

IN THE SUPREME COURT OF FLORIDA

ANGEL SANTIAGO-GONZALEZ,

Appellant,

**CASE NO. SC18-806
LT. No.: 2014-CF-080**

v.

STATE OF FLORIDA,

DEATH PENALTY CASE

Appellee.

_____ /

**ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR UNION COUNTY, FLORIDA**

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant Angel Santiago-Gonzalez is referred to as “Appellant”; Appellee State of Florida is referred to as “State”; and victim Donald Burns is referred to as “Burns” or “Victim.” Components of the record on appeal are abbreviated according to the .pdf document title: Record (R), followed by page number; the Corrected Supplemental Record (CSR), followed by page number; and the Corrected Trial Transcript (CTT), followed by page and line number(s) (l. or ll.).¹

STATEMENT OF THE CASE AND FACTS

Background

Appellant, an inmate with the Florida Department of Corrections (FDOC), was indicted on one count of premeditated first-degree murder by a Union County grand jury, following the January 9, 2014, stabbing and subsequent death of his cellmate, Donald Burns. R 57-58. The indictment was not returned until November 24, 2014, because the victim did not immediately succumb to his injuries and died on July 3, 2014. CTT 199, ll. 16-21. Appellant pled not guilty on December 3, 2014, and the State filed its Notice of Intent to Seek Death Penalty on January 13, 2015.² R 65, 73. On August 15, 2016, Appellant pled guilty to first-degree murder

¹ Special Note: The CTT record page numbers (top right corner of page) do not coincide with .pdf numbers. The R concludes at page 4516 and the CSR page numbering begins at 4517.

² The State amended its Notice of Intent to Seek Death Penalty following *Hurst v. Florida*, 136

and waived a penalty phase jury on February 1, 2018. R 244-48; CSR 4540-43. The trial court conducted the penalty phase February 5, 2018, through February 27, 2018, which subsumed the *Spencer*³ hearing. R 4305. Appellant was sentenced to death on April 13, 2018. *Id.* 4342. This direct appeal follows.

Facts of the Case

On January 9, 2014, Appellant and Burns were inmates at the FDOC Reception and Medical Center, Main Unit in Union County, Florida (RMC). Both were housed in K Wing referred to in the record as K Dorm, which is the RMC's "confinement unit" designated for administrative confinement of "close management inmates" who are segregated from the general population for security reasons, protective or security purposes or behavioral or disciplinary issues. CTT 30-31. According to Appellant, he and Burns knew each other since 2013, while both were at the Santa Rosa Correctional Institution, prior to transfer to the RMC. CTT 140, ll. 9-11; 1064-65, ll. 4-12.

Hours before the stabbing attack, Burns and Appellant were housed at the RMC in separate cells, on different floors within K Dorm (Cells K-3218 and K-

S.Ct. 616 (2016), and amendment of Florida Statutes § 782.04(1)(b) included aggravating circumstances. R 125-29, 530. Appellant unsuccessfully moved to strike the amended notice and the State withdrew the "Criminal Gang Member" aggravator. R 1437-38.

³ *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

3107, respectively). R 1635, 1653, 3092. Appellant requested to be moved to the victim's cell on the pretense that Burns was working on "legal stuff" for him and being in the same cell would "make it easy" to "get some help" with his legal work. CTT 140, ll. 14-19; 1064-65, ll. 4-12. Appellant was moved to Burns' cell on January 9, 2014, between 3:15 and 3:30 p.m. CTT 666; R 1654, 3972. The record does not establish when Appellant requested to be moved, to whom he made the request or who moved Appellant to Burns' cell. CTT 169, ll. 3-5. RMC Captain William Hamilton (Ret.) testified that two "close management" inmates may be moved into the same cell upon request, if they meet compatibility requirements. CTT 42-45. Criteria to evaluate whether inmates may be moved together includes custody status, weight, size, charges and sentences. *Id.*

On January 9, 2014, Capt. Hamilton was the shift commander responsible for making rounds, walking past each cell and "visit[ing] each post and mak[ing] sure everything is okay." CTT 29, ll. 21-24; 30, ll. 6-17. Sometime after 9:00 p.m., Capt. Hamilton and Sergeant Kelvin Young made normal rounds through the K Dorm, walked past Burns' and Appellant's Cell 3218 and everything appeared normal. CTT 33, ll. 11-25. Capt. Hamilton did notice that both Appellant and Burns were dressed in their boxer shorts, cleaning their cell. CTT 42, ll. 18-23. Shortly after completing rounds, a loud disturbance and banging sounds were made by numerous

inmates in K Dorm. CTT 51-52. Sgt. Young went to Cell 3218, saw Appellant standing by the cell door with the shank in his hand and Burns laying in the back corner of the cell, with blood all over the floor. CTT 52-53, 54, ll. 20-22. Sgt. Young reported the incident to Capt. Hamilton, who returned to Cell 3218 and observed a “very bloody” scene, the victim was lying on the floor of the cell, tied at the ankles and hands and had been stabbed. CTT 34-37.

The account of the stabbing was obtained primarily from Appellant in his recorded sworn post-*Miranda* interview with FDOC Inspectors General Kevin Ortiz and Jonathan Boone. CTT 138-55. According to Appellant, he stabbed Burns after Burns put his hand on his buttocks, underneath his boxer shorts. Burns had an erect penis, observed through his boxer shorts. CTT 141, ll. 3-13. Appellant did not immediately attack Burns, but waited “about two minutes.” CTT 147, ll. 16-19. He planned to tie up Burns and then spent 7-8 minutes tearing his bed sheet to make three ligatures, “one for the hand, one for the feet” and one to tie hands and feet together. CTT 145-46, 148; R 1550.

During the time Appellant was making the ligatures, Burns did not ask what he was doing or why he was ripping the sheets. CTT 146, ll. 8-10. During the interview, the inspector asked Appellant why he waited and Appellant answered, to “punish him” and to start planning what he was going to do. CTT 147-48. After

Appellant made the three ligatures, he punched Burns in the head and kicked him, knocking him on the bed. CTT 149. Appellant then tied Burns' wrists and feet together and used the third ligature to tie his bound hands to his bound feet and blind-folded the victim. CTT 142, ll. 19-20, CTT 149-50.

Prior to moving into Burns' cell, Appellant either made a homemade shank or otherwise obtained it, which he concealed in the ace-type bandage wrapped around his foot when he was moved. CTT 144. After Appellant made the ligatures and blind-folded Burns, he retrieved the shank and began stabbing, with the first stab wound to the victim's throat. CTT 142-43, 150. Appellant said he was "trying to hold [Burns] down, but he wouldn't like settle down." CTT 152, ll. 3-4. During the attack, Burns struggled, tried to stand up and break free of the ligatures and broke the long strip connecting his hands to his feet. CTT 151; 153, ll. 2-5.

Appellant told the inspectors Burns was a sexual offender of children, Burns "tried him" by touching him and Appellant was thinking about his kids, "[t]hat's why I planned to kill him. That's why I said, I'm going to tie this mother fucker." CTT 145. When asked why he tied Burns up instead of just stabbing him, Appellant replied, "Punishment. . . . to see the fear in his eyes or something. I just wanted to see how, the reaction. . . . I didn't see no reaction at first and I just tie the thing on the eye." Appellant said, he was intent on killing Burns and wanted him to suffer.

CTT 153. Although Appellant told inspectors during the attack he “was blind,” he also stated, “Really, I react slow. You know what I mean? I take my time . . . and so now the mother fucker has to die, he’s going to die. I just plain knocked him out and tie him up, and that’s what I did.” CTT 154.

The attack ended when Appellant realized corrections officers were “coming around,” and told them, “I ain’t doing anything.” CTT 153, ll. 6-8. Appellant refused to relinquish the weapon or be removed from the cell, stating, “No, bring the camera. . . . I told captain, you gotta turn on the camera or I ain’t gonna come out of my cell. [Burns] gonna die in here.” CTT 155, ll. 11-16. He was extracted from the cell without incident and taken to a holding cell. Officer James Reed retrieved a video camera and recorded Appellant from the time he was removed to a holding cell. CTT 67-69. Appellant was also medically assessed and informed inspectors he had no injury. No injuries were seen on Appellant. R 1675-78; CTT 114, 192-93. He was “worried about the blood he had on him [and] was pretty adamant about[] when [he was] going to get to take a shower. . . . [I]t was all about getting the blood off him.” CTT 114, ll. 14-21; 121, ll. 16-20.

RMC Captain Mark Finken was the night shift lieutenant in the main unit hospital dormitory area. CTT 75-76. At approximately 9:40 p.m., he responded to Sgt. Young’s radio call for assistance at K Dorm Cell 3218. CTT 76. Capt. Finken

brought a digital camera, took photographs of the scene, as well as of Burns in the RMC emergency room. CTT 78, 85-87. Photographs taken included the shank front of the cell, the ligatures and of Burns and the Appellant and Burns laying on the cell floor, tied up and in a fetal position. R 1483-84, 89; CTT 77-89.

Capt. Finken described Burns' wrists were tied together, touching and facing each other in front of his body. CTT 84. The ligatures had to be cut off his hands and legs with ligature cutters. CTT 53, ll. 22-24; 58. He testified that Burns' blood loss was "quite enormous" and he believed Burns would die. CTT 80. Burns was weak, but able to communicate and told Capt. Finken he was going to die and was asking for help. CTT 81-82. Capt. Finken testified that Burns stated several times, "I'm dying. I'm going to die" and needed help. CTT 82, ll. 1-21; 95. He accompanied Burns to RMC's emergency room after removal from the cell and video recorded his statements. CTT 82-83; 85, ll. 17-19; 94-98. Burns told Capt. Finken that he let Appellant tie him up, his roommate stabbed him, but did not know why. CTT 94-95. Burns gave a conflicting account of whether he let Appellant tie him up or if Appellant tried to rape him and tied him up forcibly. Capt. Finken asked why he would let Appellant tie him up and Burns replied, "I don't know. I was a fool." CTT 95-96. At one-point, Burns stated that Appellant stabbed him "out of spite." CTT 96. After he stopped recording, Capt. Finken continued talking to Burns

about why he let Appellant tie him up and Burns “kept indicating along the lines he didn’t want his mother to know what had happened in there.” CTT 87-89, 97-98.

Burns was triaged by RMC emergency room/department LPN Jeffrey Dukes. CTT 185-87. Because of multiple bleeding wounds and his life-threatening condition, Burns could not be treated in the cell and was taken to the emergency department. CTT 187-89. Burns’ first words to Dukes were akin to, “oh God, he killed me, I’m going to die,” continuing to believe he was going to die. CTT 189, ll. 4-7, 25. According to Dukes, he did not notice any injuries to indicate blunt force trauma to Burns’ eyes or head and all the injuries appeared to have been inflicted by a sharp object. CTT 193-94. Burns was transferred to Shands Hospital emergency room in Gainesville, Florida. CTT 190-91; R 1684.

Dr. Lawrence Lottenberg, M.D., Shands Hospital trauma team director, admitted Burns for multiple stabs wounds and testified that Burns’ condition rapidly deteriorated, he lost blood pressure and heart rate due to a massive amount of blood around his heart. CTT 177-78, R 1684. Dr. Lottenberg “slashed open his left chest” to release the blood around Burns’ heart and found a “penetrating wound to the back of his heart.” CTT 178. Burns’ heart stopped and he had to be resuscitated. *Id.* During a three-hour surgery, Dr. Lottenberg found six deep wounds to the right lung and multiple wounds in his neck, all of which were “massively hemorrhaging.” CTT

179. Burns' heart stopped 3 times during surgery, requiring electric resuscitation and he also required 40 pints of blood and blood products, the equivalent of replacing his entire blood volume 10 times. *Id.* Although most of the bleeding was controlled, the medical team was unable to close any of the wounds. *Id.* Over the next six months, Burns required several surgical treatments and suffered a stroke because the wounds to his neck decreased blood flow to his brain. CTT 180. Burns was "at an extreme level of pain and discomfort and required all of the aggressive support with pain medicine" that could be given. CTT 181. Following the stroke, Burns was totally bedridden until he succumbed to his injuries on July 3, 2014. CTT 199-200.

District 8 Medical Examiner, Dr. William Hamilton, M.D., conducted Burns' autopsy on July 3, 2014, just hours after his death. CTT 199. Burns, who was 5'9", weighed only 86 pounds, was skeletal and suffered from severe malnutrition. CTT 200. Dr. Hamilton identified a minimum of 64 healing or healed stab wounds, consistent with being stabbed with the shank Appellant used. CTT 204-07. Most of the wounds were on Burns' back, from the base of his skull, down toward the center of his spine. CTT 219. Dr. Hamilton marked the stab wounds, but may have missed some because the stabbing took place six months prior and time would have obliterated much of the internal evidence and the wound tracks would have healed. CTT 205-06. The penetrating injuries to his central nervous system resulted in the

cerebellum stroke and necrosis of much of Burns' spinal cord and his starvation and severe malnutrition was the result of the widespread damage in his alimentary canal. CTT 207, 209, ll. 7-17. Dr. Hamilton stated there was no medical reason Burns did not feel pain. CTT 212-13. His injuries were not survivable and the probable cause of Burns' death was complications of multiple stab wounds. CTT 216, 218.

Guilt Phase/Change of Plea⁴

Following two years of discovery in his case, Appellant notified the trial court that he intended to change his plea to guilty of the first-degree murder of Burns at the June 13, 2016, case management conference. CSR 4540, ll. 3-11. The trial court ordered a competency evaluation because Appellant wanted to plead guilty, was aware of his mental health history, and the seriousness of the offense and appointed Dr. William Meadows, Ph.D., and Dr. Almari Ginory, D.O., on June 20, 2016. R 200-02. The trial court's order was issued in accordance with 3.210(b), Florida Rules of Criminal Procedure and section 916.12, Florida Statutes, and required the evaluations and written reports be made on the following:

- A. The experts shall first determine whether the defendant is mentally ill and, if so, consider the factors related to the issue of whether the

⁴ Several defense counsel from the Eighth Judicial Circuit Public Defender's Office represented Appellant. First appearance counsel was Assistant Public Defender (APD) Roger Blinn. Chief APD Alan Chipperfield, APD Canaan Goldman and APD Kristofer Eisenmenger represented Appellant at the August 2016 change of plea hearing. Chief APD William Miller, APD's Goldman, Kristofer Eisenmenger and Aaron Kelley represented Appellant in the penalty phase.

defendant meets the criteria for competence to proceed; that is, whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings. In considering the issue of competence to proceed, the examining experts shall first consider and specifically include in their reports the defendant's capacity to:

- 1) appreciate the charges or allegations against the defendant;
- 2) appreciate the range and nature of possible penalties . . . ;
- 3) understand the adversarial nature of the legal process;
- 4) disclose to counsel facts pertinent to the proceedings at issue;
- 5) manifest appropriate courtroom behavior;
- 6) testify relevantly.

The experts shall also include in the reports any other factor they deem relevant, especially considering that the defendant has expressed a desire to plead guilty to a capital crime, which would expose him to a possible death sentence.

R 200-02.

Dr. Meadows conducted a forensic psychological evaluation of Appellant on July 15, 2016, and issued a Competency to Proceed report. R 220-25. Dr. Meadows noted he previously evaluated Appellant for competency to proceed on July 7, 2010, in conjunction with charges out of Osceola County, Florida, for armed robbery, kidnapping and escape while armed. (Case No. 49-2009-CF-2575). R 221, 2448-51. In that evaluation, Dr. Meadows determined Appellant malingered psychotic disturbances and found Appellant competent to proceed. *Id.* Appellant's psychiatric

treatment history dated back to age nine, including two hospitalizations in Puerto Rico for depression and multiple crisis stabilization unit admissions. R 221. Appellant had a history of cutting his arms and suicide attempts. *Id.* While incarcerated, Appellant was diagnosed with adjustment disorder, depressive disorder, bipolar disorder, and bipolar disorder with psychotic features and was prescribed a variety of psychotropic medications. *Id.* At the time of Dr. Meadows' 2016 evaluation, Appellant was diagnosed with antisocial personality disorder and bipolar disorder and prescribed antipsychotic medication. R 222.

Dr. Ginory's psychiatric evaluation addressed Appellant's "multiple episode[s] of self-injurious behavior and suicide attempts since incarcerated." R 226-30. Her report noted, because of Appellant's reported "frustration" and "anger," he engaged in self-harm "rang[ing] from cutting himself to swallowing objects." R 227. Appellant's actions resulted in "over 40 procedures, numerous hospitalizations, a blood clot in his right arm, and breathing difficulties," undergoing surgery three weeks prior to the competency evaluation. *Id.* Dr. Ginory observed that Appellant's mental health treatment began at age nine and had multiple psychiatric admissions during his incarceration. *Id.* She diagnosed Appellant with recurrent, mild major depressive disorder, bipolar disorder and antisocial personality disorder. R 229-30.

Both Dr. Meadows and Dr. Ginory opined that Appellant was competent to

proceed, finding he had adequate appreciation of the nature of the proceedings and specifically: (1) he knew that he was charged with premeditated murder, was able to discuss this current offense, as well as past offences; (2) he was aware of the range and nature of possible penalties including life sentences, for which he was already serving several, as well as the death penalty; (3) he understood his plea options and even explained the concept of plea bargain and how he used it in past trials; and (4) understood that he needed to work with the attorney in his case. R 223-24, 228-30.

Chief Assistant Public Defender (APD) Chipperfield notified the trial court at the August 15, 2016, hearing that Appellant intended to change his plea against advice of counsel, filed a Petition to Enter Plea of Guilty (Petition) to first-degree murder of Burns and waived a penalty phase jury to have the proceedings conducted before the trial court. CSR 4585-4611; R 244-48. Prior to tendering the plea, Mr. Chipperfield had an in-depth exchange with Appellant regarding the Petition and his decision to plead guilty, stating in part:

MR. CHIPPERFIELD: Mr. Gonzalez, this document that I have in front of you, this [Petition] — did we review this together in private with the translator?

DEFENDANT: Yes.

....

MR. CHIPPERFIELD: This agreement provides that you're entering a plea of guilty to the charge of first-degree premeditated murder, and you're doing that against the advice of counsel. Do you understand

that?

DEFENDANT: Yes.

MR. CHIPPERFIELD: And do you understand that the maximum penalty for that offence is the death penalty and the minimum penalty is life in prison without the possibility of parole.

DEFENDANT: Yes.

MR. CHIPPERFIELD: So your plea exposes you to a possibility of death. Do you understand that?

DEFENDANT: Yes.

MR. CHIPPERFIELD: And under the law you would have a right to present mitigation to a penalty phase jury unless you decide to waive that, and then you could present information to the judge alone.

DEFENDANT: Yes.

....

MR. CHIPPERFIELD: And, Mr. Santiago, we've been representing you for a long time, and we understand that you have been taking mental health medications during the time that we've been representing you.

DEFENDANT: Yes.

MR. CHIPPERFIELD: And you've also at times taken pain medication because of self-inflicted injuries.

DEFENDANT: Yes.

....

MR. CHIPPERFIELD: Are you on pain medication today?

DEFENDANT: No.

MR. CHIPPERFIELD: But you are taking Vistaril and Celexa as mental health medication; is that right?

DEFENDANT: Yes.

MR. CHIPPERFIELD: And do those medications help you think more clearly?

DEFENDANT: Sometimes.

MR. CHIPPERFIELD: Do you think that you are thinking clearly here today?

DEFENDANT: Perfectly.

MR. CHIPPERFIELD: Do you fully understand what you are doing?

DEFENDANT: Yes.

MR. CHIPPERFIELD: Page four of this agreement is the most important page because it sets forth that your plea is an open plea against the advice of counsel, and that you understand that this plea exposes you to a death sentence.

DEFENDANT: Yes.

MR. CHIPPERFIELD: And it exposes you to a minimum sentence of life in prison without the possibility of parole.

DEFENDANT: Yes.

CSR 4588-90. Mr. Chipperfield continued to discuss the plea and reviewed the Petition in detail with Appellant, who understood its contents. *Id.* at 4590-91.

Mr. Chipperfield asked additional questions of Appellant to “make sure that you understand exactly what you’re doing.” CSR 4591-92. In response, Appellant acknowledged he understood that: (1) by pleading guilty, he waived the right to argue certain motions before the court, including a speedy trial violation; (2) by foregoing a guilt phase trial, he could be found not guilty or guilty of a lesser offense and not face the death penalty; (3) trial counsel advised him not to plead guilty; (4)

trial counsel talked to him about the possibility of changing his mind, because he had changed his mind previously and might regret the decision and Appellant indicated he would not change his mind again; and (5) if he wanted to “take it back” at a later time, it would be too late. *Id.* at 4591-93.

Defense counsel tendered Appellant’s guilty plea and the trial court conducted an extensive plea colloquy reproduced in part as follows:

COURT: . . . If you’ll hand up the plea petition, please, or come on up. All right, Mr. Santiago-Gonzalez. I’m going to ask you some questions also, and some of them will be the same. Okay? I just want to make sure this is what you want to do.

DEFENDANT: Yes.

COURT: You mentioned to your attorney that you’re currently on Vistaril and Celexa. Are you also currently on Tegretol?

....

DEFENDANT: I’m not taking any more Tegretol.

COURT: . . . I only mention it because I believe it was Dr. Ginory mentioned in the evaluation that you were on that medication back during the evaluation.

DEFENDANT: Yes.

COURT: Are you feeling clearheaded and understanding all of my questions so far?

DEFENDANT: Perfectly.

COURT: Do you know why we are here today?

DEFENDANT: To talk about the case.

COURT: Okay. I’ve been handed a plea form that you and your attorney filled out.

DEFENDANT: Yes.

CSR 4595-96. The court asked several questions about the plea form and his review with his attorneys to which Appellant stated he understood the form and had no questions. *Id.* at 4596. The court continued,

COURT: Is it your intent that you wish to plead guilty or no contest to this offense?

DEFENDANT: Guilty.

COURT: And is that because you're guilty of the offense, sir?

DEFENDANT: Yes.

COURT: Now, the attorneys can correct me if I'm wrong, but I believe there's only one count of first-degree murder. . . . You understand that that offense carries a maximum sentence punishable by death, with the minimum sentence being life in prison without parole.

DEFENDANT: Yes.

COURT: You understand in Florida that "life" means life.

DEFENDANT: Yes.

COURT: . . . Do you understand that the law means that you will not be eligible for parole or early release?

DEFENDANT: Yes.

COURT: Has anyone suggested to you that you will someday be released from prison if you enter a plea to this charge?

DEFENDANT: No.

COURT: Do you understand that, for a case in which the State is seeking death, there's two phases?

DEFENDANT: Yes.

COURT: And do you understand that, if you enter a guilty plea here today, that will take care of the first phase?

DEFENDANT: Yes.

COURT: Do you understand the second phase requires either a trial by myself or a trial with a jury?

DEFENDANT: Yes.

COURT: And do you understand that you have a right to a jury trial for the second phase, also known as the penalty phase?

DEFENDANT: Yes.

COURT: And my understanding is today you wish to have the trial only before myself for the penalty phase.

DEFENDANT: Yes.

COURT: You understand that, if you change your mind as to phase two, you need to let your attorney know that you now request to have a jury trial as to the penalty phase.

DEFENDANT: Yes.

COURT: The last time you were in court you told me you wanted to plead guilty, and you wanted the death penalty; is that correct?

DEFENDANT: Yes.

COURT: You understand that at the penalty phase, the State would still have to put on evidence of the aggravators, and you understand I would consider any evidence of mitigators.

DEFENDANT: Yes.

COURT: That even if you maintain that you wish to seek the death penalty, after hearing all the evidence, I still may come back with a life sentence.

DEFENDANT: Yes.

COURT: Knowing that, do you still wish to go forward with this guilty plea?

DEFENDANT: Yes.

COURT: You also understand, at the penalty phase, that you may end up testifying under oath about the offense and that any answers that you may give could be used against you at a later date.

DEFENDANT: Yes.

....

COURT: . . . Did your attorney go over with you what's known as the Jimmy Ryce warnings regarding there being a sexually violent or sexually motivated crime in your history?

DEFENDANT: I don't have any sexual charges.

COURT: . . . I just wanted to make sure you're aware that, if you did, that you could be subject to involuntary civil commitment as a sexual predator.

DEFENDANT: I understand.

....

COURT: So, Mr. Santiago, you've had the services of the public defender's office, which you've had Mr. Chipperfield, Mr. Goldman, and Mr. Eisenmenger; is that correct?

DEFENDANT: Yes.

COURT: Have you been satisfied with their services?

DEFENDANT: Yes.

COURT: Is there anything you asked your attorney to do in this case that he refused to do?

DEFENDANT: No.

COURT: Do you feel that your attorneys have represented you to the best of their ability?

DEFENDANT: Yes.

COURT: . . . Do you desire any additional time at this point to discuss anything that I've spoken with you about the case so far with your attorney?

DEFENDANT: No.

COURT: Your attorney mentioned to you that you have some pending motions outstanding. One involves a potential speedy trial issue that, if you were to win, would be dispositive, and the charges would be dismissed against you.

DEFENDANT: Yes.

COURT: . . . You understand there's also some additional motions regarding the death penalty that are outstanding.

DEFENDANT: Yes.

COURT: You understand, by entering your plea of guilty prior to them being heard, you're going to waive your right to be able to appeal any order that I would give on those motions.

....

DEFENDANT: Yes.

COURT: . . . Do you understand that if, in the future, a higher court finds the Florida death penalty statutes are unconstitutional, you would not be allowed to withdraw your plea based on that fact.

DEFENDANT: Yes.

COURT: You understand that by entering a plea that has a potential of a life sentence with no eligibility of parole —

DEFENDANT: Yes.

COURT: — you are forever waiving any future claim to withdraw your plea in the event that the United States or the State of Florida declared the death penalty unconstitutional.

DEFENDANT: Yes.

COURT: Do you understand that?

DEFENDANT: Yes.

COURT: Are you entering this plea freely and voluntarily?

DEFENDANT: Yes.

COURT: Has anyone forced or pressured you into entering this plea?

DEFENDANT: No.

COURT: Has anyone threatened you to get you to enter this plea?

DEFENDANT: No.

COURT: Are you currently under the influence of any alcohol?

DEFENDANT: No.

COURT: Has anyone promised you anything other than what we have discussed which has made you enter this plea today?

DEFENDANT: No.

COURT: With everything we've discussed up to this point, do you still wish to enter this plea?

DEFENDANT: Yes.

CSR 4595-4603.

Defense counsel and the prosecutor agreed to enter Drs. Meadows' and Ginory's competency evaluation reports into evidence. CSR 4603. Mr. Chipperfield advised that defense counsel discussed the reports with Appellant and based on their conversations, Appellant agreed that no further testimony was required on the issue of his competency. CSR 4604.

The State then presented its factual basis for the guilty plea. CSR 4606-07. In accepting Appellant's guilty plea, the trial court stated,

All right, Mr. Santiago. The Court finds that there is a factual basis for the plea and that Mr. Santiago has had an opportunity to consult with an attorney, of whom he says he's satisfied with, that he is alert and completely cognizant as to what is occurring in court today.

The Court also finds the defendant is aware of all the rights he is waiving by entering his guilty plea today.

In addition, the Court finds his pleas are freely and voluntarily made, and he understands the consequences of his pleas.

The Court also finds he is competent to enter a plea to the charge.

I, therefore, accept your plea of guilty to the one count of first-degree murder. So next we have to schedule the penalty phase. I'm also going to order a presentence investigation report.

CSR 4607-08.

Penalty Phase

The penalty phase began on February 1, 2018, and defense counsel announced Appellant's decision to waive a penalty phase jury and the proceedings were conducted before the trial judge. CSR 4540, ll. 3-14. The trial court conducted an extensive colloquy, advising Appellant of his rights to (1) a 12-person jury to hear aggravation and mitigation evidence; (2) representation by legal counsel; (3) testify on his own behalf or remain silent, which would not be held against him; (4) the subpoena power of the court to compel witness attendance before a jury; and (5) the possibility of a life sentence on an 11-1 jury vote, which the trial court could not override. CSR 4540-41. Appellant stated that he understood each item the trial court

conveyed. *Id.* The following colloquy continued:

COURT: You understand that even if you waive a jury trial as to the penalty phase, we will still conduct what's known as a *Spencer* hearing for additional evidence the jury would not have considered; however, I anticipate that would be done at the same time as the penalty phase. Do you understand that?

DEFENDANT: Yes.

COURT: Has anyone, your attorney, your pastor, your relatives, or anyone else given you any assurances that your decision to waive a jury trial for the penalty phase will result in any leniency whatsoever?

DEFENDANT: No. I am doing this voluntarily.

COURT: Do you understand that if I allow you to waive a jury for the penalty phase, you will not be allowed to change your mind at a later date?

DEFENDANT: Yes.

COURT: So one last time, are you sure that you want to waive a jury for the penalty phase?

DEFENDANT: Yes.

COURT: . . . Mr. Santiago-Gonzalez, after carefully considering your response to my questions, I find that your decision to waive a jury for the penalty phase of this case has been made freely and voluntarily, and the case will then proceed to a penalty phase without a jury.

DEFENDANT: Yes.

CSR 4542-43.

The State presented testimony to prove the following four aggravating factors:

The capital felony committed by one previously convicted of a felony and under

sentence of imprisonment, § 921.141(6)(a), Fla. Stat. (2017);⁵ the defendant was previously convicted of a felony involving threat of violence (PVF), § 921.141(6)(b), Fla. Stat. (2017); the capital felony was especially heinous, atrocious or cruel (HAC), § 921.141(6)(h), Fla. Stat. (2017); and the capital felony was committed in a cold, calculated and premeditated (CCP) manner without any pretense of moral or legal justification, § 921.141(6)(a), Fla. Stat. (2017). R 4305-43. The following RMC staff were called as State witnesses, whose pertinent testimony is included *supra* at 3, et seq.: RMC Capt. Hamilton, Sgt. Young, Corrections Officer James Reed, Capt. Mark Finken, Inspectors General Jonathan Boone and Kevin Ortiz, and RMC emergency room nurse Dukes. Emergency room physician and surgeon Dr. Lottenberg and medical examiner Dr. Hamilton also testified as indicated above.

Appellant presented two statutory mitigating circumstances: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (§ 921.141(7)(b), Fla. Stat. (2017)); and (2) his capacity to appreciate the criminality of his conduct was substantially impaired (§ 921.141(7)(f), Fla. Stat.) R 4313-15. Appellant presented 57 non-statutory mitigating circumstances stemming from his (1) dysfunctional family, difficult

⁵ The parties stipulated that Appellant was “under multiple sentences of imprisonment, serving nine life sentences, plus 210 years at the time of the murder.” R 2444-51, 4021-22.

childhood and up-bringing in a depressed area of Puerto Rico; and (2) history of mental illness. R 4041-4137, 4315-36.

Appellant presented live and perpetuated mitigation testimony of 17 family members, including his mother, siblings, aunts, cousins, and one of his children. CTT 1258-60. His family members discussed the poor living conditions and violence in Puerto Rico's Luis Llorens Torres housing project, as well as the disfunction and abuse within their family. CTT 240-654. Most of the family members had not seen or spoken to Appellant since he was a child living in Puerto Rico and two of Appellant's children living in Puerto Rico had never seen him due to his incarceration for most of his life. CTT 495, ll. 13-14; 810, ll. 20-25; 859-62. Appellant also offered evidence that he created art work for an APD who represented him in other cases. CTT 930, ll. 11-17. Mitigation specialist Betty Fuentes testified that Appellant wrote songs while in prison, including one titled "Remembering You," dated January 30, 2014, twenty-one days after stabbing Burns. CTT 808-10.

Dr. Steven Gold testified regarding psychological trauma and Appellant's adverse childhood experiences, stating that Appellant's capacity to appreciate the criminality of his conduct was substantially impaired and he was under the influence of extreme mental or emotional disturbance when he killed Burns. CTT 945-48, 968, ll. 13-22. On cross-examination, Dr. Gold acknowledged that Appellant

“categorically denied” sexual abuse in his childhood. CTT 975-76. He further stated he did not diagnose Appellant with post-traumatic stress disorder (PTSD) prior to January 2018. CTT 982-83.

Finally, Dr. Michele Quiroga, Ph.D., was retained by the defense to conduct a “full neuropsychological evaluation with IQ testing to determine Appellant’s cognitive functioning” and explore mitigating factors. CTT 995. She first evaluated Appellant on February 12, 2016 and saw him five times through early 2017. CTT 995-96. Appellant denied and did not remember experiencing sexual abuse, but later remembered blood in his pants. CTT 1053. Appellant attained a full-scale score of 89 on the WAIS/EIWA assessment. CTT 1004, ll. 16-22. Dr. Quiroga diagnosed Appellant with bipolar disorder, borderline personality disorder and mild cognitive impairment due to his drug use as a child, which does not interfere with his capacity for everyday activities. CTT 1009-10, 1026, 1027. Dr. Quiroga testified that Appellant’s self-mutilation and cutting was “a coping behavior that he learned early on.” CTT 1013, ll. 10-15.

At the close of the defense witness testimony, defense counsel and Appellant discussed whether he would testify on his own behalf and waived that right because he believed it to be in his best interests. CTT 1057-58. The trial court asked Appellant whether he had questions regarding his right to testify, to which he

responded, no. CTT 1058, ll. 16-19.

In rebuttal, the State called forensic psychiatrist, Dr. Tonia Werner, M.D., and Dr. Michael Herkov, Ph.D., a neuropsychologist. Dr. Werner interviewed Appellant on January 5, 2018, who told her, he wanted Burns to suffer, knew Burns would die and accused other inmates of snitching on him. CTT 1066. Dr. Werner diagnosed Appellant with antisocial personality disorder, but ruled out PTSD because he denied sexual abuse and stated he did not remember. *Id.* Dr. Werner also testified that Appellant did not meet the full criteria of borderline personality disorder, but had depressive symptoms and exhibited self-injurious behavior. CTT 1068. Further, Dr. Werner had no concern that Appellant was under any extreme mental or emotional disturbance, but could conduct his behavior according to the law and understood what he was doing. CTT 1068-69. Dr. Herkov provided the opinion that Appellant did not indicate any cognitive impairment that would have been an issue in this case, after reviewing among other records, Dr. Quiroga's raw testing data. CTT 1097-98.

The trial court found four aggravators were proven beyond a reasonable doubt in its detailed Sentencing Order on April 13, 2018: the capital felony committed by one previously convicted of a felony and under sentence of imprisonment (great weight); PVF (great weight);⁶ HAC (very great weight); and CCP (very great

⁶ Of the twenty-one charges, nearly one-half were violent felonies, including robberies with a

weight). Sentencing Order, R 4305-43. A presentence investigation report was ordered. R 263, 388-9.

The trial court rejected Appellant's two proposed statutory mitigating circumstances as unproven. R 4313-15. It also rejected the following non-statutory mitigation circumstances as unproven: (1) Appellant suffered from severe developmental trauma (R 4315); (2) placement with Aunt Gloria as a child (R 4324); (3) placement with Aunt Maria as a child (R 4324-25); (4) Appellant was sexually assaulted by Donald Burns (R. 4334); (5) Appellant was the victim of a lewd act by Burns (R 4334-35); and (6) other factors in character, background or life, or circumstances of the offense (R 4336).

The trial court rejected Appellant's mitigator that he was sexually assaulted by Burns reasoning, "[t]he Defendant deliberately and intentionally had himself transferred into the victim's cell for the purpose of killing him based on the victim's crimes and his status as a sex offender. Other than the Defendant's self-serving statements . . . there is no substantial evidence that the victim provoked or instigated the events that led to his murder." R 4334. The mitigator claiming Appellant was the victim of Burns' lewd act was similarly rejected because the Appellant deliberately and intentionally had himself transferred to Burns' cell and no

firearm, armed burglary, kidnapping and attempted felony murder.

substantive evidence supported these mitigating circumstances other than his self-serving statements. R 4334-35.

The trial court found Appellant proved the following non-statutory mitigators and assigned weight as follows: (1) Luis Llorens Torres Caserio housing project (moderate weight); (2) Appellant was the product of statutory rape (very little weight); (3) father was absent (very little weight); (4) mother was intellectually disabled (very little weight); (5) mother had impaired parenting skills (very little weight); (6) mother abandoned him (little weight); (7) grandfather was violent and abusive (very little weight); (8) grandfather was a pedophile (very little weight); (9) grandmother failed to protect children (very little weight); (10) Appellant suffered sexual abuse in the Llorens community (considered in conjunction with the Luis Llorens Torres Caserio mitigator and given moderate weight); (11) early drug use (very little weight); (12) lack of childhood health (very little weight); (13) mental illness as a child (little weight); (14) home of Appellant's mother (very little weight); (15) mother was a prostitute (very little weight); (16) siblings were neglected (very little weight); (17) placed in juvenile detention at age 9 (moderate weight); (18) experienced sexual abuse in juvenile detention (moderate weight); (19) death of Appellant's grandmother (little weight); (20) lack of education (very little weight); (21) Appellant saved his brother's life (very little weight); (22) exposure to violent

crimes, considered a subset of the Luis Llorens Torres Caserio mitigator (moderate weight); () Luis Llorens, the Protector (very little weight); (24) opiate addiction as a child (very little weight); (25) victim of violent crime, considered with the Luis Llorens Torres Caserio and exposure to violent crimes mitigators (very little weight); (26) Appellant's father's death (very little weight); (27) family history of drug and alcohol abuse (some weight); (28) family history as violent crime victims (some weight); (29) family history of criminal behavior (moderate weight); (30) family health issues (very little weight); (31) family mental illness history (moderate weight); (32) family suicide history, considered with family history of mental illness mitigator (moderate weight); (33) Appellant is bipolar (very little weight); (34) Appellant has clinical depression (some weight); (35) Appellant has PTSD (very little weight); (36) Appellant has complex PTSD (very little weight); (37) Appellant has borderline personality disorder (very little weight); (38) Appellant's Baker Acts (very little weight); (39) Appellant uses psychotropic medication (very little weight); (40) Appellant has a history of suicide attempts (very little weight); (41) Appellant has a history of self-harm (very little weight); (42) Appellant is an artist (very little weight); (43) Appellant's lifetime of institutionalization (little weight); (44) Appellant pled guilty to first-degree murder (little weight); (45) Appellant waived a jury trial (little weight); (46) Appellant's courtroom behavior (little weight); and (47)

the love of Appellant's family (little weight). R 4313-41. At the conclusion of its sentencing order, the trial court stated,

In weighing the aggravating factors against the mitigating factors, the Court understands that the process is more qualitative than quantitative. In that regards, the Court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances.

The Defendant has an extensive history of violent felony offenses; and, at the time of the murder in this case, was serving multiple life sentences . . . based on three separate and distinct criminal episodes involving violence or threats of violence.

In committing the murder in the case, the Defendant manipulated . . . correctional officers into placing him into the victim's cell. The Defendant then either manipulated the victim into letting himself be blindfolded and tied up or forced to be blindfolded and tied up at which point the Defendant removed the blindfold and began stabbing the victim approximately 64 times. The removal of the blindfold was to increase the terror and fear that the victim would experience by allowing him to see himself being stabbed. Furthermore, the Defendant wanted the victim to suffer and know that he was going to die.

R 4341-42. Appellant's direct appeal followed.

SUMMARY OF ARGUMENT

ISSUE I: Appellant was competent to enter a knowing, intelligent and voluntary guilty plea to first-degree murder, as well as to waive a penalty phase jury, despite a history of mental illness. Both the trial court and defense counsel followed established procedures to determine competency and protect his constitutional rights. Appellant underwent two competency evaluations and the trial court

conducted a lengthy and thorough colloquy to accept the guilty plea. Because competency was not an issue, the trial court determined a formal competency hearing was not required.

ISSUE II: The trial court was not required to order another competency evaluation prior to the penalty phase where Appellant had been previously competent to proceed and the presumption of competency follows a defendant throughout the proceedings. Appellant's behavior after his guilty plea did not give rise to a reasonable belief to question his competency or to believe his competency status changed prior to the initiation of the penalty phase.

ISSUE III: The trial court was not required to enter a written competency order under Rule 3.212(b), Florida Rules of Criminal Procedure, because competency was not at issue in Appellant's case. Neither defense counsel nor the trial court had a reasonable belief that Appellant's competency was at issue, thus the procedural requirements of Rule 3.212 did not apply.

ISSUE IV: Appellant's death sentence was proportionate because it is among the most heavily aggravated and least mitigated cases when compared to similar cases. This case was heavily aggravated with HAC, CCP, PVF and that the crime was committed while incarcerated aggravators, all of which were proven beyond a reasonable doubt. The HAC, CCP and PVF aggravators are among the

most serious and weightiest aggravators in Florida's sentencing scheme.

ISSUE V: The trial court did not require a nexus between mitigating circumstances and Burns' murder. Of the mitigators challenged by the Appellant, the trial court found all but one to have been proven and assigned weight accordingly. The trial court's sentencing order properly put the facts of the case in context as opposed to applying a nexus requirement.

ISSUE VI: Appellant's argument that aggravating factors must outweigh mitigating circumstances beyond a reasonable doubt is incorrect. The findings regarding sufficiency and weighing are not subject to a beyond-a-reasonable-doubt standard because they are not elements of a crime and they do not increase the eligible penalty that can be applied in Appellant's case.

ISSUE VII: The CCP aggravator was proven beyond a reasonable doubt. Competent, substantial evidence supports the trial court's finding where Appellant obtained the weapon in advance, requested and orchestrated the move into the victim's cell, took his time to make the ligatures used to tie the victim up and confessed that he wanted to punish the victim and see him suffer.

ISSUE VIII: The HAC aggravator was proven beyond a reasonable doubt and competent, substantial evidence supports the trial court's finding where the Appellant tied up the victim to see the fear in his eyes, the victim was brutally

stabbed 64 times, the victim was alive and conscious throughout the attack, the victim believed he would die and he endured intense pain, multiple surgeries and a stroke over a six-month period, until his death.

ISSUE IX: Appellant pled guilty to first-degree murder and was eligible for imposition of the death penalty upon the finding that sufficient aggravating factor(s) were proven beyond a reasonable doubt. In accordance with *Foster*, findings required to impose the death penalty are separate and distinct from a conviction for first-degree murder, as defined by Florida Statutes.

ISSUE X: The State was entitled to seek the death penalty for Appellant's crime. *Hurst* was procedural in nature and did not render Florida's death penalty unconstitutional. Further, because Appellant pled guilty to first-degree murder and waived a penalty phase jury, his *Hurst*-induced claim is meritless.

ARGUMENT

ISSUE I: APPELLANT WAS COMPETENT TO ENTER A KNOWING, INTELLIGENT AND VOLUNTARILY GUILTY PLEA AND TO WAIVE A PENALTY PHASE JURY.

Appellant claims he was not competent to have entered a guilty plea to first-degree murder or to waive a penalty phase jury, in violation of his due process rights. IB 18. Appellant argues that mental health issues precluded him from perceiving and understanding the proceedings accurately, prevented his ability to work with his

attorneys and that he was “too mentally ill” to enter a knowing, intelligent and voluntary plea and waiver. IB 18-19, 21. These arguments are meritless because Appellant was evaluated and found competent to enter a knowing, intelligent and voluntary guilty plea, followed by the trial court’s thorough colloquy before accepting his guilty plea and penalty phase jury waiver. The court and counsel followed proper procedures to ensure that Appellant’s constitutional rights were protected. Therefore, this Court should affirm Appellant’s conviction and sentence.

This Court’s review of imposition of a capital defendant’s guilty plea to first-degree murder focuses on the knowing, intelligent and voluntary nature of the plea. *Barnes v. State*, 29 So. 3d 1010, 1020 (Fla. 2010). The plea is scrutinized to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights being waived and pled voluntarily guilty. *See Winkles v. State*, 894 So. 2d 842, 847 (Fla. 2005). Where a history of mental illness is present and competency evaluations were conducted, this Court must look at Appellant’s competency “as it bears on [his] ability to enter a knowing, intelligent and voluntary plea.” *Gill v. State*, 14 So. 3d 946, 959 (Fla. 2009).

A trial court’s “competency determination must be based on all relative evidence, and the decision will stand absent an abuse of discretion.” *Gill*, 14 So. 3d at 960 (quoting *Boyd v. State*, 910 So. 2d 167, 187 (Fla. 2005)). *See also Tanzi v.*

State, 964 So. 2d 106, 114 (Fla. 2007) (this Court “recognize[s] and honor[s] the trial court’s superior vantage point in assessing the credibility of witnesses and in making findings of fact”) (citation omitted). The competency standard to plead guilty is the same to stand trial promulgated by the United States Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960). See *Gill*, 14 So. 3d at 959 (accord *Godinez v. Moran*, 509 U.S. 389 (1993) (defendant’s competence to plead guilty is measured no higher than the standard set forth in *Dusky*)). Florida Statutes § 916.12(1) codifies the *Dusky* standard and provides,

A defendant is incompetent to proceed within the meaning of this chapter if the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him.

A defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Gill*, 14 So. 3d at 959 (quoting *Dusky*, 362 U.S. at 402).

Upon accepting a guilty plea, the trial court must carefully inquire into the defendant’s understanding of the plea, ensuring the plea was intelligent and voluntary. *Sanchez-Torres v. State*, 130 So. 3d 661, 668 (Fla. 2013) (quoting *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992)). As the *Godinez* Court stated, the *Dusky*

standard “has a modest aim: It seeks to ensure that [defendants have] the capacity to understand the proceedings and to assist counsel.” *Godinez*, 509 U.S. at 402. *See also Wall v. State*, 238 So. 3d 127, 140-41 (Fla. 2018). The trial court is required to hold a hearing “only where the court ‘has reasonable ground to believe that he defendant is not mentally competent to proceed.’” *Rodgers v. State*, 3 So. 3d 1127, 1132 (Fla. 2006) (quoting Fla. R. Crim. P. 3.210(b)).

When Appellant indicated his intent to plead guilty to first-degree murder, the trial court, as well as defense counsel deemed it prudent to conduct a competency evaluation in light of his mental health history. Two mental health experts were appointed and a competency evaluation was ordered in June 2016. R 200-02. The trial court ordered the evaluations even though defense counsel had not raised a concern that Appellant was incompetent. On the day Appellant tendered his guilty plea, the trial court stated,

So when I was aware that Mr. Santiago wanted to enter a plea and he wanted to request the death penalty, I was made aware that he had a history of mental illness. Competency has never been an issue in this case, but because of the seriousness of the offense, I went ahead and ordered Mr. Santiago to be evaluated. And I based part of that on the Ricardo Gill case, which I have reviewed the Supreme Court order in that appeal. I don’t have the case in front of me for a citation, but Judge Cates did something similar in that case.

CSR 4605, ll. 7-16. The trial court appointed experienced mental health experts, Dr. Meadows and Dr. Ginory to perform the evaluations and whose detailed reports

addressed the competency standard elements required by *Dusky* and section 916.12, Florida Statutes. Appellant fully participated in the evaluations and “demonstrated a solid understanding of the nature” of the confidentiality notice that his information would be shared. R 221, 226. He was described as “calm, cooperative” and was “relevant and coherent in responding to questions.” R 223-24, 229. Both Drs. Meadows and Ginory found Appellant competent to proceed. R 224, 230.

Drs. Meadows and Ginory took Appellant’s history of mental illness into account, including his self-harm, suicide attempts and resulting hospitalizations. Both doctors considered Appellant’s abuse history, early onset of behavioral and psychiatric treatment and juvenile detention placement at age 9. R 221, 226, 1157. Importantly, both doctors were aware of Appellant’s episodes of self-injurious behavior which was well documented in his corrections records. Appellant’s mental health issues are not a new development. Appellant suffered from ongoing mental health issues prior to and during the proceedings below.

Prior to the competency evaluations, two self-harm episodes occurred requiring hospitalization where Appellant swallowed a razor blade in 2014 and inserted two pieces of metal fencing into his abdomen on February 22, 2016. R 1366, 3840. The following day, Appellant returned to FDOC custody and “[i]n order to be sent to the hospital again for additional treatment [Appellant] inserted three

plastic objects . . . into his abdomen, all of which were hooked to paper clips to secure them to his abdomen wall.” R 1366. According to his interview with FDOC mental health staff, Appellant stated he self-harmed to “warrant surgery.” *Id.* During a follow-up evaluation on February 25, 2016, Appellant stated, “I think I went too far.” R 1011. Dr. Ginory’s psychiatric evaluation and report addressed Appellant’s multiple episodes of self-injuries and suicide attempts since incarcerated. R 221, 227. She also specially noted his 40 procedures, numerous hospitalizations resulting from inserting foreign objects into his body and self-injurious behavior ranging from cutting himself to swallowing objects. *Id.*

Dr. Meadows’ report contains an important fact ignored by Appellant. Dr. Meadows evaluated Appellant for competency in July 2010 in an unrelated case. Charges in that case included armed robbery, kidnapping and escape while armed, which resulted in three life sentences, plus 210 years. R 220-21, 2448-51. In 2010, Dr. Meadows found Appellant was competent, but was “malingering psychotic disturbances and was not exhibiting active psychiatric disturbances.” R 221. During the 2016 evaluation, Appellant recalled Dr. Meadows “from a previous meeting and he admitted that he was malingering psychiatric symptoms in that examination.” R 222. Dr. Meadows noted, Appellant “discussed his rationale for wanting to plead guilty . . . and his logic was not irrational, delusional, or disturbed by any psychiatric

condition or intellectual disability.” R 223.

Both Drs. Meadows and Ginory determined Appellant competent, finding he had an adequate appreciation of (1) the charges against him; (2) the range and nature of possible penalties and plea options; and (3) the adversarial nature of the legal process. R 223-24, 228-29. Both doctors found Appellant had the capacity to (1) disclose facts pertinent to the proceedings, providing “relevant, organized, sequential, and reality-based account of the proceedings and his actions leading up to these charges,” (2) manifest appropriate courtroom behavior, and (3) testify relevantly. Appellant was described as “calm, cooperative” and was “relevant and coherent in responding to questions.” R 223-24, 229. Notably, in discussing the role of the jury with Dr. Ginory, “he mentioned the new death penalty scheme based on ‘*Hurst v. Florida.*’” R 228.

Appellant points to self-harm episodes which occurred in January, February and March 2016, several months *prior* to the court ordered competency evaluations. IB 23; R 3870. Appellant inaccurately characterizes these incidents as new information, not considering the mental health experts or the trial court in arriving at a competency determination. As discussed above, both Dr. Meadows and Dr. Ginory considered these events and Appellant’s history of self-harm.

Appellant also claims that he was unable to work with his trial counsel, had

no rational degree of understanding of the consequences of his guilty plea and “lacked a rational and factual understanding of what he faced.” IB 21. But, he fails to identify any specific part of the plea discussions that he did not understand. The record, however, clearly reflects that Appellant assisted his legal counsel and understood precisely what he was facing and the consequences. Appellant’s responses to the August 15, 2016, change of plea colloquy and February 1, 2018, penalty phase jury waiver indicated a full understanding of the consequences of his waivers. CSR 4540-42. His responses to Mr. Chipperfield’s questions in open court regarding his decision to waive a trial and penalty phase jury reflected a normal working relationship with counsel. CSR 4586-94. When the trial court questioned Appellant about his satisfaction with counsel’s work, he indicated consistently that he was satisfied with his representation. CSR 4600.

Finally, Appellant references a February 2016 letter he wrote to a previous trial judge in this case saying he wanted a trial and to complain that his lawyers are treating him like he is crazy. IB 19, R 101-02. Again, Appellant improperly infers that this supports incompetency. When the letter is read in full, it shows clear rational thought regarding his case and was expressing his impatience because he was ready to go to trial. R 101-02. Appellant even discussed the mitigation information being prepared by defense counsel, including his FDOC medical and

mental health records, records from Puerto Rico and interviews with his family members. R 101. Ending the letter, Appellant wrote in part,

Your honor, I would like to go to trial on April or the beginning of May. Can you please pick a date to trial [sic] my case? My attorneys and the rest of the defense team they all are good people with the best intentions and that, they want to do a wonderful job. But, I hate the long waiting!

R 102. Nothing within this letter suggests Appellant was incompetent. On the contrary, it shows a level of sophistication, knowledge regarding his penalty phase process and a rational and factual understanding of the proceedings against him.

Once Dr. Meadows and Dr. Ginory submitted their findings that Appellant was competent to proceed, a hearing was held on August 15, 2016, for Appellant to change his plea. Mr. Chipperfield announced that against advice of counsel, Appellant wished to enter a guilty plea to the charge of first-degree murder, as well as to waive a penalty phase jury. CSR 4586, ll. 19-24. Mr. Chipperfield addressed Appellant in part,

MR. CHIPPERFIELD: Mr. Gonzalez, we've been representing you for a long time, and we understand that you have been taking mental health medications during the time that we've been representing you.

DEFENDANT: Yes.

MR. CHIPPERFIELD: And you've also at times taken pain medication because of self-inflicted injuries.

DEFENDANT: Yes.

MR. CHIPPERFIELD: And this is true that today you're not on any

pain medication?

DEFENDANT: No.

MR. CHIPPERFIELD: I worded that improperly. Are you on pain medication today?

DEFENDANT: No.

MR. CHIPPERFIELD: But you are taking Vistaril and Celexa as mental health medications; is that right?

DEFENDANT: Yes.

MR. CHIPPERFIELD: Do those medications help you think more clearly?

DEFENDANT: Sometimes.

MR. CHIPPERFIELD: Do you think that you are thinking clearly today?

DEFENDANT: Perfectly.

MR. CHIPPERFIELD: Do you fully understand what you are doing?

DEFENDANT: Yes.

CSR 4588-90. Mr. Chipperfield reviewed the Petition to Enter Plea of Guilty with Appellant prior to the hearing, but went through it again with him in detail, in open court. CSR 4588-89. Because of Mr. Chipperfield's intimate knowledge of his client, he pointedly inquired whether Appellant was entering the guilty plea because "you're depressed and upset about something that happened recently?" CSR 4593.

Appellant stated he was not. *Id.* The exchange continued:

MR. CHIPPERFIELD: You recognize, if you look at your own behavior . . . that sometimes you do things impulsively that you later

regret. Do you think this is one of those times, or have you really thought about this?

DEFENDANT: I already thought about it. No. And I already thought about it.

MR. CHIPPERFIELD: Okay. And I'm not trying to talk you out of this right now. I'm just trying to make a record so the record is clear that you know what you're doing.

DEFENDANT: Yes.

MR. CHIPPERFIELD: You understand that we've already spent a lot of time trying to talk you out of this.

DEFENDANT: Yes.

MR. CHIPPERFIELD: How would you feel if you change your mind in the future?

DEFENDANT: I'm not going to change.

MR. CHIPPERFIELD: . . . you have told us in the past that you wanted to do this just because you wanted to get it over with. Do you understand that this plea today doesn't just get it over with, that we still have a penalty phase in front of the judge that's now scheduled for October.

DEFENDANT: Yes.

Id. at 4593-94. The plea was then tendered to the trial court. *Id.* at 4595.

Clearly, Appellant's defense counsel were not mental health experts, but they worked with him closely and observed his behaviors, understanding of the proceedings, and perceived competence. The United States Supreme Court in *Drope v. Missouri*, 420 U.S. 162, 177, n. 13 (1975), highlighted defense counsel's role in competency issues. *Drope* explained, a lawyer's representations concerning his

client's competence is "unquestionably a factor which should be considered" in making a competency determination because the attorney is the one with "the closest contact with the defendant." *Id.* (citation omitted). The exchanges between Mr. Chipperfield and Appellant reflected a healthy working relationship with his attorneys. No lack of Appellant's understanding was indicated to any degree. His responses to counsel's questions demonstrate that Appellant was competent to enter a knowing and voluntary waiver.

Following defense counsel's exchange with Appellant the plea to first-degree murder was tendered and the trial court conducted a lengthy and thorough colloquy, set forth *supra* at 16. The colloquy is further evidence that Appellant made a knowing, intelligent and voluntary decision. CSR 4595-4603. The trial court asked baseline, as well as detailed and in-depth questions which fully informed Appellant of the constitutional and procedural rights he would be waiving if the guilty plea was accepted. *Id.* It ensured Appellant's understanding of the totality of the proceedings and confirmed that he knew the consequences of his guilty plea. *Id.* Further, the trial court reinforced that his plea was only one part of the process and that the penalty phase would proceed, resulting in a possible death penalty or life sentence. *Id.* Appellant's responses to the trial court were appropriate and gave no indication that he did not understand that he could be sentenced to death or had a lack of

appreciation of the charges against him. Appellant was fully aware of the consequences of his guilty plea.

Defense counsel did not challenge Appellant's competency finding and agreed with the State to enter Dr. Meadows' and Dr. Ginory's reports into evidence in order for the court to make his determination. CSR 4603-04. Mr. Chipperfield advised the trial court,

We have reviewed those reports. Mr. Santiago is aware of the contents. We've discussed that with him. And we don't require any additional testimony besides the reports, and we stipulate to the reports being received in evidence on the issue of competency to enter this plea. And based on our conversations with Mr. Santiago, he feels the same way.

CSR 4604, ll. 10-17. The fact that defense counsel did not dispute the competency evaluations, did not mean that counsel made the competency determination.

The trial court's observations of Appellant and defense counsel's exchange, its own colloquy and the fact that defense counsel was confident in the competency evaluations and did not contest the recommendation, led to its determination that no formal competency hearing was necessary. The trial court indicated that Appellant's competency was never at issue, the defense did not need to call witnesses regarding competency and a competency hearing was unnecessary stating,

Since competency is not at issue, I don't think I have to have a formal competency hearing. I find that there's competent and substantial evidence based on the doctors' reports, my interaction with the defendant, and the attorneys not expressing any concern regarding the

defendant's competence. That evidence supports the finding that the defendant, who has a history of mental illness, is competent to enter a knowing, intelligent, and voluntary plea here today.

CSR 4605, ll. 17-25.

At the start of the penalty phase on February 1, 2018 and when Appellant announced his decision to waive a penalty phase jury, the trial court conducted another thorough colloquy. CSR 4540. The trial court advised Appellant of his rights to (1) a 12-person jury to hear aggravation and mitigation evidence; (2) representation by legal counsel; (3) testify on his own behalf or remain silent, which would not be held against him; (4) the subpoena power of the court to compel witness attendance before a jury; and (5) the possibility of a life sentence on an 11-1 jury vote, which the trial court could not override. *Id.* at 4541-42. The trial court also questioned Appellant on his possible motivations for waiving a penalty phase jury. *Id.* After the colloquy, the trial court accepted Appellant's waiver and found that Appellant waived his penalty phase jury freely and voluntarily. *Id.* at 4542.

This Court has noted, “[i]n the field of criminal law, there is no doubt that ‘death is different,’ but, in the final analysis, all competent defendants have a right to control their own destinies.” *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988). Nothing contained in either defense counsel's or the trial court's exchanges with Appellant support his claims that he was incompetent or that defense counsel

determined competency.

This Court has found other capital defendants competent to proceed despite serious mental illness diagnoses. This Court has held that a mentally ill defendant can enter a knowing, intelligent guilty plea, waive a penalty phase jury and presentation of mitigation. *Gill*, 14 So. 3d at 954; *Rodgers v. State*, 242 So. 3d 276, 278-79 (Fla. 2018) (defendant who pled guilty to first-degree murder was competent to proceed despite being incarcerated most of his life with mental illness and history of self-mutilation); *Covington v. State*, 228 So. 3d 49, 67 (Fla. 2017) (defendant understood the ramifications of his plea, although he was on psychiatric medications); *Dessaure v. State*, 55 So. 3d 478, 483 (Fla. 2010) (defendant was competent to stand trial “even in light of his [PTSD] and history of suicide attempts”); *Barnes v. State*, 124 So. 3d 904, 913-14 (Fla. 2013) (defendant’s personality disorder diagnosis did not preclude competency finding) (quoting *Card v. Singletary*, 981 F.2d 481, 487-88 (11th Cir. 1992) (“[N]ot every manifestation of mental illness demonstrates incompetence. . . .”)).

Appellant never challenged the psychiatric reports as inadequate or faulty in any way and did not seek to withdraw his guilty plea. Instead, Appellant highlights isolated incidents from February 11, 2016, through his penalty phase in February 2018. IB 8, 19, 23-24. These acts of self-harm and diagnoses Appellant points to

were not new or different behaviors which he had not exhibited in the past. They are merely continuations of Appellant's past behaviors and the same type of information that the mental health experts considered to find him competent to proceed in 2016. The purportedly new information was consistent with Appellant's history and not indicative of incompetence.

For example, Appellant states that he "started a medication regime less than a month before he entered the plea." IB 24. This claim is refuted by the record. The portion of the record to which Appellant refers does not specify what, if any psychotropic medication was prescribed. Appellant has long been prescribed psychotropic medications including Lithium and Vistaril as early as 2007, as well as Celexa and Stelazine in 2013. R 1140, 1158, 1307, 1341. Appellant's treatment was acknowledged and addressed in the competency evaluations.

Appellant states "his psychiatrist diagnosed him with borderline personality disorder because of the severe self-mutilation" in January 2017, nearly 1½ years after his plea. IB 8. He implies that his first diagnosis did not occur until 2017, which is incorrect and refuted by the record. Appellant was treated by several mental health professionals over several years and was diagnosed with borderline personality disorder and antisocial personality disorder in 2016, possibly as early as 2015. R 1363, 3857, 3890.

Notably, Appellant’s mental health expert witnesses Dr. Quiroga or Dr. Gold did not raise concerns of possible incompetence, nor did they challenge Drs. Meadows’ and Ginory’s competency evaluations. Dr. Quiroga, who had worked on at least 250 capital cases, testified that she spent more than 30 hours with Appellant over one year. CTT 994-95. She pointedly stated,

He gave me full effort but I took a lot of time to establish rapport. . . . I think that was very helpful where other psychologists might have only seen him for two hours or for a competency evaluation. I took my time to get to know him. . . .

CTT 1003, 11. 11-20. Dr. Quiroga never indicated any concern for Appellant’s competency during her testimony and there is no evidence that she developed competency concerns during her five lengthy interactions with him.

Dr. Gold was retained by Mr. Chipperfield as a trauma expert in 2014 and spent 9-10 hours with Appellant, reviewed his “past psychiatric evaluations” and reviewed depositions of other doctors who evaluated him. CTT 943-47. Like Dr. Quiroga, he did not raise any concerns regarding Appellant’s competency.

Appellant’s claim that the trial court merely showed a “willingness to go through the motions to determine competency” is baseless. Neither his trial counsel, nor the trial court disregarded Appellant’s history of mental health issues or proceeded at the expense of his competency. Comprehensive competency evaluations were conducted, and Appellant was previously found competent in a

2010 case, resulting in a life sentence.

Appellant's mental health history and self-harm does not in and of itself negate his competency. As Drs. Meadows and Ginory opined, Appellant had a full understanding of the proceedings, actively participated in the preparation of his defense and understood the consequences of his decision to plead guilty and waive a penalty phase jury. The record is abundantly clear that his issues have been known and evaluated over many years. He fails to set forth any "new evidence" that the trial court was unable to consider at the time he was found competent to enter his guilty plea. The trial court did not abuse its discretion finding that Appellant was competent to enter a valid knowing, intelligent and voluntary guilty plea to first-degree murder and waive a penalty phase jury.

ISSUE II: THE TRIAL COURT DID NOT ERR IN FAILING TO ORDER A NEW COMPETENCY EVALUATION PRIOR TO THE PENALTY PHASE.

Appellant claims the trial court erred when it did not order new competency evaluations prior to the penalty phase in February 2018. IB 32. Appellant argues that "materially new evidence was presented to the trial court to suggest incompetency." IB 33. This claim is meritless and a new competency evaluation was not warranted because the trial court did not have reasonable grounds to believe that Appellant was not competent to proceed. Appellant's general and speculative

statements, as well as restatements of his known mental health issues that were previously considered by Dr. Meadows, Dr. Ginory and the trial court, do not constitute new evidence. Nothing new occurred following the doctors' evaluations to suggest to the trial court that another competency evaluation was required. Appellant's behavior was a continuation of that which had occurred for many years.

A criminal defendant must be examined for competency during any material stage of a criminal proceeding "if the trial court 'has reasonable ground to believe that the defendant is not mentally competent to proceed.'" *Wall*, 238 So. 3d at 140 (quoting Fla. R. Crim. P. 3.210(b)). However, once a defendant has been deemed competent to proceed, that "presumption of competence continues throughout all subsequent proceedings." *Id.* at 140 (quoting *Dessaure*, 55 So. 3d at 482-83). The trial court is not required to conduct another competency hearing unless a bona fide question as to the defendant's competency has been raised. *See id.* (quoting *Boyd*, 910 So. 2d at 187). *See also Lawrence v. State*, 846 So. 2d 440, 447 (Fla. 2003) (competency decisions, including whether a defendant should be given a hearing after previously being declared competent to proceed are within the sound discretion of the trial court and required "only if a bona fide doubt is raised as to a defendant's mental capacity") (quoting *Hunter v. State*, 660 So. 2d 244, 248 (Fla. 1995)); and *Rodgers*, 3 So. 3d at 1132 (no abuse of discretion for failure to hold another

competency proceeding after penalty phase jury waiver where nothing was observed causing the court to question defendant's competency and reliance on counsel's statement that there was no issue with competency).

A trial court is not required to order a competency evaluation *sua sponte*, where the trial judge did not have a reasonable belief that defendant was incompetent to proceed. *See Barnes*, 124 So. 3d at 912 (*sua sponte* competency determination not required and conclusively refuted by the record which showed the defendant said or did nothing to provide reasonable grounds to believe he was incompetent to proceed); and *Wickham v. State*, 124 So. 3d 841, 861-82 (Fla. 2013) (trial court not required to *sua sponte* order competency determination where defendant was evaluated and found competent to stand trial, trial counsel did not request a separate competency hearing and nothing occurred during the trial process to cause the court to question competency). The trial court's decision not to hold a competency hearing during the penalty phase will be upheld, absent an abuse of discretion. *Lawrence*, 846 So. 2d at 447. When asked to recede from this standard of review, the *Lawrence* Court wrote,

We decline to do so. We continue to conclude that the trial judge's resolution of the ongoing mental status of the defendant involves a credibility determination and observations of the defendant in the courtroom. These are decisions that a trial judge must make.

Id. at n. 10.

Prior to his guilty plea, Appellant participated in a total of three competency evaluations (two in the instant case and one in 2010) and was found competent to proceed, despite his history of mental illness. R 220-21, 224, 230. However, Appellant's mental health issues did not begin at his penalty phase, but long before and his conduct between his August 2016 guilty plea and the February 2018 penalty phase was continued behavior, documented in the record. A review of Appellant's medical and prison records revealed he had been in Florida's penal system for violent felonies since September 2003 (age 22) and his history of mental illness and incidents of self-harm since 2013 were known.

The first self-harm incident in custody occurred in 2013, when Appellant "ate 3 razor blades" and was treated at Baptist Hospital in Pensacola, Florida. R 1140. These records noted Appellant had a "history of self-injuries and mood swings since age 9" and classified "cutting his elbow" as "trying to kill himself" and "trying to get some attention." R 1157. In 2014, he swallowed a razor blade requiring hospitalization. R 3840. In February 2016, Appellant inserted two pieces of metal fencing into his abdomen and a June 2016 psychological evaluation conducted at Union Correctional Institution described his self-injurious behavior as a "hobby," with the first self-harm incident occurring at age 20. R 1362-63.

Nothing in Appellant's behavior after his competency determination in 2016

through his penalty phase in 2018 constituted any material change previously evaluated by mental health experts or observed by the trial court and counsel. Appellant continued to exhibit the same behavior and held the same diagnoses considered by the court appointed experts and the court in its competency determination. For example, Appellant's suggestion that his involuntary commitment in July 2017 and the October 2016 diagnosis of borderline personality disorder was new information the trial court should have considered to affect a new competency determination. IB 34. Appellant had been subject to commitment petitions since 2014 and diagnosed with borderline personality disorder and antisocial personality disorder possibly as early as 2015. R 1363, 3839, 3857, 3890. These facts were known to and considered by the trial court and it determined that they did not provide reasonable grounds to believe Appellant was not competent to proceed. Absent such grounds, a new competency evaluation was not required.

Following Appellant's 2016 competency determination, defense never moved to set aside the guilty plea or suggested a change occurred in Appellant's competency status because there was no basis for it. Just prior to the February penalty phase, Appellant's mental health issues were discussed and acknowledged at the December 1, 2017, status conference and motion hearing. Defense counsel first discussed this issue in the context of a jury instruction regarding the effect Appellant's

psychotropic medications might have on him during trial, such as sleepiness. R 4458, ll. 5-15; 4459-60. At that hearing, one of the defense’s motions raised a premature Eighth Amendment argument that there be “a reliable determination of culpability at his sentence” in the event that Appellant should decide to forego presentation of mitigation evidence. R 4473, ll. 1-8. APD Goldman stated,

We have a patient that — or a defendant that has been a patient before, that has, as the court’s heard, been subject to many mental health hearings. I don’t think anyone is saying that he’s incompetent or incapable of understanding anything at this moment; however, it does require a heightened reliability for this sentence. The recent *Hurst* case had said that the jury determines what the ultimate sentence is. We think that puts an added burden on the courts that the jury should be required — the Eighth, Fifth and Sixth Amendment[s] all require these jury determinations to limit mitigation or restrain mitigation, abrogate mitigation or to reassign mitigation with justice.

Id. Although defense counsel acknowledges Appellant’s continued mental health issues, APD Goldman clearly is not calling his competence to proceed into question. *See Wuornos v. State*, 644 So. 2d 1012, 1017 (Fla. 1994) (trial court not required to *sua sponte* order competency evaluation where defense counsel stipulated to competency based upon psychological evaluations and personal interaction with client). In fact, APD Goldman informed the court that “we plan to present mitigation. Mr. [Santiago-Gonzalez] is on board with that.” R 4478, ll. 2-7.

Finally, at the December 2017 hearing, the trial court was aware of Appellant’s continued self-harm conduct, which affected the trial schedule. The

court addressed this issue, the penalty phase start date and whether Appellant intended to waive the jury, advising,

COURT: . . . So, Mr. Santiago, one of the issues that's been created is that you have missed court because you have hurt yourself and you've had to be hospitalized. . . . You've heard the plan now for your trial in February. My intention is on February the 4th to have a jury ready to go and — excuse me, February the 5th. At that point you can make a decision if you want to go forward with a jury trial or if you want a nonjury trial for the penalty phase just in front of myself.

DEFENDANT: I'm going to wait until February then for that.

R 4498-4500. These exchanges demonstrate that counsel and the court were aware of Appellant's on-going mental health issues, and they addressed the issues as appropriate.

Appellant relies on *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990), and *Hunter*, 660 So. 2d 244, which are inapplicable. In *Nowitzke*, the defendant was “unresponsive, detached, and confused” the day prior to killing his mother and stepbrother and his family had a history of schizophrenia. *Nowitzke*, 572 So. 2d at 1348. *Nowitzke* was found incompetent to proceed and was hospitalized for six months, but later found competent. *Id.* at 1348-49. The day before trial, *Nowitzke* rejected a plea offer, informing the trial court he would not be executed because he would be “spiritually released” on July 4, based on information obtained in a dream. *Id.* at 1349. This Court held that the trial judge should have ordered a new

competency determination, not because the defendant rejected the plea offer, but because his behavior exhibited (1) lack of rational thought processes, (2) the inability to assist his attorneys and (3) lack of understanding about the proceedings against him. *Id.* at 1350-51.

In *Hunter*, a defense motion for a competency determination was denied. *Hunter*, 660 So. 2d at 248. This Court held, the trial court did not abuse its discretion in finding the defendant competent to stand trial after reviewing reports, observing his behavior in the courtroom and there being “nothing materially new in his second competency motion.” *Id.* The *Hunter* Court stated, once a defendant has been declared competent, the trial court must be receptive to competency issues, but is required to conduct a competency proceeding “only if bona fide doubt is raised.” *Id.*

Nowitzke and *Hunter* do not support Appellant’s claims. Instead, their facts and holdings support the State’s argument that the trial court in this case did not abuse its discretion by not reevaluating his competency. The face of the record shows this Court: (1) Appellant was competent to proceed and enter a guilty plea, despite his history of mental illness; (2) his defense team never challenged or raised a concern about his competency; (3) Appellant never acted unusually or inappropriately in the courtroom; (4) the trial court had many opportunities to observe his demeanor and behavior; (5) Appellant always responded intelligently

and appropriately to the trial court and his counsel; (6) throughout the proceedings, Appellant exhibited rational thought; (7) no materially new information was presented to or observed by the trial court; and (8) the trial court had no reasonable basis or bona fide doubt as to Appellant's competency. Therefore, the trial court did not abuse its discretion by not revisiting Appellant's competency to proceed.

ISSUE III: THE TRIAL COURT'S FAILURE TO ENTER A WRITTEN COMPETENCY ORDER WAS NOT IN ERROR.

Appellant claims the trial court erred by not entering a written order of competency in accordance with Rule 3.212(b), Florida Rules of Criminal Procedure, which states, "[t]he court shall first consider the issue of the defendant's competence to proceed. If the court finds the defendant competent to proceed, the court shall enter its order so finding and shall proceed." A written order was not required in this case because concerns about Appellant's competency was not raised by defense counsel or by the trial court at any point in the proceedings. Neither defense counsel nor the trial court had reasonable grounds to question Appellant's competency to proceed or enter a knowing, intelligent and voluntary guilty plea, thus the procedural requirements of Rule 3.212 do not apply in this case.

Rule 3.212 provides guidelines for addressing whether a defendant is competent to proceed, where the defendant's competency is in question based on reasonable grounds. Rule 3.210(b), Florida Rules of Criminal Procedure, provides

that the court may set a hearing and order a competency determination if it “has reasonable ground to believe that the defendant is not mentally competent to proceed....” Again, the facts do not suggest Appellant was incompetent and a formal hearing was not required. As the trial court stated *supra* at 46-47, competency was not at issue and appointing mental health experts and ordering the evaluations was a prudent decision by the trial court and counsel, made in an abundance of caution because Appellant wanted to plea to a serious offense. CSR 4605, ll. 17-25. Moreover, defense counsel stipulated to Dr. Meadows’ and Dr. Ginory’s reports finding Appellant competent, which were entered into evidence and advised that no additional testimony was needed, to which Appellant agreed. CSR 4603-05.

While the order appointing mental health experts included the language from Rule 3.212, statements on the record made it clear that the order for competency evaluations was triggered by Appellant’s intent to enter a guilty plea, not because any occurrence suggested Appellant’s incompetence. R 231-33. The trial court also included language from section 916.3012 (2016) Fla. Stat., enumerating the specific areas to be evaluated such as appreciation of the charges and possible penalties. *Id.* Mentioning that defense counsel suggested a competency evaluation “might be in order” is not premised upon their position that Appellant was incompetent. *Id.* The language in the trial court’s order simply mirrored the applicable rule and statute.

The State is cognizant of this Court's holding in *Mullens v. State*, 197 So. 3d 16, 37-38 (Fla. 2016), requiring a written order following a Rule 3.212 competency determination. In *Mullens*, the defendant's competency was at issue, necessitating a hearing and expert witness testimony. One of the three experts who evaluated Mullens found him incompetent. *Id.* at 22, 37-38. Appellant does not present the same circumstances because defense counsel did not challenge their client's competency and there was no adversarial posture. The evaluations were conducted as prudent measures, not because there was a bona fide or reasonable belief of incompetency; and no hearing was required. Therefore, because the procedural requirement of Rule 3.212 did not apply, no written order was required in this case and the trial court did not abuse its discretion.

ISSUE IV: APPELLANT'S DEATH SENTENCE WAS PROPORTIONATE.

Appellant claims that his death sentence is disproportionate because his is not among the most aggravated and least mitigated cases. IB 39. Appellant argues that his case was heavily mitigated primarily because of his fear of sexual assault, "under no circumstances should he have been housed with a sexual offender of children," and he was raised in a culture where male sexual abusers were killed in the streets, virtually as a matter of course. *Id.* Appellant misapprehends facts that, even if accurate, do not support a disproportionate sentence. The record unambiguously

shows that Appellant requested the move to Burns' cell, concealed the shank brought with him, tied Burns up and stabbed him 64 times, negating his claims of fear. Moreover, Appellant's case is heavily aggravated through findings of HAC, CCP, PVF and killing was committed while under a sentence of imprisonment, proven beyond a reasonable doubt. HAC, CCP and PVF are among the most serious and weightiest aggravators in Florida's sentencing scheme. The facts and findings in this case, as well as comparable capital cases, demonstrate that Appellant's death sentence was proportionate.

Appellant's capital sentence proportionality review is a comprehensive analysis to determine whether Burns' stabbing and drawn-out death "falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in . . . the sentence." *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) (quoting *Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003)). It is not a simple comparison between the number of the aggravating and mitigating circumstances, but is a "qualitative review" of the basis of each aggravator and mitigator. *Id.* The totality of the circumstances is considered and compared with other similar capital cases. *See Doty v. State*, 170 So. 3d 731, 744 (Fla. 2015).

In analyzing proportionality, it is not this Court's function to reweigh the mitigating factors against the aggravating factors, that is the trial court's function.

Snelgrove v. State, 107 So. 3d 242, 260-61 (Fla. 2012). The sentencing judge's determination as to relative weight given to each established mitigator will not be disturbed where the ruling is supported by competent, substantial evidence. *Gill*, 14 So. 3d at 964 (holding, weight given aggravating circumstances is within the discretion of the trial court and will not be disturbed absent abuse of discretion).

Appellant's case is heavily aggravated through findings of HAC, CCP, PVF and killing was committed while under a sentence of imprisonment. HAC and PVF are among the weightiest aggravators in Florida's sentencing scheme. *See Lynch v. State*, 841 So. 2d 362, 377 (Fla. 2003); *Hodges v. State*, 55 So. 3d 515, 542 (Fla. 2010). The Appellant's premeditated and planned killing is shown through orchestrating the move to the victim's cell and his advanced procurement of the weapon. After the victim touched him, the Appellant admitted to the inspectors that he set his mind in motion and took time to rip the bed sheet to make three ligatures to tie up the victim, illustrating his calm reflection. CTT 145-48. Appellant admitted that he wanted to punish the victim, he wanted the victim to suffer and he tied him up to see the fear in his eyes. CTT 141, 147-48, 153. After stabbing the victim 64 times and with great indifference to the victim's condition, Appellant refused to let anyone in the cell until his removal could be recorded, telling Capt. Hamilton he would let the victim die right there. CTT 155, ll. 11-16. The PVF aggravator was

proved in light of the stipulation between the parties and the Appellant's nine life sentences. R 2444-51, 4021-22. Although the trial court found numerous mitigating circumstances, including mental health mitigation, his death sentence is nonetheless proportionate when compared to other cases.

This Court has found several capital cases proportionate where defendants have a history of mental illness. Two cases, *Gill* and *Doty*, are substantially similar to Appellant's case in underlying facts, procedural history, proven aggravators and applied mitigators. *See also Rodgers*, 3 So. 3d at 1131, 1134 (death sentence proportionate when trial court found two serious aggravators (CCP and PVF) and defendant had an extensive history of mental illness and sexual abuse by his mother); and *Wall*, 238 So. 3d at 137-38, 145 (death sentence after guilty plea proportionate upon finding of HAC, CCP and PVF aggravators despite defendant's history of mental illness from a young age, numerous diagnoses including bipolar and antisocial personality disorders, abuse and early incarceration).

In *Gill*, this Court found the death sentence was proportionate despite the defendant's long history of mental illness. *See Gill*, 14 So. 3d at 965-66. Gill strangled his cellmate after being moved in with him. *Id.* at 952. Gill pled guilty to first-degree murder, waived a sentencing jury and the trial court considered mitigation on his behalf. *Id.* at 950. Comparable to Appellant, Gill had a long

history of mental illness manifesting in childhood, was diagnosed with antisocial and borderline personality disorders, had multiple suicide attempts, was institutionalized at a young age, was prescribed antidepressant and psychotropic medications and was evaluated for competency. *Id.* at 953, 957-58. Gill also suffered from a brain abnormality. *Id.*

Three strong aggravators were found in Gill's case, including the felony was committed by a person under a sentence of imprisonment, PVF and CCP. Two statutory mitigating factors were found, including Gill committed the murder under extreme emotional distress or mental disturbance and his ability to appreciate the criminality of his act was impaired. *Gill*, 14 So. 3d at 956-57. The *Gill* Court further stated, "[t]he existence of mental illness or mental mitigation does not automatically disqualify a defendant from receiving the death penalty." *Id.* at 965-66. The trial court in Appellant's case ruled similarly, that the heavily weighted aggravators outweighed non-statutory mitigation, including mental mitigation.

Doty is much like Appellant's case where the defendant was sentenced to death after pleading guilty to the stabbing death of a fellow inmate. *See Doty*, 170 So. 3d at 733. Doty planned the murder, procured the weapon and laid in wait to attack the victim. *Id.* at 734. Doty lured the victim into a room, tricked him into allowing his hands to be tied, and then choked and stabbed him repeatedly. *Id.*

Doty's trial court found three aggravators including PVF, that the capital felony was committed while under a sentence of imprisonment and CCP, and assigned great or very great weight. The aggravators were weighed against seven non-statutory mitigators, including a history of significant mental health issues. *Id.* at 735. Like Appellant, Doty carried diagnoses of major depressive disorder, PTSD, and antisocial personality disorder and he suffered physical and emotional abuse. *Id.* at 735-36. After weighing the three aggravators and mitigation presented, this Court determined the death sentence was proportionate.

This Court has found numerous capital cases and death sentences proportionate involving inmate on inmate murders, as well as the same or similar aggravators and mitigators. *See Globe v. State*, 877 So. 2d 663 (Fla. 2004) (strangulation death with a garrote and findings of same four aggravating factors as Appellant (HAC, CCP, PVF and committed under a sentence of imprisonment) and 11 non-statutory mitigating circumstances, including antisocial personality disorder and an abusive relationship with his parents, none of which were given more than slight/little weight); *Cox v. State*, 819 So. 2d 705 (Fla. 2002) (stabbing death and findings of four aggravating factors as Appellant (HAC, CCP, PVF and committed under a sentence of imprisonment) and 32 mitigating circumstances); and *Kilgore v. State*, 688 So. 2d 895 (Fla. 1996) (stabbing death and findings of two aggravating

factors (under sentence of imprisonment and PVF) and two statutory mitigating factors (extreme mental or emotional disturbance and capacity to conform was substantially impaired)).

Appellant's claim that Burns' murder is less aggravated because he allegedly feared sexual assault, feared future assault of children or that corrections officers were negligent by moving him is not persuasive and unsupported by the record. IB 39, 41-43. The record shows that Appellant was aware of Burns' criminal background, knew him in a prior institution and most importantly, requested to be moved into his cell. It cannot follow that if he genuinely feared contact with Burns, he would have requested to be moved in with him, ostensibly for legal help.

Also, the allegation that corrections staff "broke protocol" moving Appellant to Burns' cell upon his request which "directly contributed" to the murder is wholly unsupported. IB 39, 41-43. As stated above, RMC Capt. Hamilton testified that moving inmates upon request is permissible. CTT 42-45. Suggesting that corrections staff intentionally or even negligently moved a sexual assault victim into a sexual offender's cell is reaching at best. There is no evidence in the record to support this claim or that any information of Appellant's history with possible sexual offenders was known to corrections officers.

Appellant cites to *Morgan v. State*, 639 So. 2d 6 (Fla. 1994), *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990), and *Offord v. State*, 959 So. 2d 187 (Fla. 2007), to support his disproportionate claim. IB 42-44. These cases are unpersuasive and have very little or no comparable facts or circumstances to Appellant's case.

In *Morgan*, the defendant was 16 years old at the time of the murder, of marginal intelligence, unable to read or write, "committed the crime during a rage" and argued insanity as a defense. *Morgan*, 639 So. 2d at 8-9. The death was disproportionate and vacated in part because the trial court improperly rejected the following mitigating circumstances: the defendant's young age, extreme immaturity, low intelligence, and he sniffed gasoline and consumed alcohol in the past and on the day of the murder. *Id.* at 14. Appellant attempts to equate his own inhalant use decades before killing Burns to the mitigating circumstances contemporaneous with Morgan's inhalant and alcohol use on the day of his crime. IB 42-43. This is completely unpersuasive.

In *Nibert*, the defendant stabbed a drinking buddy and was sentenced to death upon the finding of the HAC aggravator, as the victim was stabbed 17 times and only the "possible" mitigation of an abused childhood was presented. *Nibert*, 574 So. 2d at 1061. Nibert's death sentence was vacated as disproportionate and remanded to impose a life sentence because the trial court should have found

additional mitigation including: (1) Nibert exhibited “‘a great deal’ of remorse and [had] a ‘good potential for rehabilitation’”; and (2) because he had been drinking heavily on the day of the murder, he was under the influence of extreme mental and emotional disturbance and his ability to control his behavior was substantially impaired. *Id.* at 1062-63. *Nibert* is unpersuasive because the trial court in Appellant’s case found as proven and assigned weight to more than 40 non-statutory mitigating circumstances. Moreover, Appellant’s case of four heavily weighted aggravators is far more significant than the single aggravator in *Nibert*.

Finally, the defendant in *Offord* killed his wife after “hear [ing] voices telling him to kill [her].” *Offord*, 959 So. 2d at 190-91. His death sentence was vacated as disproportionate where only the HAC aggravator was found, which did not outweigh two statutory mitigators and extensive documented mitigation. *Id.* at 190-91. *Offord* suffered from schizophrenia, where a person may not be grounded in reality, had a history of auditory hallucinations, bipolar disorder, and an alcohol and cocaine dependency. *Id.* at 189-91. In remanding *Offord*’s sentence to life imprisonment because it was not one of the most aggravated and unmitigated, this Court noted that the mental illness “significantly contributed to the murder.” *Id.* at 193.

This Court notably differentiated its decision in *Offord* from its analysis in *Wright v. State*, 19 So. 3d 277 (Fla. 2009). The *Wright* Court stated, when mental

health mitigation reveals a disturbed defendant, a death sentence has been vacated under appropriate circumstances, even where the HAC aggravator has been found. *Id.* at 304. However, it found Wright's death sentence proportionate where the trial court found three aggravators given great weight (CCP, PVF and murder was committed to avoid or prevent lawful arrest) and three statutory mitigating circumstances (Wright was under the influence of extreme mental or emotional disturbance, capacity to appreciate the criminality of his conduct and his age of 19 and the time of the crime). *Id.* at 303-04. The *Wright* Court soundly distinguished this type of case from *Offord*, as well as *Nibert*, because those cases found only one aggravator to support the death sentence. *Id.* at 304.

Appellant also argues that Doty's co-defendant William Wells' sentencing supports his disproportionality argument because Wells was sentenced to life imprisonment and not to death for his role. IB 40. This case is unpersuasive because this Court is not privy to the underlying facts or the reasoning behind the lesser sentence. According to *Doty*, Wells assisted to trick the victim into allowing his hands to be tied and "ensured that nobody else entered the room" while Doty stabbed the victim. *Doty*, 170 So. 3d at 734. A case where a less culpable co-defendant who received a lesser sentence, is not persuasive.

The cases cited by Appellant do not compare to his, where Burns' killing was heavily aggravated, supported by findings of HAC, CCP, PVF and committed while Appellant was serving nine life sentences. Of the four aggravators in Appellant's case, three are among the weightiest and were assigned great or very great weight. Unlike the cases Appellant cites, the trial court in his case found 49 mitigating circumstances and gave moderate weight to 9, some weight to 3; little weight to 7 and very little weight to 30. *See* Sentencing Order R 4305-43. Appellant put forth mental health mitigation, as well as several subparts related to his dysfunctional family and difficult upbringing in a depressed and violent area of Puerto Rico. However, the gravity of the aggravators, weighed against the mitigators, support Appellant's proportionate sentence when compared to similar cases.

ISSUE V: THE TRIAL COURT DID NOT IMPROPERLY REQUIRE A NEXUS BETWEEN MITIGATING CIRCUMSTANCES AND THE MURDER.

Appellant claims that the trial court improperly required a nexus to exist between mitigating factors and Burns' murder. IB 56. He challenges the trial court's findings in the sentencing order and disagrees with the weight assigned to these mitigators. *See* IB 59. This claim is meritless as the trial court found over 40 mitigators were proven and assigned weight, including those Appellant claims were subject to a nexus requirement. The trial court did not impose a nexus requirement,

but properly put Appellant's mitigation evidence in context as detailed in its sentencing order and gave appropriate weight to each mitigator found.

The State disagrees with Appellant's *de novo* standard of review, citing *Insko v. State*, 969 So. 2d 992, 997 (Fla. 2007). This is a factual issue regarding assignment of weight to mitigating circumstances, reviewed under an abuse of discretion standard. See *Fletcher v. State*, 168 So. 3d 186, 219 (Fla. 2015) (comments by the trial court explaining why mitigating circumstance warranted little weight was not an abuse of discretion), and *Lowe v. State*, 259 So. 3d 23, 61 (Fla. 2018).

A trial court may not "enforce a nexus requirement" between a mitigating circumstance and the crime that results in rejection of the mitigating circumstance. *Carr v. State*, 156 So. 3d 1052, 1066-68 (Fla. 2015). The trial court may, however, place a defendant's mitigation in context. *Id.* at 1067. In so doing, the trial court "may consider the connection or relationship between the mitigating circumstance and the murder." *Fletcher*, 168 So. 3d at 219. See also *Cox*, 819 So. 2d at 723, n. 15 (holding that trial court's statement that evidence of defendant's heightened anxiety does not support conclusions "as to how it contributed to Mr. Cox's decisions and actions that led to" the victim's death, did not enforce a nexus requirement, but attempted to place mitigation evidence in context); and *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) ("We therefore recognize that while a

proffered mitigating factor many be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case.”). This Court has consistently held, mere disagreement with the force or weight given to any given mitigator is insufficient to challenge a sentence. *Carr*, 156 So. 3d at 1067.

The trial court in Appellant’s case did not use a nexus requirement to reject valid mitigation, which is expressly prohibited by *Carr*. Similar to *Carr*, however, the trial court accepted all of Appellant’s challenged mitigators as proven and assigned weight ranging from very little weight to little weight. R 4317-36. Of the 34 mitigators Appellant challenges, the trial court found only one was not proven (XXIV – Defendant’s placement with his Aunt Maria). R 4324-25.

In Appellant’s case, the trial court found that the challenged mitigating circumstances were proven and were mitigating in nature and the trial court assigned appropriate weight. All of these actions are proper. *See, e.g., Fletcher*, 168 So. 3d at 218. It did not qualify its findings based on a nexus requirement. For example, mitigator XI on the Sentencing Order (Defendant’s Grandfather Was a Pedophile) was found to be “clearly established” that Appellant’s grandfather sexually abused female children in the family. R 4319. However, the evidence did not support that

Appellant was aware of sexual abuse of his aunts by his grandfather or experienced it himself. R 4319. Although the trial court stated there was no connection between this mitigator and Burns' murder, "very little weight" was assigned. The trial court's commentary shows that it put mitigation regarding sexual abuse in Appellant's family in context with the sexual overtones of this case. Had the trial court actually enforced a nexus requirement between the mitigator and the crime, the trial court would have found this is not mitigating in nature.

Moreover, the sentencing order's language is not dispositive. *See* IB 60. Appellant argues that the wording, "there is no connection" between the mitigators and the murder, proves the trial court employed a nexus requirement. *See* IB 57. This is a one-dimensional interpretation of the trial court's actions. When read together and in context, the trial court's consideration of a "connection" between the two was proper, precisely what this Court approved of in *Fletcher* and illustrated in the example of mitigator XI, above. Therefore, the trial court's assignment of weight to the mitigating circumstances was not an abuse of discretion.

ISSUE VI: THE TRIAL COURT PROPERLY DETERMINED THAT AGGRAVATING CIRCUMSTANCES OUTWEIGHED MITIGATION IN ORDER TO IMPOSE A DEATH SENTENCE.

Appellant claims that the trial court failed to determine that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

IB 61. Appellant argues that the existence of an aggravating circumstance must outweigh the mitigators beyond a reasonable doubt and this weighing procedure is an element of first-degree murder. This claim is meritless and unsupported by existing law as Florida’s capital statutory scheme does not enumerate the process of weighing aggravators against mitigating circumstances in a capital case as an element of the offense. Moreover, neither *Hurst v. Florida* nor *Hurst v. State* require that weighing aggravators against mitigators be determined beyond a reasonable doubt to support a death sentence. Because this is a purely legal issue, it is reviewed *de novo*. See *Taylor v. State*, 246 So. 3d 204, 206 (Fla. 2018).

The State’s discussion begins with *Hurst v. Florida*, 136 S.Ct. 616 (2016), a Sixth Amendment case which applied *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida’s sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty. *Hurst v. Florida*, 136 S.Ct. at 624. *Hurst v. Florida* did not address the process of weighing aggravating and mitigating circumstances, nor did it suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. The Supreme Court addressed the capital sentencing statute at issue in *Ring* in a similar manner.

In *Ring*, the Arizona statute required the judge to find the existence of an aggravator and then determine whether “there are no mitigating circumstances

sufficiently substantial to call for leniency,” before imposing a death sentence. *Ring*, 536 U.S. at 593, citing § 13-703(F) Ariz. Stat. (2001). This statute acted in two parts, where the first determination qualified the defendant for the death penalty and the second determination was one of mercy. Much like the *Hurst v. Florida* Court, the *Ring* Court did not hold that every determination listed in the statute must be found by a jury. Instead, it held that finding of a single aggravator must be found by a jury as it was the finding that was necessary for imposition of the death penalty. *Ring*, 536 U.S. at 604, 609. Notably, Justice Scalia stated in his concurrence that *Ring* “has nothing to do with jury sentencing,” explaining that the holding only says the jury must “find the existence of the *fact* that an aggravating factor existed.” *Id.* at 612 (Scalia, J., concurring) (emphasis in original).

Kansas v. Carr, 136 S.Ct. 633, 642 (2016), further clarifies that the Supreme Court never intended to mandate jury sentencing in *Hurst v. Florida*. Days after issuing its opinion in *Hurst v. Florida*, the Supreme Court rejected that the constitution requires a burden of proof attached to the finding of whether mitigating circumstances outweigh aggravating circumstances. The *Carr* Court noted,

Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one jury might consider mitigating another might not. And of course[,] the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that defendants must

deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Kansas v. Carr, 136 S.Ct. at 642.

Other courts have reached similar conclusions, including Alabama, Connecticut, Indiana, Mississippi, Nebraska, Nevada, and Ohio. *See State v. Mason*, 153 Ohio St. 3d 476, 483-84 (Ohio 2018) (“Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender’s guilt of the principal offense and any aggravating circumstances” and that “[w]eighing is not a fact-finding process subject to the Sixth Amendment.”) (emphasis and citation omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (“As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found.”); *Underwood v. Royal*, 894 F.3d 1154, 1186 (10th Cir. 2018) (declining to overrule prior precedent that an Oklahoma jury was not required to find that aggravation outweighed mitigation beyond a reasonable doubt because *Hurst v. Florida* did not compel such a finding) (*cert. denied*, *Underwood v. Carpenter*, 2019 WL 235099 (Mar. 18, 2019)); *Ex parte Bohannon*, 222 So. 3d 525, 532-33 (Ala. 2016) (*cert. denied*, *Bohannon v. Alabama*, 137 S.Ct. 831 (2017)); *State v. Rizzo*, 266 Conn. 171, 206 (Conn. 2003); *Leonard v. State*, 73 N.E.3d 155, 168-69 (Ind. 2017); *Evans v. State*,

226 So. 3d 1, 39 (Miss. 2017) (*cert. denied, Evans v. Mississippi*, 138 S.Ct. 2567 (2018)); *State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018); *Jeremias v. State*, 412 P.3d 43, 54 (Nev. 2018) (*cert. denied, Jeremias v. Nevada*, 139 S.Ct. 415 (2018)).

To impose a beyond-a-reasonable-doubt burden of proof on sufficiency and weighing would be tantamount to requiring jury sentencing. No case from the Supreme Court has mandated jury sentencing in a capital case and such a holding would require reading a requirement into the constitution that is simply not there. Further, nothing in this Court’s precedent or in section 921.141, Florida Statutes, compels imposing a burden of proof on the jury findings regarding sufficiency of the aggravators and the weighing of the aggravation and mitigation.

Appellant relies on *Perry v. State*, 210 So. 3d 630 (Fla. 2016), to argue that sufficiency and weighing are elements of capital murder that must be found for a defendant to be eligible for the death penalty. *See* IB at 62. He points to an excerpt in which this Court stated that “to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances....” *Perry*, 210 So. 3d at 640. *See* IB at 62.

Perry is perhaps unclear in explaining that the only finding the jury must make

for a defendant to be *eligible* for the death penalty is whether a qualifying aggravator has been proven. And it follows that such a finding must be proven beyond a reasonable doubt. The additional findings that must be made are steps in a process to determine whether death is appropriate, rather than qualifying determinations.⁷

This concept is reflected in this Court’s assertion in *Perry* that the burden of proof remains the same following *Hurst*. See *Perry*, 210 So. 3d at 638 (“We reject Perry’s argument that the burden of proof is inverted. The burden of proof is not inverted—the State still must prove the requisite facts beyond a reasonable doubt to establish the same elements as were previously required under the prior statute.”).

This Court fully clarified its intent regarding requisite findings in the standard jury instructions for capital sentencing proceedings. Following the instruction on

⁷ While Appellant argues that the trial court’s weighing procedure is an element of first-degree murder, it is the State’s position that weighing itself was never a part of the Sixth Amendment right to a jury trial addressed by the United States Supreme Court in *Hurst*. See, e.g., *Hurst v. State*, 202 So. 3d 40, 81-82 (Fla. 2016) (Canady, J., dissenting). The Court’s decision in *Hurst* was a narrow one and extended only to the findings necessary to render a defendant “eligible” for a death sentence. *Hurst v. Florida*, 136 S. Ct. at 624 (“Florida’s sentencing scheme, which required the judge alone to find the existence of **an aggravating circumstance**, is therefore unconstitutional.”) (emphasis added). The overwhelming weight of subsequent precedent from other courts applying *Hurst* does not support this Court’s expansive interpretation. See *Lotter*, 917 N.W.2d at 864 (“The plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances.”); *State v. Goff*, 154 Ohio St. 3d 218, 225 (Ohio 2018) (rejecting the defendant’s argument that “for Sixth Amendment purposes, the weighing of aggravating circumstances and mitigating factors is itself a factual finding necessary to impose a death sentence”). See also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 378-79 (2010) (“Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects.”).

finding whether aggravators are proven, the instruction reads,

If, however, you unanimously find that [one or more] of [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, *then the defendant is eligible for the death penalty*, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

Fla. Std. Jury Instr. (Crim.) 7.11. (emphasis added). Following the standard instruction's full explanation of how to make findings in mitigation, the instruction then explains the weighing process the jurors must conduct. The instructions explain that weighing is not a mechanical process and "[t]he law contemplates that different factors or circumstances may be given different weight or values by different jurors."

Fla. Std. Jury Instr. (Crim.) 7.11. These instructions fully illuminate the issue and demonstrate that the only determination the jury must make for the defendant to be eligible for the death penalty is whether a qualifying aggravator has been proven. All other determinations that the jury makes are steps in the process for determining whether the death penalty is appropriate.

The State proved each aggravator (HAC, CCP, PVF and that the killing occurred while under a sentence of imprisonment) beyond a reasonable doubt. R 4307-13. While Appellant waived a penalty phase jury and the requisite findings were made by the trial court, the language of the jury instruction and its intent is nonetheless informative. Simply, the same obligation is imposed upon a trial judge

as is imposed on the jury, to determine the sufficiency of aggravators.

In *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), this Court recently addressed the “elements of ‘capital first-degree murder,’” in the context of a bid for retroactive application of *Hurst* to Foster’s pre-*Ring* death sentence. *Id.* at 1251. Although these specific issues are not before this Court in Appellant’s appeal, the discussion regarding Florida’s capital sentencing scheme after *Hurst v. Florida* is relevant. The *Foster* Court stated, in order for a defendant to be sentenced to death, a jury must:

(1)unanimously find at least one aggravating factor beyond a reasonable doubt; (2) identify all aggravating factors that it unanimously finds beyond a reasonable doubt; (3) unanimously determine whether sufficient aggravating factors exist to impose a sentence of death; (4) determine whether any mitigating circumstances exist and unanimously determine whether the aggravating factors outweigh those mitigating circumstances; and (5) unanimously determine that the defendant should be sentenced to death.

Id.. The Court specially noted that these findings are only made after a defendant’s conviction. *Id.* More importantly, a conviction for first-degree murder, a capital offense, “solely consists of the jury having unanimously found the elements set forth in the substantive first-degree murder statute.” *Id.* at 1252.

In its sentencing order, the trial court clearly indicated that all aggravators in Appellant’s case were proven by the State beyond a reasonable doubt. R 4307-13. The trial court also clearly indicated that of 57 proposed mitigating factors, the defense proved 49, which were assigned weight ranging from very little weight to

moderate weight. R 4313-36. In so doing, the trial court fulfilled its obligations both substantively and procedurally. Hence, Appellant's unsupported argument which misinterprets Florida's statutory capital scheme fails.

ISSUE VII: THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR WAS PROVEN BEYOND A REASONABLE DOUBT.

Appellant claims that the State did not prove the cold, calculated and premeditated (CCP) aggravating factor beyond a reasonable doubt. IB 64. He argues even if Burns' killing was premeditated, his moral and legal justification precluded the trial court's finding of this aggravator. Appellant's acts and admissions refute this claim and render his alleged moral and legal justification baseless. This Court's review "is limited 'to ensuring that the trial court applied the correct rule of law and, if so, that there is competent, substantial evidence to support its findings.'" *Altersberger v. State*, 103 So. 3d 122, 126 (Fla. 2012) (quoting *Caballero v. State*, 851 So. 2d 655, 661 (Fla. 2003)).

Four factors are required to prove the CCP aggravator: (1) the killing was a product of cool calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit the murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the defendant had no pretense of

moral or legal justification. *See Eaglin v. State*, 19 So. 3d 935, 947 (Fla. 2009); § 921.141(6)(i), Fla. Stat. (2017). The focus of the CCP aggravating circumstance “is the manner of the killing, not the target.” *Oliver v. State*, 214 So. 3d 606, 616 (Fla. 2017) (quoting *Doorbal v. State*, 837 So. 2d 940, 961 (Fla. 2003)). *See also Campbell v. State*, 159 So. 3d 814, 830 (Fla. 2015) (CCP aggravator centers on the manner in which the defendant executed the crime). Legally sufficient evidence supporting a CCP finding includes advance procurement of a weapon, lack of resistance or provocation and the appearance of a killing carried out as a matter of course. *See Campbell*, 159 So. 3d at 830.

There is no question, this murder was cold, calculated and premeditated based on Appellant’s actions and admissions. Appellant did not immediately react after Burns allegedly touched him. Instead time passed before the stabbing began or the initial punch occurred. Appellant told the inspectors that he waited “about two minutes” before he began ripping the sheet to make the ligatures, “set[ting his] mind in motion” and planning what he was going to do. CTT 147, ll. 18-21; 148, ll. 1-6. Appellant admitted to the inspectors, he intended to “punish” Burns, to see “fear in his eyes,” wanted the victim to suffer and he “wanted to tie him . . . to knock him over. I tied him up and I’m going to kill him and that’s what I did.” CTT 141, ll. 15-19; 147-48; 153.

Appellant then spent 7-8 minutes ripping the sheet to make the three ligatures and to “gather everything” before he attacked Burns. CTT, ll. 145-46. Burns saw Appellant making the ligatures, but did not ask what he was doing or why he was doing it, indicating, nothing was amiss. CTT 146, ll. 8-11. Such deliberate planning to make and strategically use the ligatures was not a random thought which occurred while Appellant was in an emotional frenzy or a rage. Appellant did not commence the attack until right after corrections staff completed the evening rounds. CTT 33-34. Appellant took the time to tie up the victim and blindfold him. CTT 149-150. Once the stabbing began, Appellant described his intentions to inspectors “I punched all around, all around the neck and head. I tried to stab him in the face, in the eye, heart, chest, and back, and hand.” CTT 143, ll. 11-14.

Ample evidence also demonstrates that Burns’ killing was premeditated, as established by examining the circumstances of the murder and Appellant’s conduct. *See Middleton v. State*, 220 So. 3d 1152, 1171 (Fla. 2017). His advanced planning is evidenced by orchestrating the move to Burns’ cell, despite knowledge of his sexual offender status since their prior incarceration together in 2013. CTT 140, ll. 14-25; 1064-65, ll. 4-12. Appellant obtained the shank used to stab Burns and sharpened it before he was moved, either by procuring it or making it himself. CTT 144, ll. 12-21. Appellant took significant steps to conceal the weapon from both

corrections officers during the physical move to Burns' cell and from Burns himself, in an "ace" bandage tied around his leg. CTT 142-43. Once in Burns' cell and the touching event occurred, Appellant took his time preparing how he would "tie him up" with the three ligatures and was "going to kill this man." CTT 141, ll. 17-20.

Appellant's claims that he had a pretense of moral justification based on a purported fear of sexual assault, a fear that Burns would assault other children and the culture in which he was raised accepted killing and mutilating sexual offenders as matter of course. IB 64, 68. He also theorizes that corrections officers randomly moved him into Burns' cell in an unauthorized transfer and that Burns could have helped tie himself up. IB 65. Appellant's feigned repugnance and fear of sexual assault by Burns is directly contradicted by his knowledge of Burns' history as a sexual offender from their time together in another facility, and he still chose to be moved in with Burns. Appellant told inspectors he requested to be moved to Burns' cell and knew why Burns was in prison, further stating, "it ain't none [of] my business, you know what I mean? I'm just trying to get some help with my legal work." CTT 140, ll. 9-23. It begs the question, if Appellant was "fearful" of sexual contact from Burns, why did he ask to be put in his cell, if not to murder him? Appellant's thin justifications for the murder are negated by his careful and deliberate actions leading up to the stabbing.

Appellant's alleged fear for other children being sexually assaulted by Burns in the future does not justify this cruel murder. *See* IB 64. There was no immediate need to defend children from Burns, who was not scheduled for release for at least 15 years. The depraved and horrific manner in which Appellant committed this murder belies any hint of an altruistic, morally or legally justified act. Finally, blaming Burns' killing on a purported cultural norm learned during Appellant's upbringing where the brutal killing of sexual offenders was done as matter of course, is no basis for moral or legal pretense and borderlines on the absurd. IB 68. Accepting this reasoning would be tantamount to accepting vigilante justice and retaliatory killings.

This Court has upheld the application of the CCP aggravator in similar cases: *Doty*, 170 So. 3d at 737 (CCP assigned great weight where killing of a fellow inmate was planned and the victim was tied up); *Gill*, 14 So. 3d at 964; *Williamson v. State*, 511 So. 2d 289, 293 (Fla. 1987) (inmate defendant's argument that if he had not murdered fellow inmate, the victim would have killed someone else was rejected as a pretense of moral justification); *Tai A. Pham v. State*, 70 So. 3d 485, 498 (Fla. 2011) (legal sufficiency for CCP found where defendant procures murder weapon and killing carried out as a "matter of course"); and *Cox*, 819 So. 2d at 723-24 (CCP found in inmate stabbing victim to death for allegedly stealing from defendant).

Should the CCP aggravator be stricken, any error would be harmless because there is no reasonable possibility that it would have affected Appellant's sentence. *Middleton*, 220 So. 3d at 1172. Three remaining aggravators (HAC, PVF and that the killing occurred while Appellant was serving nine life sentences), which were given great weight or very great weight, would still have supported imposition of the death penalty. As competent, substantial evidence supports a finding that the CCP aggravator was proven beyond a reasonable doubt, this claim should be denied.

ISSUE VIII: THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATOR WAS PROVEN BEYOND A REASONABLE DOUBT.

Appellant also challenges the application of the especially heinous, atrocious or cruel (HAC) aggravator, claiming that the victim consented to be tied up by Appellant and therefore, was not in imminent fear at the beginning of the attack. IB 71. Appellant's argument is meritless and the evidence provides overwhelming support that Burns (1) was alive and conscious throughout the 64 stab wounds; (2) he suffered through excruciating pain and did not succumb to those injuries until 6 months later; and (3) he believed he would die. This Court's review of the HAC finding ensures that the trial court applied the correct rule of law and its findings are supported by competent, substantial evidence. *See Altersberger*, 103 So. 3d at 126.

The HAC aggravator is proper in "torturous murders — those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high

degree of pain or utter indifference to or enjoyment of the suffering of another.” *Hall v. State*, 107 So. 3d 262, 276 (Fla. 2012) (citation omitted). The focus should also be on the victim’s perception of the circumstances as opposed to that of the perpetrator. *Lynch*, 841 So. 2d at 369. The victim’s mental state may be evaluated for such a determination in accordance with common-sense inferences from the circumstances. *Id.* The evidence must demonstrate that the victim was conscious and aware of impending death and may be shown by the length of the victim’s consciousness and the fear and emotional strain suffered. *See Gosciminski v. State*, 132 So. 3d 678, 714 (Fla. 2013); and *Covington*, 228 So. 3d at 63.

Again, Appellant’s actions and his own words to RMC inspectors about the brutal attack unequivocally showed his desire to inflict incredible pain on Burns, depravity in wanting to see him suffer and utter indifference that Burns was alive and suffering throughout the attack. Appellant made alarming statements to inspectors that he wanted “to punish” Burns, he wanted to see him suffer and most chilling, that he wanted “to see the fear in his eyes.” CTT 147-48, 153.

Burns was alive, conscious and suffered immense pain through 64 stab wounds, with Appellant targeting his face, eyes, heart, chest and back. CTT 143, ll. 11-14. Many of the wounds were deep penetrating stab wounds on his front and back chest, a severe wound to his neck, and six deep wounds to his lungs. CTT 81;

178, ll. 14-21. Burns suffered unimaginable terror after being tied up, not just by his hands and feet, but Appellant used the third ligature to tie his hands and feet together. CTT 147, ll. 19-21. Appellant blind-folded the victim at some point because he did not see the reaction he was looking for. CTT 153, ll. 12-16. Burns was helpless to defend himself, which Appellant confirmed with inspectors, telling them Burns “never break free. He trying to, I guess. He broke the long one that was connected to the hands to the feet.” CTT 153, ll. 2-6.

Throughout the attack, Burns stated over and over, he was going to die, which were the first words he said to RMC emergency room nurse, Jeffrey Dukes. Mr. Dukes testified that Burns “genuinely believed he was going to die” and when he arrived at the cell to attend to Burns he said something akin to, “oh, my God, he killed me, I’m going to die.” CTT 189, ll. 4-7, 9. Capt. Finken recorded Burns’ dying declarations on video within minutes after the attack because he believed Burns would die. CTT 89, 94-97 (official transcript of Burns’ recorded statement). Even in his weakened state after the stabbing, Burns repeatedly asked for help and told Capt. Finken five or six times, he was going to die. CTT 82, 95. The first of these statements were made by Burns when he was still tied up in the cell. CTT 91. Capt. Finken testified that there was an enormous amount of blood in the cell and in his opinion, Burns was going to die. CTT 80.

Burns' awareness of his fatal condition and intense suffering did not end after the attack. The victim had six months of pain and time to contemplate his death, suffered from severe malnutrition resulting from the injuries to his abdomen and also suffered a stroke resulting from the stab wound near his spinal cord. CTT 208-10. Dr. Hamilton also testified that there were no pathological findings and no medical reasons that Burns was unable to perceive pain after his stroke. CTT 212-13.

Incredulously, Appellant disputes that Burns experienced and suffered pain before his death six months after the stabbing attack. IB 72. A rational and reasonable person could infer not only did Burns endure pain, it was likely unimaginable. Documenting Burns' extreme pain while in the hospital, medical records noted his pain description was "ten out of ten." CTT 180, ll. 4-8. Dr. Lottenberg noted, Burns "was at an extreme level of pain and discomfort and required all of the aggressive support with pain medicine we could give him." CTT 181, ll. 8-12. Dr. Lottenberg stated, Burns "succumbed numerous times in the emergency department and in the operating room and yet managed to live through all of that." CTT 178, 14-21. The medical team operated on Burns for 3½ hours, had difficulty controlling the bleeding and used 40 pints of blood and blood products, which is the equivalent of full blood volume 10 times over. CTT 179. Burns returned to the operating room several times to "continue controlling and repairing

and closing all of these wounds.” CTT 180, ll. 9-14. Burns was totally bedridden from the time of his injuries and suffered penetrating wounds of the chest, abdomen and central nervous system, resulting in profound blood loss. CTT 207, 210.

With utter indifference to Burns’ suffering and while he was still tied up on the cell floor, bleeding to death, Appellant refused to leave the cell or turn the weapon over to corrections officers until a camera was brought to document his extraction. CTT 55-56; R 1489. Sgt. Kelvin Young testified that Appellant was “pretty calm when he made a demand about the camera. It wasn’t nothing.” CTT 56, ll. 3-7. Appellant told the inspectors, “I told captain, you gotta turn on the camera or I ain’t gonna come out of my cell. [Burns] gonna die in here.” CTT 155, ll. 13-17. Appellant also told inspectors he did not try to get the corrections officers’ attention after the attack because “I leave the mother fucker right there to bleed to death. . . . I’m going to let him die.” CTT 147, ll. 10-15. Appellant was more concerned about officers documenting his removal and taking a shower to get Burns’ blood off of him, than whether Burns lived or died. CTT 114, 121, 155.

This Court specifically noted, “[w]e have consistently upheld the HAC aggravator where the victim was repeatedly stabbed.” *Marquardt v. State*, 156 So. 3d 464, 488 (Fla. 2015) (citing *Francis v. State*, 808 So. 2d 110 (Fla. 2001)). *See also Guardado v. State*, 965 So. 2d 108, 116 (Fla. 2007) (HAC proper where victim

was repeatedly stabbed); and *Duest v. State*, 855 So. 2d 33, 45 (Fla. 2003) (HAC found where victim was attacked while lying on a bed, suffered 12 stab wounds and massive blood loss, and was in tremendous fear and pain).

Whether Burns consented to being tied up has no bearing on whether the HAC aggravator was proven, as Appellant suggests. If Burns consented to be tied up before the stabbing, one could logically presume that Appellant tricked or somehow convinced him to it. *E.g.*, *Doty*, 170 So. 3d at 734. If on the other hand, Burns was tied up by force, given Appellant's admissions that he wanted Burns to suffer and he wanted to see the fear in Burns' eyes, the HAC nature of this crime is still supported. In either event, the HAC circumstances are evidenced in the record and it was properly applied.

Should the HAC aggravator be stricken, any error would be harmless because there is no reasonable possibility that it would have affected Appellant's sentence. *Middleton*, 220 So. 3d at 1172. Three weighty remaining aggravators, including CCP, PVF and that the killing occurred while Appellant was serving nine life sentences, were each given great weight or very great weight. These three serious aggravators would still support the imposition of the death penalty.

Burns' suffering and acute awareness of his impending death are unquestionably established by the facts in this case which in turn, support the trial

court's finding that the HAC aggravator was proven beyond a reasonable doubt. *See Cox*, 819 So. 2d at 720. This Court has ample competent, substantial evidence showing that the trial court found the HAC aggravator was proven beyond a reasonable doubt and this claim should be denied.

ISSUE IX: APPELLANT'S GUILTY PLEA TO THE CAPITAL CRIME OF FIRST-DEGREE MURDER RENDERED HIM ELIGIBLE TO BE SENTENCED TO DEATH.

Appellant claims that his guilty plea to first-degree murder was punishable by a maximum sentence of life imprisonment and he was not eligible to be sentenced to death. He argues that the grand jury should have determined all of the elements to "support a capital murder indictment" and the true bill should have contained findings of sufficient aggravating circumstances. IB 75. This claim fails because the presence of aggravating factors in a capital scheme make one *eligible* to receive a death sentence and are not elements of the criminal act itself. Because this is a purely legal issue, it is reviewed *de novo*. *See Taylor*, 246 So. 3d at 206.

This Court's holding and supporting discussion in *Foster* are dispositive of this claim, where that Court rejected a similar claim that a "capital first-degree murder" conviction required not only the statutory elements for murder, but the specific unanimous penalty findings required by *Hurst*. *Foster*, 258 So. 3d at 1251. *See also Rivera v. State*, 260 So. 3d 920, 927 (Fla. 2018) (acknowledging that *Hurst*

penalty phase findings are not elements of the capital felony of first-degree murder). Florida law prohibits first-degree murder, which by definition is a capital crime and to which Appellant pled guilty. *Foster*, 258 So. 3d. at 1251-52.

The *Foster* Court recognized that the findings required to impose the death penalty are separate and distinct from a criminal conviction for first-degree murder. *Foster*, 258 So. 3d at 1252. If a jury makes these findings, it does so only *after* a unanimous conviction of the capital crime of first-degree murder, delineated in section 782.04, Florida Statutes. *Id.* The *Foster* Court held that because the crime for which Foster was convicted, the crime of first-degree murder, is defined by Florida Statutes, the process satisfies due process. The conviction stands alone, regardless of whether the death penalty was imposed or not. *Id.* A separate penalty phase to determine punishment and sentence is required upon conviction. Conviction of the substantive crime must occur before and independently of the penalty phase findings required by *Hurst*. *Id.*

Appellant's argument that his plea colloquy did not contain an admission to an aggravating factor as an element of the crime charged is meritless and his guilty plea does not change the impact of *Foster*. Appellant knowingly, intelligently and voluntarily pled guilty to the statutory crime of first-degree murder. The trial court's acceptance of his plea to first-degree murder under Florida Statutes § 782.04(1)(a)

(2016), served as his conviction. It was his decision and his decision alone to forgo a trial by jury. Upon his conviction, Appellant waived a jury for his penalty phase, but presented mitigation testimony and evidence to the trial court. It then became the State's burden to prove sufficient aggravating factors beyond a reasonable doubt, in order for Appellant to be eligible for the death sentence. Therefore, Appellant's claim that he did not plead guilty to a death penalty-eligible crime is wholly without merit and should be rejected by this Court.

ISSUE X: THE TRIAL COURT PROPERLY APPLIED FLORIDA'S DEATH PENALTY SCHEME.

Appellant claims that the State was precluded from seeking the death penalty and the trial court erred by denying his motions to strike the State's notices of intent to seek the death penalty following the United States Supreme Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016). IB 77. Appellant argues that *Hurst v. Florida* rendered Florida's death penalty statute unconstitutional and he did not plead guilty to a death-eligible crime, warranting remand of his case and imposition of a life sentence. IB 78. These arguments are meritless and should be rejected because (1) *Hurst v. Florida* addressed a Sixth Amendment procedural error regarding jury findings required to impose a death sentence; (2) it does not apply to Appellant where he knowingly, intelligently and voluntarily pled guilty to first-degree murder and subsequently waived a penalty phase jury; and (3) Appellant was

properly sentenced under the procedural scheme which was in place at the time. Because this involves a pure question of law, this Court reviews the issue *de novo*. See *Taylor*, 246 So. 3d at 206.

While Appellant does not make a traditional *Hurst*-based claim, he nonetheless seeks relief on its effect on Florida's death penalty sentencing scheme. However, changes in the statute following *Hurst v. Florida* were procedural in nature and did not affect the substantive crime charged, which was based upon a defendant's conduct. See *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (determining that *Ring*, 536 U.S. 584, was a procedural rule and did not establish a substantive constitutional change in the law, altering "the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment"). Since the Supreme Court held that *Ring* did not create a substantive constitutional rule and *Hurst v. Florida* is simply an extension of *Ring* to Florida's sentencing scheme, *Hurst v. Florida* is likewise procedural in nature.

In *Evans v. State*, 213 So. 3d 856 (Fla. 2017), this Court settled the question of whether the revised statutory scheme following *Hurst v. Florida* (Chapter 2013-13, the "Act"), could be constitutionally applied to pending cases. See also *Perry*, 210 So. 3d 630. The *Evans* Court determined that the Act "can be applied to pending

prosecutions because ‘most of the provisions of the Act can be construed constitutionally and [can] otherwise be validly applied to pending prosecutions.’” *Evans*, 213 So. 3d at 859 (citation omitted). Chief Justice Labarga’s concurrence in *Evans* is informative stating, the “judicial branch has an obligation to ‘uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.’” *Id.* at 860 (Labarga, C.J., concurring) (quoting *Ray v. Mortham*, 742 So. 2d 1276, 1280 (Fla. 1999)). Chief Justice Labarga concluded with “[f]urther, capital prosecutions are able to proceed in the absence of the stricken subsection. . . . I believe there is no substantial or relevant difference between the operation of the statute with the offending subsection and the operation of the statute without it.” *Id.*

Appellant’s decisions and actions to kill Burns dictated his charge to the crime of first-degree murder, to which he knowingly, intelligently and voluntarily pled guilty. This plea made him eligible to be sentenced to death. This Court has consistently held that *Hurst*-related claims may not be brought by one who waives his Sixth Amendment right to jury factfinding by entering a guilty plea to first-degree murder or who waives a penalty phase jury. *See Mullens*, 197 So. 3d at 39-40; *Robinson v. State*, 260 So. 3d 1011, 1016 (Fla. 2018); *Twilegar v. State*, 228 So. 3d 550 (Fla. 2017); and *Lynch v. State*, 254 So. 3d 312, 320 (Fla. 2018).

Appellant’s penalty phase and sentencing were separate and apart from his guilt phase. This procedural process was constitutionally conducted within Florida’s statutory framework for the capital crime of first-degree murder and subsequent sentencing proceedings. As this Court has held, Appellant cannot “subvert the right to jury factfinding” by waiving his rights and then suggest “that a subsequent development in the law has fundamentally undermined his sentence.” *Mullens*, 197 So. 3d at 40. *See Rodgers*, 242 So. 3d at 278. Therefore, this claim is without merit and should be rejected.

STATEMENT ON SUFFICIENCY OF THE EVIDENCE

Although Appellant does not challenge the sufficiency of the evidence in this case, this Court has a mandatory obligation to independently review the legal sufficiency of the evidence in every death penalty appeal. *See Robertson v. State*, 187 So. 3d 1207, 1218 (Fla. 2016). When the conviction is based on a guilty plea rather than a verdict of a trier of fact, the Court reviews the issue of whether the guilty plea was knowingly, intelligently and voluntarily entered. *Id.* *See also Altersberger*, 103 So. 3d at 128-29.

Qualified mental health experts found Appellant competent, taking his history of mental illness and self-harm behavior into consideration. R 220-25, 226-30. Appellant exhibited an understanding of the proceedings, consequences of his

decisions and a present ability to assist his legal counsel. R 200-02, 220-25, 226-30. His cognitive abilities led to a discussion of *Hurst* with Dr. Ginory during her evaluation. R 228. Drs. Meadows' and Ginory's conclusions of Appellant's competency were not challenged by his defense team. CSR 4604. Following the competency evaluations, the trial court and defense counsel conducted extensive inquiries with Appellant, confirming his knowledge and understanding of the charge against him, his legal and constitutional rights, the consequences of his guilty plea and waiving a penalty phase jury. CSR 4588-95, 4595-4603.

The record contains overwhelming and incontrovertible evidence to support a conviction of first-degree murder, his plea notwithstanding. Appellant admitted to the stabbing and wanting to kill Burns; he requested to be moved into Burns' cell; Appellant obtained and concealed the weapon used to stab Burns prior to the move; the two men were together in a secure cell when Burns allegedly touched Appellant's buttocks and had an erection; Appellant spent 7-8 minutes making three ligatures used to restrain Burns; Appellant then punched Burns to subdue, blindfold and tie him up; Appellant admitted to stabbing the victim; and Burns died as a direct and proximate consequence of the massive injuries he sustained from 64 stab wounds Appellant inflicted on him. These facts, coupled with Appellant's knowing, intelligent and voluntary plea to first-degree murder, demonstrate that the conviction

and sentence should be upheld and affirmed by this Court.

CONCLUSION

Appellant was competent to enter a knowing, voluntary and intelligent guilty plea and his conviction and death sentence were supported by competent substantial evidence. Therefore, Appellee, the State of Florida, respectfully urges this Court to affirm the conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Assistant Public Defender Megan Long, Counsel for Appellant, Angel Santiago-Gonzalez, via the Florida Courts E-Filing Portal at megan.long@fldpd2.com, this 7th day of June, 2019.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Rule 9.100, Florida Rules of Appellate Procedure.

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