No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL SHANE BARGO,
PETITIONER,

VS.

STATE OF FLORIDA,
RESPONDENT.

On Petition for Writ of Certiorari to the Florida Supreme Court

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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Supreme Court of Florida

No. SC14-125

MICHAEL SHANE BARGO, JR.,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[June 29, 2017]

PER CURIAM.

Michael Shane Bargo, Jr., appeals his first-degree murder conviction and sentence of death for the killing of Seath Jackson. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm Bargo's conviction but vacate the death sentence and remand for a new penalty phase based on the United States Supreme Court's opinion in Hurst v. Florida (Hurst v. Florida), 136 S. Ct. 616 (2016), and this Court's opinion on remand in Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, No. 16-998, 2017 WL 635999 (U.S. May 22, 2017).

BACKGROUND

The evidence presented at trial established that on the night of April 17, 2011, Bargo and codefendants Amber Wright, Kyle Hooper, Charlie Ely, and Justin Soto murdered the victim.[1] Bargo planned the murder and directed his codefendants throughout the commission of the murder. At the time of the crime, Bargo was eighteen years old and the victim was fifteen years old.

Wright and the victim began dating in December 2010, but broke up bitterly in March 2011. Wright became romantically involved with Bargo around the time of her breakup with the victim. According to William Samalot, the victim's friend, Bargo wrongly believed that the victim had abused Wright. Nevertheless, Wright and the victim continued to send text messages to one another after their breakup.

Two or three weeks before the murder, Bargo and the victim threatened one another at Wright's home. Only one week before the murder, Bargo went to the victim's home and argued with him. During that argument, the victim's mother heard Bargo tell her son, "I have a bullet with your name on it."

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1. Wright, Hooper, Ely, and Soto were tried separately from Bargo, and each was convicted of first-degree murder. Wright v. State, 161 So. 3d 442, 444, 445 n.2 (Fla. 5th DCA 2014). The Fifth District reversed Wright's first-degree murder conviction and remanded for a new trial, affirmed Hooper's first-degree murder conviction and remanded for resentencing, and affirmed Ely's first-degree murder conviction and life sentence. Id. at 445, 445 n.2. Soto did not appeal his first-degree murder conviction. Id. at 445 n.2.

Hooper, Wright's half-brother, was initially friends with the victim. However, their friendship deteriorated after Wright and the victim broke up. Their friendship further deteriorated when Hooper discovered the victim in bed with a girl in whom Hooper was romantically interested. Hooper admitted that, one week before the murder, he sent a text message to the girl stating that he was going to kill the victim.

In the weeks preceding the murder, Ely allowed some of her friends to move into her two-bedroom home in Summerfield, Florida. Bargo, one such friend, owned and kept a .22 caliber Heritage revolver inside Ely's home. Bargo was known to fire his revolver on Ely's property. Approximately two weeks before the murder, Bargo and Hooper contacted Samalot and the victim to challenge them to a fight at Ely's home. However, when Samalot and the victim approached Ely's home, they heard a gunshot and left the area. Hooper testified that Bargo shot his revolver at Samalot and the victim "to scare them a little bit off." Approximately one week before the murder, two of the home's occupants moved out after Bargo threatened one of them with his revolver during an argument. At the time of the murder, Bargo, Hooper, Soto, and Ely were living at Ely's home, where Wright would sometimes stay overnight.

Hooper testified that on April 17, 2011, the day of the murder, he and Bargo "had a conversation about killing [the victim]." Bargo "wanted to make a plan to

do it," and he went to Hooper "because [Hooper] had issues with [the victim] also." That afternoon, Bargo asked Wright to go get the victim and bring him to Ely's home. She agreed. The plan was that Wright would walk with the victim and lure him to Ely's home. Then Bargo, Hooper, and Soto would attack when the victim came inside Ely's home. First, Soto would hit the victim with a wooden object; next, Bargo and Hooper would jump the victim from behind; and finally, Bargo would shoot the victim.

Later that evening, Samalot and the victim visited some neighborhood friends. Samalot noticed that the victim was exchanging text messages with Wright. In those text messages, Wright implemented Bargo's plan. Wright told the victim she wanted to "work things out" with him, asked him to meet her and Ely, and told him not to tell anyone about their meeting. The victim, apparently suspicious this could be a trap, warned Wright in his reply text: "Amber if you have me jump[ed] I will never give you the time of day so if I g[e]t jump[ed] say good[bye] al[right]." She responded that "I could never do that to y[o]u" and "I just want me and y[o]u back." Later, the victim received a phone call from Wright, and Samalot advised the victim not to talk with her. At approximately 9 p.m., Samalot and the victim left a friend's home. They parted ways at approximately 9:15 p.m. Samalot went home, but the victim walked in the direction of Ely's home.

A short time later, Wright and Ely met the victim and the three walked to Ely's home. After the victim entered the home, he sat down in a chair in the living room. Because Soto did not initiate the attack as planned, Hooper grabbed a wooden object and ran into the living room where he delivered a blow to the victim's head. Meanwhile, Wright and Ely ran into Ely's room. Then Bargo, following close behind Hooper with his revolver in hand, began firing at the victim and shot him. The victim fled towards the kitchen and ran out the front door of the home. Soto followed and tackled the victim in the front yard, where Bargo shot the victim again. Bargo and Soto also beat the victim. At Bargo's direction, Hooper joined them and the three of them carried the victim back into the home and put him in the bathtub.[2]

Bargo's plan was to keep the victim alive after the initial assault so that Bargo could kill him and the victim would know his killer before he died. To that end, Bargo stayed in the bathroom with the victim and hit him, cursed at him, and fired more bullets into him. Bargo ultimately killed the victim by shooting him in the face. Thereafter, Bargo and Soto carried the victim's body in a sleeping bag to

2. Steven Montanez, a neighbor that lived two homes down and across the street from Ely's home, saw two or three males chase and beat a kid with their fists in Ely's yard and then carry him inside Ely's home at approximately 9:30 p.m. on the day of the murder. Although Montanez testified that he did not hear a gunshot, he heard "doors and stuff" and someone yell, "Get him."

Ely's fire pit and placed it into a large fire.[3] Bargo and Wright later went to bed, and Hooper tended the fire until about 2:30 a.m.

On the morning of April 18, 2011, James Havens—Wright's and Hooper's "stepdad"—arrived at Ely's home and helped dispose of the victim's remains.[4] Hooper had previously helped Wright and Ely clean up the blood in the home with bleach. The remains from the fire pit had been stored in three paint buckets with lids, which Bargo and Soto put in the back of Havens' truck along with cinder blocks and cable. Havens drove Bargo and Soto—at Bargo's direction—to a remote water-filled rock quarry in Ocala, Florida, where they dumped the cinder block laden buckets.

Later that afternoon, after returning from the quarry, Havens and Bargo drove to pick up Hooper from work. Along the way, Havens received a phone call from Wright's and Hooper's mother. She informed him that the police were in the neighborhood investigating the victim's disappearance. After Havens and Bargo picked up Hooper from work, Bargo informed Hooper about the police

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3. The State presented evidence that, hours before the murder occurred, Wright asked Bargo if it was time to start the fire in Ely's fire pit and Bargo responded "no." The State also presented evidence that the fire was started before the victim actually arrived at Ely's home.

4. Havens was present at Ely's home the previous evening when Bargo and the codefendants discussed killing someone. Havens purportedly left Ely's home because this made him uncomfortable. Later that night he received a call from Bargo who said, "The deed is done."

investigation. Bargo borrowed some money from Hooper so that he could leave town.

That same day, Havens drove Bargo to Ocala so that Bargo could see Kristen Williams, an out-of-town girlfriend. Bargo told Kristen that he and some friends had been in a fight with a kid, Bargo shot him, and they "t[ook] him apart and burn[ed] him and then took him to the rock quarry" near her home. Next, Havens drove Bargo to Starke, Florida, where Kristen's father lived. During his stay at the Williamses, Bargo told James Williams, Jr., Kristen's brother, that he had shot a boy eight times with a .22 caliber pistol and killed him. Bargo also told him that they busted his kneecaps in the bathtub, placed him in a sleeping bag, burned him, put his remains in paint buckets, and took the paint buckets to a rock quarry. Bargo told Crystal Anderson, James Williams, Sr.'s girlfriend, that he killed a guy who raped his little sister. Bargo described beating him, chasing him outside, shooting him outside, placing him in a bathtub, beating him some more, and shooting him twice in the face, which killed him. Bargo also told her that the body was put in a sleeping bag and then burned. However, because the body did not burn completely, Bargo used pliers to pull the remaining teeth out of the skull one by one. Bargo told James Williams, Sr., that he shot and killed someone who raped his sister. Bargo also told Joshua Padgett, a neighbor of the Williamses, that he shot a guy, dragged him into a home, shot him again, burned him, and carried

him into the woods. Law enforcement arrived at the Williamses' home on April 19, 2011, and took Bargo into custody. Before being taken into custody, Bargo destroyed his cell phone.

Shortly after his arrest, while in a holding cell, Bargo told a fellow inmate that he killed a kid who raped his girlfriend. Bargo described shooting him in a chair, placing him in a bathtub, shooting him in the bathtub when he awoke to make sure he was completely dead, and accidentally burning his own face while trying to burn the body. In addition, David Smith, a retired corrections officer, overheard Bargo tell another inmate that "[t]here were only two witnesses that saw me shoot him."

During the course of their investigation, law enforcement obtained and executed search warrants for Bargo's room in his grandmother's home, Ely's home, and the Ocala quarry. In Bargo's room in his grandmother's home, law enforcement found a Heritage gun box and a spent .22 caliber cartridge. In Ely's home, law enforcement found a loaded .22 caliber Heritage revolver and two boxes of live ammunition hidden inside a floor vent. Law enforcement found .22 caliber casings and live ammunition in several rooms of the home. In Ely's yard, law enforcement found dried paint on the ground, a rake with dried paint on the tines, drag marks, a pressure washer, and a fire pit that contained possible human remains. Finally, in the Ocala quarry, law enforcement found a five-gallon bucket

with a plastic bag floating in the water. A dive team found two more such buckets attached to cinder blocks underwater.

Dr. Robert Beaver, an expert in DNA typing and kinship analysis, testified regarding the analysis of the human remains recovered by law enforcement and found they were 63,000 times more likely to be from a biological child of the victim's parents than a randomly chosen Caucasian individual from the United States population. Dr. Michael Warren, an expert in forensic anthropology and human identification, examined the remains from the fire pit and found human bones from various parts of a body that were most likely from a male aged fourteen to eighteen. Having also examined the remains from the quarry, during which he found a projectile in a "large mass of burned tissue and bone," Dr. Warren concluded that they were from the same individual as the remains found in the fire pit. Ronald Lai, a forensic DNA analyst, compared the partial DNA profile from the liver of the victim to known samples from the victim's parents and opined that "the liver could not be excluded from coming from a child of Sonia Jackson and Scott Jackson." Nicole Lee, a Florida Department of Law Enforcement (FDLE) crime laboratory analyst, also testified that DNA analysis of a mass of burned tissue from the fire pit at Ely's home was consistent with being a biological child of the victim's parents.

Crime scene investigators found blood evidence on the bathroom floor, kitchen floor, living room floor, bathroom wall, and kitchen ceiling of Ely's home. Lee testified that she was unable to obtain any DNA evidence from the blood found on the bathroom floor or the kitchen floor, but found Ely's DNA in a mixture in the blood found on the bathroom wall, Hooper and the victim's DNA in a mixture in the blood found on the living room floor, and Bargo's DNA in the blood found on the kitchen ceiling.

Maria Pagan, an FDLE expert in firearms examination and identification, testified that the projectile found in the human tissue was a .22 caliber bullet. Pagan compared a bullet she fired from Bargo's .22 caliber Heritage revolver with the projectile from the victim's tissue and found that they both had the same class characteristics—six grooves with a right twist and correct dimensions—as Bargo's revolver. Pagan was unable to determine whether the projectile from the victim's tissue was fired from Bargo's revolver due, in part, to the condition of the projectile. Ultimately, Pagan concluded that Bargo's revolver could not be excluded as being the murder weapon.

Dr. Kyle Shaw, the medical examiner, testified that he observed a pattern of bright dots consistent with a projectile or bullet impact in an X-ray of a skull fragment found among the victim's remains. Dr. Shaw found this evidence was in turn consistent with a gunshot wound to the head or face. From the totality of the

evidence examined and information obtained, Dr. Shaw concluded the cause of death "was [a] gunshot wound or wounds and blunt force trauma and . . . the manner of death [was] homicide."

Bargo testified at trial in the form of a narrative. Bargo denied participating in the murder, but he admitted his involvement in disposing of the victim's remains. According to Bargo, he argued with Hooper on the evening of the murder and accused Hooper of stealing his revolver. In the resulting fight against Hooper and Soto, Bargo claimed to be the loser and said they broke his nose, blackened his eyes, and busted his lip. Bargo claimed that he showered, drank some beer, searched for his revolver, and left to visit a girlfriend.

Bargo testified that he began walking to his girlfriend's home about 9 p.m. the night of the murder, moving slowly because of a recent injury to his knee. Bargo stated that after more than two hours of walking, including stopping to roll and smoke two joints and vomit, he gave up reaching his destination. He claimed that he called his father, who purportedly picked him up and took him back to Ely's home. Bargo testified that he found Ely scrubbing the floor with bleach and Wright drinking and crying. Bargo claimed that he went to his room and encountered Soto who said he had Bargo's revolver, but would not return it until Bargo talked to Hooper. Bargo claimed that Hooper told him that he shot and killed the victim with Bargo's .22 caliber revolver. According to Bargo, Hooper

threatened to blame the murder on Bargo when Bargo suggested that they should call the police.

The jury found Bargo guilty of first-degree murder with a firearm. During the penalty phase, neighbors, friends, and family testified in support of Bargo, and three expert witnesses testified regarding Bargo's mental health. The jury recommended that Bargo be sentenced to death by a vote of ten to two.

After the Spencer[5] hearing, the trial court sentenced Bargo to death. In imposing the death sentence, the trial court concluded that the two aggravating factors[6] greatly outweighed the two statutory mitigators and fifty nonstatutory mitigators.[7]

ANALYSIS

On appeal, Bargo raises seven issues: (1) trial counsel provided ineffective assistance that deprived Bargo of a fair trial; (2) the evidence is not sufficient to

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5. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

6. The trial court found that the following two aggravating factors were proven beyond a reasonable doubt: (1) the murder was especially heinous, atrocious, or cruel (HAC)—great weight—and (2) the murder was cold, calculated, and premeditated (CCP)—great weight.

7. The trial court found two statutory mitigators: (1) the murder was committed while Bargo was under the influence of an extreme mental or emotional disturbance—slight weight—and (2) Bargo was eighteen at the time of the murder—slight weight. The trial court also found that Bargo established fifty nonstatutory mitigators and accorded each slight, little, or moderate weight.

convict Bargo of first-degree murder; (3) the trial court erred by denying Bargo's motion for the appointment of a crime scene expert; (4) Florida's death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002); (5) the trial court abused its discretion by excluding evidence of threats made by the victim proffered by Bargo during the penalty phase; (6) Bargo's death sentence is disproportionate; and (7) Florida's death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment.

I. Ineffective Assistance of Counsel

In the first issue raised in this appeal, Bargo raises four claims of ineffective assistance of counsel.[8] We decline to address these claims on direct appeal because ineffective assistance of counsel does not appear on the face of the record. See Gore v. State, 784 So. 2d 418, 437-38 (Fla. 2001) ("A claim of ineffective assistance of counsel may be raised on direct appeal only where the ineffectiveness is apparent on the face of the record."). Bargo is free to raise them in an appropriate postconviction motion.

8. Bargo alleges that trial counsel provided ineffective assistance by: (1) failing to refresh Hooper's recollection and impeach Hooper at the guilt phase with his statement that "[t]he only thing we have left is to blame this all on Mike"; (2) arguing to the guilt phase jury that Bargo was "guilty, guilty as hell" of second-degree murder; (3) urging Bargo during allocution at the Spencer hearing that he should tell the trial court whether he wanted "[r]egular or extra crispy"; and (4) failing to argue at the guilt phase that the projectile found in the victim's remains did not match the bullets recovered from Bargo's revolver.

II. Sufficiency of the Evidence

Bargo claims that the evidence presented at trial does not support his first-degree murder conviction. "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001).

We find that sufficient evidence exists to support Bargo's first-degree murder conviction. Hooper testified at trial that, on the day of the murder, Bargo spoke with him about murdering the victim and directed Wright to bring the victim to Ely's home. Hooper further testified that he saw Bargo shoot and beat the victim at Ely's home. Havens testified that he overheard Bargo and the codefendants discuss killing someone the evening before the murder. Havens also testified that Bargo called him the night of the murder and said, "The deed is done." On the night of the murder, a neighbor saw two or three males chase and beat a kid with their fists in Ely's yard and then carry him inside Ely's home. The State presented evidence that, hours before the murder occurred, Wright asked Bargo if it was time to start the fire in Ely's fire pit yet and Bargo responded "no." The State also presented evidence that the fire was started before the victim actually arrived at Ely's home and that the victim's remains were burned in the

fire. Bargo confessed the murder to an out-of-town girlfriend, her brother, her father, her father's girlfriend, and her father's neighbor. Bargo also confessed the murder to two inmates, and one of those confessions was overheard by a retired corrections officer. Accordingly, competent, substantial evidence exists to support the murder conviction in this case.

III. Crime Scene Expert

Bargo claims that the trial court erred by denying Bargo's motion for the appointment of a crime scene expert. "This Court reviews the denial of a motion for appointment of experts for an abuse of discretion." Howell v. State, 109 So. 3d 763, 776 (Fla. 2013). "In evaluating whether there was an abuse of discretion, courts have applied a two-part test: (1) whether the defendant made a particularized showing of need; and (2) whether the defendant was prejudiced by the court's denial of the motion requesting the expert assistance." Marshall v. Crosby, 911 So. 2d 1129, 1133 (Fla. 2005) (quoting San Martin v. State, 705 So. 2d 1337, 1347 (Fla. 1997)).

We conclude that the trial court did not abuse its discretion in denying Bargo's motion for the appointment of a crime scene expert. The record indicates that Bargo's trial counsel argued at a pretrial hearing that a crime scene expert was needed to answer unspecified anthropological questions, generally assist in preparing a defense, and possibly assist the jury in understanding the complexity of

the crime scene and any exculpatory evidence in existence at or around the crime scene. However, Bargo's unelaborated and speculative argument made no particularized showing of need.

Regardless, even if we were to assume that defense counsel established a particularized need for a crime scene expert, Bargo could not demonstrate prejudice. Bargo argues that a crime scene expert would have assisted the defense in locating and testing a .22 caliber rifle depicted in crime scene photographs of Ely's home to: (1) determine if the .22 caliber bullet found in the victim's remains could have been fired from the rifle and (2) have the rifle examined for fingerprints. However, even if the bullet found in the victim's remains could have been fired from the .22 caliber rifle, prejudice could not be demonstrated. Bargo confessed to shooting and killing the victim on numerous occasions. On at least one such occasion, Bargo confessed that he shot and killed a boy with a .22 caliber pistol. Hooper testified at trial that Bargo shot the victim with his .22 caliber revolver, and the State presented expert testimony at trial that Bargo's revolver could not be excluded as being the murder weapon. Accordingly, the evidence precludes any showing of prejudice by Bargo.

IV. Ring and Hurst

While Bargo's appeal was pending before this Court, the United States Supreme Court issued its decision in Hurst v. Florida in which it held that Florida's

former capital sentencing scheme violated the Sixth Amendment because it "required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty" even though "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Hurst v. Florida, 136 S. Ct. at 619. On remand in Hurst we held that

> before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst, 202 So. 3d at 57.

In light of the nonunanimous jury recommendation to impose the death sentence, it cannot be said that the failure of the jury to make the required determination was harmless. See Franklin v. State, 209 So. 3d 1241, 1248 (Fla. 2016) ("In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any Ring- or Hurst v. Florida-related error is harmless."), petition for cert. filed, No. 16-1170 (U.S. March 23, 2017). We therefore reverse Bargo's death sentence and remand for a new penalty phase. Because we remand for a new penalty phase under Hurst, we decline to address

Bargo's other penalty phase claims and need not address the proportionality of his death sentence.

CONCLUSION

For the reasons stated above, we affirm Bargo's conviction, vacate his sentence of death, and remand for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.
PARIENTE, J., concurs with an opinion.
LAWSON, J., concurs specially with an opinion.
CANADY and POLSTON, JJ., concur as to the conviction but dissent as to the sentence.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring.

I concur in the reversal for a new penalty phase in light of Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied No. 16-998, 2017 WL 635999 (U.S. May 22, 2017), based on the lack of a jury's unanimous recommendation for death. Although the per curiam opinion does not address proportionality because we are reversing for a new penalty phase, I have serious concerns in this case about whether the death sentence is proportionate for this eighteen-year-old with significant mental health mitigation.[9]

9. If the Court were to conclude that the death sentence was disproportionate based on the record, as we did in Wood v. State, 209 So. 3d 1217

The defendant was eighteen years old at the time of the crime, and the trial court found two statutory mitigators (age and under the influence of extreme emotional distress) and numerous nonstatutory mitigators—including that defendant suffers from frontal lobe brain damage, bipolar disorder, schizoaffective disorder, complex partial seizure disorder, hallucinations, and diminished control over inhibitions, was abandoned by his father, grew up in a disadvantaged and abusive home, has a severe substance abuse problem which aggravated a neurological disorder, along with the possibility that the defendant was misdiagnosed and treated for ADHD. The trial court did not ascribe great weight to any of this mitigation. However, a review of the record indicates that Bargo's mental health mitigation reaches far back into his childhood, rather than emanating from evaluations occurring after the murder occurred.

By the age of fourteen or fifteen, Bargo was self-harming. Dr. Berland testified that records "indicated . . . a couple times where [the defendant] had suicidal ideation, which is typical of someone who has a partial complex seizure disorder." Further, when the defendant was in ninth grade and a subject of the Michigan Juvenile Justice System, a psychologist suggested that the defendant be

(Fla. 2017), it would then be our obligation to reduce the death sentence to life rather than remand for a new penalty phase.

sent to a mental institution. Rather than being institutionalized, Bargo was sent to boot camp for six months, during which he also attended counseling.

In March 2009, approximately two years before the crime in this case, Bargo was diagnosed with bipolar disorder diagnosis rapid cycling. Although not taking medication at the time of the crime, Bargo had been prescribed several strong medications in the past.

On this record, I am unable to conclude that the sentence should be reduced to life based on proportionality. However, our case law indicates that reliable, uncontroverted evidence of mental health mitigation coupled with age indicates that a sentence of death may be disproportionate, even in light of substantial aggravation. See, e.g., Crook v. State, 908 So. 2d 350, 352, 358 (Fla. 2005). Likewise, upon retrial, depending on the jury findings and verdict, the facts of this case may compel the conclusion that a sentence of death for this eighteen-year-old defendant with substantial mitigation is disproportionate.

LAWSON, J., concurring specially.

See Okafor v. State, 42 Fla. L. Weekly S639, S641, 2017 WL 2481266, at *6 (Fla. June 8, 2017) (Lawson, J., concurring specially).

An Appeal from the Circuit Court in and for Marion County,
David Brent Eddy, Judge - Case No. 422011CF001491AXXXXX

Valarie Linnen, Atlantic Beach, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Vivian Singleton, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

Supreme Court of Florida

No. SC19-1744

MICHAEL SHANE BARGO,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

June 24, 2021

PER CURIAM.

This case is before the Court on appeal from a sentence of death. Michael Shane Bargo appeals the sentence of death that was imposed at his resentencing for the 2011 first-degree murder of Seath Jackson. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

We previously affirmed Bargo's conviction for first-degree murder with a firearm but vacated his sentence of death and remanded for a new penalty phase based on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 297 So. 3d

487 (Fla. 2020), *cert. denied*, 141 S. Ct. 1051 (2021). *Bargo v. State*, 221 So. 3d 562, 570 (Fla. 2017) (*Bargo I*). At the new penalty phase, the judge, following the jury's unanimous recommendation, imposed a sentence of death. We affirm.

BACKGROUND

The facts relating to the crime and investigation are detailed in *Bargo I*. 221 So. 3d at 563-67. In short, the evidence established that on the night of April 17, 2011, at then-eighteen-year-old Bargo's request, codefendant Amber Wright lured fifteen-year-old Seath Jackson to codefendant Charlie Ely's home, so that Bargo, codefendant Kyle Hooper, and codefendant Justin Soto could ambush and kill Jackson. After Jackson was struck in the head by Hooper and shot by Bargo, Jackson unsuccessfully attempted to flee. *Id.* at 565. Jackson was tackled by Soto, shot again by Bargo, beaten, and then put into a bathtub. *Id.*

> Bargo's plan was to keep the victim alive after the initial assault so that Bargo could kill him and the victim would know his killer before he died. To that end, Bargo stayed in the bathroom with the victim and hit him, cursed at him, and fired more bullets into him. Bargo ultimately killed the victim by shooting him in the face. Thereafter, Bargo and Soto carried the victim's body in a sleeping bag to Ely's fire pit and placed it into a large fire.

> Bargo and Wright later went to bed, and Hooper tended the fire until about 2:30 a.m.
>
> On the morning of April 18, 2011, James Havens—Wright's and Hooper's "stepdad"—arrived at Ely's home and helped dispose of the victim's remains. Hooper had previously helped Wright and Ely clean up the blood in the home with bleach. The remains from the fire pit had been stored in three paint buckets with lids, which Bargo and Soto put in the back of Havens' truck along with cinder blocks and cable. Havens drove Bargo and Soto—at Bargo's direction—to a remote water-filled rock quarry in Ocala, Florida, where they dumped the cinder block laden buckets.

Id. (footnotes omitted). Bargo was later arrested, tried, and "found . . . guilty of first-degree murder with a firearm." *Id.* at 567.

During the initial penalty phase, the jury recommended death by a vote of ten to two. *Id.* at 568. The trial court found two aggravators were proven beyond a reasonable doubt—i.e., that the murder was especially heinous, atrocious, or cruel (HAC), and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP)—and assigned both great weight. *Id.* at 568 n.6. The trial court concluded that the two aggravators "greatly outweighed . . . two statutory mitigators and fifty nonstatutory mitigators." *Id.* at 568. And the trial court sentenced Bargo to death. *Id.*

On direct appeal, this Court affirmed Bargo's conviction but vacated his sentence of death and remanded for a new penalty phase based on *Hurst v. State*, while "declin[ing] to address Bargo's other penalty phase claims" or "the proportionality of his death sentence." *Id.* at 570.

At the new penalty phase, the jury unanimously found that the State established the existence of both proposed aggravators (HAC and CCP) beyond a reasonable doubt; that the aggravating circumstances were sufficient to warrant a possible death sentence; that one or more mitigating circumstances was established by the greater weight of the evidence; and that the aggravators outweighed the mitigating circumstances. And the jury unanimously recommended that Bargo be sentenced to death.

After the *Spencer*[1] hearing, the circuit court found that the two statutory aggravators (HAC and CCP) were proven beyond a reasonable doubt, accorded each great weight, and concluded that each "alone would justify the imposition of a death sentence." As to mitigation, the circuit court was "reasonably convinced of the

1. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

existence of twenty-one (21) mitigating circumstances," assigning them weight as follows: "one (1) was assigned very little weight, ten (10) were assigned little weight, eight (8) were assigned slight weight; and two (2) were assigned moderate weight." The court further found that four proposed mitigators were not "reasonably established" and that three others were not mitigating.[2] Following the jury's recommendation, the court sentenced Bargo to death.

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2. Specifically, the circuit court found as follows regarding mitigation: (1) Bargo's age at the time of the crime (slight weight); (2) he was under the influence of a mental or emotional disturbance (slight weight); (3) his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was impaired (not proven); (4) he has a hostile relationship with his mother (little weight); (5) he was diagnosed with ADHD at age 7, and was prescribed Ritalin, Concerta, Focolin and Adderall (little weight); (6) he was found to be a danger to himself or others because of his growing anger through his parents' divorce and was referred to inpatient treatment (little weight); (7) the hostility between his mother and father impacted his development in a negative way (slight weight); (8) he was subject to harassment and teasing during his adolescence because he was smaller than other children in his age group (little weight); (9) Soto and Ely participated in the killing and were sentenced to life in prison (moderate weight); (10) Hooper and Wright participated in the killing (moderate weight); (11) Bargo was diagnosed with an abnormal brain scan, bipolar disorder, schizoaffective disorder and a complex partial seizure disorder (not mitigating "as it was not established . . . that the Defendant actually suffers from the listed medical or mental health conditions"); (12) he is a loving brother who has a close relationship with his sister, Lauren (little weight); (13) he has a severe drug addiction for which he received treatment (little weight); (14) he

ANALYSIS

In this direct appeal of his sentence of death, Bargo raises five issues: (1) the 2016 amendment to section 782.04(1)(b), Florida Statutes, retroactively precluded the State from seeking the death penalty at resentencing; (2) the circuit court erred in the application of the HAC aggravator; (3) the circuit court abused its discretion in giving "little or no weight" to the mental mitigation presented by Bargo; (4) the circuit court abused its discretion by failing to

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completed his high school education when he obtained a GED (slight weight); (15) he had a loving relationship with his paternal grandmother, Vergie Waller, and his father (little weight); (16) he is a follower and not a leader (not reasonably established); (17) he is artistic like his mother, who is a graphic designer (little weight); (18) he has maintained his behavior during the trial (very little weight); (19) he completed probation in Michigan (little weight); (20) he loved and cared for his dog, Lady, and brought her with him when he moved to Michigan (little weight); (21) he came from a dysfunctional family (slight weight); (22) he was not taking his medications at the time of the killing (no evidence presented that Bargo was prescribed medications that he was not taking at the time of the offense); (23) he sought employment to make money to be self-sufficient (not proven); (24) his paternal grandfather had been committed to a mental health facility and later committed suicide (slight weight); (25) he was prescribed Seroquel for hallucinations and Risperdal for anxiety (little weight); (26) he will have mental health treatment if he is sentenced to life in prison without parole (not mitigating); (27) Hooper developed a plan to blame everything on Bargo (rejected as impermissible attempt to relitigate guilt); and (28) Bargo had an Emotional Quotient (EQ) of a 15-year-old (slight weight).

adequately consider Bargo's age and ten other mitigating circumstances; and (5) Bargo's death sentence is disproportionate. We address each issue in turn.

I. Section 782.04(1)(b)

In his first issue, Bargo argues that the State was foreclosed from seeking the death penalty. He asserts that the Notice of Intent to Seek the Death Penalty (the Notice) filed by the State in 2011 was neither "timely filed" nor later "properly amended" to list the proposed aggravators for the new penalty phase. He relies on the purported retroactivity of section 782.04(1)(b), which was amended in 2016 to add certain notice requirements the State must follow when seeking the death penalty. *See* ch. 2016-13, § 2, Laws of Fla.

As amended in 2016, section 782.04(1)(b) provides in part that "[i]f the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment," and that "[t]he notice must contain a list of the aggravating factors the state intends to prove." § 782.04(1)(b), Fla. Stat. (2016). The amendment took effect on March 7, 2016. *See* ch. 2016-13, § 7, Laws of Fla. Later in 2016, this Court adopted "new rule 3.181 (Notice to Seek Death

Penalty)" to implement the statutory amendment. *In re Amendments to Fla. Rules of Crim. Proc.*, 200 So. 3d 758, 758 (Fla. 2016). Prior to the statutory amendment and rule adoption, no statute or rule required the State either to file a notice within 45 days of arraignment to be able to seek the death penalty, or to file a notice listing the proposed aggravators.[3]

Bargo asserts that the 2011 Notice should be "quashed" because it was purportedly not filed within 45 days of his waiver of arraignment, and because it never included a list of aggravators and was never amended to place him on notice "of the aggravators for the second penalty phase." He concedes that the State gave him

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3. Florida Rule of Criminal Procedure 3.202(a) (Notice of Intent to Seek Death Penalty), which was amended in the same 2016 rule-amendments case in which this Court adopted new rule 3.181, did from its adoption in 1995 until its amendment in 2016 contain a requirement that the State "give[] written notice of its intent to seek the death penalty within 45 days from the date of arraignment." *See Amendments to Fla. Rule of Crim. Proc. 3.220 Discovery (3.202 Expert Testimony of Mental Mitigation During Penalty Phase of Cap. Trial)*, 674 So. 2d 83, 85 (Fla. 1995). But rule 3.202 addresses expert testimony of mental health professionals and examinations of defendants by state experts. And, in any event, rule 3.202(a) expressly provided at the time that "[f]ailure to give timely written notice" under that rule did "*not* preclude the state from seeking the death penalty." *Id.* (emphasis added).

notice of the proposed aggravators prior to the initial penalty phase, in which the State pursued the same two aggravators (HAC and CCP) later pursued at the new penalty phase.

In concluding that the State was not precluded from seeking the death penalty, the circuit court here explained that the "new statute and the rule," which "did not exist in 2011 or [2013]," were both "keyed by an arraignment" and that "nobody gets re-arraigned when their case is sent back for a new resentencing." Nevertheless, the court ruled that the State would be limited to the same two aggravators sought at the initial penalty phase, given that Bargo had long been on notice of those two aggravators.

We agree with the circuit court that the State was not precluded from seeking the death penalty.[4] At bottom, nothing in the 2016 legislation evinces any intent to apply to cases in which a defendant was arraigned—or waived arraignment—years before the amendment took effect. *See Jackson v. State*, 256 So. 3d 975, 976 (Fla. 1st DCA 2018) (concluding that the 2016 amendment to

4. The circuit court's decision to limit the State to the same two aggravators sought in the initial penalty phase is not before us.

section 782.04(1) did "not apply retroactively to an arraignment that occurred in 2007").

Bargo claims that the 2016 amendment, enacted in the wake of the Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), "establishe[d] a Sixth Amendment right . . . and as such applies retroactively." We disagree. Nothing in *Hurst v. Florida* mentions any right to receive written notice of proposed aggravators, let alone within 45 days of arraignment. Indeed, this Court later in 2016 recognized as much. *See Perry v. State*, 210 So. 3d 630, 636 (Fla. 2016) (concluding that the 2016 amendment to section 782.04(1) was "not required by . . . *Hurst v. Florida*"), *receded from on other grounds by Rogers v. State*, 285 So. 3d 872 (Fla. 2019). We reject Bargo's claim.

II. HAC – Evidence of Post-death Acts

Bargo next argues that the circuit court improperly "allow[ed] testimony and evidence to the facts of what happened to the victim's body after the murder," and that this evidence "confused the jury as to the proper application of the [HAC aggravator]."[5] He

5. The post-death evidence here included that the victim's body was burned in the firepit; Bargo later pulled out the victim's

relies on *Jones v. State*, 569 So. 2d 1234 (Fla. 1990), in which evidence of post-death acts was presented and in which this Court concluded that the trial court erred in giving the HAC instruction. But based on our review of the record, we conclude that Bargo did not properly preserve the argument he now presents.

Bargo filed a motion in limine seeking to exclude "evidence regarding the disposal of [the victim's] body" as irrelevant to the proof of HAC *and* CCP. In arguing the motion, defense counsel conceded to "not hav[ing] a case on point" but asserted that, once the victim was deceased, that "would complete the two aggravators." The State countered by arguing *only* that the evidence was relevant to CCP because the post-death acts were part of a prearranged plan. Defense counsel ultimately requested, in the event the evidence was presented, that the court give "a special instruction" to advise the jury that the evidence was only relevant to CCP. The court agreed with the State that the evidence was relevant to CCP. And the court agreed with defense counsel that a jury instruction

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teeth; the victim's remains were placed in paint buckets; and Bargo dumped the buckets down a limerock pit.

would be "the more appropriate way to deal with the evidence." The court concluded that, assuming the State could tie the evidence to CCP, the jury should be instructed "that the evidence is relevant to [CCP] and . . . not relevant to [HAC]." And the court invited defense counsel to submit a proposed instruction.

It does not appear that defense counsel submitted a proposed instruction or that the jury was given a special instruction. As to the HAC and CCP instructions that *were* given, defense counsel offered no objection. And a review of the State's closing argument reveals that, other than one unobjected-to reference to "they burned him" made in the context of arguing for the HAC aggravator, the State discussed the post-death acts solely in the context of arguing for the CCP aggravator, also without objection.

Bargo's argument to this Court is that the evidence of post-death acts was prejudicial *only* regarding HAC. Given the record we just outlined, coupled with what is effectively Bargo's concession that the evidence was otherwise relevant to CCP, Bargo's argument was not adequately preserved for our review. And Bargo nowhere asserts that fundamental error occurred.

III. Mental Mitigation

Bargo claims that the circuit court abused its discretion in assigning little or no weight to the mental mitigation he presented. "In Florida, the finding of a trial court with regard to mitigation will be upheld if there is competent, substantial evidence for such a finding in the record. . . . Additionally, the weight assigned to a mitigating factor is reviewed under an abuse of discretion standard." *Lebron v. State*, 982 So. 2d 649, 660 (Fla. 2008). We find no abuse of discretion. The circuit court's conclusions here are reasonable and supported by the record. *See Calloway v. State*, 210 So. 3d 1160, 1178 (Fla. 2017) ("This standard [of an abuse of discretion] is only met if no reasonable person would arrive at the same conclusion as that of the trial court.").

A. The first-degree murder was committed while Bargo was under the influence of a mental or emotional disturbance.

The circuit court concluded that this proposed mitigating circumstance was established but assigned it slight weight. The gist of Bargo's argument is that the circuit court "arbitrarily" chose the opinion of the State's experts over those of his experts "without giving clear, objective, and demonstrable reasons as [to] the weight

assigned this mitigating circumstance." But a circuit court is not obligated to provide "demonstrable reasons" for the weight assigned to a mitigating circumstance. *See Rogers v. State*, 285 So. 3d 872, 890 (Fla. 2019) (receding from *Oyola v. State*, 99 So. 3d 431 (Fla. 2012), "to the extent that it employed a requirement that a trial court expressly articulate why the evidence presented warranted the allocation of a certain weight to a mitigating circumstance"). And the record here supports the circuit court's decision to find the State's expert, Dr. Greg Prichard, more credible than the defense's expert, Dr. Hyman Eisenstein. *See Ponticelli v. State*, 941 So. 2d 1073, 1098 (Fla. 2006) ("[W]e defer to the trial court's finding of fact when faced with conflicting expert testimony.").

Dr. Eisenstein, a clinical psychologist and neuropsychologist, testified that Bargo was a highly complex individual who had received multiple diagnoses over the years, including ADD/ADHD, oppositional defiant disorder (ODD), bipolar disorder, schizoaffective disorder, anxiety, and depression. Dr. Eisenstein opined that Bargo was currently suffering from depression and anxiety, that his ODD had been remedied over time, and that his other diagnoses were all "inactive." Dr. Eisenstein also opined that the murder was complex

but not well planned. At the *Spencer* hearing, Dr. Eisenstein testified about "emotional intelligence" or "emotional quotient" (EQ), concluding that Bargo's EQ at the time of the murder was "somewhere between 14, 15 years old . . . in terms of his thought processes, in terms of his behavior." While acknowledging there was "no test, per se" for EQ, Dr. Eisenstein explained that he reached his conclusion based on all factors and circumstances, including Bargo's parents' acrimonious divorce.

On the other hand, Dr. Prichard, a forensic psychologist, testified that "the most appropriate diagnosis for Mr. Bargo" was ODD, which, according to Dr. Prichard, is a behavioral disorder rather than a neurochemical disorder. Noting that Bargo's records contained an earlier diagnosis of ODD, Dr. Prichard opined that Bargo met "at least six" of the eight criteria for ODD. And Dr. Prichard offered explanations for why the events surrounding the murder were consistent with that diagnosis rather than being driven by psychosis or bipolar disorder, including that Bargo's behavior was "far too organized." As to Bargo's other past diagnoses, Dr. Prichard opined that Bargo had likely been misdiagnosed, reasoning that two of those diagnoses were

"mutually exclusive," and noting "the failure of the various psychotropic medications prescribed for [Bargo] over the course of his life." Such medications, according to Dr. Prichard, cannot treat a behavioral disorder. Dr. Prichard summed up:

> [T]he data is not there to say that [Bargo] was under the influence of extreme mental or emotional disturbance. I don't think he was symptomatic of anything at the time. I think oppositional defiant is kind of his personality, so he had the same personality, but not symptomatic in terms of bipolar or anything he couldn't control.
>
> The planning tells me that, you know, it wasn't some kind of acute thing where he just lost it for a second. This thing went on for a long time from beginning to end.

The circuit court found Dr. Eisenstein's testimony less credible, reasoning in part that Dr. Eisenstein, who indicated he was aware of the facts of the case, "stated several times that, 'I don't know what happened,' " when pressed about evidence and other witness testimony. The court viewed those statements as an admission of Dr. Eisenstein's "lack of knowledge as to the details of the crime and the exact nature of the Defendant's role in the offense." Elsewhere in the Sentencing Order, the court explained that "Dr. Eisenstein failed to identify any aspect of [Bargo's] 'thought processes' or 'behavior' . . . that suggested that [Bargo] was

functioning with the maturity level of a 14 or 15-year old." And the court noted that Dr. Prichard's opinion testimony, on the other hand, "rationally explained" what the records showed to be "a consistent pattern of behavior on the part of [Bargo]."

In assigning this mitigator slight weight, the circuit court concluded that it was established that Bargo "suffers from a mental disorder which may in some way *explain* [his] behavior at the time of the offense," but that there was no evidence the disorder "caused or contributed to the crime or impacted him such that he was incapable of regulating his conduct or making the choice not to plan and carry out the murder."

Given this record, we cannot say that the circuit court's decision was unreasonable. Indeed, we have upheld the outright rejection of this mitigating circumstance where the facts of the crime "show[ed] an element of planning" and the defendant was not shown to be under the influence of a disturbance "at the time of the murder." *Hoskins v. State*, 965 So. 2d 1, 17 (Fla. 2007). We have also upheld the rejection of this mitigating circumstance when there was a "conflict in [expert] testimony" and the sentencing order revealed "thorough consideration of th[e] issue" by the trial court.

Philmore v. State, 820 So. 2d 919, 937 (Fla. 2002). Here, there was evidence presented regarding Bargo's planning of what Dr. Prichard described as a "very well thought out" crime. Dr. Prichard also offered reasoned analysis for his conclusion that "the data [was] not there to say that [Bargo] was under the influence of . . . anything he couldn't control." And a review of the Sentencing Order reveals that the circuit court carefully considered this issue.

We note that the circuit court employed somewhat similar reasoning with respect to related proposed mitigating circumstance "j.," that Bargo had been "diagnosed with an abnormal brain scan, bipolar disorder, schizoaffective disorder and a complex partial seizure disorder." The court found that, yes, it was established that Bargo had been "*diagnosed*" with those conditions over the years, but that the circumstance did "not tend to mitigate against a sentence of death." Noting the conflicting expert testimony, the court concluded that "it was not established by the greater weight of the evidence that the Defendant actually suffers from the listed medical or mental health conditions." This, too, was a reasonable conclusion with record support.

For example, the circuit court addressed the testimony of defense expert Dr. Joseph Wu, a psychiatrist, who opined that a PET scan of Bargo's brain "was abnormal" and that it "revealed that [he] suffered from a 'partial complex seizure spectrum disorder.' " In doing so, the court noted that two of the State's experts, Dr. Steven Nelson and Dr. Geoffrey Negin, both medical doctors, contradicted Dr. Wu's testimony. As the court noted, "Dr. Nelson testified that a person experiencing a complex partial seizure would be disoriented, confused and unable to communicate for a period of time after suffering the seizure." Indeed, Dr. Nelson listed reasons why the murder was not the product of a seizure, including that Bargo was able to "carry out an organized plan." Dr. Nelson also explained why Bargo's PET scan was "incompatible with epilepsy." Dr. Negin similarly testified that Bargo's PET scan was "not consistent with" a seizure disorder. Dr. Negin explained "that the PET scan reviewed by Dr. Wu . . . revealed hyperactivity in an area of [Bargo's] brain rather than showing the hypoactivity that would be expected if the patient was suffering from a seizure disorder." Dr. Negin further testified that in any event "an MRI scan was the normal tool used to verify the existence of seizure-related issues in

the human brain," and he offered potential explanations for "the hyperactivity apparent in [Bargo's] PET scan." We decline "to reweigh the evidence and to ourselves resolve [the] conflicting expert testimony," as it "is not our role" to do so. *Kocaker v. State*, 311 So. 3d 814, 821 (Fla. 2020).

B. The capacity of Bargo to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was impaired.

The circuit court concluded that Bargo failed to prove the existence of this mitigating circumstance. Bargo again argues that the circuit court abused its discretion in purportedly failing to provide " 'exact' details" of its decision. We conclude that the circuit court's rejection of this proposed mitigator is supported by "competent, substantial evidence." *Lebron*, 982 So. 2d at 660.

The circuit court began by reiterating why it found "the credibility of Dr. Eisenstein's opinions [and] explanations of [Bargo's] mental status" to be "diminished." The court further noted that Dr. Eisenstein nevertheless "did *not* testify that he believed [Bargo's] capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was impaired." On the other hand, the court concluded that Dr.

Prichard had "rationally explained" Bargo's "consistent pattern of behavior" and had testified that Bargo's behavioral disorder "did not affect [his] ability to choose to act in conformity with rules." Indeed, Dr. Prichard gave an example of how Bargo had demonstrated that ability, namely when Bargo "chose to stop using drugs while he was in prison in order to regain his visitation privileges." Again, these conclusions all have record support.

Bargo also asserts that the trial court "failed to include the important findings of Doctor Joseph Wu and Doctor Robert Berland" when addressing Bargo's mental mitigation. But the testimony of those two experts was contradicted by the State's experts and, in the case of Dr. Berland, was additionally questionable.

As noted above, the circuit court, when separately addressing proposed mitigating circumstance "j.," explained how Dr. Wu's opinion that Bargo suffered from a "partial complex seizure spectrum disorder" was contradicted by Dr. Nelson and Dr. Negin. That was a conflict for the circuit court to resolve.

Dr. Berland, whose prior testimony was read to the jury, he had conducted a mental health evaluation of Bargo, reviewed

records, and administered the MMPI-II, a psychological test, by reading it to Bargo. Dr. Berland had also administered the test to Bargo's father. Dr. Berland testified that Bargo "had a lot of delusional paranoid thinking" and "had symptoms of psychosis." In the end, Dr. Berland concluded that Bargo "suffers from a biological, mental illness . . . and brain injury has probably enhanced the symptoms." But Dr. Berland also testified that "there's a group of people that say you shouldn't read [the MMPI-II test], that you should use the recorded version [of the test]." And Dr. Berland conceded on cross-examination that Bargo's "extremely high" score on one of the validity scales for the test would lead "most professionals" to conclude that the test was invalid. It is difficult to fault the circuit court for not discussing Dr. Berland's testimony at length. And in any event, as the circuit court noted, Dr. Prichard testified as to why he "did not believe that [Bargo] suffered from bipolar disorder or a schizoaffective disorder."

We have upheld a trial court's rejection of this mitigator "when a defendant's actions during and after the crime has indicated that he was aware of the criminality of his conduct." *Bright v. State*, 299 So. 3d 985, 1006 (Fla. 2020) (quoting *Ault v. State*, 53 So. 3d 175,

188 (Fla. 2010)), *cert. denied*, 141 S. Ct. 1697 (2021). Here, the evidence supports the conclusion that Bargo's actions "indicated that he was aware of the criminality of his conduct." *Id.* Indeed, Dr. Prichard testified that "the coverup tells you [Bargo] recognized how criminal it was," including "burning the body," "removing teeth," disposing of "[t]he ashes and the body parts," and "leav[ing] town."

IV. Bargo's Age and Other Mitigators

Bargo next argues that the circuit court failed to adequately consider and assigned too little weight to his age and certain other mitigating circumstances. "[T]he weight assigned to a mitigating factor is reviewed under an abuse of discretion standard." *Lebron*, 982 So. 2d at 660. Bargo's claim lacks merit.

A. Bargo's age—given "slight weight"

"In Florida, numerical age alone may not be mitigating if not linked to some other material characteristic (e.g., immaturity)." *Id.* This Court has "long held that the fact that a defendant is youthful, 'without more, is not significant.' " *Mahn v. State*, 714 So. 2d 391, 400 (Fla. 1998) (quoting *Garcia v. State,* 492 So. 2d 360, 367 (Fla. 1986)). In order "to be accorded any significant weight as a

mitigating factor, '[a defendant's age] must be linked with some other characteristic of the defendant or the crime such as immaturity.' " *Id.* (quoting *Echols v. State*, 484 So. 2d 568, 575 (Fla. 1985)).

Bargo relies on Dr. Eisenstein's testimony that Bargo had an EQ of a fourteen- or fifteen-year-old "in terms of his thought processes, in terms of his behavior." Bargo argues that, among other things, the circuit court "did not take the time or the resources to actually understand the body of research behind EQ." We conclude that the circuit court did not abuse its discretion.

As an initial matter, the circuit court noted that Dr. Eisenstein conceded there was "no test, per se" for measuring EQ. The court thus considered his opinions to be "subjective and closer to a 'guess.' " Moreover, as the court alluded to, Dr. Eisenstein repeatedly stated something to the effect of "I don't know what happened" when pressed about evidence and other testimony. But more importantly, the court explained that "Dr. Eisenstein failed to identify any aspect of [Bargo's] 'thought processes' or 'behavior' before, during or after the instant offense that suggested that [Bargo] was functioning with the maturity level of a 14 or 15-year

old." Indeed, the court concluded that "[n]o part of the evidence . . . suggest[ed] that any lack of maturity contributed to [the] murder." Rather, according to the court, the evidence established that the murder was "conceived, explained and orchestrated" by Bargo, who "encouraged, directed and corrected the activities of others." The court, which was unable to reconcile Dr. Eisenstein's testimony with Bargo's "behavior at the time of the offense," was under no obligation to attribute much weight to that testimony. *See Coday v. State*, 946 So. 2d 988, 1002 (Fla. 2006) ("[E]ven uncontroverted expert opinion testimony may be rejected if that testimony cannot be squared with the other evidence in the case.").

Lastly, Bargo asserts that this Court in *Bargo I* "recognized the age of Mr. Bargo as a mitigating circumstance." But *Bargo I* did no such thing. Indeed, *Bargo I* addressed the *Hurst* issue and no "other penalty phase claims." *Bargo I*, 221 So. 3d at 570.

B. Weight assigned to certain nonstatutory mitigation

Bargo argues that "[t]he trial court abused its discretion when it assigned 'little weight' or 'slight weight' to [ten] mitigating circumstances without giving a factual or legal analysis." Relying principally on *Hudson v. State*, 708 So. 2d 256 (Fla. 1998), and

Campbell v. State, 571 So. 2d 415 (Fla. 1990), *receded from on other grounds by Trease v. State*, 768 So. 2d 1050 (Fla. 2000), Bargo's argument is that the circuit court did "not explain the reasons for the weight assigned to" the mitigating circumstances. But we have made clear that our caselaw does not impose such a requirement on the sentencing court. *See Rogers*, 285 So. 3d at 890 (receding from *Oyola* "to the extent that it employed a requirement that a trial court expressly articulate why the evidence presented warranted the allocation of a certain weight to a mitigating circumstance"). We thus reject Bargo's argument.

V. Proportionality – Relative Culpability

Lastly, Bargo argues that his death sentence is disproportionate. He recognizes that this Court in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), "eliminate[d] comparative proportionality review from the scope of our appellate review." *Id.* at 552. But he asserts that "relative culpability review" survived *Lawrence* and that, under a relative culpability review, his death sentence is disproportionate "in light of the other sentences of the codefendants," none of whom has been given a death sentence.

We need not decide whether "relative culpability review" survived *Lawrence*. Indeed, Bargo's claim fails under this Court's pre-*Lawrence* caselaw, which generally rejected claims of relative culpability raised by "triggerman" defendants. *See, e.g.*, *Blake v. State*, 972 So. 2d 839, 849 (Fla. 2007) ("We have rejected relative culpability arguments where the defendant sentenced to death was the 'triggerman.' "). And although "the triggerman has not been found to be the more culpable where the non-triggerman codefendant is 'the dominating force' behind the murder," *Stein v. State*, 995 So. 2d 329, 341 (Fla. 2008), here the sentencing order makes clear that the evidence established that Bargo not only fired the gun but planned all aspects of the murder. We reject Bargo's claim of relative culpability.[6]

CONCLUSION

For the reasons stated above, we affirm Bargo's death sentence.

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6. Two of Bargo's four codefendants (Wright and Hooper) were juveniles at the time of the murder. Any relative culpability review would thus be "inapplicable" with respect to them, given their "ineligib[ility] for the death penalty." *Sanchez-Torres v. State*, 130 So. 3d 661, 675 n.5 (Fla. 2013).

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.
LABARGA, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LABARGA, J., dissenting.

In my dissent in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), I raised my concerns about this Court's elimination of comparative proportionality review in cases where a death sentence has been imposed. Because Bargo's case is a prime example of the need for comparative proportionality review, I respectfully dissent.

Comparative proportionality review previously required this Court to complete a comprehensive analysis in every death penalty case to determine whether the crime at issue falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the death sentence. While Bargo's case involves significant aggravation, it also involves significant mitigation. As the majority notes, during the initial penalty phase, the trial court found two statutory mitigators and fifty nonstatutory mitigators. Majority op. at 3. The

record revealed evidence of significant mental health mitigation dating back to Bargo's childhood.

In Bargo's initial direct appeal, Justice Pariente explained in a concurring opinion her "serious concerns in this case about whether the death sentence is proportionate for this eighteen-year-old with significant mental health mitigation." *Bargo v. State*, 221 So. 3d 562, 570 (Fla. 2017) (Pariente, J., concurring). Justice Pariente described the following:

> The defendant was eighteen years old at the time of the crime, and the trial court found two statutory mitigators (age and under the influence of extreme emotional distress) and numerous nonstatutory mitigators—including that defendant suffers from frontal lobe brain damage, bipolar disorder, schizoaffective disorder, complex partial seizure disorder, hallucinations, and diminished control over inhibitions, was abandoned by his father, grew up in a disadvantaged and abusive home, has a severe substance abuse problem which aggravated a neurological disorder, along with the possibility that the defendant was misdiagnosed and treated for ADHD. The trial court did not ascribe great weight to any of this mitigation. However, a review of the record indicates that Bargo's mental health mitigation reaches far back into his childhood, rather than emanating from evaluations occurring after the murder occurred.

Id. at 570-71.

Prior to this Court's abandonment of comparative proportionality review, our case law determined that reliable, uncontroverted evidence of mental health mitigation coupled with age indicates that a sentence of death may be disproportionate, even in light of substantial aggravation. *See*, *e.g.*, *Crook v. State*, 908 So. 2d 350, 352, 358 (Fla. 2005); *see also Morgan v. State*, 639 So. 2d 6, 14 (Fla.1994); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla.1988).

As this Court aptly observed in *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991), "proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." Given Bargo's extensive mental health mitigation dating far back into his childhood, coupled with the fact that he was only eighteen years old at the time of the crime, a comparative proportionality review would have benefitted this Court's analysis. "Failing to consider a death sentence in the context of other death penalty cases impairs the reliability of this Court's decision affirming that sentence." *Lawrence*, 308 So. 3d at 558 (Labarga, J., dissenting).

Accordingly, because I believe comparative proportionality review would have provided this Court with a significant and useful lens through which to analyze Bargo's case, I respectfully dissent.

An Appeal from the Circuit Court in and for Marion County,
Anthony Michael Tatti, Judge – 422011CF001491CFAXXX

Philip J. Massa of Philip J. Massa, P.A, West Palm Beach, Florida,

for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Doris Meacham, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

OF FLORIDA, IN AND FOR MARION COUNTY

CASE NO. 42-2011-CF-1491-A

STATE OF FLORIDA,

Plaintiff,

vs.

VOLUME 12 OF 12

MICHAEL SHANE BARGO, JR.,

ORIGINAL

Defendant.

PROCEEDINGS: JURY TRIAL (GUILT PHASE)

BEFORE: Honorable David B. Eddy
Circuit Judge
Fifth Judicial Circuit
Marion County, Florida

REPORTED BY: CONSTANCE MILLER, RPR
Stenographic Court Reporter
Notary Public
State of Florida at Large

DATE: August 20, 2013

TIME: 9:00 a.m.

PLACE: Courtroom 2E
Marion County Judicial Center
Ocala, Florida

A P P E A R A N C E S:

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APPEARING ON BEHALF OF DEFENDANT

I N D E X

AUGUST 20, 2013 9:00 a.m.

* * *

THE COURT: Counsel approach the bench.

(Discussion off the record.)

THE COURT: I'm going to just take a brief recess. I'll return in about five minutes.

MS. ARNOLD: Yes, Judge.

(Recess was taken.)

THE COURT: Go ahead and be seated, please.

Do you have that case law or is Ms. Arnold --

MS. BERNDT: Ms. Arnold is getting it for me.

THE COURT: Counsel, do each of you need that podium?

MS. BERNDT: I don't need it, Your Honor. That's why I moved it out of the way so the jury could see the screen. Charles?

THE COURT: Do you need it, Mr. Holloman?

MR. HOLLOMAN: Uh-huh, yes, sir.

THE COURT: We'll relocate it during the defense closing argument, not now.

Counsel, approach the bench, please. Will you approach the bench?

This doesn't need to be on the record.

(Off-the-record discussion.)

THE COURT: Hand one to the bailiff for my review.

MS. ARNOLD: Your Honor, on page four headnotes four, five, six, seven and eight together.

MS. BERNDT: You see it's on page four, Charles; page four headnote four, five, six, seven and eight?

MR. HOLLOMAN: Page four?

MS. BERNDT: Yes.

THE COURT: Have you read that, Mr. Holloman?

Counsel, approach the bench.

For review, the State has presented the case of Sanborn, S-A-N-B-O-R-N, versus State, 474 So. 2d 309 Third District Court of Appeal 1985.

It appears, Mr. Holloman, by this case, that you are prohibited to argue in closing argument what you believe to be perjured testimony.

MR. HOLLOMAN: Well, gee, some of it is and some of it isn't.

THE COURT: Which is not? Which is not?

MR. HOLLOMAN: It's technically like --

THE COURT: I'm going to allow you to present the argument that you feel is appropriate. And if there is any objection or argument, I'll charge the State with making such objection, but I'm not going to limit your closing argument.

MR. HOLLOMAN: Kind of puts me in a dilemma here.

THE COURT: Make the argument you see fit. I'm not going to limit you.

At this time, we will need the Defendant in the courtroom.

Noting the Defendant's present, counsel for the Defendant are present, counsel for the State of Florida are also present.

The jurors' notepads are being returned to them at this time, which is immediately prior to them entering the courtroom.

Counsel, are we ready for the jury to return?

MS. BERNDT: State's ready, Your Honor.

MR. HOLLOMAN: Defense is ready, Judge.

THE COURT: Please have the jury return to

the courtroom.

THE BAILIFF: Yes, sir.

(The jury entered the courtroom, and the following further proceedings were had in the presence of the jury:)

THE COURT: Good morning, ladies and gentlemen.

Members of the jury, both the State and the Defendant have now rested their case. The attorneys now will present their final arguments. Please remember, that what the attorneys say is not evidence or your instruction on the law; however, do listen closely to their arguments. They are intended to aid you in understanding the case. Each side will have equal time, but the State is entitled to divide this time between an opening argument and a rebuttal argument after the Defendant has spoken.

Counsel.

MS. BERNDT: May it please the Court, Mr. Holloman, Ms. Hawthorne.

Good morning, members of the jury. I want to start by thanking you for the time you've given during this trial and for the attention

that you've paid. I know that it was a long trial, I believe there's about -- a little over 40 witnesses, and I thank you because without you guys we can't do this.

I want to start by getting back to what this case is about. A 15-year-old child is dead; murdered in the most horrific way. His name is Seath Jackson and he is the victim in this case. Not the Defendant, Michael Bargo. Michael Bargo was not framed and he was not simply misunderstood. He confessed to eight people that he shot and killed Seath. And these are eight people that had no grudges against the Defendant, no reason to come in here and lie. And, in fact, some of those people could barely get through their testimony without crying when they fried to recall what the Defendant had told them. The Defendant, Michael Bargo, wanted Seath Jackson dead, he planned his murder and he carried it out.

Now, the facts and circumstances surrounding this case are so gruesome, that most of the people that testified that the Defendant confessed to them said we didn't believe it. We didn't want to believe it, we

couldn't believe something this horrible had happened. And you've seen the pictures and they're horrible; the bones and the remains. So what I want to do is start off and show you something that you haven't seen yet; it's been entered into evidence but it hasn't been shown to you. And it's a picture of what Seath Jackson looked like alive because you haven't seen that. That's what he looked like before he was murdered by the Defendant, Michael Bargo.

Now what you're going to get to take back with you is something we talked a lot about in jury selection and it's something you haven't seen yet, and that's the law. You're all gonna get one of these packets and this is what it looks like. It's called the jury instructions. It's going to give all that law we talked about forever, it seems, during jury selection. And I have some of this up on the screen for you so we can talk about what exactly the State has to prove to you for you to find the Defendant guilty. But what you're going to find in here also, I want to briefly touch on it, is something that's called lesser included

offenses and that law is in here as well, but I'm not going to go over that with you on the PowerPoint.

You're going to find some lessers; one called second-degree murder. And that's basically there's no premeditation and the Defendant killed Seath out of ill will, hatred, spite. Say, for example, they met up on the street, Michael Bargo hated Seath, he took out his gun and shot him. And I'm gonna submit to you that doesn't apply in this case because there's clear evidence of premeditation which we're going to go over later on, so I suggest that doesn't fit this case.

Then you're going to have another option which is manslaughter. And that's if Michael Bargo had done a criminal act, some kind of act -- he didn't intend to kill Seath but he did some act without premeditation, no evil intent or ill will. And again, clearly that doesn't fit the facts of this case. I just wanted to mention those because you are going to be able to read about those.

What he's charged with and what we've proven to you beyond a reasonable doubt, is

murder in the first degree. And this is exactly from the jury instructions. It's in this packet and this is the law. There are only three, three things, three elements that the State has to prove to you beyond a reasonable doubt for you to find the Defendant, Michael Bargo, guilty of murder in the first degree, and that's it. And you don't see up here any numbers that say who was sleeping with whom, who broke up with Seath, who broke up with Amber; none of that's on there because we don't have to prove any of that.

We have to prove one, Seath Jackson is dead. Two, the death was caused by the criminal act of Michael Bargo. And three, there was a premeditated killing of Seath Jackson. And if we proved to you those three things and only those three things beyond a reasonable doubt, you must find the Defendant guilty of murder in the first degree.

Let's go through those. Number one, Seath Jackson is dead. Normally, in a murder case you have a body and we wouldn't have to present so much evidence that Seath is dead. I know we spent a lot of time doing that. But we have to

prove it to you beyond a reasonable doubt, and because we didn't have a body in this case, and somebody that could come in and say yes, that body is Seath Jackson, we had to present all this evidence to prove it to you. And the reason we didn't have a body is because of the great lengths the Defendant went to to try to dispose of it like burying it, pulling its teeth, throwing it in the limerock pit. That's why so much time was spent on this issue. This has clearly been proven beyond a reasonable doubt. Like anybody's going to say that Seath Jackson's not dead. He hasn't been seen since April 17th of 2011 and that's why those questions had to be asked of his mother. Terrible to have to ask a mother when was the last time you seen your child alive, but that's part of what we have to do to prove it to you.

Three paint buckets are found in the quarry with Seath's charred remains. DNA tests have to be done, and they are by FDLE, and they confirm that those remains are the biological child of Sonia and Scott Jackson. We have all those bones that are found in the fire pit at Charlie Ely's house and then the DNA tests done

by Bode Labs, that was on the bones from the fire pit. They say they can't exclude those remains as being the biological child of Sonia and Scott Jackson. Dr. Warren testified that the bones came from one individual, a male, between the ages of 14 and 17. And probably the most importantly, both Kyle Hooper and the Defendant both admit that he's dead. The Defendant denies he did it but he admitted Seath was dead. That's number one, the first element. That's clearly been proven beyond a reasonable doubt.

Two, the second element, the death was caused by the criminal act of Michael Bargo. That's the second element. These are the people the Defendant confessed to that he killed Seath or made some admission to. Eight people. Kristin Williams, let's pick a couple. When she came in here she could barely testify when she had to tell you what Michael Bargo told her. She had to hesitate, she was crying, she was upset. If the Defendant had just told her what he said, somebody was shot and killed with my gun, is that the way she would react? She would have said no, he told me somebody was

shot and killed with his gun. That is not what he told her. It's common sense. Her boyfriend of a year-and-a-half told her I shot and killed a kid. She was with him for a year-and-a-half and that is why when she came in here she could barely tell you that.

You have Crystal Anderson. Obviously, she could barely even get through the door. When she hesitated at the door y'all saw that before she even came in. And she sat on the witness stand, she had to turn her chair at one point, she couldn't even get it out. And they were all, all firm on he said I shot and killed the kid. There was no shaking them on that.

And again, there's no reason for these people to come in here and lie. He admitted when he testified yeah, they were fine, I hung out with them. There's no grudge with these people, there's no reason for them to come in here and say these things. And interestingly enough, David Smith, he was a very short witness, he was the corrections officer. And he came in and told you I overheard the Defendant admitting something to another inmate. And it's interesting what he said and

it's more interesting after Kyle Hooper testified because what David Smith heard the Defendant say is, there's only two people that saw me shoot him. What does David Smith have, what reason does he have to come in here and make that up? If you're going to make something up, it could be something better than that. So he hears that, the detectives say okay, write it down. And you could see that he was reading from that, he had his statement that he had written down on the day this happened, the exact quote. And after Kyle Hooper testified, what did we learn? There were only two people that saw Michael Bargo shoot Seath because the girls had run into the bedroom.

If you recall, Ms. Arnold asked Kyle Hooper once you guys started beating Seath, what did the girls do? They both ran and hid in Charlie's room. Who would know that? Who would say that; the person that shot Seath. I mean, it fits perfect, it fits perfectly.

He can't get around these people. Maybe one person says yeah, he told me I shot him. Okay, maybe they misunderstood, he or they.

Not eight, not eight. Beyond a reasonable doubt, this would be enough but there's more to prove that he actually shot Seath and caused his death.

This is just more about why those people are not making it up. As we went through, there's nothing in the paper or the television. Detectives didn't tell him any details. Defense attorney tried to suggest they read it on Facebook. They're like we're sitting around a burn barrel drinking some beer, we weren't on Facebook getting the details of the murder. They didn't know anything about it.

All of the Defendant's confessions matching the physical evidence. So besides all the people that he confessed to, I submit to you that alone is enough. You confess to eight people, it's proven beyond a reasonable doubt. But everything that he confessed to matches the physical evidence that's been presented.

For example, he confessed that he shoots Seath with a .22 caliber gun. He owned a .22 caliber gun. Michael Proctor sat here and said, yeah, I traded it to him, I owed him money. He admitted it was his gun, there was

no question that was his gun.

And Megan Albany if you remember, and Kyle Hooper both testified that the Defendant always had that gun with him. He always had that gun with him.

And the firearms expert testified that the projectile sent to her from the Medical Examiner's Office, the one they did recover, was a .22 caliber bullet. And there was some cross contamination, well, we don't know for sure that it came from that gun. Well, we do now because the Defendant said so. He says Kyle shot it but he admits that it was his gun so we know that. We know that Seath was shot with the Defendant's gun that the witnesses say he always carried on him.

The Defendant had an injury on his hand consistent with having come from the hammer of a firearm. And the Defendant tells the evidence technician he got it from the hammer on his .22 caliber gun. There's the picture.

Judge is going to tell you to use your common sense and many of you on the panel have guns and you hunt. You look at that picture. Is that from him firing over and over and over

again when he killed Seath? Because the testimony is he shot him multiple times and there's the physical evidence that proves it.

He told Kristin Williams that the gun he used to shoot Seath was under a house. Where was the gun found, under the house. That air vent duct that had broken off, and that's where the gun was. How did she know that? Because that's where he hid it and that's where he told her he hid it.

Defendant confessed to Crystal Anderson that he shot Seath two times in the face. Those are the details that she said and Dr. Warren testified he took x-rays of the skull and saw the metal flecks, those bright, white spots that are on that x-ray and those are evidence of gunshot wounds to the face. And Dr. Shaw also saw the same things and he called it a lead spray is his description, a lead spray. And he took those x-rays and he also saw the metal flecks and he came to the same conclusion. The physical evidence matches up with his confession, Seath was shot in the face. And this is the -- right here are these white flecks that the doctors talked about.

Now, the Defendant confessed to several people that he shot Seath multiple times; more than once, shot him inside, shot him outside, shot him in the bathtub. How do we have evidence of that? How does the physical evidence match that part of his confession? One projectile is located in some tissue next to that vertebra. The x-rays indicate Seath was shot in the face. So you have at least two shots there; one projectile in the tissue, you have the lead spray that's showing he was shot in the face. And then the evidence technicians located in that fire pit what appeared to be five melted bullet fragments in the fire pit. I don't know if you remember when that picture was shown but that's what she was talking about. These were all found in the fire pit. Again, that's the physical evidence matching up with the Defendant's confession. That he was shot at least eight times.

The Defendant told Crystal Anderson that Seath's skull didn't burn all the way so he pulled his teeth out. Part of Seath's skull was found in that limerock pit. What else was found in the limerock pit? A human tooth.

That is part of the skull that was found, and that's the tooth.

He's telling the details of exactly what he did and everything is matching up with that. The Defendant confesses to numerous people that he put Seath's remains in paint containers and he threw them in a rock quarry or a body of water. That's where his remains were found. In the limerock pit that he admitted and he admitted on the stand, I think he even admits to swimming down and touching of the bottom, he knows how deep it is. He admits that was his idea, he told him where -- I told him where that limerock pit was. He's the only one who knew where that was. He swam there, his girlfriend was Kristin Williams, she lived less than one mile and look where they're found.

He confesses that he burned Seath's body. He's got burn marks on his face. And the pictures are in here and you can look at the pictures all you want to. Those are burn marks on his face, not from a beating. It's not black and blue from a fight with Kyle Hooper.

And he told William Fockler that when he was burning the kid's body he threw an aerosol

can in the fire to make it hotter and it burned his face. And then you heard from Tracy Wright, what does she tell you? On Monday the day after Seath was killed, his face was messed up and she said she asked him what happened to your face and he said he burned it in a fire. He told her I threw an aerosol can in the fire.

And if you want to talk about evidence matching up, think about how what Tracy Wright and William Fockler say about the aerosol can matching up with what Julie Cunningham tells you. Now, those people don't even know each other. Julie Cunningham is the neighbor who lived with her husband, they came out to address the fire being hot. Tracy Wright has no connection with her and William Fockler has no connection with her.

Her testimony was to you at first we see what we think is an orange glow and then we go out and investigate the fire and then we tell them, you know, watch the fire. We come back in. And her exact quote was then she saw in her window flames, exact quote from her on the stand was it was as if they had accelerated the fire. She's testifying it was as if they had

accelerated the fire and he has burn marks on his face and is confessing I threw an aerosol can in the fire. He's trying to accelerate the fire. And the neighbor has nothing to do with them is saying yes, it seemed like somebody was accelerating the fire.

That's not from a fight with Kyle Hooper punching him in the face or kicking him in the face, it's the burn marks. That's number two. That was the second element. I mean, there can't be much more evidence than that. He confessed to eight people, all the physical evidence matches up with exactly what he said. Did he cause the death? Yes, he did, absolutely. That's element number two proven beyond a reasonable doubt.

You got one more element. Was it premeditated? That's the last thing we have to prove to you beyond a reasonable doubt. Was it premeditated? We know the Defendant hated Seath and he had numerous verbal altercations with him in the weeks leading up to the murder.

Sonia Jackson testified a week before Seath was murdered the Defendant told him I have a bullet with your name on it. What was

it over? From what everybody testified to, except the Defendant, it was over Amber because Amber cheated on Seath with the Defendant. That's what they were feuding about, not some song lyric about gangs. And think back about how interesting it is that when we go through the list of all the people the Defendant was seeing, all the girlfriends he had and all the people he was sleeping with, who was the one person that he will not admit he was either sleeping with or in a relationship with? Amber Wright. Why does he not want to admit that? He's admitted a whole host of other girls he's seen at the same time, why deny that you're with Amber Wright? Because clearly, that's why you got into it with Seath. That's why you hated Seath and that's why you killed him. You don't want to admit that. You want to distance yourself from that. But you can't distance yourself from the fact that numerous people saw you guys together, saw you kissing, saw you holding hands and you have her initials tattooed right here and we have pictures of that. And she has your initials tattooed right here. Why do you have that?

And the Defendant said something about killing Seath to the group while James Havens was still there. They were talking about it early on about killing Seath. This is hours before the murder.

And Kyle Hooper told you that everybody had a specific role, didn't go as planned but everybody had a role. You can't be more premeditated than that. Let's plan, what are we gonna do. Amber and Charlie are going to lure Seath to the house. Michael Bargo told them that's your job, you get Seath here because Seath is not coming for anybody else. Michael Bargo already tried to get Seath to meet him, if you'll recall, and then they went by Charlie's house and he started firing a gun at him. There's no way Seath is coming to this house because the Defendant asks him or because Kyle Hooper asks him. The only people that can get Seath to that house are Amber and Charlie and the Defendant knows it.

Roach, Justin Soto, was supposed to have a stick or a board. He was supposed to hit Seath once he got in the house. And then the Defendant Michael Bargo and Kyle were gonna

come out and beat Seath up and then the Defendant was going to shoot him. You can't get more premeditated than that plan right there.

But you have more. That's enough, but you have more. The Defendant planned to burn Seath in the fire several hours before the murder. You have Larry Jenkins -- again, these are people, he's a neighbor, he doesn't know him, he's got no problems with Michael Bargo. He comes in and says yeah, I'm out there smoking my second cigarette of the night, I see Michael Bargo by the fire with Amber Wright. It's just the two of them, it's not a group starting a bonfire. And Amber Wright says to Michael Bargo is it time to light the fire yet? And he says no because he says it's too early and the plan will call for lighting the fire later. He wasn't out there as he tried to say because he was worried the fire marshal was going to come and give him a ticket because there was a burn ban.

James Havens said the Defendant said something about texting. James Havens said I heard him say something about texting to get

Seath to come to the house. And the text messages show the premeditation beyond a reasonable doubt. The text messages alone, which you're going to see in a minute, just those alone show premeditation. But you've got tons of other things that show premeditation.

I'm going to end with the text messages for the premeditation. That was the third element. If we have proven those three elements, which there's just been an abundance of evidence of those three things, beyond a reasonable doubt, you have to find him guilty of first-degree murder.

And the next thing I'm going to show you are the text messages that were taken off of Amber's phones and they're going to show you how premeditated it was to get Seath to come there. This is how they start. You can see the time at the bottom, it says 8:12. Amber at 8:12, this is hours after they had talked about it, texted Seath, Hey, can you talk?

Seath texted back, You said you needed to talk?

Amber says, Well, I kinda need da talk to you about us working things out.

8:46. Seath says, What do you mean?

Amber says, Can you please call me, like now?

Seath says, Yeah, sure.

She says, Hey, my friend Charlie's coming with, I've been telling her everything between me and you and she's coming because I need her to help us through this. Is that okay? But don't tell anybody what's going on because I want to make sure we can work things out before anybody knows.

How premeditated is that? And by the way, don't tell anybody. Seath says he knows, everybody's told him stay away from her. Amber, if you have me jumped, I will never give you the time of day, so if I get jumped say goodbye, all right.

No, she's going to smooth it over.

I swear you're not, Seath. I could never do that to you. I just want me and you back.

And he says, okay.

And then he says, Sorry, I didn't want Will to hear me. Stay around the corner where me and you fought, just wait there and I'll be there in a minute.

She says, I'm walking up the hill now, I'm at the neighborhood road. Where are you? 9:08.

And we know what happens after he meets her at the neighborhood road. And those three elements have clearly been proven beyond and to the exclusion of every reasonable doubt.

Michael Bargo wanted Seath Jackson to die and as he told James Havens after he murdered him, the deed is done.

THE COURT: Can we have that podium repositioned, please.

THE BAILIFF: Yes, sir.

MR. HOLLOMAN: Judge, can we take a brief recess?

THE COURT: We'll take -- we'll make it an approximate 20-minute recess. We'll reconvene at 10:05. The jury may retire from the courtroom.

(The jury was excused from the courtroom, and the following further proceedings were had outside the presence of the jury:)

THE COURT: We'll be in recess until 10:05.

(Break was taken.)

THE COURT: Go ahead and be seated, please.

Noting everyone's presence back in the courtroom, please have the jury return.

THE BAILIFF: Yes, sir.

MR. HOLLOMAN: Judge, I'm mindful of that case law we looked at. I just wanted the Court to know that. I'm going to restrict my argument accordingly; to the extent that I can.

THE COURT: As I mentioned at the bench conference, you can feel free to make the argument that you see fit to make.

MR. HOLLOMAN: Thank you.

(The jury entered the courtroom, and the following further proceedings were had in the presence of the jury:)

THE BAILIFF: One in the restroom.

(The juror enters.)

THE COURT: Noting that the jury has returned to the courtroom.

Mr. Holloman.

MR. HOLLOMAN: Thank you, Your Honor, Counsels.

Your Honor, may it please the Court.

Ladies and gentlemen of the jury, I too

want to thank you for the time that you've taken to go over this horrific thing. I want to put this case in context. We live in a world that is very different than it was 20, 30 years ago. I don't offer this by way of any excuse or defense but I want to set the context of this thing.

What type of age do we live in? We live -- well, talk about wanting to find the weapons of mass destruction, you see that all the time on the TV. What country's got it, what countries don't, what country's going to use them. Well, technology is evolved to the point to where we have our own personal weapon of mass destruction right in our own pocket, our cell phone. And you see it every single day. Push a button send a text in this case, push a button post something on the internet, ruin somebody's reputation, push some buttons get someone killed. If that's not the weapon of mass destruction I don't know what.

Now the issue in this case is have they proven their case beyond and to the exclusion of every single reasonable doubt. You heard the testimony of the Defendant, and we'll leave

that for what it is.

Let me address some other things here. He was only 18 when this thing happened. You can see the circumstances they were living under; absurd. Where were the parents?

Evidence of premeditation, I would submit to you this. I see the evidence of premeditation, premeditation as to Kyle and Amber. Kyle and Amber are the key to this thing because that is where the communication was. Kyle gets up belatedly and says well, Bargo was in on the plan, but I just submit that to you for what it is. We look at the -- for example, the gun. What I'm going to do as I go through this thing is I'm going to point out reasonable doubts to you in certain pieces of evidence. What about the gun? Where did the bullet come from, okay? And they said, Ms. Berndt says well, they solved that riddle because they say he shot. Did you see any other gun in this case? In the video you saw what was clearly a .22 caliber rifle leaning against the wall. What part did that play?

You talk about the gun, the marks on his hands. Well, let's see, where is that piece of

evidence, let's see that gun for a minute. Mr. Bargo says that that gun was wrenched from his hands in an argument; you remember that testimony? Well, you guys and some of the gals know guns. The injury that he received is more consistent with him wrenching it than him firing it. Said there was a fight, you saw how the hole was dug in his hand.

Now, you got the credibility of these witnesses that testified. All of them testifying to his confessions, I believe there was eight of them that they talked about and you're going to have to resolve those issues yourself.

What was his involvement? What was the quantum of his involvement? He testifies that his involvement was a mere accessory after the fact to this thing. The blood on the ceiling, there's a mixture of Kyle Hooper's blood and Seath Jackson's blood on the floor. They ignore that and they point way over to the kitchen where there's a speck of blood near a light fixture. Steven Montanez, well, gee whiz, isn't he a sterling citizen because he witnesses all this stuff, doesn't even pick up

the telephone, doesn't even bother to call the police. Refers to it as the usual sort of North Jersey beatdown.

Larry Jenkins from across the field. Larry Jenkins, 300 feet across the field in the road as a matter of fact. He says, well, I heard time to start the fire or is it time to start the fire. Could he have heard anything from that sort of distance? There wasn't any evidence that they was yelling and screaming that; I would suggest not, the evidence suggests he wouldn't.

Julie Cunningham, she described the person as she identifies as Michael Bargo as being a blondish person. Joanne Jenkins, she saw people moving things wearing hoodies. Then you heard the testimony of Mr. Bargo about at least his involvement in dumping the remains.

Cast impressions; well, we know he was wearing sliders, they didn't pick up any cast impressions, he said that. DNA test; they tested boxers, the jeans, everything else. This test -- this case rather, is based on his testimonial but has evidence, forensic evidence that back up the actual acts of the shooting

and the manner and means in which the death took place.

Now, the testimony implicating Mr. Bargo is largely the testimony of other people. That's one view of it. So it's other people saying he said something. But there's also the flip side of that too, in all candor. The argument would be that he's the worst witness against himself, if that's to be believed. I know it's a stressful situation, and it's horrendous allegations.

What I'm suggesting to you is this, is that there's -- we don't have to convince you of anything because the law doesn't require that. They've got to prove their allegations to such an extent there's not so much as one, single reasonable doubt, not a speck in the elixir, so to speak, let's be clear. Beyond and to the exclusion of every, single reasonable doubt.

And I submit to you they haven't and that a lesser included offense of second-degree murder is more appropriate for the verdict because the conspiracy is loosely weaved in here. These text messages, these text messages

are not Michael Bargo's text messages, they're Amber Wright's. These text messages don't mention Michael Bargo. The only person that quote tries to tie him to this, first-degree murder. The only thing that ties him to this is a pack of liars and a pack of admitted killers, and that's it.

When he, so to speak, gave that confession to what's known as the Starke people, he didn't talk about we made a plan, we made a plan that went wrong. When he gave those other statements, did he talk about a plan? He didn't talk about a plan. You didn't hear one single person talk about a plan. The State stands up there and tells you well, you got to believe there was premeditation.

Now, does that convince you that he didn't premeditate? Probably not because I'd never be able to convince you of that in that type of weather, so to speak. What it does is, shows a reasonable doubt that he was involved in the premeditation of this. And because of that reasonable doubt, that third element is not met because it's not met beyond and to the exclusion of every, single reasonable doubt.

What would be met? What would your verdict have to be, guilty, guilty as hell of second-degree murder. There's no question about that. Why? Because that has been proven beyond and to the exclusion of every, single reasonable doubt.

Look at how hard they've struggled on the premeditation end. For example, as I referenced, we've been casting aspersions against Kyle, so to speak. And we've been doing that for a good reason. Kyle said what, he wanted them dead. All right, I know what you're thinking, Bargo also said listen, we got a bullet -- I got a bullet with your name on it, so to speak, or at least that's what they say he said.

This controversy with Amber that was very fresh. That was about a week, a week-and-a-half away or less than this controversy that Seath had with Michael Bargo, which was a month or month-and-a-half dated. That's the things that go into the consideration of it, too. The entire plan was this, what happened was this. Mr. Bargo talked about it, ordinarily don't talk about this in a

trial but Mr. Bargo brought it up. He asserted his right to remain silent once he was apprehended. He was the last person to be apprehended. All these other people were brought together. And it's been a suggestion and it's there that he made the comment -- how he tried to waffle around it a little bit, but he was asked hey, you said let's just hang this thing on Kyle, let's just hang this thing on Mike, we'll blame Mike. That's exactly what they did. That's exactly what they did.

Example, did they do trace metals test or do other tests; luminal. You heard some testimony that they put, what was it, they put him in a chair? You heard that testimony and they shot him in the chair. There wasn't anybody shot in the chair. There was no evidence of anybody being shot in the chair. You've got those types of things that are circulating around this case.

There's a reasonable doubt anywhere in this case, there's a reasonable doubt as to the premeditation. Because what they've done is this, there's a great sound and light show around that because you've got these graphic

texts, you've got somebody luring somebody over there. What you've got too is you got the stamp of admitted liars and admitted killers.

You didn't hear one word from the person that was the author of those texts, did you; not one word. But yet those texts were presented. You see, it's not like just in everyday life, it's not like you're going to be convinced of a proposition simply because it's told to you.

Like for example, how do we learn things in school? We learn them by visual aids by the board and things like that. And it looks nice when it's all lined up because it's lined up with all these other people, but you dig down to the heart of it because you know something, you can be convinced back there as to probabilities you know, say probably so-and-so did this, probably this or I feel certain that this happened. What I'm out for is this, and the Judge will tell you this, it's different in the courtroom, it's very different. It's very different because you've got to put it to the proof to where it's beyond and to exclusion of every, single reasonable doubt.

In other words, if you believe something, if you think -- if you're confident it happened that's not enough. If there's a thousand reasons that's not enough, if there's one reason that gives you a reasonable doubt. Dig into this case because what we're getting ready to do is this. They're asking you to come back with a verdict with first-degree murder, murder in the first degree. And of course, with that verdict we will go on and we'll have our master of second phase as to whether you're going to make a death recommendation.

So regardless of what you heard about other cases or things like that, go back there and deliberate this thing, applying that standard of reasonable doubt because there is a verdict in this case that will do justice. That's a verdict that has more than adequate punishment. There's a verdict that jibes with the facts and there's a verdict where the case is proven beyond and to the exclusion of every single reasonable doubt.

I am not going to stand up here and tell you that Michael Bargo is innocent because he's not incident. He's guilty, but he's not guilty

as charged because of that reasonable doubt and only because of that reasonable doubt. He's guilty of murder in the second degree. I'd ask you to return a verdict of guilty of murder in the second degree.

Thank you.

THE COURT: Ms. Arnold.

MS. ARNOLD: Thank you, Your Honor. Mr. Holloman, Ms. Hawthorne.

The Judge is going to tell you and the law that he gives you, that you have to find the Defendant guilty of the highest degree offense that the State has proven to you beyond a reasonable doubt. The verdict form that Ms. Berndt talked to you a little bit about has murder in the first-degree as charged in the indictment at the top. That's where you start.

If you find from the evidence that the State has proven all those three elements of first-degree murder, you don't even get to the consideration of second-degree murder, manslaughter with a firearm, manslaughter or not guilty because the State has proven beyond and to the exclusion of every reasonable doubt that the Defendant, Michael Bargo, is guilty of

first-degree premeditated murder.

Now, Mr. Holloman tells you you should discount the testimony of, as he quoted admitted liars and admitted killers. Well, let's talk about that for a minute. On Friday the State rested its case having proved to you beyond and to the exclusion of every reasonable doubt without the testimony of Kyle Hooper that the Defendant, Michael Bargo, is guilty of first-degree murder. You saw the evidence that Ms. Berndt reviewed in the first part of the closing argument. Very little of that had to do anything with Kyle Hooper. The Defendant's own statements about it's not time to start the fire. Think about the timing of all that. That's at 7:30 or 8:00, according to Mr. Jenkins. It's not time to light the fire yet.

His statement to James Havens when he called him at 11:00 and said the deed is done. That's all he said. How did James Havens know what he was talking about if there had not been a discussion about the plan to kill Seath Jackson? There's evidence of premeditation even apart from what Kyle Hooper said. In

rebuttal we did call Kyle Hooper as a witness.

Now, the Judge is going to tell you that part of your job is to determine the credibility of the witnesses, the Judge is going to talk to you about reasonable doubt, he's going to give you that explanation, he's going to tell you that a reasonable may arise from a conflict in the evidence. There is clearly a conflict in the evidence in the testimony of Michael Bargo, in the testimony of Kyle Hooper. But just because their testimony conflicts, does not mean there's a reasonable doubt because the Judge will go on to tell you that you as the jury can believe or disbelieve any of the evidence or the testimony of any witness, and you should use your common sense in deciding what evidence is reliable and what evidence is unreliable. And he gives you rules to do that; how did their testimony agree with the other testimony and evidence in the case? How did they act on the witness stand? Who was more believable?

The State has to prove all those three elements. It doesn't come down to who you believe, Kyle Hooper or Michael Bargo, but

that's something you have to decide. And what Kyle Hooper's testimony does, is fill in some of those details about how premeditated this crime actually was. That each person had a role, each person attempted to carry out their role. It didn't go exactly as planned but that doesn't mean there wasn't a plan. Amber didn't text them soon enough to get them all in position. And we're not trying to argue to you, ladies and gentlemen, that Kyle Hooper, Amber Wright, Charlie Ely, Justin Soto weren't part of this; clearly they were.

The Defendant also had a part. It was his plan, his desire to kill Seath Jackson but he needed help. He knew he couldn't lure Seath over there because of the stuff that had gone on before. And the argument between Seath Jackson and Michael Bargo was not stale, it wasn't old, it was ongoing. Seven days before, seven days was when the Defendant showed up at Seath Jackson's house and made that statement to his mom. He needed Amber and Charlie to lure them, lure Seath Jackson there. He needed Kyle Hooper and Justin Soto because quite frankly, he needed the muscle to help carry out

the plan; his plan, his gun, his desire. His hand that pulled the trigger.

Seven days earlier, the Defendant had stood in the driveway of Seath Jackson's house and said you're a punk and I've got a bullet with your name on it. And he didn't just stand there and say that, he took his hand as if he had a gun and pointed it at him, I've got a bullet with your name on it.

Seven days later, again, he's standing over Seath as Seath is in the bathtub already having been shot, already having tried to escape the residence but having been dragged back in and he has that bullet with Seath's name on it and that was the plan. He wanted Seath to know that it was Michael Bargo who had that bullet with his name on it and he shot him in the face. And with that, ladies and gentlemen, the deed was done.

Michael Bargo is guilty of first-degree premeditated murder, the murder of Seath Jackson on April 17, of 2011. And we ask that you find him guilty as to that as charged.

THE COURT: Members of the jury, you will have this set of instructions with you in the

jury room during your deliberations for your review, if necessary, but please listen carefully to me as I read them to you.

Members of the jury, I thank you for your attention during this trial. Please pay attention to the instructions I'm about to give you. Michael Shane Bargo, Jr., the Defendant in this case, has been accused of the crime of murder in the first degree.

Introduction to homicide. In this case, Michael Shane Bargo, Jr., is accused of murder in the first degree. Murder in the first-degree includes the lesser crimes of murder in the second degree, manslaughter with a firearm and manslaughter, all of which are unlawful.

A killing that is excusable or was committed by the use of justifiable deadly force is lawful. If you find Seath Jackson was killed by Michael Shane Bargo, Jr., you will then consider the circumstances surrounding the killing in deciding if the killing was murder in the first degree or murder in the second degree or manslaughter or whether the killing was excusable or resulted from justifiable use

of deadly force.

Justifiable homicide. The killing of a human being is justifiable homicide and therefore lawful if necessarily done while resisting an attempt to murder or commit a felony upon the Defendant or to commit a felony of any dwelling house in which the Defendant was at the time of the killing.

Excusable homicide. The killing of a human being is excusable and therefore lawful under any one of the three following circumstances.

One, when the killing is committed by accident and misfortune in doing any lawful act by lawful means with usual, ordinary caution and without any unlawful intent.

Or two, when the killing occurred occurs by accident and misfortune in the heat of passion upon any sudden and sufficient provocation.

Or three, when the killing is committed by accident and misfortune resulting from a sudden combat if a dangerous weapon is not used and the killing is not done in a cruel or unusual manner.

Dangerous weapon is any weapon that taken into account the manner in which it is used is likely to produce death or great bodily harm.

I now instruct on the circumstances that must be proved before Michael Shane Bargo, Jr. may be found guilty of murder in the first or any lesser included crime.

Murder in the first degree. To prove the crime of first-degree-premeditated murder the State must prove the following three elements beyond a reasonable doubt.

One, Seath Jackson is dead.

Two, the death was caused by the criminal act of Michael Shane Bargo, Jr.

Three, there was a premeditated killing of Seath Jackson.

An act includes a series of related actions arising from and performed pursuant to a single design or purpose.

Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind and at the time of the killing.

The law does not fix the exact period of time that must pass between the formation of

the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing. The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

Lesser included crimes or attempts. In considering the evidence, you should consider the possible -- the possibility that although the evidence may not convince you that the Defendant committed the main crime of which he's accused, there may be evidence that he committed other acts that would constitute a lesser included crime. Therefore, if you decide that the main accusation has not been proved beyond a reasonable doubt, you will next need to decide if the Defendant is guilty of any lesser included crime.

The lesser crimes indicated in the

definition of murder in the first-degree are murder in the second degree, manslaughter with a firearm and manslaughter.

Murder in the second degree. To prove the crime of second-degree murder, the State must prove the following three elements beyond a reasonable doubt. One, Seath Jackson is dead. Two, the death was caused by the criminal act of Michael Shane Bargo, Jr. Three, there was an unlawful killing of Seath Jackson by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.

An act includes a series of related actions arising from and performed pursuant to a single design or purpose. An act is imminently dangerous to another and demonstrating a depraved mind if it is an act or series of acts that one, a person with ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another and two, is done form ill will, hatred, spite or an evil intent and three, is of such a nature that the act itself indicates an indifference to human life.

In order to convict of second-degree murder, it is not necessary for the State to prove the Defendant had an intent to cause death.

Manslaughter. To prove the crime of manslaughter, the State must prove the following two elements beyond a reasonable doubt. One, Seath Jackson is dead. Two, Michael Shane Bargo, Jr. intentionally committed an act or acts that caused the death of Seath Jackson. The Defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide.

The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the Defendant or to commit a felony in any dwelling house in which the Defendant was at the time of the killing.

The killing of a human being is excusable and therefore lawful under any one of the following three circumstances. One, when the killing is committed by accident and misfortune in doing any lawful act by lawful means with usual, ordinary caution and without

any unlawful intent. Or two, when the killing occurs by accident and misfortune in the heat of passion upon any sudden and sufficient provocation. Or three, when the killing is committed by accident and misfortune resulting from a sudden combat. If a dangerous weapon is not used and the killing is not done in a cruel or unusual manner.

In order to convict of manslaughter by act, it is not necessary for the State to prove that the Defendant had an intent to cause death, only an intent to commit an act that was not merely negligent, justified or excusable and which caused death.

Plea of not guilty, reasonable doubt and burden of proof.

The Defendant has entered a plea of not guilty. This means you must presume or believe the Defendant is innocent. The presumption stays with the Defendant as to each material allegation in the indictment through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the Defendant's presumption of

innocence, the State has the burden of proving the crime with which the Defendant is charged was committed and the Defendant is the person who committed the crime. The Defendant is not required to present evidence or prove anything. Whenever the words reasonable doubt are used, you must consider the following:

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.

On the other hand, if after carefully considering, comparing and weighing all of the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof. A reasonable doubt as to the guilt of the Defendant may arise from the

evidence, conflict in the evidence or the lack of evidence. If you have a reasonable doubt, you should find the Defendant not guilty. If you have no reasonable doubt, you should find the Defendant guilty.

Weighing the evidence.

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

One, did the witness seem to have an opportunity to see and know the things about which the witness testified?

Two, did the witness seem to have an accurate memory?

Three, was the witness honest and straightforward in answering the attorneys' questions?

Four, did the witness have some interest

in how the case should be decided?

Five, does the witness' testimony agree with the other testimony and other evidence in the case?

Six, has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

Seven, had any pressure or threat been used against the witness that affected the truth of the witnesses' testimony.

Eight, did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

You may rely on your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses.

Expert witnesses are like other witnesses

with one exception. The law permits an expert witness to give his or her opinion. However, an expert's opinion is only reliable when given on a subject about which you believe him or her to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Defendant testifying.

The Defendant in this case has become a witness. You should apply the same rules to consideration of his testimony that you apply to the testimony of the other witnesses.

Defendant's statements.

A statement claimed to have been made by the Defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made. Therefore, you must determine from the evidence that the Defendant's alleged statement was knowingly, voluntarily and freely made. In making this determination, you should consider the total circumstances, including but not limited to one, whether when the Defendant made the

statement he had been threatened in order get him to make it. And two, whether anyone promised him anything in order to get him to make it.

If you conclude the Defendant's out-of-court statement was not freely and voluntarily made, you should disregard it.

The Constitution requires the State to prove its accusations against the Defendant. It is not necessary for the Defendant to disprove anything, nor is the Defendant required to prove his innocence. It is up to the State to prove the Defendant's guilt by evidence.

The Defendant exercised a fundamental right by choosing not to be a witness in this case. You must not view this as an admission of guilt or be influenced in any way by his decision. No juror should ever be concerned that the Defendant did or did not take the witness stand to give testimony in the case.

A statement claimed to have been made by the Defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with

great care to make certain it was freely and voluntarily made.

Therefore, you must determine from the evidence that the Defendant's alleged statement was knowingly, voluntarily and freely made. In making this determination, you should consider the total circumstances, including but not limited to:

One, whether, when the Defendant made the statement, he had been threatened in order to get him to make it.

And two, whether anyone had promised him anything in order to get him to make it.

If you conclude the Defendant's out-of-court statement was not freely and voluntarily made, you should disregard it.

Rules for deliberation.

These is are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict.

One, you must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of

us are depending upon you to make a wise and legal decision in this matter.

Two, this case must be decided only upon the evidence that you have heard from the testimony of the witnesses and as seen in form of exhibits in evidence and these instructions.

Three, this case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.

Four, remember the lawyers are not on trial. Your feelings about them should not influence your decision in this case.

Five, your duty is to determine if the Defendant has been proven guilty or not in accord with the law.

Six, whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict.

Seven, your verdict should not be influenced by feelings of prejudice, bias or sympathy. Your verdict must be based on the evidence and on the law contained in these instructions.

Cautionary instruction.

Deciding a verdict is exclusively your

job. I cannot participate in that decision in any way. Please disregard anything I may have said or done that made you think I preferred one verdict over another.

Verdict.

You may find the Defendant guilty as charged in the indictment or guilty of such lesser included crime as the evidence may justify or not guilty.

If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt. If you find that no offense has been proven beyond a reasonable doubt, then, of course, your verdict must be not guilty.

Only one verdict may be returned as to the crime charged. This verdict must be unanimous. That is, all of you must agree to the same verdict. The verdict must be in writing and for your convenience the necessary verdict form has been prepared for you.

Ladies and gentlemen, this is the verdict form that you will have in the jury room to be filled out by the foreperson.

The verdict reads: In the Circuit Court

of the Fifth Judicial Circuit of the State of Florida in and for Marion County the State of Florida versus Michael Shane Bargo, Jr., Case Number 2011-CF-001491-A-Z. That is referred to as the style of the case.

The verdict continues to read:

Verdict Count I, we, the jury, find as follows as to the Defendant in this case. And then you will check only one of the furthest left-hand column. You will check only either A, B, C, D, or E.

We, the jury, find as follows as to the Defendant in this case:

A, the Defendant is guilty of murder in the first degree with a firearm, as charged in the indictment.

B, the Defendant is guilty of murder in the second degree, a lesser-included offense.

If and only if you check B, second-degree murder, then you must make some following findings. You must answer three of the following questions by circling a response.

One, did the Defendant actually possess a firearm during the commission of a murder in the second degree? And then you will circle

either yes or no.

Two, did the Defendant discharge a firearm during the commission of murder in the second degree? Then you will circle either yes or no.

Three, did the discharge of the firearm result in death or great bodily harm to another person? And then you will circle either yes or no.

C, the Defendant is guilty of manslaughter with a firearm, a lesser included offense.

D, the Defendant is guilty of manslaughter, a lesser included offense.

E, the Defendant is not guilty.

So say we all, dated this blank day of August 2013 and then there's a signature line for the foreperson's signature.

Today is the 20th day of August. And just to review briefly, on the verdict form again, you check only one in the left-hand column A, B, C, D or E. If you check B, only then do you make further findings.

Submitting case to jury.

In just a few moments you will taken to the jury room by the bailiff. The first thing you should do is choose a foreperson who will

preside over your deliberations. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. It is also the foreperson's job to sign and date the verdict form when all of you have agreed on a verdict and to bring the verdict form back to the courtroom when you return.

When you return with the verdict form, that is the foreperson has the verdict form, I will ask the foreperson number one, has the jury reached a verdict. If the answer to that is yes, I'll ask the foreperson to hand the verdict form to the bailiff.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case.

Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing or electronic communication such as a blog, Twitter, email, text message or any other means. Do not contact anyone to assist you during

deliberations. These communication rules apply until I discharge you at the end of the race, excuse me, end of the case.

If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff. If you need to communicate with me, send a note through the bailiff signed by the foreperson.

If you have questions, I will talk with the attorneys before I answer so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions if I can in writing or orally here in open court.

Your verdict finding the Defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each juror, as well as of the jury as a whole.

During the trial, items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. These exhibits will be sent into the jury room with you when you begin to deliberate.

In closing, let me remind you, that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have lived by the Constitution and the law. No juror has the right to violate rules we all share.

Ladies and gentlemen, as I just mentioned, in the jury room to be delivered to you will be the exhibits which have been received in evidence and the instructions on the law that I have given you during the course of the case and the verdict form to be filled out by the foreperson of the jury.

Members of the jury, you may now retire to consider your verdict.

(The jury was excused from the courtroom, and the following further proceedings were had outside the presence of the jury:)

THE COURT: Counsel, we will be in recess until the jury either has a question or have reached their verdict. We are in recess.

Those exhibits will need to go to the jury

room and --

THE BAILIFF: Yes, sir.

THE COURT: Counsel, did you want to review the exhibits before the exhibits go to the jury room?

MS. HAWTHORNE: Yes.

THE COURT: Will counsel approach the bench?

I don't need this on the record.

(Discussion off the record.)

THE COURT: Let's go back on the record.

MR. HOLLOMAN: Judge, the Defendant has argued for guilt of a lesser included offense. The Defendant specifically acquiesced to that and he acquiesced in front of Candace Hawthorne, cocounsel; Gary, investigator; Roger, investigator and Dawn Mahler and myself. He's voiced the complaints that what you did was not my closing. No, it wasn't his closing, it was the lawyer's closing consistent with my ethical responsibilities in this case pursuant to the Rules of Professional Conduct, which he seems to think doesn't exist.

THE COURT: And also, arguing for a lesser included offense I believe is authority by the

Nixon case, an opinion from the United States Supreme Court.

MR. HOLLOMAN: It's like, you know --

THE COURT: I don't have the cite in front of me but it is Nixon, N-I-X-O-N. It was a case that the Florida Supreme Court actually looked unfavorably upon such an argument. That was then appealed to the United States Supreme Court which said that such argument was entirely proper under the appropriate circumstances.

The Court finds in this case it was an appropriate circumstance, and especially if the Defendant acquiesced to the argument.

(Court was adjourned upon the return of the jury verdicts.)

THE COURT: Go ahead and be seated, please.

MR. HOLLOMAN: Judge, could I walk back there just a minute and caution him?

THE COURT: I'm going to caution him.

Lieutenant Wright, is he in shackles?

THE BAILIFF: He is.

THE COURT: Court reporter ready?

THE COURT REPORTER: Yes, sir.

THE COURT: Noting everyone's presence back in the courtroom. Counsel, I have been advised that the jury has reached a verdict in this case.

They have also, however, sent me a note, a question from the foreperson. "Should the members of the jury be concerned for their safety from any source related to our decision in this case?"

I suggest I should simply assure them they do not need to be concerned for their safety.

Any contrary argument?

MS. BERNDT: No, Your Honor.

THE COURT: Mr. Holloman, Ms. Hawthorne?

MR. HOLLOMAN: I don't know of any eminent threat, Judge, or anything like that.

THE COURT: I don't know of any. As a matter of fact, we have made arrangements to have the jurors escorted to their cars or motor vehicles by the deputy sheriff.

MR. HOLLOMAN: And if I did, I would disclose it. If I did I would disclose because I would be required to as a member of the Bar.

THE COURT: I don't know of any such threat so I'm simply going to try to allay any

fears that they have.

Addressing those in the audience section. I'm going to ask everyone to maintain your composure when the verdict is published. No one can predict with any certainty what verdict is going to be returned by a jury. I do expect everyone to honor the dignity of the courtroom and I don't expect any outbursts.

Please have the jury return to the courtroom.

THE BAILIFF: Yes, sir.

(The jury entered the courtroom, and the following further proceedings were had in the presence of the jury:)

THE COURT: Good afternoon, ladies and gentlemen.

Before we proceed further, let me address a question that was presented to me by the Bailiff from the foreperson of the jury.

"Should the members of the jury be concerned for their safety from any source related to our decision in this case?"

I will assure you, I don't believe you need to be concerned for your safety by any means. I have addressed the question with the

attorneys, no one knows of any such threat to your safety. We have, however, made arrangements to have you escorted to your motor vehicles by deputy sheriffs after we conclude business for the day.

Who is the foreperson of the jury?

THE FOREPERSON: I am.

THE COURT: Has the jury reached a verdict?

THE FOREPERSON: Yes, we have.

THE COURT: Please hand the verdict form to the bailiff.

The Court finds there are no errors or omissions in filling out the verdict form.

Madam Clerk, please publish the verdict.

THE CLERK: In the State of Florida versus Michael Shane Bargo, verdict as to Count I, we the jury find as follows as to the Defendant in this case, the Defendant is guilty of murder in the first degree with a firearm, as charged in the indictment. So say we all, dated this 20th of day of August 2013.

THE COURT: Madam clerk, please poll the jurors.

THE CLERK: Jonathan Szydlo, is this your

verdict?

THE JUROR: Yes, ma'am.

THE CLERK: Gary Miller, is this your verdict?

THE JUROR: Yes.

THE CLERK: John Hall, is this your verdict?

THE JUROR: Yes.

THE CLERK: Ricardo Martinez, is this your verdict?

THE JUROR: Yes.

THE CLERK: Victor Payette, is this your verdict?

THE JUROR: Yes.

THE CLERK: Barbara Rountree, is this your verdict?

THE JUROR: Yes.

THE CLERK: Jeremiah Fister, is this your verdict?

THE JUROR: Yes.

THE CLERK: David Hipsher, is this your verdict?

THE JUROR: Yes.

THE CLERK: Regina Pitts, is this your verdict?

THE JUROR: Yes.

THE CLERK: Brenda Franklin, is this your verdict?

THE JUROR: Yes.

THE CLERK: Taylor Pitter, is this your verdict?

THE JUROR: Yes.

THE CLERK: Evelyn Brown, is this your verdict?

THE JUROR: Yes.

THE COURT: Thank you.

Ladies and gentlemen of the jury, let me give you one final instruction regarding this phase of the trial. We will now be taking a recess in the trial in order to allow the attorneys and the Court to prepare for the second part of this trial, the penalty phase. Preparations have been ongoing for months, however, final preparations need to be made.

Although you have deliberated and reached a verdict as to the Defendant's guilt in the first part of the trial, you may not discuss either among yourselves or with anyone else, what punishment he should receive. When we return from this recess, you will hear

additional evidence, argument by counsel and instructions on the law governing the penalty phase by the Court. It is your duty to keep an open mind as to what recommendation this jury shall make to the Court after hearing the additional matters in the penalty phase.

Therefore, please continue to avoid reading any newspaper coverage of this case, watching any related television news or listening to any news on the radio that may pertain to this case. Please do not discuss this case with your spouses, parents, other family members, friends, co-workers, neighbors or any other person.

When we return from this recess, I will give you further instructions. We're going to be in recess in this case until this Friday morning at 9:00, which should afford the attorneys sufficient preparation time.

I will ask you to once again report promptly at 8:50 a.m., ten minutes before nine. Are your notepads in the jury room? I'm going to ask this of you. I'm going to ask the bailiff to accompany you and if you'll place those notepads, once again, in the envelopes,

they will be maintained securely until Friday morning when they will be delivered to you immediately before you return to the courtroom.

Thank you. You may now retire with the bailiff.

(The jury was excused from the courtroom, and the following further proceedings were had outside the presence of the jury:)

THE COURT: The record will also reflect that immediately before entering the courtroom, for the rendition of the verdict, I had ordered the Defendant to be shackled. I did that because I had received information that over the weekend Mr. Bargo had threatened, had conferred with other inmates and was overheard by corrections officers that he intended to act out when the verdict was returned. You did not do so, I'm taking that into consideration whether you should be shackled further during the course of the trial.

Counsel, are there any other matters to be addressed before we adjourn?

MS. BERNDT: Nothing from the State, Your Honor.

THE COURT: We will be in recess in this

case until 8:50 a.m. on Friday. We are adjourned.

MR. HOLLOMAN: Your Honor, if I may?

THE COURT: Yes, sir.

MR. HOLLOMAN: When we reconvene, I'd like for the client to have an opportunity to put something on the record that he had asked to put on the record.

THE COURT: Does he want to do that now?

MR. HOLLOMAN: No, we're not going to do that now.

THE COURT: Very well. We'll conduct that business as the first order of business on Friday.

Thank you, we're adjourned.

(Court was concluded.)

* * *

C E R T I F I C A T E

STATE OF FLORIDA

COUNTY OF MARION

I, CONSTANCE MILLER, Stenographic Court Reporter and Notary Public, State of Florida at Large, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings taken in the case of STATE OF FLORIDA vs. MICHAEL SHANE BARGO, JR., Case Number 42-2011-CF-1491-A, and that the foregoing pages, numbered ** through **, inclusive, constitute a true and correct record of the proceedings to the best of my ability.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel, nor am I financially interested in the action.

WITNESS MY HAND this 4th day of April, 2014 at Ocala, Marion County, Florida.

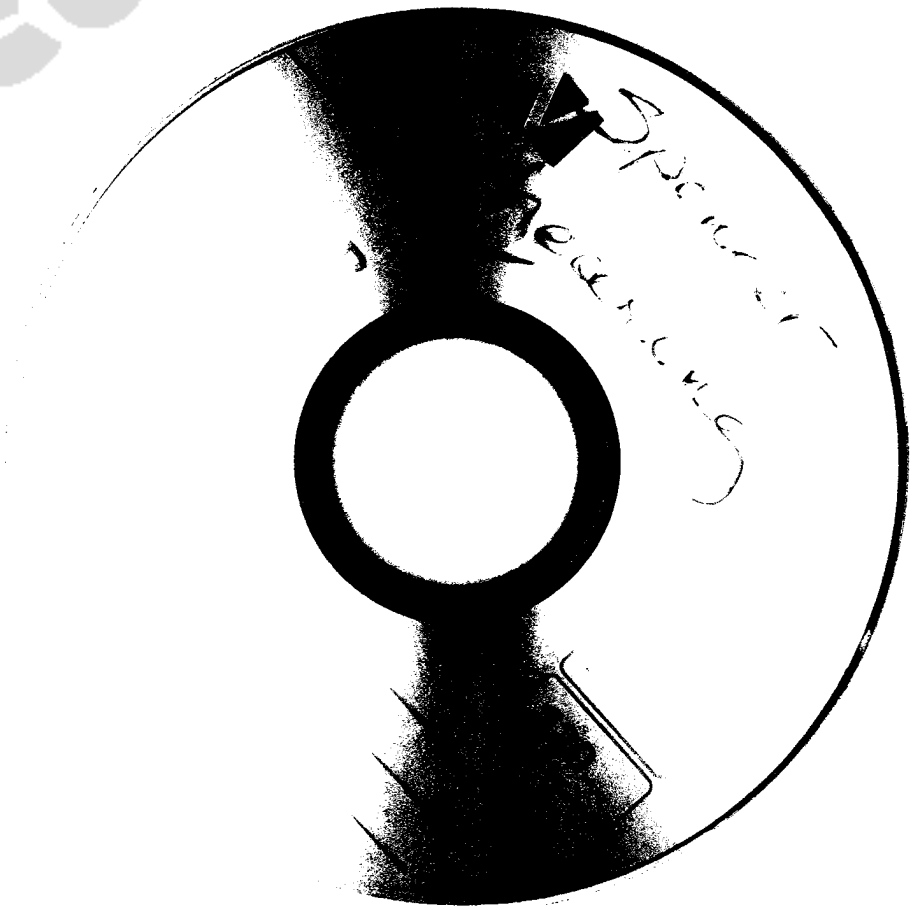
Constance Miller

CONSTANCE MILLER, RPR
Stenographic Court Reporter

DVD - of Spencer Hrg
— to be held in court file

Filed in Open Court
The 9 Day of April, 2019
By [illegible] D.C.

11-1491-CF-A. Michael Bargo



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

CASE NO.: 2011-CF-1491-A

STATE OF FLORIDA,

vs.

MICHAEL SHANE BARGO, JR.,

Defendant.

PROCEEDINGS BEFORE: Honorable DAVID EDDY

DATE: November 13, 2013

TIME: 9:30 a.m. - 3:50 p.m.

LOCATION: Marion County Courthouse
110 Northwest 1st Avenue
Ocala, Florida

REPORTER: Katrenia L. Horiski, RPR, FPR

APPEARANCES

AMY BERNDT, ESQUIRE
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On behalf of the State of Florida

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-and-

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Ocala, Florida 34475

On behalf of the Defendant.

* * * * * *

I N D E X

E X H I B I T S

PROCEEDINGS

(The following proceedings were held in camera.)

MS. BERNDT: Good morning, Judge.

THE COURT: Good morning, everyone. I want to -- on the record I want to meet with the attorneys before going into the courtroom. Once again, Mr. Bargo wrote me a letter. Once again, I have not read that letter and I just want to outline what happened.

On Halloween, October 31, I was standing at my judicial assistant's counter and I just glanced over at the mailbox and a handwritten letter was laying on top and I just glanced down and read the first line or the beginning of the first line, which was something to the effect, Dear Judge Eddy, I know you told me not to write you letters. I stopped reading.

I turned it over to look and see who had written me the letter. It was Mr. Bargo. I told Mary Kisicki, my judicial assistant to simply stamp it with the date that we received it. I put it in an envelope, which I am now providing to Mr. Holloman and Ms. Hawthorne.

MR. HOLLOMAN: Well, unlike you, Judge, we can read it.

THE COURT: I just want the record to be clear, I did not read the letter, other than what I have just referenced in the opening line. I know something to the effect of I know you told me not to write you a letter.

MR. HOLLOMAN: Judge, I'll reference one thing -- let me finish it first. I figured this was going to be a controversy. Okay. Obviously, this letter is not privileged.

THE COURT: Well, is there anything about it that you need to confer with your client?

MR. HOLLOMAN: No, but I need to confer with the Court. I'll confer with the client again. We all know the purposes of why we're here today. We're not here to argue any sort of ineffective assistance claim. This complaint in this letter is that he was -- that he gave testimony in narrative form. Okay.

And that I, secondly, am not permitted under the rules of professional conduct to argue his perjury, which is simply what it is, as a defense. And what he claims as a result of that is that basically I threw him under the bus. What we did was this: Based upon the available admissible evidence that was lawfully before the Court, even

the Court ruled that my conduct beforehand -- because we discussed this -- we had a pretrial -- off-the-record pretrial before and then we discussed it on the record several times.

The case law was there -- Ellis Rubin cases -- we all had that case, so we were all very conversant in the rules of professional conduct. Now what he wants to do this morning is he wants to get up there and engage in a diatribe of how he was thrown under the bus because of that and how certain witnesses were not called that could have proven his innocence.

THE COURT: Well, I find -- let me state it this way: I found at the time that narrative testimony was the only way in which Mr. Bargo would be able to testify. I continue to make that finding. I'm not going to go back and readdress that issue.

MR. HOLLOMAN: I'm not asking you to, sir. I believe he's going to get up there and just try to trash me.

THE COURT: What we're going to do is conduct the Spencer hearing. Does the State have any further evidence to present?

MS. BERNDT: No, Your Honor.

THE COURT: Do you have further witnesses to call?

MS. HAWTHORNE: For that letter or --

THE COURT: No. Just for the Spencer hearing.

MS. HAWTHORNE: Yes, sir. We have quite -- several witnesses. We have two doctors. We have two law enforcement officers and three or four civilian witnesses to call. Now, I will advise the Court of where I'm headed because I have a number of articles on adolescent brain development.

I wanted to address that through Dr. Mings and then also Dr. Berland. I have evidence to present regarding my client's character and information regarding the weeks preceding the homicide. And previously the Court had not permitted me to call witnesses like Mr. Bessey or go into evidence regarding the victim's harassment and bullying of this group of young people, including my client.

We have a Facebook article, the Facebook postings that were also published in the Ocala Star Banner. We have an article regarding the jurors, "Face to face with Jackson," key in death recommendation in that article. The focus of my

examination is going to be on my client's character and how he reacted to the Facebook postings and how he reacted in situations where Mr. Jackson was present and he did not engage Mr. Jackson in violence.

There's also testimony from William Samalot about Mr. Bargo having been in fights with Mr. Jackson previously in the previous weeks and that he was no match. My client's been called a princess; he was bullied over the Internet. My client denies all this stuff.

Now, either he's lying or everybody else is lying. So here I have this evidence. And part of the problem that I have with this evidence is that the Court advised that because we didn't choose a particular theory of defense that we were not permitted to go into certain evidence.

I am now -- I've restructured that evidence to focus on my client's character. And I'm just raising these issues because I'd rather do it now than when we're in court.

THE COURT: And we're very long past the guilt phase. That, I believe, goes to whether your client was guilty or not guilty of committing a first-degree murder. You can present the evidence

that you believe is admissible. The State can object to the evidence and I'll make the rulings as I see fit.

MR. HOLLOMAN: Judge, there's a standing order of this Court that before the defense can do that -- there's a standing order of this Court already in place saying that we can cannot denigrate the victim. And that would be denigrating the victim.

THE COURT: And that remains in effect. This is a Spencer hearing. I believe a Spencer hearing is part of the penalty phase, not a part of the guilt phase. So that's what we're here for, a continuation of the penalty phase of these proceedings.

So we need to go ahead and get started.

MR. HOLLOMAN: Judge, just to put this on the record, I can see what type of theory she's talking about, because what it does is even though it would tend to denigrate the victim, it's not offered in terms of a trial, which is not a trial; it's offered to lessen the gravity and somewhat try to create a semblance of moral justification for the relationship that they had.

I just thought I needed to put that on here

for the purposes of further review.

THE COURT: I recognize that. And if it's offered in mitigation, I may allow it. Okay.

MR. HOLLOMAN: Because I don't want to inadvertently violate any order of the Court. And my understanding was that that was the order of the Court.

THE COURT: And that remains the order of the Court. Anything further?

MS. ARNOLD: Judge, just one thing. Ms. Hawthorne subpoenaed Scott and Sonia Jackson, the parents of the victim, who really had no intention of attending this Spencer hearing today. So if she does not plan on calling them, I would ask that they be released from their subpoena so that they can leave.

MS. HAWTHORNE: I do not plan on calling Sonia. I will call Scott.

THE COURT: Sonia Jackson will be excused then?

MS. ARNOLD: And I don't know, but if Scott can go -- I don't know if -- they probably rode together so I don't know if she'll leave or not.

MR. HOLLOMAN: Is he going to be allowed to raise this issue? The Court had ruled on that.

THE COURT: In preparation for this hearing I reviewed the Spencer case which does reference that the defendant has the right of allocution, A-L-L-O-C-U-T-I-O-N, so he does have a right to be heard. That will be at the end of the testimony.

MR. HOLLOMAN: Swell.

THE COURT: Thank you all.

(In open court.)

THE COURT: Go ahead and be seated, please. Noting the attorneys' presence in the courtroom the defendant may enter the courtroom. Mr. Bargo can enter the courtroom.

Noting the defendant's presence in the courtroom. Counsel are all present. Returning to the case of the State of Florida vs. Michael Shane Bargo, Jr., Case Number 2011-CF-1491, in which case Mr. Bargo is the A defendant.

The hearing to be conducted at this time is what is referred to as a Spencer hearing. It is an opportunity for either side to present additional evidence for my consideration in regards to what sentence should be imposed. The evidence to be presented is only evidence that was not previously presented to the jury.

Is the State ready to proceed?

MS. BERNDT: Yes, Your Honor.

THE COURT: Is the defense ready to proceed?

MS. HAWTHORNE: Yes, Your Honor.

THE COURT: Does the State of Florida have any further evidence to present?

MS. BERNDT: Not at this time, Your Honor.

THE COURT: The defendant does have witnesses to present; is that correct?

MS. HAWTHORNE: Yes, sir. And at this time we would ask the Court to invoke the rule of sequestration except for Dr. Berland and Dr. Mings.

THE COURT: The State has no witnesses; is that correct, or do you have potential rebuttal witnesses?

MS. BERNDT: Not in the courtroom, Your Honor, no.

THE COURT: Let me ask any potential witness who's present in the courtroom to please come forward.

Ladies and gentlemen, please listen carefully to me. Each of you has been summoned as a witness in this case. The Court is now invoking a rule of procedure which requires your exclusion in the courtroom at all times except during the time when you testify in this cause.

You are directed to remain out of the courtroom except when you are called to testify. While you are waiting to testify and after you have done so you are not to discuss this case or your testimony among yourselves or with anyone else until this hearing has concluded.

You may, however, one witness at a time discuss your testimony with Counsel for either party in this case. If you do that, do that outside the presence of any other witness. Counsel for each of the parties is instructed to advise each of its respective witnesses that are not present at this time of the direction that I have just given and each of them shall also be governed thereby.

Any violation of this direction may not only subject you to contempt of court but may also disqualify you as a witness in this case. You will now retire from the courtroom until you are called to testify.

MS. ARNOLD: Your Honor, if I may, we would ask that Mr. Jackson, who is the father of Seath Jackson be excused from the rule of sequestration.

THE COURT: That request is granted to the extent that he is allowed to remain in the

courtroom. In regards to discussing his testimony with any other witness, that instruction remains in effect.

MS. ARNOLD: Yes, sir.

THE COURT: The defense may call its first witness.

MS. HAWTHORNE: Yes, Your Honor. Defense would call Scott Jackson.

(Whereupon, SCOTT JACKSON was duly sworn and testified under oath as follows:)

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Good morning, sir.

A. Morning.

Q. Would you please tell the court your name?

A. Scott Jackson.

Q. And could you tell us the name of your wife, sir?

A. Sonia Jackson.

Q. And your son is?

A. Seath.

Q. First, let me extend to you my condolences. I'm very sorry for your loss. I'd like to turn back the clock and focus your attention to March and April

of 2011.

Were you living in the Summerfield area at that time?

A. Uh-huh.

Q. Could you answer yes or no?

A. Yes.

Q. Thank you. And did your son, Seath, live with you?

A. Of course.

Q. Have you ever met Mr. Michael Shane Bargo, Jr.?

A. Yes.

Q. About how many times?

A. Maybe two.

Q. And the first time you met him, can you tell us about that?

A. I think it was over in front of Amber's house.

Q. And what was going on?

A. Kid drama.

Q. Excuse me?

A. Kid drama.

Q. Was Mr. Bargo there?

A. Yeah.

Q. Was anybody else there?

A. Yeah. A bunch of other people.
Q. Who else was there?
A. I can't name them all.
Q. You were there, obviously?
A. Apparently.
Q. Was your wife there?
A. Yes.
Q. And was Tracy Wright there?
A. Yes.
Q. And who was Tracy Wright?
A. She is Amber's mother.
Q. And was Amber there?
A. Yeah.
Q. Was Kyle Hooper there?
A. I can't recall that.
Q. Was Mr. Bargo's father, Mike Bargo, Sr. there?
A. Yeah.
Q. Were any other neighbors there?
A. Yeah.
Q. Do you remember their names?
A. No.
Q. Were any law enforcement there?
A. Yeah.
Q. Do you remember their names?

A. No.
Q. Do you or have you ever met a Deputy Rasnick?
A. Yeah.
Q. Do you recall if he was there?
A. I believe he was.
Q. And did you -- were you invited to come over to Amber's house?
A. Probably not.
Q. And how did you decide to go over there?
A. I do believe I got a call at work and said there's some kind of commotion going on, so I left work and went there.
Q. And when you arrived, again, you saw my client, Mr. Michael Shane Bargo, Jr.?
A. I believe so. I don't know if it was that time or the next time or when it was exactly.
Q. And did you or Mr. Bargo, Jr. speak?
A. Yeah, I believe so. I asked him if he had a gun.
Q. And did you get a response from him?
A. Yeah. He said no.
Q. And do you know why you were called?
A. It involved my son, so, yes, I'm going to be there.
Q. And did it involve Mr. Bargo?

A. Yeah, I believe so. I believe they had an altercation or verbal altercation or something like that. It's been a while.

Q. How about -- do you know -- at the time did Mr. Bargo make any threats to you?

A. No, not to me.

Q. Was he arrested by law enforcement?

A. Not at that time, no.

Q. Did he make any statements to your wife?

A. I don't recall.

Q. Did he make any statements to anybody else that you overheard?

A. I really wasn't paying attention to him. I didn't like him. Still don't.

Q. How would you describe Mr. Bargo?

A. I'm not allowed to put that in my words. Let's just go with I don't particularly care for him and all this is unnecessary.

Q. Have you ever referred to him as a punk?

A. Oh, yeah.

Q. Now, you said you had met him on another occasion?

A. Yeah. Probably over there too.

Q. At the same -- at Ms. Wright's house?

A. Uh-huh.

Q. Were the same people present?
A. I couldn't tell you that.
Q. Was Deputy Rasnick present?
A. I couldn't tell you that.
Q. Were you at work that time?
A. Probably. I work a lot.
Q. How did you come to go to Ms. Wright's home on the second occasion?
A. Somebody called and said you need to get over here.
Q. And when you arrived did you see Mr. Bargo, Jr.?
A. Actually one of the times I did and one of the times I didn't.
Q. Okay. Were there any occasions where you ever witnessed Mr. Bargo making any threats to you or your family?
A. No. It wouldn't have done him no good.
Q. Is there any time where you ever witnessed Mr. Bargo striking your son?
A. No. That wouldn't have done him no good either.
Q. And have you ever witnessed Mr. Bargo making any threats?
A. Me personally? No.

Q. Did you ever -- were you aware of any Facebook postings by Mr. Bargo?

A. No. I don't do Facebook.

Q. Were you -- have you ever been made aware that Mr. Bargo had engaged in a fight with your son?

A. Yeah.

Q. And do you know if Mr. Bargo had to go to the hospital?

A. I don't know if he had to go to the hospital. I know he got whooped.

Q. And do you know who the people were that were fighting him?

A. Probably my boy.

Q. Did you ever speak to Michael Bargo, Sr.?

A. Yeah.

Q. And did you talk to him about his son?

A. I asked him if he knew if his son had a gun. He stood there and lied to my face too.

Q. And the answer?

A. He said no.

Q. Did you ever talk to Mr. Bargo, Sr. about resolving whatever issues were going on between Mr. Bargo, Jr. and your son?

A. Well, at the time it was just a bunch of kid drama. We didn't know it was going to escalate to

this, so, no.

Q. Did your son attend school with Mr. Bargo?

A. No, he was home-schooled.

Q. Did your son work with Mr. Bargo?

A. No.

Q. To your knowledge did they have any other contact besides in the community where y'all lived?

A. No.

Q. Did you know Mr. Bargo, Sr. when you were growing up?

A. No. I'm not from here.

Q. You didn't grow up in Summerfield?

A. No.

Q. Thank you, sir. I don't have any other questions.

THE COURT: Cross-examination?

MS. BERNDT: No, Your Honor.

THE COURT: May this witness be excused, Counsel?

MS. HAWTHORNE: Yes, sir.

THE COURT: You're excused, sir.

The defense may call its next witness.

MS. HAWTHORNE: The defense would call Deputy Rasnick.

(Whereupon, DAVID RASNICK was duly sworn and testified

under oath as follows:)

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Good morning, sir.

A. Good morning.

Q. Deputy Rasnick, how long have you worked with the Marion County Sheriff's Office?

A. Ten years.

Q. And back in March and April of 2011, were you also working with the sheriff's office?

A. Yes.

Q. In the south section?

A. Yes.

Q. In Summerfield?

A. Yes, ma'am.

Q. Did you have occasion to get called out to locations, homes for Tracy Wright in Summerfield?

A. Yes, I did.

Q. And did you have occasion to get called out to the home of Michael Bargo, Sr. or his mother, Virgie Waller?

A. Not that I recall.

Q. Have you ever met my client prior to April 17, 2011?

A. Not to my recollection. I don't ever

remember meeting him.

Q. Do you recall an occasion where Scott Jackson was called out to come over to Tracy Wright's house?

A. Scott Jackson? No, ma'am, I don't remember.

Q. Do you know Seath Jackson?

A. Yes, ma'am.

Q. Were you ever called out to a location where Michael Bargo, Sr. and Mr. Scott Jackson were present?

A. I don't remember Michael Bargo, Sr.

Q. Do you know if you ever were called out to Virgie Waller's house and issued a trespass warning where Michael Bargo was living and the trespass warning was against Mr. Jackson's son Seath?

A. Not that I recall.

Q. Okay. Now, does that mean that it didn't occur?

A. I handle hundreds of calls. I don't remember each specific call. So if I did and I wrote a warning, it would be in the copy of the sheriff's office records.

Q. And just so we're clear, prior to April 17 did you have an occasion or any occasion to be called out for Michael Bargo, Jr. for fighting?

A. No, ma'am, not that I remember. I don't ever remember meeting him.

Q. Okay. Do you know if you've ever met Seath Jackson?

A. No, ma'am, I never met him personally.

Q. Thank you. I have no more questions. But I reserve to call him back.

THE COURT: Cross-examination?

MS. BERNDT: No questions, Your Honor.

THE COURT: You're excused, sir, but you're not released from subpoena.

Defense may call its next witness.

MS. HAWTHORNE: We would call Mr. Joey Desy.

(Whereupon, JOEY DESY was duly sworn and testified under oath as follows:)

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Good morning, sir.

A. Good morning.

Q. Would you tell the Court your full name?

A. Joseph Kenneth Desy.

THE COURT: How do you spell your last name, sir?

THE WITNESS: D-E-S-Y.

THE COURT: Thank you.

BY MS. HAWTHORNE:

Q. And do you live in Summerfield, sir?
A. I do.
Q. Do you live down the street from Virgie Waller?
A. I do.
Q. And what street is that, sir?
A. 137th Place.
Q. How long have you lived there?
A. Probably about 14 years.
Q. And during that 14 years have you had occasion to come in contact with my client, Michael Shane Bargo, Jr.?
A. I have.
Q. And do you know Virgie Waller?
A. I do.
Q. And do you know Michael Shane Bargo, Sr.?
A. I do.
Q. Do you know them well enough to talk to them if you saw them on the street?
A. I do.
Q. Have you ever been present when my client -- and let me focus us on March and April 2011, where my client was present at his grandmother's house on your street and the police were called?
A. I do know of one occasion. I'm not exactly

sure what the date was when the police were called. Something to do with Michael Bargo.

Q. Do you know if Michael Shane Bargo, Jr., whether the police were called out there for him or was it something else that was going on?

A. It was something else.

Q. And did you call the police, sir?

A. I did.

Q. During that incident did you ever see my client, Michael Shane Bargo, Jr., strike anyone?

A. I did not.

Q. Did you ever see my client threaten anyone?

A. I did not.

Q. Did you witness anyone else threatening Mr. Bargo, Jr.?

MS. BERNDT: Objection; Your Honor. This is a violation of a previous court order and this is not relevant and it is attacking the victim's character.

THE COURT: Why is this relevant, Counsel?

MS. HAWTHORNE: I wasn't going to go any further, but it's to suggest -- it shows that my client's character was not one of physical violence, that there were others there that were threatening him.

THE COURT: The objection is overruled.

BY MS. HAWTHORNE:

Q. Sir, did you overhear anybody threatening my client?

A. I did.

Q. Did you witness my client engage that threat or did my client retreat?

A. He retreated.

Q. Where did he go?

A. Back to the house, his house.

Q. Did you observe law enforcement there?

A. After I called them, yes.

Q. Do you know if law enforcement made any arrests of the individuals who were making the threats?

A. I believe they tried to make contact with the individuals causing the threats. But from my understanding they never made an arrest.

Q. Now, prior to March 2011, would you have an occasion to see my client on a regular basis?

A. I wouldn't say regular. From time to time. I mean, his family and I are friendly, passing by, you know, exchanging pleasantries, but that's about the extent of it. Although, I do own a small business and Michael has helped me in the past.

Q. And when he assisted you in your business did

you find him to be reliable and dependable?

A. I did. Actually, a lot of my clients are fairly well-to-do and Michael has actually accompanied my sister to the job to help her with things that she just wasn't able to handle herself. He was always very respectful to myself and my sister and the clients that we had. These were people that I consider family. And if I had any doubts I would have never sent Michael.

Q. Did he ever do anything to embarrass you?

A. On the contrary. Talking about the incident that happened, after it was all said and done, Michael, on his own accord I'm assuming, came up to my house and apologized for me getting in the middle of the issue. And, you know, even though he wasn't the aggressor in it, he came up and he apologized to me and thanked me for stepping in.

Q. Did he ever make any statements to you that he intended to do any harm to the people that made the threats?

A. Absolutely not.

Q. Thank you, Mr. Desy.

THE COURT: Cross-examination?

MS. BERNDT: No questions, Your Honor.

THE COURT: May this witness be excused, Counsel?

MS. HAWTHORNE: Yes, sir.

THE COURT: Sir, you're excused.

Defense may call its next witness.

MS. HAWTHORNE: Tracy Wright.

(Whereupon, TRACY WRIGHT was duly sworn and testified under oath as follows:)

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Good morning, Ms. Wright.

A. Good morning.

Q. How are you today?

A. Fine.

Q. Again, can you tell the Court your full name?

A. Tracy Ann Wright.

Q. And you are the mother of Amber Wright and Kyle Hooper?

A. Yes, ma'am.

Q. I would like to ask you some questions having to do with the time period prior to April 17, 2011. And first I would like to ask you, did you grow up in Summerfield?

A. Yes.

Q. And growing up did you know Michael Bargo, Sr.?

A. Yes.

Q. Have you been friends with him over the years?

A. No, not until our kids got together. We kind of -- after school everybody grew apart.

Q. You mean high school?

A. Yes.

Q. And when did this kids get together occur?

A. Probably a few years ago before.

Q. Would it have been in 2010?

A. Probably, yeah.

Q. And did that enable you to reconnect with Mr. Bargo, Sr. and what had been going on in his life, what had been going on in your life?

A. It wasn't that personal but, yeah. The kids mostly.

Q. Were my client, Michael Bargo, Jr., and your children close friends?

A. Yes.

Q. And was there a relationship between Michael Bargo, Jr. and Amber?

A. Not to my knowledge. I knew they were good friends but I wasn't aware of any other.

Q. Okay. Now, back in 2010 and 2011, your daughter was dating a young man?

A. Yes.

Q. By the name of Seath Jackson?

A. Yes.

Q. And she and Seath had a good relationship or a bad relationship in the beginning?

A. It was good in the beginning.

Q. When did they break up?

A. I'm going to say either -- I believe either February -- I don't know. I don't remember. I know it was February of 2011, I believe. I think.

Q. Do you know if Michael Bargo, Jr. had anything to do with that breakup?

A. I don't know. I think it was just a lot of things going on in that relationship. I'm not sure who had what to do with it. It was just a bad relationship.

Q. Did you ever witness my client, Michael Bargo, Jr., engage physically with Amber's former boyfriend?

A. Just -- not fighting, not contact, but verbal.

Q. Okay. And who was making the threats?

A. Both parties.

Q. Did you ever read anything on your daughter's Facebook?

A. Not until after.

Q. Okay. And were you surprised to learn of some of the discourse between your daughter and others regarding the breakup of her relationship?

A. Yes.

Q. Did this have an effect on my client?

A. Meaning?

Q. Did the verbal exchanges on the Internet --

A. There was some about Mike. There was a bunch of them on there about Mike and Amber. And there was a bunch of people on there. There was a bunch of parties.

Q. And how did that affect -- did you witness my client, any effect that the remarks were having on him?

A. Yes. He was getting angry, yes.

Q. What about Amber?

A. What about her?

Q. How did she take some of the --

A. Crying a lot because of things that were being said about her personally. And it was affecting her.

Q. Now, was your son a part of any of this?

A. Not too much. He worked a lot.

Q. And did -- at some point your son want to move into a house that was being --

A. Yes, from Charlie.

Q. And were you familiar with Michael Bargo, Jr. living there as well?

A. In and out, yes.

Q. Were you familiar with my client and the tattoo lessons he was getting from your former husband, Duane?

A. He wasn't really getting lessons from him. He was doing his own thing, Mike.

Q. Is Duane also a tattoo artist?

A. Yes.

Q. He did tattoos on Michael?

A. Yes, he did.

Q. He did a tattoo on his back, didn't he?

A. Yes.

Q. And what was that tattoo? Do you know?

A. Grim reaper, I think.

Q. And did you know about the initials on Amber --

A. No.

THE COURT: Counsel, you may need to complete that question.

BY MS. HAWTHORNE:

Q. The tattoos on Amber of Michael Bargo, Jr.'s, initials?

A. Not until after he was arrested, no.

Q. Did Michael talk about wanting to do harm to anybody?

A. Yes.

Q. And was that in response to threats that were made to him?

A. Yes.

Q. Did you think that Mr. Bargo, Jr. -- did you ever see him engage in fighting?

A. I never seen him engage in fighting. I know he was always in fights because he always came to the house with a broken nose or something to that effect, always beat up or...

Q. So you witnessed injuries on him?

A. Yes.

Q. Do you know how he got those injuries?

A. I don't know from who, but I know he had a broken nose several times when he had come over.

Q. Okay. Did you learn to take my client's stories with a grain of salt or did he tell you things that you could rely on?

A. I took them with a grain of salt. He was a kid.

Q. Did you ever talk to my client or in front of my client about threats you had received?

A. Yes. He has been at my house when I had gotten threats, yes.

Q. Did you read any threats on Facebook?

A. Yes.

Q. Were these before April 17?

A. Yes.

Q. And did you know -- do you know if those threats were coming from my client?

A. No.

Q. Can you tell us what the threats were?

A. Burning down my home, just physical things, wanting to beat up my husband, my ex, I should say, my kids' father.

Q. Did you contact law enforcement?

A. Yes.

Q. Did you contact Mr. Jackson?

A. My kids' father did, yes.

Q. And was there a time when you were at your home and law enforcement was there and Mr. Jackson was there and my client was there?

A. Yes.

Q. And at that time did you see my client threaten or engage anyone in violence?

A. No.

Q. Did you witness anyone threatening my client?

A. Neighbor people, yeah.
Q. And the person who was threatening you, was that person arrested?
A. No.
Q. Have you ever witnessed acts of kindness that were done by my client?
A. Around me he was fine, yes.
Q. Was he respectful to you?
A. Yes.
Q. Did you ever witness him being physically abusive with your daughter?
A. No.
Q. Did you ever witness your daughter coming home with bruises?
A. Yes.
Q. With cigarettes burns?
MS. ARNOLD: Objection, Your Honor.
THE COURT: Sustained.
BY MS. HAWTHORNE:
Q. Do you know if those were done by Michael Bargo?
A. No.
Q. Did you ever witness Michael Bargo's reaction to those bruises and cigarette burns?
A. Yes.

Q. What was his reaction?
A. Angry.
Q. He was upset?
A. Yes.
Q. How about your son?
A. Yes.
Q. He was upset?
A. Of course. He's the brother.
Q. And did you contact anyone to get help for your daughter regarding that?
A. No.
Q. I don't have any other questions. Thank you, ma'am.
THE COURT: Cross-examination?
MS. ARNOLD: No questions, Your Honor.
THE COURT: May this witness be excused, Counsel?
MS. HAWTHORNE: Yes, sir.
THE COURT: You're excused, ma'am.
The defense may call its next witness.
MS. HAWTHORNE: Defense would call William Samalot.
MR. HOLLOMAN: May we approach the bench, Your Honor?
THE COURT: Yes, sir.

(Conference at the bench before the Court without the hearing of the jury as follows:)

MR. HOLLOMAN: I just want the Court to know my client, he's starting to act up. He said if we don't ask the questions he wants, we can call this whole damn thing off right now. I just wanted the Court to know he's starting to act up.

THE COURT: Okay. So noted.

(The discussion at the bench was concluded and the following took place within the presence and hearing of the jury:)

(Whereupon, WILLIAM SAMALOT was duly sworn and testified under oath as follows:)

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Good morning, sir.

A. Good morning.

Q. Can you tell us your full name for the record, please?

A. William Santos Samalot.

Q. And, Mr. Samalot, do you live in Summerfield?

A. Yes, ma'am.

Q. I'd like to take your attention back to 2011.

A. Yes, ma'am.

Q. To the March, April time period prior to April 17.

A. Yes, ma'am.

Q. Prior to April 17, how long had you known my client, Michael Shane Bargo, Jr.?

A. For a few years.

Q. And were you close friends with him or not or just acquaintances?

A. Good friends, you could say. Not like close friends. I can say, like, we didn't share everything together. I guess you could say decent friends.

Q. And were you friends with Amber Wright?

A. Yes, ma'am.

Q. Were you friends with Kyle Hooper?

A. Yes, ma'am.

Q. Were you friends with Justin Soto?

A. No.

Q. Were you friends with Charlie Ely?

A. Yes, ma'am.

Q. Now, in March of 2011, did you have occasion to see my client in fights?

A. Yes, ma'am.

Q. And was this with a number of people or was this just one particular person that these fights were occurring with?

A. Mostly with Seath.

Q. Okay. And was Mr. Bargo engaging in conversations with Mr. Jackson that was threatening?

A. You could say, yes.

Q. What about -- did you witness Mr. Bargo being threatened by anybody else?

A. You mean anybody threatening him?

Q. Uh-huh.

A. No, ma'am.

Q. Did you ever witness Mr. Jackson antagonizing him?

A. They were antagonizing each other.

Q. Did you ever go on Facebook?

A. Yes, ma'am.

Q. And do you have a Facebook page?

A. Yes, ma'am, I do.

Q. And did you ever read any postings regarding anyone wanting to shoot Mr. Bargo, Jr.?

A. I did not read anything about that, no. I saw a few arguments that had happened between Seath and Amber and a few other people were posting. I never myself posted on the status. But I never saw anybody threaten to shoot your client.

Q. Okay. Were you present when Mr. Jackson's dad and Seath and law enforcement, my client, Tracy

Wright, they were over at Tracy Wright's house, the police were called out there?

A. No, ma'am. I believe I was in Puerto Rico at the time.

Q. Did you -- you witnessed the fights?

A. Ma'am?

Q. You witnessed fights that my client got into?

A. Which specific ones?

Q. Did you witness the first fight between my client and Mr. Jackson?

A. No. The first fight that had occurred was while I was in Puerto Rico. I had mentioned that in my deposition.

MS. HAWTHORNE: May I approach the witness, please?

THE COURT: You can ask him whether he was asked a specific question and provided a specific answer. If he denies it I'll grant that request.

MS. HAWTHORNE: Okay.

BY MS. HAWTHORNE:

Q. Were you asked a question --

MS. BERNDT: Excuse me. May I have a page and line, please?

MS. HAWTHORNE: Yes, ma'am. Page 21, beginning line 18. Make that 16.

BY MS. HAWTHORNE:

Q. Were you asked, "Were you aware of multiple fights they had?"

A. Uh-huh. By fights you could also mean arguments through phone, texts, Facebook, so that's what I was referring to.

Q. Do you recall what answer you gave?

A. No, ma'am, I do not.

MS. HAWTHORNE: May I show him the transcript or should I read him the answer?

THE COURT: You can read him the answer and ask if he gave that answer.

BY MS. HAWTHORNE:

Q. The answer that's in the transcript is, "Yes, I was aware of multiple fights."

A. But I could mean over texts, Facebook, et cetera.

Q. Do you remember being asked did you witness any of the them?

A. Not that I can recall.

Q. Is that you don't recall your answer or you don't recall whether you witnessed any?

A. I don't recall it being asked.

Q. The transcript has a question at line 18, "Did you witness any of them." On line 19 you

answered, "The only one I witnessed was the first one. And then, like, other ones where Bargo told Seath to meet him somewhere and Seath just wanted to come along just for the help."

A. Yes, ma'am.

Q. Okay. Is that the answer you gave?

A. Yes, ma'am.

Q. Do you recall being asked if my client and Seath were a match?

A. Yes, I recall.

Q. And do you recall whether they were a match or not?

A. No, they were not.

Q. And why was that?

A. Seath was taller, probably more experienced, you would say. Pretty much all I can answer is that it was just -- he was just bigger, kind of a bigger person, a lot taller than him. I'd say more experienced in fighting.

Q. And you witnessed the bigger person fighting the smaller person?

A. I don't think you asked me that in my deposition.

Q. No. I'm asking you that.

A. If I witnessed them fighting?

Q. Yes.

A. In which fight? Might this be an actual physical altercation or verbal or phone, text or Facebook?

Q. The fight that you indicated that you saw between them, the first one.

A. That could indicate anything. There were fights over texts, Facebook. You didn't specify.

Q. Now, in the deposition you didn't explain that, did you? You just answered the person's question to you.

A. Well, had you elaborated a little bit more maybe I could have gone into that more in detail.

Q. I wasn't there, sir, so I didn't ask the questions.

A. Well, maybe who asked the questions, maybe she should have.

Q. Okay. Did you ever witness Mr. Bargo with a broken nose?

A. No, ma'am.

Q. Did you ever witness Seath --

A. No, not Seath, but I seen a mugshot with him. It looked like he had a broken nose. But not face-to-face, no.

Q. All right. Now, the incident where the

police were called to Mr. Bargo's home, were you present for that occasion?

A. I believe I was -- to Bargo's home? Was this early April, maybe May, before the 17th?

Q. Before the 17th.

A. No, ma'am, I was in Puerto Rico.

Q. Were you -- but you knew about that incident?

A. Yes, ma'am, I did.

Q. Do you know if anyone was injured that day?

A. I heard that --

MS. BERNDT: Objection, Judge. He wasn't present.

THE COURT: Sustained; hearsay.

MS. HAWTHORNE: And, Your Honor, the Spencer allows the relaxation of the rules during a Spencer hearing.

MS. BERNDT: She's still asking him to comment on something when he wasn't there. It would be complete hearsay for him to speculate on that.

THE COURT: I believe the rules of evidence still apply. The objection is sustained.

BY MS. HAWTHORNE:

Q. Did you ever talk to Mr. Bargo, Jr. about that day?

A. No, ma'am.
Q. Did you ever talk to Seath Jackson about that day?
A. Which day?
Q. The one that we were just talking about.
A. When the police were called while I was in Puerto Rico?
Q. Yes.
A. Yes, I did.
Q. And did he tell you if Mr. Bargo --
MS. BERNDT: Objection; hearsay.
THE COURT: I'm going to afford some latitude; overruled.
BY MS. HAWTHORNE:
Q. Did he tell you that Mr. Bargo fought him that day?
A. He had told me that Bargo had two of his friends apparently jump him.
Q. That day.
A. The day that they had apparently fought.
Q. No. I'm talking about the day that the police were called out.
A. Well, I wasn't there.
Q. I understand that, sir. But you had a conversation with Mr. Jackson?

A. Yes.
Q. About that day?
A. Yes, ma'am.
Q. And were you advised by Seath that he had mooned Bargo?
A. No, ma'am.
Q. Were you advised by Seath that he kept saying come on out, I want to fight you?
A. Not by him personally, no.
Q. You were familiar with the Facebook conflict exchange between the two of them?
A. Yes, I had seen the comments and posts.
Q. And were you ever present when the police were called out?
A. Which time?
Q. Any time for either Seath or Michael.
A. On the day that they had reported him missing, yes, I was present when the police were there.
Q. Okay. But prior to that?
A. Prior to that, no, ma'am.
Q. You had access to all the Facebook exchanges, didn't you?
A. At the time that people were posting and commenting -- I believe that eventually they got deleted for provocative language and stuff like that.

Somebody reported it as abusive and then it got deleted.

Q. But you were privy to those, weren't you?

A. Yes, I had seen a few of them. Yes.

Q. Did you ever discuss any of the postings with my client?

A. No, ma'am.

Q. Did you ever hear or did you ever read that Seath referred to Michael Bargo as a princess?

A. I believe that was his nickname. A few people called him that.

Q. And why was that?

A. No idea.

Q. Did you ever call him princess?

A. No, ma'am.

Q. Did you ever talk to Amber about Michael Bargo, Jr.?

A. On which occasion?

Q. Any occasion.

A. I had a few discussions, yes.

Q. Did you have any discussions with her about some of the things that were being said on Facebook about her?

A. No, ma'am.

Q. Did you read some of the stuff that was being

posted on Facebook?

A. Yes, ma'am.

Q. Were you aware that Amber's mom had been threatened?

A. No, ma'am.

Q. Do you recall a time where your friend Seath had expressed that my client wouldn't fight him?

A. Well, a few times Michael had asked him to come over to fight him. It was a lot of going back and forth, them antagonizing each other.

Q. Do you know if the police were ever called regarding the threats Michael made to Seath?

A. No, ma'am. I'm not aware of any of them.

Q. Did you ever fight Michael Bargo, Jr.?

A. No, ma'am.

MS. HAWTHORNE: I don't have any other questions of this witness.

THE COURT: Cross-examination?

MS. BERNDT: No questions, Your Honor.

THE COURT: May this witness be excused?

MR. BARGO, JR.: Your Honor, may I talk to my counsel before we release the witness?

THE COURT: Excuse me?

MR. BARGO, JR.: Can I talk to my counsel before we release the witness?

MS. HAWTHORNE: If I may have a moment?
THE COURT: Yes, ma'am.
(Discussion off the record.)
BY MS. HAWTHORNE:
Q. Mr. Samalot, with regard to Facebook, can you tell us what you saw on Facebook?
MS. BERNDT: I'm going to object to hearsay, anything from Facebook.
THE COURT: Sustained.
Counsel, approach the bench, please.
MS. HAWTHORNE: My client is asking for headphones so he can hear the sidebar conferences.
THE COURT: Pursuant to the rules of criminal procedure, that's not going to be provided.
MS. HAWTHORNE: Yes, sir.
(Conference at the bench before the Court without the hearing of the jury as follows:)
THE COURT: The Facebook postings, what theory do you have that you think that that would be admissible?
MS. HAWTHORNE: Under my client's character --
THE COURT: How it affected him?
MS. HAWTHORNE: How it affected him, yes.
MS. BERNDT: Judge, she's asking him to

comment on posts that he didn't even make, comments that were made between other people that he didn't even make. He can't speak to the reliability or the veracity. He can't talk about that.

THE COURT: I'm going to afford some latitude because I think the theory is how the Facebook postings affected Mr. Bargo. Is that accurate?

MS. HAWTHORNE: Yes, sir.

THE COURT: In that regard I'm going to reconsider my previous ruling and allow some examination on that issue.

(The discussion at the bench was concluded and the following took place within the presence and hearing of the jury:)

THE COURT: Pursuant to the conference at the bench, I had advised Counsel I was reconsidering my previous ruling, I was going to allow some examination regarding the Facebook postings.

BY MS. HAWTHORNE:

Q. We will come back to Facebook. But I would like to ask you now, going back to two weeks before April 17, do you recall Mr. Bargo telling you to meet up with him?

A. Not me specifically. But, no, it was Seath.

Q. And what were they going to meet up and do?

A. Apparently fight.
Q. And is that when you rode behind Charlie's house?
A. Yes, ma'am.
Q. And you heard a sound?
A. Yes, ma'am, I heard a .22 caliber gunshot go off.
Q. Did you see anybody?
A. All I saw was some blinds moving at Charlie Ely's house, but the sound of the gunshot did come from that direction.
Q. And did you get a call after that?
A. Yes, ma'am.
Q. Who called you?
A. I did not receive the call personally. Seath had got a call from Amber.
Q. Okay. Did you tell someone at your deposition that you got a call from Amber?
A. I don't recall. I believe I said we, not specifically saying myself.
Q. Page 16, line 23, you responded to a question, can you tell me what problems you ever saw between Seath and Kyle Hooper and on line 23 you responded after that, which is after going to Charlie's house, I got a call from Amber and she's yelling at me.

A. I would have to see that.

MS. HAWTHORNE: May I approach?

THE COURT: Yes, ma'am.

BY MS. HAWTHORNE:

Q. Now that you've reviewed page 16, your answer on the bottom of page 16 -- did you just have an opportunity to review that?

A. Yes, ma'am.

Q. And does that refresh your recollection as to what --

A. Yes, I was on phone, but it was not my cell phone personally.

Q. Okay. And the person on the phone was whom?

A. At first it was Amber, because Seath had handed me the cell phone. And then Kyle had taken the phone away. It was just a bunch of stupid arguing back and forth, just name-calling, senseless arguing.

Q. Was Amber yelling at you?

A. Yeah.

Q. And did Kyle Hooper get on the phone?

A. Yes.

Q. And did he use the F word?

A. He used provocative language, yes.

Q. He was mad?

A. Yes, ma'am.

Q. Did Mr. Bargo get on the phone?
A. No, ma'am.
Q. Did you see Mr. Bargo?
A. No, ma'am.
Q. You didn't see anybody shooting that gun, did you?
A. No, ma'am. But I could definitely indicate the location that it came from.
Q. Well, that's fair. And was that the location of Charlie Ely's house?
A. Yes, ma'am.
Q. And were you aware that Kyle Hooper and Amber Wright were spending time there?
A. I did not know if they were staying there at the time, but I knew they had been spending a lot of time there, yes.
Q. Shortly after you heard this sound that sounded like a .22 you received the phone call from Amber and Kyle?
A. Yes.
Q. Were they were mad at you or yelling at either you or Seath?
A. Yes, ma'am.
Q. And just for the record, you didn't say during this deposition when you were discussing this

and you didn't witness Michael Bargo, Jr. firing a gun out that window, did you?

A. I didn't say I saw anybody. They could have opened a door or a window, shot out of it. I'm not specifically sure. But I did indicate that it came in the direction of Charlie Ely's house, which I knew Michael Bargo was staying there at the time.

Q. Okay. That day that you were driving behind Charlie's house, is that the day that you were going to Seath's to meet up with my client?

A. Yes. Because your client had called him and told him to meet up with him.

Q. All right. And now, were you aware of any problem between Kyle Hooper and Seath?

A. Yeah, there was a problem. Mostly because he was defending his sister over the breakup. Most family seems to take the side of their family, so he was a little upset about it, you could say.

Q. And that's what the phone call was about? That's why he was so mad on the phone?

A. I know there was a lot of arguing going back and forth after Amber had cheated on Seath with your client. So what do you mean by was it about -- what was the argument about? What do you mean specifically?

Q. When Kyle got on the phone, was it about his

sister's breakup with Seath or did Kyle have his own separate issue with Seath that --

MS. HAWTHORNE: I'm going to object at this point. This is all evidence presented during the guilt phase; it's not relevant during the Spencer hearing.

THE COURT: Granted. And we're very far afield. Sustained.

BY MS. HAWTHORNE:

Q. Do you -- as to Facebook -- we will go back there -- there were some posts on March 30 on Seath's Facebook page. Do you recall reading that? Did you ever hear Seath call Michael Bargo, Jr. faggo?

A. I don't recall it, but it says that happened.

Q. Did you ever read that Seath was trying to get some people together to go fight Mike again? Who is Alyssa?

A. Probably Alyssa Masters.

Q. Okay. Was she a girlfriend of Kyle's?

MS. BERNDT: I'm going to object at this time. He doesn't even know that it's Alyssa Masters. This is speculation.

THE COURT: Sustained.

BY MS. HAWTHORNE:

Q. Do you know if Kyle had a relationship with

her?

A. With who?

Q. Alyssa Masters.

A. They never actually dated, but I know he had feelings for her.

Q. Did Seath have a relationship with Alyssa?

MS. BERNDT: Objection; relevance. Your Honor, again --

THE COURT: Overruled. If you know.

THE WITNESS: They never dated, no.

BY MS. HAWTHORNE:

Q. So Kyle never witnessed anything going on at Alyssa's house between Seath and Alyssa, to your knowledge?

A. Possibly.

Q. Did you ever review a post to Amber that Seath had given her a venereal disease?

MS. BERNDT: Objection, Your Honor. This is not relevant. It's just attacking the victim's character again. It's not relevant at the Spencer hearing.

THE COURT: Sustained.

MS. HAWTHORNE: I think it goes to Ms. Wright's testimony about the effect --

THE COURT: I think that overreached.

Sustained.

MS. HAWTHORNE: Yes, sir.

May I have a moment with my client?

THE COURT: Yes, ma'am.

(Discussion off the record.)

MS. HAWTHORNE: Your Honor, I would tender the witness.

THE COURT: Cross-examination?

MS. BERNDT: No questions, Your Honor.

THE COURT: May this witness be excused?

MS. HAWTHORNE: Yes, sir.

THE COURT: You're excused, sir. We are going to take a recess at this time. We will take an approximate 20-minute recess. We will reconvene in the courtroom at 11:15 a.m.

THE BAILIFF: All rise.

(Whereupon, a recess was taken.)

THE BAILIFF: Circuit court is now in session.

THE COURT: Go ahead and be seated, please. Noting the defendant's presence back in the courtroom accompanied by Counsel. The State is also present. Actually Mr. Holloman is not present. Noting Mr. Holloman's presence back in the courtroom, everyone is now present.

Before the next witness is called, let me just reference why headphones are not provided to the defendant regarding bench conferences. And the rule that addresses that is rule of criminal procedure 3.180 which is titled presence of the defendant.

I happen to have been on the criminal procedure rules committee when that rule was modified. The issue that the committee was addressing many years ago was whether a defendant had the right to be physically present at the bench during a bench conference. We eventually answered that question in the negative. The defendant has no such right and actually if my recollection is correct we added a definition for the term presence.

And I'll just read that into the record. It's rule 3.180, subsection B as in boy. Presence definition. A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding and has a meaningful opportunity to be heard through counsel on the issues being discussed.

And that is the reason why a defendant is not actually at the bench during a bench conference.

The defendant may call its next witness.

MS. HAWTHORNE: The defense would call Duane Hooper.

THE COURT: Sir, please raise your hand and face the clerk.

(Whereupon, DUANE HOOPER was duly sworn and testified under oath as follows:)

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Good morning, sir.

A. Good morning.

Q. For the record would you please tell us your full name?

A. Duane Edward Hooper.

Q. And, Mr. Hooper, are you the father to Kyle Hooper?

A. Yes, I am.

Q. And is Amber your daughter?

A. Yes, ma'am.

Q. And do you know Michael Shane Bargo, Jr.?

A. Yes, I do.

Q. How long have you known Mr. Bargo?

A. I guess about the last six years, six or eight years or so.

Q. And during that time did you have a close

relationship with him?

A. Yes, I did.

Q. Back in 2011, the early part of that year 2010 -- well, let me strike that. April 29, 2010, Mr. Bargo was 18. And after that time did you and my client, did he come under your tutelage for tattooing art?

A. I taught him some.

Q. And was he someone who wanted to learn?

A. Yes.

Q. Was he respectful to you?

A. Oh, he was always very respectful to me.

Q. And did he have a good relationship with your children?

A. Yes.

Q. Did he spend a lot of time at your home?

A. Yes, he did.

Q. Did you actually put tattoos on my client?

A. Yes, I did.

Q. Is that what they call it? I've never had a tattoo, so I don't know what it's called when someone gets a tattoo.

A. Yes.

Q. All right. And did Michael want to go into that as a line of employment?

A. I don't know about a line of employment, but he was interested.

Q. And did you ever agree to do a tattoo for him?

A. Well, I put one on him.

Q. Okay. Just one?

A. Well, it was a pretty large piece, yes.

Q. And can you describe it to us?

A. It was a back piece, reaper.

Q. And how long did that take?

A. It took a couple sittings.

Q. And did he ask you to do that?

A. Yes.

Q. And you discussed it with him?

A. Oh, yeah.

Q. And did you ever watch my client performing any tattoo work on others?

A. A little bit. I mean, not -- I've seen him do a little bit, yeah.

Q. Have you ever seen my client at the house for dinnertime? Did he come over and eat?

A. He used to eat at my house quite a bit.

Q. Did you kind of take him under your wing --

A. I treated him like my own kids.

Q. And during the time -- did he -- once he was

18 did he try to seek employment?

A. I don't know. I think he worked with a landscaping or lawn service or something like that. I'm not real sure.

Q. Did he ever talk to you about doing tattoo work?

A. Not as far as, like, as a career, but...

Q. Did he have a kit?

A. Yes, he did. Not at first.

Q. Were you aware of any tattoos that he did for other people?

A. No.

Q. Now, in the spring of 2011, before April 17, 2011, had you been in the same type of close relationship with Michael?

A. Well, you know, I guess you would say there towards the end I sensed something different about Mike and I was uncomfortable. I really did not want him at my house anymore. I did not want him around my kids any longer.

Q. Did he -- was he acting bizarre?

A. I wouldn't say bizarre, but he was not the Mike Bargo that I knew. And I'm in my 40s. I've been around a little bit, so I just -- I just felt uncomfortable. And actually that caused a lot of

problems between Amber, Kyle and myself, my two kids and myself and as -- yeah.

Q. Did you suspect that Michael was using drugs?

A. Yes, I did.

Q. Did he have mood swings?

A. Not around me. But I knew there was a difference.

Q. Were you aware of Michael getting into fights in the neighborhood?

A. Yeah. Mike -- yeah, he had been in a couple of fights. I don't know who with, but I've seen him with a busted nose and banged up a little bit, roughed up, I guess.

Q. And do you know Seath Jackson?

A. Yes, I do.

Q. And your daughter was dating Seath?

A. I thought that they were good friends. Yeah, I guess they were dating there for a little while.

Q. Did you ever have an occasion to try to talk to Seath Jackson's dad, Scott Jackson?

A. Yes.

Q. Why did you do that?

A. Because Seath Jackson threatened to shoot me. He also threatened to burn down my house on Facebook. And a couple of times that I went to Mr. Jackson's

house I could not reach him there. They were not home.

Q. Were you present when the police came out to Tracy Wright's house?

A. Yes. I had just come home from work. When they took the kids or prior till?

Q. No. I'm talking about when Tracy had the problems with being threatened.

A. Yes.

Q. Were you there when Scott Jackson came over to Tracy's house when the police were there that day?

A. I believe -- I'm not sure. But I did reside at that residency [sic]. We lived together.

Q. All right. Now, up until -- right before April 17, prior to -- would it have been around March when my client started acting strange?

A. Probably so.

Q. Did you talk to him about his behavior?

A. No, I did not.

Q. Did you talk to his dad?

A. No, I did not.

Q. Did you --

A. I did not know Mike's dad as well as I knew Mike. We've only talked maybe two or three times and once was over the situation with Seath.

Q. And that would have been --

A. And actually Mike's father and I went to Seath's house to talk to his parents, actually. And they were not home.

Q. Okay. Did you ever witness my client Michael Shane Bargo, Jr., threatening Tracy Wright?

A. No.

Q. Did you ever witness him threatening anyone to their face?

A. Not that I recall, no.

Q. I don't have any other questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. ARNOLD:

Q. Mr. Hooper, are you aware of any threats that the defendant made toward you?

A. Mike never threatened me until after everything, after the whole -- after everything happened. And then I come to find out that I guess I was on a list to be killed.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Mr. Hooper, were you told that by the State?

A. Yes, I was.

Q. Have you ever seen the list?

A. No, I have not.

Q. Okay. I don't have any other questions.

THE COURT: Recross?

MS. BERNDT: No, Your Honor.

THE COURT: May this witness be excused?

MS. HAWTHORNE: Yes, sir.

THE COURT: You're excused, sir. The defense may call its next witness.

MS. HAWTHORNE: The defense would call Rhonda Stroup, Your Honor. We're going to call Deputy Rasnick back to the stand.

THE COURT: Are you calling Deputy Scott Rasnick?

MS. ARNOLD: David Rasnick.

THE COURT: David Rasnick. I apologize. Sir, if you will come back up to the witness stand. Once again, if you will stand and face the clerk?

(Whereupon, DEPUTY RASNICK was duly sworn and testified under oath as follows:)

THE COURT: Please be seated.

FURTHER DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Deputy, we were talking earlier and you had not had occasion to review a deposition that you gave back in November of 2011?

A. That's correct.
Q. Have you had an opportunity to read that now?
A. Yes.
Q. And did that refresh your recollection as to some of the things that were going on --
A. Yes.
Q. -- back in April, March and April of 2011 with the area where Mr. Bargo was living and Amber Wright and Kyle Hooper?
A. Yes.
Q. Did you ever have occasion to be called out to Virgie Waller's house?
A. No.
Q. And you never gave Virgie Waller a trespass warning?
A. When I left here I went back to the sheriff's office and reviewed my records. There was a Deputy Diaz that responded on March 30, 2011 at 1:25 p.m. That was not me.
Q. All right. Were you out at Amber Wright's house, Tracy Wright's house, previously where a complaint had come in, Mr. Bargo was there, Tracy Wright was there, Scott Jackson was there, Seath Jackson was there?
A. No.

Q. You don't recall that?

A. I reviewed all the calls there. Deputy Grantham had been out there before, Deputy Randall had been out there before, but I had never been out there.

Q. Okay. All right. You never had any contact with my client prior to -- after April 17?

A. Like I testified earlier ma'am, no.

Q. Okay. I don't have any other questions. Thank you.

THE COURT: Cross-examination?

MS. BERNDT: No, Your Honor.

THE COURT: May this witness be excused?

MS. HAWTHORNE: Yes, sir.

THE COURT: You're excused now, sir.

The defense may now call its next witness.

MS. HAWTHORNE: Detective Rhonda Stroup.

THE COURT: Come down to the witness stand, please. Please raise your right hand and face the clerk.

(Whereupon, RHONDA STROUP was duly sworn and testified under oath as follows:)

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Good morning, Detective.

A. Good morning.
Q. Could you tell us your name for the record?
A. Rhonda Stroup, S-T-R-O-U-P.
Q. And where are you employed?
A. Marion County Sheriff's Office.
Q. How long have you been there?
A. A little over 11 years.
Q. And you are a detective?
A. Yes, ma'am.
Q. Back in April of 2011, you were also a detective?
A. Yes, ma'am.
Q. And you work on the homicide unit?
A. Yes.
Q. Back on April 19, you became involved -- and it may have been on the 18th -- but I know that you became involved in conducting interviews of several of the individuals that were involved in the homicide of Seath Jackson.
A. Yes, ma'am.
Q. And those interviews were recorded?
A. Yes, ma'am.
Q. And you did quite a number of them, didn't you?
A. Yes, I did. Well, I did Kyle Hooper's and

his sister, Amanda Wright's.

Q. Who were the first people that you interviewed?

A. I interviewed first Kyle Hooper and his mother, Tracy Wright, were both in the room.

Q. And the second interview?

A. Was just Kyle Hooper.

Q. Some of these interviews occurred in what you call a soft room and some occurred in what you call a hard room?

A. Yeah. They're just -- we just have three rooms that we use for interviews. The furniture in them is what makes us differentiate between them.

Q. The soft room has a nice, cushy couch?

A. Yes. It has a couch and a chair in it.

Q. And the hard room --

A. It just has chairs.

Q. Just chairs?

A. Yeah.

Q. Did there come a time when you conducted an interview with a number of the people involved in the same room?

A. No, not an interview.

Q. Did you have an interview on April 19 with Kyle Hooper and his mom, Tracy Wright?

A. Yeah.

Q. And then Amber was also brought into that room?

A. Kyle and his mother were the very first interview. And then Kyle's mother left and I interviewed Kyle. Then I went to what you're saying is the soft room and I talked to Amber. Then I went back to the hard room and talked to Kyle, I believe.

Q. Okay. I'm looking at page 1579 of discovery.

MS. HAWTHORNE: Your Honor, may I approach and just show the witness this so she can clarify for me?

THE COURT: Yes.

BY MS. HAWTHORNE:

Q. Just the first paragraph, just read that to yourself.

A. Okay. That was in the -- yes, I got you now.

Q. Now, just so I'm clear, the interview that I'm talking about occurred in the soft room?

A. Yes, when I talked to them.

Q. And Amber Wright was in that room? She entered afterwards, after you started?

A. Correct.

Q. And then after Amber entered -- Tracy left?

A. Correct.

Q. And then a minute later Charlie Ely entered the room?

A. Correct. She was originally interviewed by Detective Buie.

Q. So we had Kyle, Amber and Charlie all in the same room at one time?

A. Correct.

Q. And they were able to talk amongst themselves -- did you interview all three of them or did you just leave them in there so that you could record their conversation?

A. As they were finished with their interviews with each perspective detective, they were sat in the soft room together. I think that's what you're referring to.

Q. Okay. Do you recall discussing with the two of them, meaning Amber and Kyle together?

A. I may, if you tell me the context of that. There was just a lot of interviews going on and a lot of room switching at the time, so I'm not exactly clear and I don't want to --

Q. That's understandable. 1581 of discovery.

MS. HAWTHORNE: Your Honor, may I approach?

THE COURT: Yes, ma'am.

BY MS. HAWTHORNE:

Q. Line 28.
A. Correct. Okay. Yes.
Q. So you were talking to both of them at the same time?
A. I think there were three of them, correct.
Q. Okay. Charlie --
A. Charlie Ely, Kyle Hooper and Amber Wright were all in the same room when I made that statement.
Q. And do you recall stepping out of the room and letting them discuss amongst themselves?
A. Yes.
Q. And while you were out of the room did you overhear what was --
A. Yes.
Q. -- you have the ability to watch and listen to what's going on in the room?
A. Correct.
Q. Kind of like putting people -- two defendants in the back of a police car and letting them talk and recording it?
A. I don't work patrol anymore, so I don't know what they do.
Q. Okay. But you purposely left them all together in that room?
A. Yes.

Q. And they did discuss things amongst themselves after you left the room?

A. Yes.

Q. And you did listen and observe --

A. Some of it, yes.

Q. And during that discussion, Kyle --

MS. ARNOLD: Objection, Your Honor.

THE COURT: Grounds.

MS. ARNOLD: I object that it's irrelevant, any conversations that they're having together and it's hearsay and it doesn't go to the issues of this Spencer hearing.

THE COURT: On the grounds of relevancy, I'm sustaining the objection. I don't understand this line of examination. What you're referencing is a discussion that occurred after the murder of Seath Jackson.

MS. HAWTHORNE: Yes, sir.

THE COURT: The objection is sustained.

MS. HAWTHORNE: Your Honor, I would like to proffer my question on the record.

THE COURT: Proffer the question.

MS. HAWTHORNE: I was going to ask the detective regarding the statement that Kyle Hooper made to the other people in the room that he wanted

to blame everything on Michael Bargo, Jr.

THE COURT: And that issue goes to whether your client is guilty or not guilty of committing first-degree murder. That issue has already been decided. The objection is sustained.

MS. HAWTHORNE: Yes, sir. If I were permitted to argue that to the Court --

THE COURT: Yes, ma'am.

MS. HAWTHORNE: I would argue that it is relevant and it goes to my client's character that he may not have done all the things that Kyle Hooper said he did, and that Kyle's testimony in this courtroom should be weighed in mitigation against my client's behavior, and if he indicated to blame everything on my client, then certainly my client's mitigation is stronger for a life sentence, as opposed to a death sentence.

THE COURT: I find that statement by Kyle Hooper to be irrelevant. The objection is sustained.

MS. HAWTHORNE: Yes, sir.

BY MS. HAWTHORNE:

Q. Did you ever interview Mr. Bargo?

A. No.

Q. That interview was done by Detective Buie?

A. I believe so.

Q. I don't have any other questions.

THE COURT: Cross-examination?

MS. ARNOLD: No, Your Honor.

THE COURT: May this witness be excused?

MS. HAWTHORNE: Yes, sir.

THE COURT: Will Counsel approach the bench, please? I don't need the court reporter.

(Conference at the bench before the Court without the hearing of the court reporter and jury as follows:)

THE COURT: At this time we are going to take a lunch recess. We will reconvene in the courtroom. I believe counsel for the state needed to do talk with the doctor who will be testifying next. We will make the recess until 1:30 p.m. We are in recess.

(Whereupon, a lunch recess was taken.)

THE BAILIFF: Circuit court is back in session.

THE COURT: Go ahead an be seated, please. Noting the defendant's presence back in the courtroom accompanied by counsel. Counsel for the State is also present. Are we ready to resume the hearing, Counsel?

MS. HAWTHORNE: Yes, sir.

THE COURT: The defense may call its next witness.

MS. HAWTHORNE: Your Honor, defense would call Dr. Eric Mings and we would ask permission of the Court let Dr. Berland to remain in the courtroom during Dr. Mings' testimony.

THE COURT: Granted.

MS. HAWTHORNE: Thank you.

THE COURT: Please raise your right hand and face the clerk.

(Whereupon, ERIC MINGS, Ph.D., was duly sworn and testified under oath as follows:)

THE COURT: Please be seated.

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Good afternoon, sir.

A. Good afternoon.

Q. Would you please, for the record, tell us your full name?

A. Eric Lawrence Mings.

Q. And where are you employed, sir?

A. I'm self-employed. I'm a psychologist. I do forensic psychology on pretty much a full-time basis.

Q. And can you tell us where you received your training?

A. Sure. I got all my degrees from the University of Florida. I got a bachelor's of science in psychology in 1980. I was accepted to graduate school there that same year. I entered the graduate program in clinical psychology at Shands Hospital that year.

I got -- during the course of the program I got a master's in 1984. I received my Ph.D. in 1987. During my training, I specialized in an area called neuropsychology and particularly my research was with kids, pediatric neuropsychology.

I went to the Veterans Administration in Gainesville to do my internship. While I was there they had an arrangement with North Florida Evaluation and Treatment Center, which was a state hospital in Gainesville. And I requested placement there. So I did part of my internship there. Then I finished in 1987.

I began -- they offered me a job at NFETC when I finished, but I had already decided to move to Orlando. But I took a part-time position there for several months until I was hired at Orlando Regional Medical Center's Brain Injury Rehabilitation Unit.

I worked there for about a year and a half while I established my private practice. And I have

been in private practice ever since.

Q. And you are licensed in the state of Florida?

A. Yes.

Q. Can you tell us what is the field of neuropsychology?

A. It's the study of relationships between brain function and behavior both in normal people and in people with various types of brain injury. Practically speaking what it means is assessment procedures to look at various aspects of cognitive functioning to determine how people are doing, whether they're doing average, better or worse than might be expected and to sort of bridge the gap between how the brain functions and how behavior is manifested.

Q. Have you published any articles?

A. Yeah. When I was in graduate school I was one of the authors of several articles in pediatric neuropsychology. It was primarily related to the effects of chronic kidney disease on brain functioning, which was a fairly subtle problem, but it's pretty pervasive.

Q. And do you have a background in adolescent brain development?

A. Yeah. I've done a lot of neuropsychological assessments of children and adolescents as well as

adults. I continue to -- even though I do forensic work full time now, I continue to evaluate both adults and children.

Q. And in your practice in Florida, have you ever testified in a court of law before?

A. Many times, state and federal.

Q. And have you ever been qualified as a neuropsychologist with a background in adolescent brain development?

A. Yes, many times.

MS. HAWTHORNE: Your Honor, at this time, I would offer Dr. Mings as an expert in the area of neuropsychology with a focus on adolescent brain development.

THE COURT: Any objection or voir dire?

MS. ARNOLD: No voir dire.

THE COURT: The Court finds that this witness is qualified as an expert witness in that area.

BY MS. HAWTHORNE:

Q. Dr. Mings, you were recently appointed to assist us with this hearing?

A. Right. I was retained sometime approximately a month ago, maybe a little longer.

Q. And when you were retained, were you provided with a number of articles?

A. Yeah. You provided me with some articles about adolescent brain development, as well as a variety of other materials.

Q. Were you provided with excerpts from the trial, guilt phase and penalty phase?

A. Yes. I had various excerpts of testimony during the trial.

Q. And did you also receive depositions of certain individuals that were witnesses in the case?

A. Yes.

Q. Did you have occasion to evaluate Michael Shane Bargo, Jr.?

A. Yes, I did. I saw him on October 23 of this year.

Q. And based on the testing that you gave him -- which took place on that one day?

A. Correct.

Q. About four to five hours?

A. Approximately that, about five hours probably.

Q. Can you tell us what kind of tests you gave to Mr. Bargo?

A. Sure. Well, I started out by doing a clinical interview, talking to him about his history in general to get some background information. I then

proceeded to do a variety of neuropsychological tests. I did initially the Wechsler Adult Intelligence Scale, Fourth Edition, which is, by far, the most widely used IQ measure in clinical practice.

It's made up of ten different subtests of different kinds of abilities. I then did the Wechsler Memory Scale, Fourth Edition, which, again, is a battery of tests which specifically focuses on memory abilities.

I did a collection of tests from a battery called the Delis-Kaplan Executive Function System. It's a battery of tests which are sensitive to frontal lobe-type deficits. And then I did some additional things, just measures of manual dexterity and strength, hand dexterity and strength, which can sometimes be affected in various kinds of neurological conditions. I think that pretty much covers it.

Q. And during the testing of Mr. Bargo, were you able to determine whether he was -- did you find he was competent?

A. Meaning what?

Q. During the course of your exchange and interview?

A. Yeah, he interacted with me appropriately, correct.

Q. And based on your tests did you come to an opinion as to Mr. Bargo's neurological function?

A. His neuropsychological functioning, I would consider basically to be average. His full-scale IQ score was 105, which is right in the average range. The battery of the memory tests that I did with him were all consistent with that, in the average range on the indexes it produced. The only, I would say, aberration, was he performed lower than expected on one particular measure of visual spacial memory, delayed.

And on the other measures I did with him, the manual dexterity and speed was within the normal range. The various tests that I did with him for the frontal lobe battery were all basically within the normal-average range.

Q. And, Doctor, with regard to adolescent brain development, what can you tell us about Mr. Bargo and his present age and brain development?

A. Okay. He's 21 years old now, which is the point in time which I saw him. Basically he is about what you would consider to be average for his age. Given that, I would presume that that's probably going to be the case throughout his life because usually you stay about the same unless something bad happens.

So I would say he was typically an average

individual for his age, in terms of his neuropsychological function.

Q. Doctor, can you tell us about how adolescent brain development differs from an adult brain?

A. Sure. The brain develops in different stages. There is dramatic changes in adolescence all the way through early to mid 20's. Essentially what happens is around preadolescence and early adolescence --

THE COURT: Excuse me, Dr. Mings. Can you elaborate for me when you use the term adolescence and preadolescence? Are you using a specific age range?

THE WITNESS: Yeah. Essentially what I was going to say is that from, say, 12 years through 13, 14, your brain develops the highest volume of synapses and gray matter that it's going to have. There's an overabundance of connections during that period of time. What happens in middle adolescence into early adulthood is two different things.

There's a lot of pruning back, meaning a lot of that stuff begins to go away. As connections are made and strengthened the extraneous stuff tends to be pruned off. So you actually lose some brain matter in that way and it's normal and it's

supposed to happen.

Simultaneously what happens is you have an increase in what's called myelination, which is basically the tissue that surrounds the nerves that improves their efficiency in communicating with each other. So, again, what happens is when you get into the early part of adolescence you have all these connections being made.

They begin to get pruned off during mid adolescence and you begin to increase the functioning capacity and the connections that are done are there by increasing the myelination so that they're more efficient. Essentially what that means that -- and this is particularly true in the frontal lobes of the brain -- the part of the brain that's highly responsible for our higher order of thinking and controlling of our behavior.

There's a lot of belief that a lot of the types of difficulties that adolescents and very young adults get into is a result of a combination of this process in the brain, along with the males', you know, testosterone, which tends to make them more active and aggressive.

So you have a period of time which goes into the early, mid to late 20's in which your brain is

not fully developed. That's part of the reason -- my understanding why the Supreme Court made the decision about not executing people under the age of 18 is because the brain was still developing during that period of time.

18 is an arbitrary number. There's nothing magic that happens between the night you're 17 to when you turn to 18. It's a number that's often used in making decisions about people for voting and other kinds of things and service and things like that.

But there's nothing magic about 18. It's in the middle of that range where this sort of thing is happening. Basically what happens, most people remember during their adolescence as well as if they've had kids, is that this is a period of time during development when people tend to engage in a lot of impulsive, risky behaviors.

The general thinking is that this has a basis in brain development during that period of time. There are theories about why that would be happening, why nature would be doing that, but the gist of is that's what happens.

So there's a lot of changes that goes on and it goes on into at least your early to mid 20's at

which time you tend to get more complete adult-type development to the brain.

BY MS. HAWTHORNE:

Q. How in adolescence, teenagers, are they affected more by peer socialization?

A. There's a lot of peer socialization in adolescence. And this is not just an issue of anecdotal evidence, you know, people noticing when kids get to be teenagers, they don't listen to me anymore, they listen to their friends and all that sort of stuff, which is true.

But even with experimentation that's been done to look at decision-making and risk taking and decision-making, they have demonstrated that this occurs -- the riskier decision occurs in the context of -- more in the context of peers being involved as opposed to by one's self.

There's a lot of peer influence that happens, even in basic research, not just in everyday behavior of kids. So they're very susceptible to peer influence. Sort of the ecological theory of why this happens is preparing the individual to move away from their family and begin an independent life, even though these things are risky and they tend to have a greater danger for the individual, in terms of moving the

individual away and beginning to function independently of the family and rely upon other things in the environment. That's why they think that perhaps this may happen.

MS. HAWTHORNE: Your Honor, may I approach the clerk?

THE COURT: Yes, ma'am.

BY MS. HAWTHORNE:

Q. Dr. Mings, I'd like you to go through the articles that you were sent to review. And this is a composite exhibit of articles that we provided to you that the clerk has marked as Defense A. The first one is entitled Adolescent Brain Development and Legal Culpability.

A. Yeah, I remember that.

Q. Is that article consistent with what you have just told us?

A. Yeah, I think this is an overview of some of the issues that we've talked about.

Q. The next article is Brain Development, Culpability and the Death Penalty. That was published by the International Justice Project. You reviewed that for today?

A. Yeah, I reviewed it in the past, but I've looked at it, yeah.

Q. And is that consistent with what you've testified to?

A. Yes, I believe so.

Q. The third article is one on psychological musings and social influences on behavior. Now, all of these articles address adolescent brain development in one way or another. The article on brain development culpability and the death penalty address adolescent brain development and the death penalty.

This article that you're looking at now talks about social behavior and the adolescent brain. Is that consistent with what you've testified to?

A. I believe so, yes.

Q. The next article is Adolescent Brains Biologically Wired to Engage in Risky Behavior Study Finds.

A. Uh-huh.

Q. That's consistent with what you have testified to today?

A. Right. That's about some of the basic research, I believe.

Q. The next is Less Capable Brain, Less Culpable Teen. And that is an article from 2010.

A. Yes, I remember this one as well.

Q. And that talks about risky behavior and teens

and sentencing?

A. Yes.

Q. The next article is Adolescent Emotional Development?

A. Yeah, I remember this.

Q. And then the last article is Should the Science of Adolescent Brain Development Inform Public Policy?

A. Yes, I remember that one clearly.

Q. Now, did these articles aid and assist you in your testimony here today?

A. A good part of what I relied upon, yeah. I've read many articles about this issue over the years.

Q. And you probably reviewed them when they were -- some of them were written several years ago, 2004, and some of them are more recent?

A. Over time I've looked at different ones, yes.

MS. HAWTHORNE: Your Honor, at this time I would move these articles into evidence.

THE COURT: Any objection?

MS. ARNOLD: Your Honor, I do object. There are ADA articles -- they were provided to Dr. Mings by Ms. Hawthorne. I don't know that they're relevant to -- they express opinions about the

efficacy of the death penalty by people who are not testifying here today. I don't know that they're appropriate for the Court to consider in reaching its decision.

THE COURT: Over objection, those exhibits or that exhibit in composite exhibit marked for identification as Exhibit A will be received in evidence in this hearing as Defendant's Exhibit 1.

(Defendant's Exhibit No. 1 was moved into evidence.)

BY MS. HAWTHORNE:

Q. And, Doctor, were you given transcripts from -- excerpts from the trial, I think you stated?

A. Yes.

MS. HAWTHORNE: And, Your Honor, at this time I would submit these to the Court. Do we need to move them into evidence, the transcripts?

THE COURT: Is it marked for identification?

MS. HAWTHORNE: Yes, sir. Defense Exhibit H is the jury trial excerpts of proceedings of James Havens, Tracy Wright, Kyle Shaw and Kyle Hooper.

THE COURT: Ms. Arnold, have you reviewed these?

MS. ARNOLD: I have not, Your Honor, but the Court sat through the trial -- I don't know that they're necessary to put into evidence, but I don't

have any real objection to that.

THE COURT: These are the excerpts that were provided to Dr. Mings; is that correct?

MS. HAWTHORNE: Yes, sir.

THE COURT: That Exhibit H for identification will be received in evidence in this hearing as Defendant's Exhibit No. 2.

(Defendant's Exhibit No. 2 was moved into evidence.)

BY MS. HAWTHORNE:

Q. And, Dr. Mings, you were provided with excerpts of proceedings of August 14, 2013. And that is listed as Defense Exhibit I for identification.

A. I believe so. Let me see what you have there. Yes, I believe so.

MS. HAWTHORNE: Your Honor, Defense would move Exhibit I into evidence.

THE COURT: Any objection?

MS. ARNOLD: I didn't hear what the reference was.

THE COURT: I believe it was the penalty phase proceedings --

MS. HAWTHORNE: No, sir. This is August 14 of the jury trial proceedings. It is the testimony of James Havens.

MS. ARNOLD: I thought his testimony was in

the previous packet.

MS. HAWTHORNE: Yes, we have a duplication. Sorry.

THE COURT: Apparently that's additional testimony. Exhibit I will be received in evidence as Defendant's Exhibit 3 in this hearing.

(Defendant's Exhibit No. 3 was moved into evidence.)

BY MS. HAWTHORNE:

Q. And, Doctor, I'm going to hand you what's been marked Defense Exhibit J and ask you if we provided that to you, the excerpts of the proceedings. It is the narrative of Michael Shane Bargo, Jr. and the cross-examination that occurred on August 19.

A. Yes.

MS. HAWTHORNE: Your Honor, at this time we would move Defense Exhibit J into evidence.

THE COURT: Any objection?

MS. ARNOLD: No, sir.

THE COURT: Defense Exhibit J for identification will be received in evidence as Defendant's Exhibit 4 in this hearing.

(Defendant's Exhibit No. 4 was moved into evidence.)

BY MS. HAWTHORNE:

Q. And, Doctor, I'm showing you Defense Exhibit K. Is that trial excerpts of the proceedings of August

23, 2013 that we sent you which would have been, I believe, the beginning -- that's probably the closing arguments --

A. I believe this is Dr. Wu, Michael Bargo and Virgie Waller.

MS. HAWTHORNE: Your Honor, at this time Defense would move exhibit K into evidence.

THE COURT: Any objection?

MS. ARNOLD: No, sir.

THE COURT: Exhibit K for identification will be received in evidence as Defendant's Exhibit 5 in this hearing.

(Defendant's Exhibit No. 5 was moved into evidence.)

BY MS. HAWTHORNE:

Q. And, Doctor, I'm showing you what's been marked Defense Exhibit L for identification and ask you if that was one of the transcripts from August 2 that we provided to you for review? And that's the penalty phase proceeding.

A. Right. This is primarily the testimony of Dr. Berland, Dr. Pritchard and Tracy O'Brien.

MS. HAWTHORNE: Your Honor, at this time Defense would move Exhibit L into evidence.

THE COURT: Any objection?

MS. ARNOLD: No, sir.

THE COURT: Exhibit L for identification will be received in evidence as Defendant's Exhibit 6 for purposes of this hearing.

(Defendant's Exhibit No. 6 was moved into evidence.)

BY MS. HAWTHORNE:

Q. Now, Dr. Mings, does the adolescent brain development -- is it affected by external things like addiction?

A. It certainly could be. I mean, you know, if one is doing a significant amount of substance that affects the brain, it certainly could affect it. And the intoxication of using drugs affects the functioning during that period of time.

Q. Okay. And how would adolescent brain development be affected by a mental illness?

A. It can be affected significantly. Some mental illnesses -- well, let me rephrase that. Most mental illnesses, their presentation changes over time, if they become evident at all during childhood. The most common change that I see clinically is in what we call affective disorder, meaning disorders of mood.

What happens oftentimes is that children get initially diagnosed with ADHD when they were young children and into preadolescence and then later they begin to show other symptoms -- certainly not everybody

that has ADHD progresses to any other illness, but once -- you later develop illnesses such as bipolar disorder or psychotic disorder or things like that, often initially get diagnosed as ADHD as a child.

And as their brain develops through adolescence the other disorders become more evident. Now, nobody can tell you exactly why that happens on a biological basis, but many of the serious psychiatric illnesses become most evident in late adolescence to early adulthood. And one presumes that has to do with maturation of the brain system.

Q. Now, Doctor, we also supplied you with copies of documents and records involving Mr. Bargo's education and psychological evaluations, schooling from Michigan.

A. I had some; I didn't have a great deal of that in this particular case. I was aware of it from the trial testimony.

Q. And now, some of the testimony of Dr. Wu -- Dr. Wu's testimony talked about a complex seizure disorder. How would your testing interface with Dr. Wu's findings?

A. I don't think that my results necessarily mean anything one way or the other in terms of what he found. He noticed differences on his PET scan, which I

believe was primarily the right temporal parietal lobe, it's the deeper brain structures that were -- had more than a normal amount of activity, which he interpreted as being potentially the result of a partial complex seizure disorder.

My testing -- unless such a condition resulted in significant brain damage that would be evident in the cognitive testing I did is not likely to answer that question one way or the other. So I don't consider my testing to be supportive of it or not supportive of it. It's a separate issue.

Q. Now, when you tested Mr. Bargo with the IQ test, could you tell us the scores that you got?

A. Yeah, if you give me just a moment.

Q. Yes, sir.

A. The full scale I examined was 105. There are other indices that are created in that. That's what's called a normal comprehension index, which is basically a measure of verbal thinking and reasoning skills and what you've learned during the course of your life and that was 108. There's what's called a perceptual reasoning index, which is 105. There is a working memory index, which is basically the ability to hold information in your brain for short periods of time. It's depending on attention and concentration. It was

a 95 and that was his lowest. But it was not dramatically different.

There's what's called a processing speed index, which was 105, and as mentioned the full-scale IQ score was 105. So it all was generally within the same range. The one area of potential weakness was the working memory index, but that was just still in the average range but it was lower than the other scores.

Q. And these are all average scores?

A. Yeah.

Q. They're not exceptional?

A. They're not exceptional. They're not bad. They're average.

Q. Now, was there anything that you discovered that was out of order in your testing, any unusual --

A. When I looked back at some of the individual -- as I said, pretty much, he did in the average range on things that I evaluated with him. The only exception to that would be on a measure of nonverbal memory, his delayed recall was lower than I expected it would be.

It is conceivably -- that kind of memory is dependent upon the right hemisphere in the temporal parietal area, so it's conceivable that that might reflect a problem there, which sort of coincides with

what they said about the PET scan. But given everything else, that's just one isolated piece. But it was unusual, considering everything else.

Q. Thank you, Doctor. I don't have any other questions.

THE COURT: Cross-examination?

MS. ARNOLD: Just briefly.

CROSS-EXAMINATION

BY MS. ARNOLD:

Q. Dr. Mings, the development of the adolescent brain that you were talking about, that applies to all adolescents?

A. Correct.

Q. Not just Mr. Bargo?

A. No, it's all of us.

Q. Having just been provided these articles today I didn't have a chance to go through all of them, but I did want to talk a little bit about the first one, the ADA article, The Adolescent Brain Development and Legal Culpability.

MS. ARNOLD: If I may approach, Your Honor?

THE COURT: Yes, ma'am.

BY MS. ARNOLD:

Q. A lot of what was in here is based on studies that they did in 1987 of juveniles on death row?

A. In this particular article, I think you are probably correct. I'd have to reread it all, but my recollection, you're probably correct.

Q. And I believe it said that there were 14 at the time, juveniles on death row?

A. Correct.

Q. And nine of the 14 had major neuropsychological disorders?

A. Yes.

Q. And seven had psychotic disorders since early childhood?

A. Yes.

Q. And all but two had IQs of less than 90?

A. Correct.

Q. And none of those circumstances apply to Mr. Bargo, do they?

A. I believe you're correct, yes. With the examination of -- there's been debate about what kind of psychiatric disorder he has. As far as the IQ stuff and the other stuff, I agree with you.

Q. Talking about the adolescent brain development, that has a lot to do with controlling -- being able to control impulses?

A. Correct.

Q. And you're familiar with the facts

surrounding this case; are you not?

A. I believe so. Generally speaking, yes.

Q. And would you not agree that it's not a crime of impulse because it was carefully planned over a period of time?

A. It was not an instantaneous impulsive act, right. If you look at some of those articles they talk about the difference between what's called cold cognition and hot cognition. Cold cognition is just like what do adolescents do when they have to reason out things and there's no emotional involvement.

Hot cognition is what they talk about the adolescent's ability to reason and govern their actions in an emotionally charged situation. I do think that this was an emotionally charged situation which had been going on for a significant period of time, leading to what happened.

But it wasn't an instantaneous act, to answer your question.

Q. And it was -- in fact, Mr. Bargo was responsible for assigning roles to different people that were involved in the carrying out of the murder of Seath Jackson?

A. I don't know for certain, but I know that there's been testimony that that was the case.

Q. And some of the people that were being directed were, in fact, younger than Mr. Bargo?

A. Yes. I think --

Q. Amber Wright was 15.

A. And her brother.

Q. And Kyle Hooper was 16.

A. Correct.

Q. And they were arguably the most involved aside from Mr. Bargo in the -- all five people had a role to play?

A. Uh-huh. Yeah, they were involved for sure.

Q. And then Charlie Ely and Justin Soto, also a year or two older than Mr. Bargo?

A. I believe two were older than him, correct.

Q. Now, the kind of testing that you performed, the neuropsychological testing, is that -- how does that relate to a finding of mental illness? Or does it?

A. It can if you -- well, it depends on what you mean by mental illness. The neuropsychological functioning looks at their thinking abilities, which impaired thinking abilities can be a symptom of mental illness, whether it's brain damage or sometimes there are deficits in other mental illnesses that don't have as obvious structural issues, such as schizophrenia or

bipolar disorder, you can see neuropsychological deficits at times, depending upon their condition.

So it can be. It's not -- the diagnosis of most psychiatric disorders are not based on neuropsychological functioning but you can see impairments in neuropsychological functioning in those disorders.

Q. But all Mr. Bargo's neuropsychological functions were in the normal range?

A. Correct.

Q. And one test that you said was below what you expected was, I believe, you described it as -- that you draw lines and patterns and then he has to draw them back?

A. You show him a picture -- you show it to him for ten seconds -- it's just a line drawing -- you turn the page and ask him to draw it from memory. You do that immediately and then approximately 20, 25 minutes later you ask them to do it again. And then you look at the difference.

In his particular case the immediate drawing was no problem whatsoever. He did worse than I expected on the delay.

Q. And I believe you said a score on the immediate draw was ten --

A. Yeah, which ten is average. I think that's correct. I'd have to pull it back up, but I think you're right.

Q. And then the one 20 minutes later, I believe, was a six?

A. Yeah. Right, that sounds right to me.

Q. But other than that, everything else, the IQ --

A. Everything else appeared to be within the normal range to me.

MS. ARNOLD: If I could just have just a moment? I don't have any other questions.

THE COURT: Redirect?

MS. HAWTHORNE: I don't have any other questions for Dr. Mings.

THE COURT: May this witness be excused?

MS. HAWTHORNE: Yes, sir.

THE COURT: You're excused, sir.

Counsel, approach the bench.

We don't need you.

We will take an approximate 20-minute recess. We will reconvene in the courtroom -- we will make it 2:35 p.m.

(A brief recess was taken.)

THE COURT: Go ahead and be seated, please.

Noting the defendant's presence back in the courtroom accompanied by his counsel and counsel for the State are also present. The defense may call its next witness.

MS. HAWTHORNE: Defense would call Dr. Robert Berland.

THE COURT: Please raise your right hand and face the clerk.

(Whereupon, ROBERT BERLAND, M.D., was duly sworn and testified under oath as follows:)

THE COURT: Please be seated.

MS. HAWTHORNE: Your Honor, may I address something with the Court before I start with Dr. Berland's examination.

THE COURT: Yes, ma'am.

MS. HAWTHORNE: Defense 1 in evidence was originally a compilation of documents. And when I went through the documents with Dr. Mings I only took out the articles that were written and not an Ocala Star Banner article -- two Ocala Star Banner articles I withheld out of the group.

The clerk had marked the entire group of documents as Exhibit A. I would ask at this time to hold out the articles from Ocala Star Banner from the group.

THE COURT: You want to redact the exhibit to remove those two articles?

MS. HAWTHORNE: Yes, and have them separately marked.

THE COURT: That's fine.

MS. ARNOLD: And there's also Facebook posts in there as well that we would object, because those were not presented to Dr. Mings.

MS. HAWTHORNE: That's part of the Ocala Star Banner section. Both of those were under A and B.

THE COURT: Very well. That request is granted. Those two articles will be redacted from Exhibit 1 in evidence and be marked in some other fashion.

MS. HAWTHORNE: And then there were other documents, Your Honor, that were part of my grouping, which was an index, the Spencer evidence which I would like to hold out and then a list of the mitigating factors.

THE COURT: That should not have been included in that packet. Okay.

DIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Dr. Berland, I'm going to hand you what is Defense Exhibit 1 in evidence. It is a compilation of

articles on adolescent brain development. Were you provided those articles prior to today?

THE COURT: For purposes of this hearing you might need to go through some of his background and credentials. I recognize he's previously testified in this trial. I think it would be better for clarity of the record.

MS. HAWTHORNE: All right.

BY MS. HAWTHORNE:

Q. Then let's get started at that point. Can you tell us your full name, sir?

A. Robert M, as in Michael, Berland, B-E-R-L-A-N-D.

Q. And where do you work, sir?

A. I'm starting on Friday the 22nd in Chattahoochee in the forensics service.

Q. And what has been your profession for the last 30 years?

A. Well, I was in private practice full time as a forensic psychologist.

Q. And you have been licensed in the state of Florida?

A. I am still, yes.

Q. And how long have you been so licensed?

A. Since April 2, 1982 or April something --

8th, I think, 1982. And I was licensed back before it was Sunset, so years before that. I'm old.

Q. And, Doctor, have you ever testified in a court of law?

A. Yes.

Q. Have you ever been found to be an expert in the field of forensic psychology?

A. Yes.

Q. And have you previously testified in this case?

A. Yes.

MS. HAWTHORNE: Your Honor, at this time I would offer Dr. Berland as an expert in the field of forensic psychology.

THE COURT: Any objection?

MS. ARNOLD: No, sir.

THE COURT: I do find Dr. Berland qualifies as an expert witness in the area of forensic psychology.

BY MS. HAWTHORNE:

Q. Now, Doctor, in your career as a forensic psychologist have you ever had occasion to become familiar with adolescent brain development?

A. Yes, just mostly through reading.

Q. And the articles that I just gave you, have

you received those articles before?

A. Yes, I had.

Q. And are those some of the articles that you've read on adolescent brain development?

A. There are others.

Q. Yes.

A. Yes.

Q. Are those some of the articles --

A. At least one of them I know I had already.

Q. Okay. And you have done testing previously on Mr. Bargo?

A. Yes, ma'am.

Q. And we heard about that testing during the penalty phase of the jury trial?

A. Correct.

Q. And you heard testimony of Dr. Mings today?

A. Yes.

Q. And you have -- were you also provided transcripts of the jury trial in the penalty phase proceedings?

A. Excerpts from them, yes, I was.

Q. And you've had an opportunity to review those?

A. Yes.

Q. Now, can you talk to us about Michael Shane

Bargo, Jr. and your testing with regard to adolescent brain development?

A. Well, my testing doesn't bear on it. My testing was the MMPI. That was given before I had received the results of Dr. Wu, the PET scan expert. And I think that he's probably right because I have great confidence in him. There's --

Q. Let me ask you this: Is Michael Bargo, Jr. an adolescent, for purposes of the adolescent brain development?

A. At this time this offense was committed he was, yes.

Q. Can you tell us, in your review of this area of psychology, what is adolescent -- what is an adolescent brain?

A. The adolescent brain is structurally and functionally different from the adult brain. In the early research had it up to about age 21 where the transformation took place and now it's 25. That's what the literature says, anyway.

And they rely -- when they do that they rely on at least several things differently from the way adults do. There's a lot of pruning of neuron connections, neural connections that goes on within the brain of an adolescent from about age 13 on where

things that they aren't using are pruned out.

Connections that they haven't used regularly are pruned out. And the ones that are left are gradually over the time during adolescence and post adolescence up to age 25, they're covered with fatty tissue called myelin, myelin sheath. That's what multiple sclerosis is, it's a temporary reduction in the myelin sheath and they only get about 80, 85 percent back because there's scarring when it grows back.

And so the myelin sheath forms and allows them to inhibit behavior that they can't inhibit as adolescents. And so at about age 25 they are able to think like an adult where other parts of the brain are more involved in decision-making. And so they're able to -- it's kind of like Freud's theory of the id. They're -- as adolescents they operate like that of an id, which is a primal urge to do what feels good and they anticipate rewards, more immediate rewards like feeling good about doing something.

And they're more likely to engage in those kinds of behaviors. And those periods can last -- now, that's the unbroken brain. His is broken, I think, based on what Dr. Wu found. He has what's called temporal lobe epilepsy. It's also called complex

partial seizure. And according to the literature those people demonstrate multiple sensory channels of hallucinations.

So he had auditory hallucinations. He complained while he was in jail about smelling something funny when no one else could smell it. I think that was probably an olfactory hallucination, which is part of -- it's part of what is seen most often in people who have temporal lobe epilepsy.

Q. Doctor, can I ask you a question?

A. Sure.

Q. The frontal lobe, is that referred to as the CEO of the body?

A. Well, informally it controls what's called the executive functions, the higher thinking functions, anticipating the consequences of your actions, planning. Yeah, it's like the CEO of the brain.

Q. To prioritize thoughts, imagine, think in the abstract?

A. Yeah.

Q. Anticipate consequences?

A. Yes.

Q. Plan?

A. Yes.

Q. And control impulses?

A. Yes.

Q. And that's in an adult brain?

A. The adult brain, again, relies on different parts of the cortex, mostly the frontal lobes, whereas the adolescent brain, up until about age 25, relies on the amygdala, which is a part of the brain, but it's a more primitive part, and it's one where they respond to -- they respond to peers more and they respond to anticipation of rewards more.

Q. Let me just ask you, in the first article there is a picture of a brain with darkened areas and -- is that a kind of a descriptive photograph of the gray matter pruning?

A. Yes, that's what it says.

MS. HAWTHORNE: And, Your Honor, just so the Court, for its reference, this is the picture on the front page and it is an example of pruning. It is the ADA article that's part of Exhibit 1.

THE WITNESS: Pruning means they cut out and it eliminates connections in the brain that aren't used.

THE COURT: The diagram is --

THE WITNESS: That's part of the structural change that takes place in the brain.

THE COURT: This is the first page of

Defendant's Exhibit No. 1.

BY MS. HAWTHORNE:

Q. Now, there are several different lobes of the brain, right?

A. That's correct.

Q. We've got the frontal lobe. And where is that?

A. That's up front in the prefrontal cortex. I don't know my brain anatomy very well. I know the parietal lobes are on the side and the occipital lobes -- the cortex controls vision and it's in the back.

Q. And the parietal lobe on the sides --

A. And the temporal lobes are on the side also.

Q. And the temporal lobe is in the area of the temple?

A. Yes.

Q. And is that the area of the brain that Dr. Wu found the heightened --

A. He found a ratio between the cortex and the inner brain where there was inactivity in the cortex. And he also found heightened activity in one of the temporal lobes. I don't remember which one, probably the right.

Q. Would it be fair to say that although someone might be physically mature, they are not mentally

mature at 18?

A. Well, that's what the literature suggests, that's correct. They lack the ability to inhibit impulses, things that they want to do.

Q. And in Mr. Bargo's case, based on your testing, how -- did you find any behavioral manifestations of low -- of immaturity or lack of impulse control?

A. No. The MMPI looks at whether he -- he looked like he was psychotic on the MMPI, but I think Dr. Wu is probably right, the literature says that a lot of people who have temporal lobe epilepsy are misdiagnosed as psychotic, either given a diagnosis of bipolar disorder or schizophrenia, but those are incorrect.

Q. What is dopamine?

A. Dopamine is a neurotransmitter.

Q. And how is dopamine affected by someone who is using drugs?

A. If they're using stimulants it's enhanced.

Q. And how does dopamine or the lack of dopamine affect someone's behavior?

A. It does. I'm not sure how. I don't know enough about that sort of thing.

Q. Now, in the article Less Capable Brain, Less

Culpable Teen, were you able to review that article?

A. Yes, I was.

Q. That article talks about how they've recently started using the MRI to show that different parts of the brain mature at different times.

A. And that was quite some time ago. I'm looking for the date that it was published.

Q. It's the article with the --

A. 2010. I'm sorry. They first started publishing stuff like this in 2004, I think.

Q. And Dr. Wu said he had before been performing his MRIs and CAT scans for ten years?

A. At least.

Q. So it would be within the time frame?

A. And then some, yes.

Q. And can you comment on Mr. Bargo's decision-making ability?

A. Well, if he had an adolescent brain, which I'm assuming at his age, he did that -- because there was nothing that showed that he was exceptionally well developed intellectually or mentally -- I'm sorry. What was your question again?

Q. The question was about his decision-making abilities.

A. Okay. Correct. Well, it was influenced by

peers. In a period of excitement, which, of course, that was a period of excitement, and that's a brain process that is the result of a malfunction in his brain. And -- well, not a malfunction -- just at his point -- in his age group they rely more on primitive brain functions.

And instead of -- they have a very limited part of the brain that's used in making decisions and -- I'm thinking. I'm sorry.

Q. You described Mr. Bargo's brain as a broken brain.

A. Well, the increase in temporal lobe activation indicates that it's not working correctly.

Q. How would that differ from a normal adolescent brain in development?

A. Well, he would be likely to do some of the things that the adolescent brain would be able to do or would be likely to do such as responding to peers and anticipating immediate rewards instead of distant ones and not inhibiting impulses to do things.

Q. Would he have less or more impulse control?

A. Poor.

Q. Poorer impulse control than a normal adolescent brain?

A. Yes. Well, I think so, with the temporal

lobe epilepsy, correct.

Q. And the testing that you did in the MMPI II, did that reveal anything with regard to the --

A. No, it did not.

Q. How does the adolescent brain differ from the adult brain?

A. Well, it relied more on the amygdala, which is a part of the brain that is -- just whatever impulses comes to it, it responds to. And because of brain processes they're more susceptible to peer pressure than an adult would be. And they use fewer parts of the brain in making a decision so they're not able to inhibit urges to do things.

Q. And have you followed the public policies around juvenile law at all?

A. No. No, ma'am.

Q. The emotional side of an adolescent brain is a lot more heightened?

A. Correct.

Q. And is part of that because of hormones that are flooding into the --

A. That used to be the belief but now it's part of a brain process as well. The hormones are part of it, but they don't account for much variance compared with the brain process.

Q. And when the brain finally matures and studies now are saying 25 -- some studies have gone further than that -- Mr. Bargo would not have been a mature adult?

A. According to the literature, no. He would have been functioning more like an adolescent at 18 than he would as an adult. And his ability to control impulses or desires which were contrary to acceptable kinds of behavior would have been reduced, especially if he were in a peer group that was promoting that sort of thing.

Q. And would brain trauma exacerbate the physical effects of the lack of impulse control for mature decision-making?

A. If you're talking about whether a brain injury would affect temporal lobe epilepsy, most forms of epilepsy are the result of brain injury.

Q. And based on the documents you received from the Marion County jail which documented his time and health, some psychological records that documented his admission into the jail, his reaching out for assistance from a psychologist describing what he was going through, in your review of those records did you see anything that evidenced a broken brain?

A. Well, he -- they describe in the literature

some activities which are repetitious and he was frequently in trouble and he complained of smelling things, olfactory hallucinations, which I think that was, because nobody else smelled it, and they have it recorded. And that's a typical part of temporal lobe epilepsy.

Q. And didn't they prescribe him --

A. Oh, they also gave him 300 milligrams of Dilantin.

Q. Which is normally a seizure medication?

A. Yes. And it's not used as a mood stabilizer, unlike Depakote or -- I can't think of the name of it. Or -- there's one other one. Anyway, it's not used as a mood stabilizer. It's also cheaper.

Q. Hallucinations -- he was having olfactory hallucinations?

A. Yes, which are fairly uncommon.

Q. Was he having auditory hallucinations?

A. According to what he told me, he was. I guess I'm not allowed to rely on lay witnesses any longer.

Q. The jail records noted that he thought he heard a little girl talking to him at the same time he was talking about having the olfactory hallucinations very close in time to the time he actually went into

the jail?

A. I don't recall that, but that would fit. There was obviously no little girl in jail.

Q. And based on your review of the materials that were provided for this hearing, is there anything else that you can add for the Court's determination of sentence?

A. Well, I don't remember whether it was in one of the articles that you gave me or one that I already had, but I remember that there was one study where they looked at a group of people who had been diagnosed with temporal lobe epilepsy and only 22 percent of them, a very small percentage, had abnormal neuropsychological tests, so it confirmed for me what I had felt for a long time, that the medical testing is better.

Q. So that's -- it's almost like a hidden brain injury that unless you do the PET scan --

A. They're said to look completely normal between episodes and be sociable and friendly and so forth.

Q. Okay. Anything else, Doctor?

A. No.

Q. Thank you.

THE COURT: Cross-examination?

MS. ARNOLD: Just briefly.

CROSS-EXAMINATION

BY MS. ARNOLD:

Q. So if the literature is saying that the brain doesn't fully develop until the mid-20s, 25 or later, then all the testing of Mr. Bargo at age 21 is reflective of his mental state at age 18 as well; would that be fair to say?

A. Well, I don't know what Dr. Wu would say but the abnormal temporal lobe was something that was going on at least for a while. He hadn't sustained, as far as I have any record, any head injury.

Q. Okay. With regard to the neuropsychological testing, the development of the brain -- I'm talking about the context of this adolescent brain issue that Ms. Hawthorne was asking about -- if the brain doesn't fully develop until age 25 or later, according to the literature that you, I believe, relied on, then testing at 21 would be reflective of the brain activity, cognitive ability, that sort of thing at age 18 as well?

A. No. It would reflect how he was functioning at age 21.

Q. Okay. I guess my point is, based on what you've testified, age 21 is still an adolescent brain?

A. It's -- according to the literature it's more

nearly adolescent than the brain is at 25, certainly for most people.

Q. And throughout the course of the testimony regarding Mr. Bargo's background and the events surrounding this crime, there was no evidence of any seizure disorder other than the injury that Dr. Wu found in the PET scan?

A. That's correct. But the temporal lobe epilepsies are famous for not being detected because of that. They don't look like -- you don't see grand mal convulsive seizures.

Q. But there's some manifestation?

A. There may be but there needn't be. They can have automatisms, for instance. But I want able to inquire about that because of the prevention from talking with lay witnesses.

Q. And I know Ms. Hawthorne asked you about the MRIs. If I recall Dr. Wu's testimony he said that the MRI was pretty much useless in determining the things that he was looking for as far as brain injury, which is why he used the PET scan.

A. The MRI gives you a picture of the shape or the structure of the brain, not the functioning of it.

Q. Right. So the articles relating to --

A. But there are functional and structural

changes that occurred during post adolescence.

Q. With the seizure disorder you said there needn't be manifestations?

A. There needn't be, according to the literature. They don't have, for instance, post seizure confusion or sleepiness like many people who have grand mal seizures have.

Q. So it's only determined by hyperactivity in the right temporal lobe?

A. These people in the articles that I read were all diagnosed with imaging studies, so they all used functional MRI, which is a -- it looks at oxygen use and PET scanning. So, yes, that would be correct. They're all identified by -- now, they used to be identified postmortem as in autopsy, but now they can image them.

Q. And if there was -- and correct me if I'm wrong -- if there was serious brain injury or significant brain injury, are you saying that it wouldn't necessarily show up in neuropsychological testing?

A. Well, according to the literature only 22 percent of the people that have been already diagnosed as having a temporal lobe epilepsy had abnormal neuropsychological testing.

Q. In that literature, what sample size are we talking about?

A. Small. They typically use like 14, 15, 16 people.

MS. ARNOLD: May I have just a minute? I don't have any other questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. HAWTHORNE:

Q. Dr. Berland, what's automatism?

A. Automatism?

Q. Yes, sir.

A. A-U-T-O-M-A-T-I-S-M, I think. It's a repetitious behavior kind of like echolalia in kids who are autistic. It's a repetitious automatic robot-like behavior and it doesn't serve any useful function. And it's usually unrelated to the activity that's going on at the time.

Q. And that is something that people with Mr. Bargo's disorder have shown or the articles --

A. They may show it, but they needn't.

Q. And can you give me an example of this?

A. Automatism? I'm thinking. I know episodic discontrol. They jump on the bed and plug their ears and scream. But automatisms that are given in the

literature as examples and that's the only way I know about it is through reading, our -- like repetitious arm movements or hand movements or facial twitches or things like that that don't serve any useful function.

Q. Can they also appear to be in some type of a hypnotic state or --

A. They are oftentimes described as being in a trance during periods, which is another way of saying temporal lobe epilepsy.

Q. Thank you, sir.

THE COURT: Recross?

MS. ARNOLD: No, Your Honor.

MS. HAWTHORNE: I don't have any other questions for Dr. Berland.

THE COURT: Thank you, Doctor. You are excused.

Ms. Hawthorne, did you have any further testimony to present?

MS. HAWTHORNE: Your Honor, I believe Mr. Bargo would like to allocute to the Court and I have a letter that was written by his mother that she has asked that I read.

THE COURT: Would Counsel like the opportunity to present closing arguments?

MS. HAWTHORNE: I would prefer to brief it,

sir.

THE COURT: That's fine. Counsel for the State?

MS. BERNDT: Same, Your Honor.

THE COURT: Let me just take a brief recess. I have targeted a couple of sentencing dates. Let me ask Counsel also, I am going to require a sentencing memorandum from both parties.

Can you present that to me within two weeks, Ms. Hawthorne?

MS. HAWTHORNE: Yes, sir.

THE COURT: Let's make it two weeks from this Friday. What date would that be?

What I'm going to require is that the State of Florida and the defense counsel provide me a sentencing memorandum. That's the day after Thanksgiving. We will make it the following Monday, which would be December 2 at 5:00 p.m.

And I'm going to take a brief recess. I would like Counsel to check your calendars. The sentencing date I'm targeting would be either December 11, Wednesday at 1:30 p.m. or December 13, a Friday at either 9:00 a.m. -- it could be any time in the morning or 1:30 p.m.

MR. HOLLOMAN: What day?

THE COURT: Friday, December 13. And let me just make certain if my recollection is accurate. Originally, the State of Florida had advised the Court that the State intended to rely on four aggravating circumstances, two of which were eventually abandoned; is that correct?

MS. ARNOLD: That's correct.

THE COURT: And the only aggravating circumstances that the State argued with which the State intends to rely is that the murder was committed in an especially heinous, atrocious and cruel manner and that the murder was committed in a cold, calculated and premeditated manner; is that correct?

MS. BERNDT: That's correct, Your Honor.

THE COURT: As to aggravating circumstances, we're down to heinous, atrocious and cruel and cold, calculated and premeditated?

MS. BERNDT: Yes, sir.

THE COURT: I will ask both sides to address those aggravating circumstances in the sentencing memorandum and to address all mitigating circumstances that have been presented to the Court. Again, those sentencing memorandums must be presented to the Court no later than 5:00 p.m. on

December 2.

We will take an approximate 15-minute recess. We will reconvene at 3:35.

THE BAILIFF: All rise.

(A brief recess was taken.)

THE COURT: Be seated, please. Noting the defendant's presence in the courtroom accompanied by counsel. Counsel for the State are also present. Ms. Hawthorne, you indicated you had a letter from Mr. Bargo that you wanted to read.

MS. HAWTHORNE: Yes, sir.

THE COURT: Do you want to read it or just present it to the Court?

MS. HAWTHORNE: I can present it to the Court, sir. I have given a copy --

THE COURT: Counsel for the State has seen it?

MS. BERNDT: Yes, sir, Your Honor.

THE COURT: Very well. You can approach the bench.

MS. HAWTHORNE: I can put it with my sentencing memorandum or both.

THE COURT: You can do both.

I have read the letter. Madam Clerk, will you please have this marked as Court's Exhibit A

for identification?

(Court's Exhibit A marked for identification.)

THE COURT: Mr. Bargo, please listen carefully to me. In any criminal court case a defendant has the right to allocution. And I'm going to read from Black's Law Dictionary the applicable definition I believe that applies to this particular case.

Allocution is an unsworn statement from a convicted defendant to the sentencing judge in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime or say anything else in an effort to lessen the impending sentence.

So at this time you have the right to address the Court, that is the right to address me in regards to what sentence should be imposed. Do you understand that, sir?

MR. BARGO, JR.: Yes, Your Honor.

THE COURT: Ms. Hawthorne, could you pull that microphone closer to your client?

MS. HAWTHORNE: Yes, sir.

MR. HOLLOMAN: Just inquiring, does he need to stand up?

THE COURT: That's not necessary, sir. You

can remain seated.

MR. BARGO, JR.: Your Honor, I have a constitutional right to argue my innocence. I was never given a fair trial, never given a chance to argue my innocence. In fact, I got on the stand and said I didn't do this. I was called a murderer twice.

THE COURT: You testified for more than two and a half hours, it's my recollection.

MR. BARGO, JR.: Right. And I said I was innocent.

THE COURT: Yes, sir.

MR. BARGO, JR.: Well, my understanding is that somehow you got the notion that I okayed him to argue second-degree murder. I never okayed that. I never got a chance to present my evidence. I had a whole list of witnesses I wanted to call. I had pages upon pages of evidence that proved I was innocent. I had pages upon pages of pages of things that I found that proved that even the prosecution witnesses proved that I was innocent.

MR. HOLLOMAN: Why don't you name a few of them for us?

MR. BARGO, JR.: Crystal Anderson, James William, Jr., James William, Sr., Christen

Williams, William Fockler, the jailhouse snitch, all these people, especially people that I seen around the neighborhood. Steven Montanez, Joanne Jenkins. Well, these people pointed directly toward my innocence. I never got a chance to prove that.

MR. HOLLOMAN: How did they point toward your innocence? That's just a bunch of names. I could say Santa Claus. That doesn't mean anything. What would they testify to?

MR. BARGO, JR.: I seen the original interviews with detectives with my co-defendants. They put them all in separate rooms, they interviewed them. They got different stories each time. Little details of what they got that I remember. That's how they picked apart a case until they found out they was lying.

One person would say one thing and another person would say another thing. They will find out the truth. Now, they put Kyle Hooper up on the stand. That was their star witness to use against me. I counted six times that I can prove that he lied to detectives and on that stand. I can prove that of how he tried to taking what he did and put off on me.

Not once did I ever get a chance to point that out. Kyle Hooper even said -- the first thing he said to detectives and on the stand -- I think it was on the stand, trial transcripts that I read, he said that Seath Jackson ran outside, I chased after him and that Soto came out behind him. He was lying, which there was an eyewitness across the road three houses down that he came out and said he seen three people outside, the victim -- we know it was the victim.

Second person came out, jumped on him and beat him down and the third person come out -- he said he couldn't see a fourth person. They tried to argue that there might have been a fourth person. He said, I don't know if there was a fourth person, I don't recall a fourth person. He knows he seen three.

Kyle Hooper sat there and argued -- or sat there and told the detective that it was me and Soto that did this. Then they went to Soto and they asked Soto and Soto said, no, it was him. They went back to Kyle and Kyle told them. Okay, you're right, it was him and Soto.

The next one is told the detectives that it was me and Soto that went out there and threw the

body in the fire pit. They went to Soto and Soto contradicted himself and said, no, it was him and Kyle.

Next morning -- now that was the second lie he told. The next morning Joanne Jenkins, witness from the back, she said she came out at 9:30 in the morning and seen two people move stuff out of a burnt out fire pit. There was no fire going. There's no smoke, just two people moving stuff and imagine what they were doing. They were putting the body in paint buckets.

Kyle Hooper tries saying that he seen this and he couldn't handle it so he went back inside and left me and Soto out there doing this. I went through when I found Amber Wright's testimony, Amber Wright's interview with detectives and she said I didn't wake up until 11:00 in the morning.

So at 9:30 in the morning you've got Kyle saying this is me, but even his own sister contradicts him and it wasn't me. Once again, Kyle is steadily trying to put what he did off on me. And it -- I got so much more of this. It's -- I never got a chance to present any of this.

THE COURT: Mr. Bargo, please listen carefully to me. You will have the right to take

an appeal of the verdict of the jury and the judgment and sentence of the Court. That is for a later time, the appeal, that is.

MR. BARGO, JR.: Your Honor, I don't know what to do. I never got a chance to put this on record. I tried talking to you last time when we did closing arguments. I never got a chance to even talk to you.

THE COURT: This is your opportunity to address me in regards to what sentence should be imposed.

MR. BARGO, JR.: I mean, Your Honor, I really -- I don't know. I mean, I think it's terrible what happened. I think that's terrible what happened. I'm not going to say it's not. It's pretty bad, a 15-year-old kid got killed. It's pretty messed up. But I didn't do this. I know I didn't do this.

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

THE COURT: This is your right to make a statement in regards to what sentence should be imposed.

MR. BARGO, JR.: I don't know. You want me to ask for life in prison for something I didn't do?

MR. HOLLOMAN: May I, Judge? If I could lead him with a question?

THE COURT: Yes, sir.

MR. HOLLOMAN: There are two choices here, basically. Regular or extra crispy, so to speak. It's either life without the possibility of parole or death by lethal injection. Now, this has been explained to you. It's logical for you to argue for life unless you want to be a death volunteer.

And I would assume that's not the case. Because if you plan on appealing, I would think you would want to be alive to pursue that appeal. What I would suggest to you is to talk about some of these other things we talked about that would mitigate toward a life sentence.

Because you wanted the right of allocution and you have got it. Okay. Just take a deep breath.

Maybe it would be appropriate to give him a

minute and let him collect his thoughts, Judge.

THE COURT: Mr. Bargo?

MR. BARGO, JR.: Your Honor, I don't want to die. Obviously nobody wants to. I mean, but I'm not going to ask you for a life sentence either. I'm not. Not for something I know I didn't do. And I don't want to die. I really don't. I was 18 years old then.

THE COURT: That will conclude the Spencer hearing conducted this afternoon. Counsel, when will you be prepared for the sentencing hearing?

MS. HAWTHORNE: December 11.

THE COURT: December would be appropriate, counsel for the State?

MS. ARNOLD: Your Honor, the only potential issue that Ms. Berndt and I have is that we're scheduled to try the State of Florida vs. Kenard Singh in front of Judge Lambert on December the 9th, the week of December the 9th.

I'm sure we can try to schedule that around this hearing since this is scheduled first. It might be easier to schedule around if this were set on Friday, but if the defense is not available Friday.

MS. HAWTHORNE: I'm available.

MR. HOLLOMAN: Friday is better for me. Do you want Friday?

MS. ARNOLD: We would prefer Friday. We could try it Tuesday and Wednesday and be done. It's a two-day trial on the 11th.

THE COURT: We will schedule the sentencing hearing for Friday, December 13 at 9:00 a.m. Sentencing memorandums must be presented to the Court no later than 5:00 p.m. December 2, 2013.

Anything further at this stage, Counsel?

MS. ARNOLD: Nothing from the State, Your Honor.

MS. HAWTHORNE: Sentencing at 9:00 a.m. on Friday the 13th?

THE COURT: Yes, ma'am.

MS. HAWTHORNE: Okay. Thank you.

THE COURT: We are adjourned.

(The foregoing proceedings were concluded at 3:50 p.m.)

C E R T I F I C A T E

STATE OF FLORIDA }

COUNTY OF MARION }

I, KATRENIA L. HORISKI, Registered Professional Reporter and Notary Public, hereby certify that I was authorized to and did stenographically report the foregoing proceedings in the above-styled cause; and that the transcript is a true record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 4th day of March, 2014.

KATRENIA L. HORISKI, RPR, FPR