. 2d 49, 51 (Fla. 1990). The requirement of proof beyond a reasonable doubt has been held to be "basic in our law and rightly one of the boasts of a free society." Cohen at 51, *quoting* Winship, 397 U.S. at 362. Reversal of Appellant's conviction should follow both under the federal and Florida constitutions.

POINT TWO

HARMFUL ERROR OCCURRED WHEN THE TRIAL COURT DENIED THE DEFENSE MOTION FOR A RICHARDSON HEARING AFTER AN EXPERT WITNESS TESTIFIED ON A SUBJECT MATTER THAT WAS NOT PRODUCED DURING DISCOVERY AND WHICH IMPACTED THE THEORY OF DEFENSE.

Preservation. The point now argued was preserved for appeal. After conducting a Richardson hearing2, the court denied appellant's arguments that the State failed in its continuing duty to disclose discoverable material and that a discovery violation occurred when a State expert witness provided previously undisclosed evidence in response to a prosecutor's direct question.

Standard of review. A trial court's decision after a Richardson hearing is subject to reversal only upon a showing of abuse of discretion. Delhall v. State, 95 So.3d 134, 160 (Fla. 2012). Where such an abuse of discretion is shown, the error can only be deemed harmless if the appellate court can say, beyond a reasonable doubt, that the defense was not procedurally prejudiced by the discovery violation. Scipio v. State, 928 So. 2d 1138, 1148-49 (Fla. 2006).

Argument. Appellant's theory of defense relied on proof that Nicole did not recognize her assailant, that another man's DNA was found on a blue towel on

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2 Richardson v. State, 246 So.2d 771 (Fla. 1971).

Nicole's bathroom floor, and that a third man's DNA was found on her laptop computer. As noted, at trial the State asked DNA analyst Emily Martin if her report would change if her results were processed today, and her answer was that she would now characterize the DNA results from the towel and laptop as uninterpretable. That answer, never previously disclosed to defense counsel, undercut a significant facet of Appellant's theory of defense, and the trial court accordingly abused its discretion when it found that no discovery violation occurred and that if one did occur, it was inadvertent and trivial.

As to presence of a violation, the State has a continuing duty to disclose changes in a witness' testimony. Rule 3.220(j), Fla. R. Crim. P.; Scipio, *supra*, 928 So. 2d 1138, 1142 (Fla. 2006). The rule exists to avoid trial by ambush and to assist the truth-finding function of our justice system. Scipio at 1144. Because full and fair discovery is essential to those important goals, this court emphasizes not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules. Id. The State failed to adhere to the rules or their spirit in this case; here as in Scipio, it failed to disclose a significant change to a State witness's testimony which the prosecutor patently knew would be revealed at trial.

The judge's finding of inadvertence is refuted by the record: clearly, counsel

for the State would not have asked Ms. Martin the question he asked, if he did not know what the answer would be. Nor was the violation trivial: the prosecutor was well aware, at that juncture of trial, that Ms. Martin's answer would undermine the heart of the theory of defense, which was that competent, reliable DNA evidence would tend to show another man committed the murder. As Judge Farmer noted in writing for the court in Pickel v. State, 32 So. 3rd 638 (Fla. 4th DCA 2009),

> [i]n the world of trial evidence, DNA may well be the whole megillah. It is the single, most formidable evidence in proving many...offenses. Because of its scientific reliability, it is often regarded as conclusive. Once inculpatory DNA evidence is well and truly laid before the jury, a guilty verdict is all but a downhill slide on a glacier.

32 So. 3rd at 638.

The trial court thus abused its discretion in overruling the defense objection. The error should not be deemed harmless, because the record shows procedural prejudice resulted. The defense is procedurally prejudiced if there is a reasonable possibility that the defense's trial preparation or strategy would have been materially different had the violation not occurred. Scipio, 918 So. 2d at 1147. Plainly, that test is met in this case: had the change to Ms. Martin's evidence been revealed before trial, the defense could have hired its own analyst to test the DNA, applying the new lab procedures Ms. Martin relied on at trial. Since procedural prejudice is present, this court should reverse the conviction appealed from.

POINT THREE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO INTRODUCE ONE OF NICOLE'S DYING DECLARATIONS.

Preservation. The point now argued was preserved for appeal. Appellant litigated the issue before trial, and objected again at trial when the partial dying declaration was introduced.

Standard of review. Whether a proper and sufficient predicate has been established for the admission of a statement under the dying declaration hearsay exception is a mixed question of law and fact that is reviewed under a "clearly erroneous" standard. Williams v. State, 967 So. 2d 735, 749 (Fla. 2007).

Argument. The State conceded that Nicole was aware of her impending death when she said both her boys were with their father and that she did not recognize her assailant. The State further conceded that the statement that she did not know her attacker should come into evidence, but it opposed admission of the slightly earlier statement. The court agreed with the State; that ruling was clearly erroneous.

The courts have long recognized a "dying declaration" exception to the rule against admitting hearsay. Section 90.804(2)(b) of the Florida Statutes codifies that exception, and defines "dying declaration" as "a statement made by the declarant

while reasonably believing that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believed to be impending death or circumstances surrounding impending death." The sticking point in this case is whether Nicole's first statement met that criterion. The first statement should have been admitted; as argued below, it was made contemporaneously with the second, and it established the significance of the second statement in that it showed Nicole was fully conscious and capable of memory at the time she spoke. The statements in combination, by any reasonable interpretation of the statutory language, both "concern[ed] the physical cause" of her impending death and related to the "circumstances surrounding" her impending death. Was

The federal constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. King v. State, 89 So. 3rd 209, 223 (Fla. 2012), *quoting* Crane v. Kentucky, 476 U.S. 683, 690 (1986). Crane's murder conviction was vacated where he was not permitted to explore the circumstances of his confession, when those circumstances were central to his theory of defense. As this court noted in King, the Supreme Court also vacated the conviction in Holmes v. South Carolina, 567 U.S. 319 (2006) where the Court applied the Crane principle in a case where the defendant had sought to show someone else committed the charged offense.

King, 89 So. 3rd at 223-24. Such evidence can be excluded by the state courts where it is confusing, misleading, repetitive, or only marginally relevant. Holmes v. South Carolina, 567 U.S. at 326-27. The proof excluded in this case meets none of those criteria, since what the defense sought to establish was that the dying victim in this case was sufficiently *compos mentis* to credibly say she did not know her assailant.

The court's ruling excluding half of the victim's dying declaration amounted to clear error and a violation of the due process clauses of the federal and Florida constitutions. *See* Holmes at 324, noting that the "meaningful opportunity to present a complete defense" is rooted in due process as well as in the rights to confrontation and compulsory process. Since the excluded statement was key to the theory of defense, reversal is warranted.

POINT FOUR

THE MOTION TO EXCLUDE LAW ENFORCEMENT OFFICERS' OPINIONS ON GUILT SHOULD HAVE BEEN GRANTED, AND THE PROPOSED LIMITING INSTRUCTION FOR THOSE OPINIONS SHOULD HAVE BEEN READ.

Preservation. The argument made on this point was preserved for review, as it was argued both before trial (R 885-89, 3456, 6059, 6092-96) and during trial. (T 263-64, 350, 847, 1194)

Standard of review. The trial courts have discretion to admit or reject any portion of a statement. Chapman v. State, 742 So. 2d 854 (Fla. 5th DCA 1999). A court's erroneous interpretation of the rules of evidence, or of the caselaw that interprets them, is subject to *de novo* review. Pantoja v. State, 59 So. 3rd 1092, 1095 (Fla. 2011). This court reviews *de novo* whether a special jury instruction should have been given. Rockmore v. State, 140 So. 3rd 979, 983-84 (Fla. 2014).

Argument. The State was allowed, over objection, to air for the jury its investigating officers' view that Appellant is guilty of the murder charged in this case. Florida's courts have reversed convictions where similar evidence was admitted. While the standard limiting instruction was read when the recorded interrogations containing the statements were played, a

more detailed limiting instruction was requested and should have been given. The combined rulings amounted to significant error.

In Jackson v. State, 107 So. 3rd 328 (Fla. 2012), this court overturned a conviction where the jury heard an unredacted police interview of the defendant. On the tape the officers accused Jackson of lying to them, and repeatedly said they had no doubt of his guilt. 107 So. 3rd at 335-37. This court held that since opinions as to credibility, and guilt or innocence, are generally inadmissible, and since officers' testimony tends to command the belief of jurors, "it is especially troublesome when a jury is repeatedly exposed to an interrogating officer's opinion regarding the guilt or innocence of the accused." Id. at 340. This court noted that such interviews can safely be played for a jury *if* the statements provoke a relevant response, *or* if the context is otherwise such that a rational jury would recognize the statements as interview technique. Id. Jackson never confessed guilt, although he made some relevant admissions; this court held it was not reasonable to expect his jury to be able to extract the admissible evidence from the aspersions of guilt. Id. at 342. This court concluded that the trial court abused its discretion by "essentially" admitting improper opinion testimony which invaded the province of the jury. Id. at 341.

Roundtree v. State, 145 So. 3rd 963 (Fla. 4th DCA 2014), is indistinguishable from Jackson. In a taped interview that came into evidence Roundtree maintained his innocence, the interviewing officers insisted on his guilt, and the appellate court ultimately reversed his conviction because the opinions had invaded the province of the jury. Similarly, in both Sparkman v. State, 902 So. 2d 253 (Fla. 4th DCA 2005) and Pausch v. State, 596 So. 2d 1216 (Fla. 2d DCA 1992), the defendant sat silent while a detective announced his personal belief that she had harmed her child. In both cases the taped interview was played for the jury over an objection, and in both cases the appellate court reversed the ensuing conviction. Here the appellant maintained his innocence, and the objected-to statements thus were not offered to provide context for admissions of guilt. The repeated assertion that police always first suspect the spouse was never supported by facts in evidence, and was clearly not relevant to the single case before the jury. *See* Nowitzke v. State, 572 So. 2d 1346, 1355-56 (Fla. 1990) (sole purpose of proof about criminal behavior patterns is to place prejudicial and misleading inferences before the jury).

Here the jurors heard officers say that the locator on Appellant's phone was turned off just before the murder and turned back on just

afterward. The jury also heard that through advanced digital manipulation the officers saw Appellant on camera reaching into the couch where the bat was concealed. Those bits of bluffing were never supported by evidence; the court admitted them based on his ruling that officers are allowed to bluff. While that is true, the State is not entitled to have the jury hear them doing it. Here, as was held in Jackson, Roundtree, and Pausch, it was unreasonable to expect the jury to extract the admissible from the "aspersions." Jackson, 107 So. 3rd at 342; Roundtree, 145 So. 3rd at 966; Pausch, 596 So. 2d at 1219.

Even if this court approves admission of the recordings, denial of the requested limiting instruction amounted to error. That instruction, unlike standard instruction 2.8, which was read at trial, clearly applied to the officers' loaded *questions* and the views implicit in those questions. The requested instruction also would have put the court's imprimatur on a crucial point defense counsel sought to convey to the jury on his own, i.e., that officers are permitted to actively mislead suspects about the strength of the State's case. The court's instructions are superior in jurors' eyes to the argument of counsel, in that the former are "viewed as definitive and binding statements of the law." Boyde v. California, 494 U.S. 370, 384 (1990).

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). Appellant had no fair opportunity to defend against what the jury heard on the recordings - i.e., that police believed he was the guilty party. On the record before this court, the State cannot show beyond a reasonable doubt that the errors argued on this point were harmless. This court should hold that Jackson controls, and should reverse and remand for a new trial.

POINT FIVE

THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING A MANIPULATED PHOTOGRAPHIC EXHIBIT.

Preservation. The issue raised on this point was preserved for appeal. Appellant filed an appropriate motion in limine and renewed his objections to the exhibit before it was introduced into evidence.

Standard of review. Review of evidentiary questions is subject to an abuse of discretion standard. Pantoja v. State, 59 So. 3rd 1092, 1095 (Fla. 2011). The trial courts' discretion is limited by the evidence code and the caselaw construing it. Id.

Argument. As noted, law enforcement sought to trap Appellant after the murder by providing him with a key to the house and setting up light-sensitive cameras. No images of the defendant moving around the house were obtained, but the State took the position that "before" and "after" shots indicated that the couch cushions were moved while he was there, lending credence to its theory that the defendant knew where the baseball bat had been hidden. Detective Russo manipulated those "before" and "after" images to create a movie effect which depicted a couch cushion slowly moving upward for the viewer's ease in connecting the two images. The prosecutor

himself thus characterized the overlay as he argued the motion to the trial court:

> Mr. Johnson: ... So, essentially he took these two photographs and he placed them - - and it's actually titled photo overlay, but I think that's sort of a misnomer.
>
> It's, basically, the first photograph to the next. The Defense motion has titled this as an altered photograph. It is not altered in any way. It simply shows the first photograph kind of leading into the second photograph. And the purpose of this is to actually show to the jury that the couch cushion actually moves upward and you can see that.

(R 5636) At trial, counsel for the State placed heavy reliance on the exhibit, playing it four separate times to the jury, twice during Det. Russo's testimony and twice more during closing argument. During pretrial hearings, a prosecutor also twice referred to the overlay's effect as "impactful." (R 5084, 5086)

Enhanced images are admissible if they "depict the same images [as the originals] and have not been manipulated to impermissibly alter the images." Bryant v. State, 810 So. 2d 532, 537-38 (Fla. 1st DCA 2002). Here the State admitted that its exhibit had a strong impact, in that it "actually show[s] to the jury that the couch cushion actually moves upward." It was clearly understood by all that the "before" and "after" images were separate and were only connected by the special effects; the State, in effect, admitted its exhibit *had* been manipulated so as to alter what was originally visible. The manipulation was designed to fool the jury

into believing it had direct, rather than circumstantial, evidence of the defendant's guilt, and thus the ruling admitting it was not harmless.

POINT SIX

THE TRIAL COURT ERRED IN DENYING THE SPECIAL REQUESTED JURY INSTRUCTION ON SPOLIATION OF EVIDENCE.

Preservation. The point now argued was preserved for appeal; counsel sought the instruction in writing and brought it to the court's attention during the charge conference. (R 3530-36; T 1537-39)

Standard of review. This court reviews *de novo* whether a special jury instruction should have been given. Rockmore v. State, 140 So. 3rd 979, 983-84 (Fla. 2014).

Argument. The requested adverse-inference instruction should have been read to the jury. In the civil arena, deliberate destruction of evidence can lead to a default judgment, while negligent destruction of evidence instead leads to an adverse presumption or evidentiary inference. Golden Yachts, Inc. v. Hall, 920 So. 2d 777, 780 (Fla. 4th DCA 2006). Nothing in the Criminal Procedure Rules suggests that a similar set of accommodations should not be made in criminal cases. To the contrary, Rule 3.220(n) broadly allows discovery sanctions to be imposed by "such order...as [the court] deems just under the circumstances." While Florida's standard criminal jury instructions do not expressly address spoliation, the requested instruction accurately reflects the law. 3.220(n); State v. Davis, 14

So. 3rd 1130, 1133-34 (Fla. 4th DCA 2009). In Davis, citing criminal cases from Delaware and Arizona, the DCA noted that on remand appropriate sanctions for losing a critical videotape would include "instructing the jury that they may infer that the lost evidence is exculpatory."

The Court of Appeals of New York relies in criminal cases on "the commonsense notion that the non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause." People v. Savinon, 100 N.Y. 2d 192, 196, 791 N.E. 2d 401, 403-04, 761 N.Y.S. 2d 144, 146-47 (N.Y. 2003), *citing* 2 Wigmore, Evidence '285, at 192 (Chadbourn rev. ed. 1979). This court has stated generally that even in the absence of a legal duty to preserve items, "the spoliation of evidence results in an adverse inference against the party that discarded or destroyed the evidence." League of Women Voters of Florida v. Detzner, 172 So. 3rd 363, 391 (Fla. 2015). Under Florida's broad discovery laws, an undergarment the victim wore when she was killed would naturally have been preserved for testing and produced but for its being discarded or destroyed. Any uncertainty about what examining the garment would have proved should be resolved in favor of the party that had no control over the missing item. The requested instruction should therefore have been read.

POINT SEVEN

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION DURING CLOSING ARGUMENT.

Preservation. The point now argued was preserved for appeal when the trial court sustained the State's objection to a defense theory during closing argument on a critical matter at issue, i.e., Appellant's motive to kill his estranged wife.

Standard of review. The standard of review for improper limitation of closing argument by counsel is abuse of discretion. Bigham v. State, 995 So.2d 207, 215 (Fla. 2008)

Argument. Nicole died May 31, 2011. The following July, Appellant was with Sharon Bennett when she overheard him receiving a call from an unknown co-worker telling him he might want to look into benefits from Nicole's work-issued life insurance policy. Without Appellant applying for life insurance benefits, detectives had little evidence to advance a motive for her murder, other than the facts that he was unemployed and low on money. Appellant spoke with an insurance company representative and submitted a claim to the company. The State argued to the jury that Nicole's life insurance policy in an amount in excess of $815,000 provided Sean with the financial motive to murder her.

The defense, with mixed success, asked the trial court to redact significant portions of transcripts of law enforcement's interviews with Appellant. Detectives openly admitted during cross-examination that they had lied to Sean in fruitless efforts to gain an admission or confession. Given the deceptive language thus placed before the jury, and the limited nature of the trial court's cautionary instruction given before each recording was played to the jury, defense counsel sought to rebut the State's theory of financial motive by arguing as part of his theory of defense that Sean did not know whether Nicole's insurance policy was still in effect or whether he was beneficiary to its proceeds prior to or on the date of her murder.

In Jean v. State, 27 So. 3rd 784 (Fla. 3rd DCA 2010), the court dealt with a trial court limiting defense counsel's arguments on a valid theory of defense based on inferences drawn from facts in the record. Jean stood accused of escape; defense counsel argued to the jury that it could decide whether the defendant was in lawful custody. Sustaining a state objection, the trial court refused to permit the defendant to advance the argument. Jean at 785-86. The appellate court reversed as follows:

> [t]he purpose of closing argument is to help the jury understand the issues presented in a case by applying the evidence to the applicable law. Counsel should be permitted to present all legitimate arguments. In so doing, the trial court must afford counsel wide latitude in presenting the closing argument. It is within the trial court's discretion to determine whether counsel's argument is improper. However, a trial

> court abuses its discretion when if fails to afford such latitude to defense counsel and, as a result, counsel is precluded from presenting his or her theory of the cases to the jury.

Jean at 786 (citations omitted).

Likewise, in Hendrickson v. State, 851 So. 2d 808 (Fla. 2d DCA 2003), a trial court granted a State limine motion and prohibited defense counsel from arguing to the jury a theory of defense. Detectives had failed to search an informant prior to an alleged drug purchase, despite agency policy requiring a search. Defense counsel sought to argue that a reasonable inference could be drawn that the informant had brought the drugs to the meeting in order to frame the defendant. Writing that "[d]efense counsel is not limited to arguing defenses for which there is direct evidence," the Hendrickson court found that the trial court abused its discretion. 851 So. 2d at 810. The court further wrote:

> [i]t is not Appellant's burden to prove his innocence. A reasonable doubt might occur when evidence is lacking or when it is discredited. Therefore, a defense lawyer's duty during closing is to challenge the sufficiency and credibility of the State's proof. Counsel is free to argue these issues using all reasonable inferences that might be drawn from the evidence.

Hendrickson at 810.

In Herring v. New York, 422 U.S. 853 (1975), the Court considered a trial court's denial of any closing argument to defense counsel. In support of its holding that denial of the defendant's Sixth and Fourteenth Amendment rights to assistance

of counsel had occurred, the Court wrote:

> [t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact-finding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Herring, 422 U.S. at 862.

Here, Appellant's counsel sought to argue to the jury that the motive of the unknown caller who contacted him in the middle of July to tell him he should investigate Nicole's life insurance policy might not have been consistent with a Good Samaritan; it actually might have been prompted by detectives who needed a financial motive to make their case against him. An adequate opportunity to challenge the State's theory of motive was denied to the Appellant. The trial court abused its discretion and Appellant was denied a fair trial. Reversal on this critical issue is warranted.

POINT EIGHT

THE DEFENSE OBJECTIONS TO THE PROPOSED PENALTY PHASE JURY INSTRUCTIONS SHOULD HAVE BEEN GRANTED.

Preservation. Each of the sub-issues raised on this point was preserved for appeal by motion. (R 1512, 1508, 1516, 3587-88, 3620, 3630, 3640) The motions were denied. (R 1577, 1581, 1593, 1598)

Standard of review. This court reviews *de novo* whether a special jury instruction should have been given. Rockmore v. State, 140 So. 3rd 979, 983-84 (Fla. 2014). Whether a standard instruction is clear is also a legal question subject to *de novo* review. State v. Floyd, 188 So. 3rd 1013, 1019 (Fla. 2016).

Argument.

A. THE PRELIMINARY INSTRUCTIONS READ BELOW REFER TWICE TO A SENTENCING RECOMMENDATION.

As this court has noted, before Hurst v. Florida, 136 S. Ct. 616 (2016) was decided, Florida's standard penalty-phase jury instruction 7.11 referred numerous times to the jury's role as advisory. *See* Reynolds v. State, 2018 WL 1633075 (Fla.), *cert. pending* no. 18-5181 (2018). In Reynolds, a case tried well before Hurst, this court rejected a collateral challenge to previous use of that instruction. In this case, which was tried in December, 2017, the judge read the version of preliminary instruction 7.10 which this court had approved for interim use in April,

2017. *See* In re Standard Criminal Jury Instructions in Capital Cases, 214 So. 3rd 1236 (Fla. 2017). This court issued its final version of 7.10 in May, 2018. In re: Standard Criminal Jury Instructions in Capital Cases, 244 So. 3rd 172 (Fla. 2018). The 2017 interim instructions removed the terms "advisory" and "recommend" for the most part, but in two places "recommend" remained in the preliminary instructions. The 2018 changes to 7.10 removed the term altogether. 244 So. 3rd at 174, 182, 183. As noted above, the defense unsuccessfully sought a ruling continuing this case until this court finalized the standard instructions.

This court limited its Reynolds decision to Hurst-based collateral challenges to instruction 7.11 in cases that went to trial in 2016 or earlier. Reynolds at *10 and n.19. Here, Appellant's position is that post-Hurst, any reference in the jurors' presence to an advisory or recommended verdict misleads them into believing that true responsibility for the life-or-death determination lies elsewhere. When a capital jury is so misled, the outcome is deemed tainted under both federal and Florida law. Romano v. Oklahoma, 512 U.S. 1 (1994), clarifying Caldwell v. Mississippi, 472 U.S. 320 (1985); Pait v. State, 112 So. 2d 380 (Fla. 1959). Appellant's jurors not only heard "recommending" twice in their preliminary instructions (R 6723, 6725), but they also heard the State, in its penalty-phase closing, again refer to their upcoming "recommendation." (R 7556) Further,

Appellant's jurors did not hear a countervailing instruction based on Tedder v. State, 322 So. 2d 908 (Fla. 1975), to the effect that the trial court could only override their advisory verdict in limited circumstances. Cf. Reynolds at **1, 12. In light of the 2018 changes to the standard instructions, and in light of other issues with the penalty phase jury instructions, the sentence appealed from should be reversed.

B. "SYMPATHY" WAS EXCLUDED FROM DELIBERATIONS, AND THE REQUESTED "MERCY" INSTRUCTION WAS DENIED.

Florida's 2017 interim instruction 7.11, read in this case, directed the jurors not to allow themselves to be influenced by invidious prejudice, or by sympathy. *See* In re: Standard Criminal Jury Instructions in Capital Cases, 244 So. 3rd 172, 196 (Fla. 2018). The 2018 final instructions removed "sympathy" from the list of improper considerations. Id. The "bias or sympathy" preclusion had been imported from the standard non-capital criminal jury instructions designed for guilt-or-innocence determinations; it appeared in the standard capital instructions from 2009 until 2018, *see* In re Standard Jury Instructions in Criminal Cases - Report No. 2005-2, 22 So. 3rd 17, 20, 30 (Fla. 2009), and its use was approved by this court in Gonzalez v. State, 136 So. 3rd 1125, 1158 (Fla. 2014). In Gonzalez this court cited Saffle v. Parks, 494 U.S. 484, 494 (1990), which similarly holds there is no constitutional bar to an instruction that tells a capital jury to "avoid any

influence of sympathy."

However, it appears from the 2018 amendments to the standard instructions that this court has reconsidered including sympathy in its list of improper jury considerations. That 2018 change was reasonable: as the four dissenting Justices in Saffle v. Parks pointed out, Parks's jury might well have taken Oklahoma's "avoid any influence" instruction to mean that they could not consider the mitigation showing *at all,* since that showing centered on Parks's unfortunate early years, and might have been viewed as solely relevant to sympathy. 494 U.S. at 501-02 (Brennan, J., dissenting). Such a belief by a jury would undermine principles protected by the governing caselaw, which allows the defense to introduce mitigation, and to argue for a life sentence, in terms of emotional connection. *See* Buchanan v. Angelone, 522 U.S. 269, 275-77 (1998) (capital sentencer may not be precluded from considering constitutionally relevant mitigation); McKoy v. North Carolina, 494 U.S. 433, 440 (1990) (relevant mitigation tends to prove or disprove any fact or circumstance which the factfinder reasonably could find mitigating); Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (relevant mitigation relates to any aspect of the defendant's character or life, and any circumstance of the offense he relies on).

Here, as in Saffle v. Parks, the mitigation showing centered around the

defendant's upbringing. Here, also, the State twice argued in its penalty-phase closing that "sympathy plays no part in" the jury's weighing process. (R 7588-89) The federal Eighth Amendment is violated when evidence is properly before the jurors in a capital case, but they have no reliable means of giving mitigating effect to it. Abdul-Kabir v. Quarterman, 550 U.S. 233, 260 (2007). While Appellant was permitted to, and did, argue for sympathy below, the argument of counsel is "likely viewed as the statements of advocates" as distinct from jury instructions, which are "viewed as definitive and binding statements of the law." Boyde v. California, 494 U.S. 370, 384 (1990).

The defense also requested an instruction which would have clearly allowed an exercise of mercy. The request should have been granted. The Supreme Court has observed that "what our case law is designed to achieve" in the capital context is a conscious jury decision to accord or withhold mercy. Kansas v. Carr, 136 S. Ct. 633, 642 (2016). This court, similarly, has referred to defending a penalty phase as "seeking the mercy of society." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). The requested instruction thus correctly reflects the governing law, and it should have been read if, in addition, the standard instructions do not already cover the same ground. *See generally* Stephens v. State, 787 So. 2d 747, 756-57 (Fla. 2001). The same ground is not covered in the 2017 or 2018 standard instructions,

although they both set out that juries are neither compelled nor required to vote for death. Appellant acknowledges that this court has referred to the "neither compelled nor required" admonition as a "mercy instruction." *See* Reynolds v. State, *supra*, 2018 WL 1633075 n.4 (Fla. 2018). The Mississippi Supreme Court disagrees, noting that such a statement "upon close examination... simply seems to instruct the jury on its ability to impose a sentence of life in prison rather than the death penalty." Flowers v. State, 240 So. 3rd 1082, 1143 (Miss. 2017).

Some authorities hold that where a capital jury is clearly told *either* that it may consider sympathy or mercy, nothing more is required. *See* People v. Henriquez, 4 Cal. 5th 1, 41-42, 406 P. 3rd 748, 777-78, 226 Cal. Rptr. 69, 105-06 (Cal. 2017) and State v. Davis, 175 Wash. 2d 287, 333, 290 P. 3rd 43, 63 (Wash. 2012). Appellant submits that instructions as to *both* should be required in Florida on request. *See* Davis, 290 P. 3rd at 63, defining "sympathy" as to do with emotion, and "mercy" as part of a measured moral response. *See also* merriam-webster.com/ dictionary, defining "mercy" as "compassion *or* forbearance." (Emphasis added.)

Here the jurors heard nothing specific about mercy, *and* were directed not to be influenced by sympathy. Precluding consideration of sympathy, in the absence of a clear mercy instruction, amounts to structural error not subject to harmless-error analysis, since the impact on the jury cannot be ascertained from the record.

See Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010) and United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006). In Hurst v. State, 202 So. 3rd 40 (Fla. 2016), this court held that a jury's failure to make a required finding is subject to harmless-error analysis, and that the question for the appellate court is whether the record contains evidence that rationally could lead to a different result. Hurst, 202 So. 3rd at 66-68. *See also* Galindez v. State, 955 So. 2d 517, 521-24 (Fla. 2007) (judicial fact-finding, though improper, was harmless; no rational jury would have found no penetration where pregnant victim attended trial). Here, in contrast, failure to make a required finding is not at issue, but instead failure to ensure that the jury could consider mitigation through a lens permitted by the caselaw. For that reason, the State will not be able to show that forestalling sympathy had no effect on the ultimate verdict in this death case.

C. THE INSTRUCTIONS ASSIGNED THE DEFENSE THE BURDEN OF PROVING MITIGATION.

In 1990, this court held for the first time that mitigating circumstances must be supported by the greater weight of the evidence. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), *receded from on other grounds in* Trease v. State, 768 So. 2d 1050 (Fla. 2000). Before and after Campbell, Florida's standard penalty-phase instructions read "if you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." In 2009 this court *sua sponte* replaced

that language with "if you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established." In re Standard Jury Instructions in Criminal Cases - Report No. 2005-2, 22 So. 3rd 17, 21, 33 (Fla. 2009). This court cited its own post-1990 cases in support of the change. Id. at 21.

Also in 1990, in a 4-1-4 decision, the Supreme Court held that the states may place a burden on the defense to show evidence is mitigating before it can be considered. Walton v. Arizona, 497 U.S. 639 (1990), *overruled on other grounds in* Ring v. Arizona, 536 U.S. 584 (2002). In Walton, the plurality relied on the fact that the states may require criminal defendants to prove affirmative defenses. The dissenters in Walton argued the analogy is inapt, in that the states are not obliged to recognize affirmative defenses, so there can be no constitutional rules as to their proof; in contrast, the States must allow relevant mitigating evidence. Walton, 497 U.S. 639, 679-81 (Blackmun, J., dissenting).

Walton, to the extent it has not already been reversed, is ripe for reconsideration by the Court. In 2016, a majority of the Justices expressed doubt

> whether it is even possible to apply a standard of proof to the mitigating-factor determination.... It is possible to do so for the aggravating-factor determination...because...[t]he facts justifying death...either did or did not exist.... Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not.... It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a

> preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's discretion without a standard of proof...[however], we doubt whether that would produce anything but jury confusion.

Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (emphasis in original).

This court's opinion in Campbell v. State, *supra*, contains no rationale for its holding that the defense must show mitigation by the greater weight of the evidence. In light of the Justices' quoted language from Kansas v. Carr, and in light of the erosion of the rationales supporting Walton v. Arizona, this court should reconsider the burden-of-proof holding in Campbell.

A misstatement of the burden of proof that vitiates all of a jury's findings is structural error not subject to harmless error analysis. Hedgpeth v. Pulido, 555 U.S. 57, 61 (2008). Pulido applied Sullivan v. Louisiana, 508 U.S. 275 (1993), where the Court held that a seriously flawed definition of reasonable doubt vitiated the guilt-or-innocence finding. The alternative to finding structural error is to determine whether a flawed instruction "had substantial and injurious effect or influence in determining the jury's verdict." Pulido, 555 U.S. at 58. In United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), the Court noted that structural error analysis may be appropriate when the effect the error had on the jury cannot be determined from the record. 548 U.S. at 149 n.4.

This court finds some errors are *per se* reversible; when it does so, it

likewise considers whether it can determine their effect on the jury. Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010). An error that taints all jury findings related to mitigation necessarily amounts to structural error, since weighing mitigation and aggravation is central to a capital jury's proper function. The effect of misallocating the burden of proof cannot be measured or even estimated from an appellate record. Reversal of the sentence appealed from should follow.

POINT NINE

FUNDAMENTAL ERROR AFFECTED THE PENALTY PHASE JURY INSTRUCTIONS.

Preservation. Neither issue raised on this point was preserved for appeal.

Standard of review. Whether a claim constitutes fundamental error is reviewed *de novo*. State v. Smith, 241 So. 3rd 53, 55 (Fla. 2018). A flaw in a jury instruction may amount to fundamental error if the affected language is pertinent to what the jurors must consider in order to reach a verdict. *See* Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982). If the effects reach down into the validity of the trial itself, reading a flawed instruction is fundamental, reversible error. *E.g.,* York v. State, 932 So. 2d 413, 416 (Fla. 2d DCA 2006).

Argument.

A. PER THE STANDARD INSTRUCTIONS, MITIGATION CONSISTS OF PROOF WHICH "REASONABLY" INDICATES DEATH IS NOT APPROPRIATE.

Both the preliminary and final penalty-phase instructions read in this case state that mitigation consists of any aspect of the defendant's character or life, or any circumstance of the offense, which *reasonably* may indicate that the death penalty is not appropriate. (R 3595, 3857-58, 6725, 7646) That language appears in both the 2017 and 2018 versions of the standard penalty-phase instructions. *See* In re: Standard Criminal Jury Instructions in Capital Cases, 244 So. 3rd 172, 184, 190

(Fla. 2018). Reading that instruction, although it is standard, contributed to fundamental error in this case.

A reference to "reasonably" well established mitigators appears in the 2018 version of subsection 921.141(4), Florida Statutes. That subsection governs death-sentence orders; the judge is directed to address, in any such order, the aggravating factors the jury found to exist, and the mitigating circumstances *reasonably* established by the evidence. The distinction presumably stems from the fact the statute does not contemplate jury findings on mitigation. The distinction should not affect deliberations, but given the current instructional language, an outnumbered juror's views might well be dismissed if they fail to satisfy the majority's perception of what is *objectively* reasonable.

As then-Judge Canady wrote for the court in York v. State, *supra*, where instructional error adversely affected a self-defense claim which was "the crux of the case," that error "clearly...reache[d] down into the validity of the trial itself" and thus amounted to fundamental error. The question which evidence the jurors would deem mitigating was the crux of this penalty phase, and of course was central to what the jurors were required to consider in order to reach a verdict. *See generally* Stewart v. State, *supra*. A new sentencing hearing is warranted.

B. THE INSTRUCTIONS DID NOT MAKE IT CLEAR THAT JURORS MUST INDIVIDUALLY FIND MITIGATION.

When it amended the standard instructions after the trial of this case in 2018, this court added to the preliminary instruction the statement "whether a mitigating circumstance has been established is an individual judgment by each juror." This court added to the final instructions a reference to "the mitigating circumstances *that you have individually found to exist*." In re: Standard Criminal Jury Instructions in Capital Cases, 244 So. 3rd 172, 183, 192 (Fla. 2018) (emphasis added). The two new statements clarified the 2017 proposed instructions, which had not clearly set out that the jurors *as individuals* must make findings on mitigation, as well as individually weigh the proof.

This lack of clarity contributed to fundamental error in this case. Jurors must understand which issues they are to decide, *see* State v. Anderson, 639 So. 2d 609, 610 (Fla. 1994); their instructions should not be confusing, contradictory, or misleading. Butler v. State, 493 So. 2d 451, 452 (Fla. 1986). An instruction that sows confusion as to the jurors' proper role should be deemed structural error, in that its effect cannot be measured. Johnson v. State, *supra*; United States v. Gonzalez-Lopez, *supra*. Viewed another way, reading the unclear instructions cannot reasonably be deemed harmless error, in that the State cannot show that all rational juries would have reached the same outcome given clear instruction. Cf. Galindez, *supra*. A new sentencing proceeding is warranted based on the preserved

and fundamental issues with the jury's instructions.

POINT TEN

THE DEFENSE OBJECTIONS TO THE PENALTY PHASE CLOSING ARGUMENT SHOULD HAVE BEEN SUSTAINED.

Preservation. The issue raised on this point was preserved for appeal in part. Multiple objections to "disparaging the mitigation" and "arguing that mitigators are aggravators" were overruled. (R 7586-91, 7594-95, 7598) A single similar objection was sustained, and a curative instruction was given. (R 7591-92) Other unobjected-to statements made in closing are challenged here as well.

Standard of review. For a prosecutor's comments to warrant a new trial, they "must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Salazar v. State, 991 So. 2d 364, 372 (Fla. 2008), *cert. den.,* 555 U.S. 1187 (2009). This court considers the cumulative effect of improper comments, both those objected to and those not objected to, in determining whether a defendant received a fair penalty phase. Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000).

Argument. The court sustained an objection to non-statutory aggravation when the State argued below that the defendant had ripped mother-child bonds

asunder. All other objections to the State closing were overruled. Failure to sustain those objections, and to appropriately rebuke the prosecution, may well have influenced the jury to return a more severe verdict than it would have otherwise.

Between Proffitt v. Florida, 428 U.S. 242 (Fla. 1976) and Hurst v. Florida, 136 S. Ct. 616 (2016), this court held that improper argument in the penalty phase must be "outrageous," or "egregious indeed," to so deeply taint the jury's advisory verdict that vacating the sentence, and remanding for a new penalty phase, was needed. *See* Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). After Hurst, penalty-phase deliberations must receive the same protections accorded to deliberations in all criminal matters. As the Supreme Court has written, the right to trial by an impartial jury is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." Hurst v. State, 202 So. 2d 40, 50 (2016), *quoting* Blakely v. Washington, 542 U.S. 296, 305-06 (2004).

As noted, the State twice argued below that "sympathy plays no part in" the jury's weighing process. (R 7588-89) The State further apprised the jurors that the judge would so instruct them. (R 7589) This court has approved similar argument in the past. Gonzalez v. State, 136 So. 3rd 1125, 1158 (Fla. 2014). However, in light of the change to the instructions discussed on Point IB, it appears that the "sympathy plays no part" argument is no longer a correct statement of Florida law.

When the prosecutor further argued that the defense presentation unfairly manipulated the jury, he improperly denigrated defense counsel. The Florida courts strictly enforce a rule against criticizing a zealous defense. This court reversed a conviction and death sentence on that ground and other grounds, where the State argued the defense had put on "a magnificent display, a real show." Cardona v. State, 185 So. 2d 514, 524 (Fla. 2016). The DCA's have reversed where the prosecutor "castigate[d]" counsel for a searching cross-examination of a young witness, *see* Chambers v. State, 924 So. 2d 975 (Fla. 2d DCA 2006) and Fuller v. State, 540 So. 2d 182, 185 (Fla. 5th DCA 1989), and the First DCA has condemned criticism of the "amusing" reasons that defense counsel "will come up with just to try to thwart the jury using common sense." *See* Melton v. State, 402 So. 2d 30 (Fla. 1st DCA 1981), where the DCA pronounced that argument Aa gratuitous insult to the adversary system of justice which the prosecutor serves." 402 So. 2d at 30.

Attacking the defense presentation as "not fair to you" also encouraged a verdict reached for reasons other than the law and the evidence. A suggestion that the defense is trying to "sucker in" jurors is improper because it tends to shift the focus of attention away from the actual evidence in the case. People v. Hurtado, 324 Ill. App. 3rd 876, 756 N.E. 2d 234 (Ill. App. Ct. 2001). *Accord* People v.

Payne, 187 A.D. 2d 245, 593 N.Y.S. 2d 675 (N.Y. App. Div. 1993) (reversing where government argued "I hope the evidence you have heard here makes you angry and insulted.") This court considers improper any argument that plays on jurors' emotions. In King v. State, 623 So. 2d 486 (Fla. 1993) this court reversed a death sentence where the State suggested that recommending life would render the jury complicit in evil. In Bertolotti, *supra,* 476 So. 2d at 133, this court reversed after the State, in effect, asked "what message will your verdict send?" It was no less improper in this case for the State to take a leaf out of juror Pluchino's book and suggest that the jurors should resent any mitigation that was intended to resonate with them emotionally.

The State further argued, over objection, that Appellant - himself a victim of one of the two most serious crimes recognized by Florida's law - should have learned better behavior from his experience. Later, without objection, when mitigation was offered to show Appellant was kind to animals, the State responded "what about Nicole?" Both of those swipes violate the rule against arguing that proof offered in mitigation in fact has the effect of aggravating the case. *See generally* Gonzalez v. State, 136 So. 3rd 1125, 1155 (Fla. 2014). Appellant acknowledges that this court has seldom reversed on that ground, but - as noted above - past improper-argument cases were decided in light of the past belief that

the jury's contribution to capital sentencing was merely advisory. *See* Bertolotti.

Also not objected to below was an argument that voting for death is the hard, courageous choice. (R 7606-07) As noted in Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998), argument that directly states the converse - by characterizing a vote for a life sentence as "tak[ing] the easy way out" - improperly suggests that voting for life would irresponsibly violate that juror's oath. The change in phrasing does not significantly change the message, and this court should hold the "courageous choice" approach impermissible.

The improper comments in this case, taken together, may well have influenced the jury to reach a more severe verdict than it otherwise would have. Reversal is warranted for that reason. Salazar, *supra*, 991 So. 2d at 372. The comments should not be deemed harmless, as they were numerous rather than isolated. Cf. Fletcher v. State, 168 So. 3rd 186, 209 (Fla. 2015) (impropriety harmless where not developed as a theme.) Further, in this case none of the comments was ameliorated by a curative instruction. In People v. Sanchez, 228 Cal. App. 4th 1517, 176 Cal. Rptr. 517 (Cal. Ct. App. 2017), in contrast, the prosecutor warned jurors not to be "gullible," "naive," or "hoodwinked" by the defense. The appellate court held that the comments "were designed to...intimidate the potential holdout juror who doubted defendant's guilt," but concluded the error

was harmless because the trial court had called the prosecutor out in the jury's presence for "calling them...gullible if they did something you don't like." 228 Cal. App. at 1523, 1529-30. In this case, the State was chided for its "ripping maternal bonds" comment, but that correction was made at sidebar; defense counsel, in contrast, was criticized by the court in the jury's presence for speechifying while objecting. (R 7590-92) This court holds that a judge "should not only sustain an objection...to...improper conduct..., but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments." Deas v. State, 119 Fla. 729, 161 So. 729, 731 (Fla. 1935). *Accord* Barnes v. State, 743 So. 2d 1105, 1107-08 (Fla. 4th DCA 1999) (calling for a "forceful admonition that [improper] argument...should not be considered in any way.")

The right to due process is threatened where the State encourages a jury to take into account matters that are not legitimate sentencing considerations, and where there is a reasonable probability the outcome was affected. Johnson v. Wainwright, 778 F. 2d 623, 629-31 (11th Cir. 1985). The federal courts look to whether improper considerations were deliberately placed before the jury. DePew v. Anderson, 311 F. 3rd 742, 749 (6th Cir. 2002). The Florida courts agree: "if jurors are to remain fair decision-makers, the trial court must guard against a deliberate

act of counsel that serves to put the jury center stage in the drama that should be the trial." Bocher v. Glass, 874 So. 2d 701, 703 (Fla. 1st DCA 2004). The ultimate question is whether the jury could fairly judge the evidence. Wilson v. Sirmons, 536 F. 3rd 1064, 1117 (10th Cir. 2008). Here, the State's calculated appeal to a non-evidentiary basis for a verdict put at risk the jury's willingness and ability to fairly judge the evidence. Appellant's right to due process, guaranteed by the Florida and federal constitutions, was not adequately protected below.

The need for heightened reliability in capital proceedings, protected by the federal Eighth Amendment, also was not met. A "reliable" verdict, in this context, exists when the courts can be confident that the decision-maker gave independent weight to the showing in mitigation. *See* Beck v. Alabama, 447 U.S. 625, 638 n.13 (1980). Here, since the State affirmatively sought a verdict on a non-evidentiary ground, the conditions that ensure the requisite reliability are absent. This court should reverse the death sentence appealed from.

POINT ELEVEN

THE DEFENSE OBJECTIONS TO EMOTIONAL VICTIM IMPACT TESTIMONY SHOULD HAVE BEEN SUSTAINED.

Preservation. The point now argued was preserved for appeal. The court denied a motion to declare unconstitutional the statute that allows juries to hear victim impact testimony, and denied a subsequent motion to limit the amount of such evidence. (R 972, 320, 5587) The court further overruled defense requests to redact specific language from the proffered statements. (R 6695-6716)

Standard of review. Generally, rulings on evidentiary admissibility are reviewed for abuse of discretion. Patrick v. State, 104 So. 3rd 1046, 1056 (Fla. 2012). A court abuses its discretion if its ruling is based on an erroneous view of the law. Id.

This court further holds that mixed questions of law and fact which determine constitutional rights should be reviewed using a two-step approach, deferring to the trial court on questions of historical fact but conducting *de novo* review of the constitutional issue. City of Fort Lauderdale v. Dhar, 185 So. 3rd 1232, 1234 (Fla. 2016), *citing* Connor v. State, 803 So. 2d 598, 605 (Fla. 2001). Similarly, this court reviews evidentiary rulings *de novo* where the Confrontation Clause right is at stake. Bolin v. State, 117 So. 3rd 728, 734-35 (Fla. 2013).

Argument. Section 921.141(8)3 of the Florida Statutes provides that the State may introduce proof designed to demonstrate the victim's uniqueness as an individual and the resultant loss to the community, provided that evidence does not characterize the defendant or convey an opinion as to the appropriate sentence. The statute codifies the law as set out in Payne v. Tennessee, 501 U.S. 808, 831 (1991). This court in Windom v. State, 656 So. 2d 432 (Fla. 1995), approved the statute, holding that it does not impermissibly affect weighing of aggravation and mitigation, or otherwise interfere with defendants' rights. 656 So. 2d at 438.

Florida's standard victim impact instruction, which was read below, provides no guidance how to consider such evidence, except to note that it cannot be used in aggravation. As was argued below, this limited guidance likely sows confusion, and invites emotional verdicts that are unreliable, inconsistent, arbitrary, and capricious." (R 165-67)

The State and the judge agreed below that the statements Appellant objected to are admissible since they touch on neither of the specific subject-matter limitations set out in the statute (opinion of defendant, or as to sentence). (R 6698) The jurors thus heard the heart-wrenching anecdotes proffered by the State's three witnesses. The jury further heard - both at the beginning and at the end of the

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[3] Formerly subsection (7). The wording of that provision did not change at any time relevant to this case.

State's penalty-phase summation - that "at the end of the day" this case is about neither the crime nor the defendant but about Nicole Bush, "an actual human being" "who had family, who had friends." (R 7552, 7605) Three of the Justices who concurred in Payne did so only after noting that "in a particular case, a witness's testimony or a prosecutor's remark [may] so infec[t] the sentencing proceeding as to render it fundamentally unfair [under] the Due Process Clause." Payne, 501 U.S. 808, 831 (O'Connor, J., concurring). The State's closing in this case invited an emotional and arbitrary verdict, in that it suggested that the jurors' reaction to the victim-impact proof "at the end of the day" has more genuine significance than the result of the weighing process.

Nine years before the trial of this case, Justice Stevens issued a statement when certiorari was denied in Kelly v. California, 555 U.S. 1020, 129 S. Ct. 564 (2008). In Kelly, two death-row litigants sought review after victim impact was portrayed at their sentencings by way of "emotionally evocative" multimedia presentations. 129 S. Ct. at 564-66. Justice Stevens noted that following Payne, the courts "have largely failed to place clear limits on the scope, quantity, or kind of victim impact evidence" that is permissible. He concluded that "[h]aving decided to tolerate...evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be

placed on its use." Id. at 566-67. Since that time, the Supreme Court has accepted no case on the subject; it accordingly falls to this court to limit victim impact.

As was noted below, Florida's voters in 1988 approved a constitutional amendment that recognizes victims' rights in criminal cases. (R 166) By the terms of that amendment, those rights can only be accommodated "to the extent [they] do not interfere with the constitutional rights of the accused." Art. I, Section 16, Fla. Const. The trial court and State agreed that the proffered statements comply with Section 921.141(8), in that they neither urge a death sentence nor characterize the defendant. Florida's courts must undertake a third inquiry under Article I, Section 16: they must exclude victim-impact proof if it will likely sway the jury in a manner that interferes with the defendant's right to due process.

Combined with the State's closing, the ruling admitting emotionally weighted victim-impact statements resulted in denial of due process of law. The State's argument amounted to a suggestion that what the jurors heard from the victim's family and friends" should take precedence over the result of their weighing process. Florida's standard jury instructions in no way prevent such a suggestion from taking hold with a jury, in that - as noted - the only guidance they offer is that victim-impact proof is not to be deemed an aggravating factor. The State thus cannot show beyond a reasonable doubt that the emotional victim-

impact showing did not affect the verdict in this case.

POINT TWELVE

CUMULATIVE ERROR CALLS FOR REVERSAL OF THE DEATH SENTENCE.

Standard of review. Where multiple errors are argued, "even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors may be such as to deny the defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007) (citations and punctuation omitted). The issue is whether the errors, viewed cumulatively, can be considered harmless beyond a reasonable doubt. Id. at 329.

Argument. Appellant has not yet received the reliable sentencing phase that he is guaranteed by the federal and Florida constitutions. U.S. Const., Amends. 5, 8, 14; Article I, Sections 9, 17, Fla. Const. As noted, the heightened reliability required in death-penalty cases is not present unless the appellate court can say with confidence that the decision-maker gave independent weight to the showing in mitigation. Beck v. Alabama, *supra*, 447 U.S. 625, 638 n.13 (1980); Abdul-Kabir v. Quarterman, *supra*, 550 U.S. 233, 260 (2007). The jurors in this case never clearly heard from the court that they must individually find which proof is mitigating; they *did* hear that whatever mitigation they found and weighed must *reasonably* indicate that death is not the appropriate sentence. They heard from

both the State and the court that sympathy is anathema to their proper role. The State told them they were being manipulated by defense counsel into voting for life, and that they should, courageously, instead choose death. Finally, despite its announced position that emotion should not guide the deliberations, the State suggested that the jury "at the end of the day" should act based on its reaction to the victim impact proof.

In death-penalty cases, it is of vital importance both to the defendant and the community that the sentencing decision be, and appear to be, based on reason rather than caprice or emotion. Gardner v. Florida, 430 U.S. 349, 358 (1977). Those goals were not reached in this case; reversal of the sentence is warranted.

POINT THIRTEEN

FLORIDA'S DEATH PENALTY SCHEME FAILS TO NARROW THE CLASS ELIGIBLE FOR EXECUTION.

Preservation. The arguments made on this point were made below in part, in Appellant's pretrial motions challenging individual aggravating factors. (R 207, 210, 252, 256, 399)

Standard of review. Whether a statute is constitutional is a pure question of law, reviewed *de novo*. *E.g.,* Jackson v. State, 191 So. 2d 423, 426 (Fla. 2016).

Argument. Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of arbitrary and capricious action. Yacob v. State, 136 So. 3rd 539, 547 (Fla. 2014), *quoting* Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion). A capital sentencing scheme, either through legislatively enumerated aggravating factors or through legislatively mandated guilt-phase findings, must genuinely narrow the class of persons eligible for the death penalty. Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), *quoting* Zant v. Stephens, 462 U.S. 862, 877 (1983). Each aggravating factor, taken singly, must also narrow the eligible class. Zant v. Stephens at 877. Florida's capital scheme fails to suitably narrow the class of eligible persons.

The death-sentencing statute approved in Proffitt v. Florida, 428 U.S. 242

(1976) contained eight aggravating factors. 428 U.S. at 251. By 2010, that number had doubled. Chapters 2010-120 '1, 2005-28 '7, 96-290 '5, 95-159 '1, 91-270 '1, 88-381 '10, 87-368 '1, Laws of Florida. Virtually all conceivable murders fit at least one of the sixteen categories of eligibility, as several of the categories are not tightly drawn.

Florida's scheme treats as an aggravator the fact that a defendant was found guilty of felony-murder, rather than premeditated murder. As Tennessee and North Carolina have held, doing so of necessity fails to narrow the death-eligible class. State v. Middlebrooks, 840 S.W. 2d 317, 346-47 (Tenn. 1992); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (N.C. 1979). This court in 1973 rejected a challenge to including felony-murder as an aggravator, on the ground that the felony-murder statute then in existence excluded minor actors; that statute has been expanded to cover significantly more participants. *See* State v. Dene, 533 So. 2d 265, 266-69 (Fla. 1988). Further, over the years the conduct underlying common predicate felonies has broadened. *See* Sparre v. State, 164 So. 3rd 1183, 1200-01 (Fla. 2015) (burglary can occur after invitation is effectively rescinded); Rockmore v. State, 140 So. 3rd 979, 982 (Fla. 2014) (robbery includes force used after taking).

Another of Florida's aggravators, that the defendant has been convicted of a prior violent felony, in practice has also failed to narrow the eligible class. This

court has construed "prior" broadly, to include violent crimes on other victims committed in connection with the murder. *E.g.,* Stephens v. State, 787 So. 2d 747, 761 (Fla. 2001). The cold, calculating and premeditated ("CCP") aggravator has also evolved. In its early years that factor was applied in cases involving contract killings and execution-style killings. *See* Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986) and Garron v. State, 528 So. 2d 353, 360-61 (Fla. 1988). In recent years, CCP has been found provided the murder is not committed impulsively or on the spur of the moment, and is not committed in a state of rage or loss of control. Campbell v. State, 159 So. 3rd 814, 830-31 (Fla. 2015). CCP has been found "even where there is evidence that the final decision to kill was not made until shortly before the murder itself." Gosciminski v. State, 132 So.2d 678, 712 (Fla. 2013).

This court regularly refers to the CCP, prior violent felony, felony-murder, and especially heinous, atrocious and cruel ("EHAC") aggravators as among the weightiest in Florida's capital sentencing scheme. *E.g.,* Hall v. State, 246 So. 3rd 210, 215 (Fla. 2018); Wall v. State, 238 So. 3rd 127, 145 (Fla. 2018); Cozzie v. State, 225 So. 3rd 717, 729 (Fla. 2017). Judge Maltz, when assigning great weight to each of the aggravating factors the jury found, noted that the prior violent felony and EHAC factors are among the weightiest in this state's sentencing calculus,

citing Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002). (R 4326, 4330, 4364) This court's ranking of aggravators thus in itself appears to have had a broadening effect on death sentencing.

In Hidalgo v. Arizona, 138 S. Ct. 1054 (2018), four Justices commented on the Court's denial of certiorari. The state court had held that Arizona's capital scheme is sufficiently narrowly drawn even if it assumed that 98% of Arizona's first-degree murder cases are automatically eligible for death-penalty proceedings. The four Justices recognized "a possible constitutional problem" which "warrants careful attention and evaluation." 138 S. Ct. at 1057. In Florida, the reported cases and the relevant statutes on their face establish that an "aggravator creep"[4] problem exists. Florida's capital scheme, as administered in 2018, fails to narrow the class of first-degree murderers eligible for death. For that reason this court should reverse Appellant's sentence and remand for imposition of a life sentence.

[4] The undersigned is indebted to O.H. Eaton, Circuit Judge *emeritus*, for the expression.

CONCLUSION

Appellant has shown that this court should reverse his conviction and sentence, and remand with directions to discharge him from liability, on the ground argued on Point One.

If that relief is not granted, Appellant has shown that this court should reverse his conviction and sentence and remand for a new trial, on the grounds argued on Points Two through Seven.

If that relief is not granted, Appellant has shown that this court should reverse the sentence appealed from, and remand with directions to enter a sentence of life in prison without the possibility of parole, on the ground raised on Point Thirteen.

If that relief is not granted, Appellant has shown on the remaining points that this court should reverse the sentence appealed from and remand for a new penalty phase.

Respecfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant Attorney General Doris Meacham, at capappdab@myfloridalegal.com, and mailed to Appellant on this 29th day of August, 2018.

CERTIFICATE OF COMPLIANCE

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

/S/ Raymond M. Warren
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