IN THE SUPREME COURT OF FLORIDA

ANGEL SANTIAGO-GONZALEZ,

Appellant,

Case No. **SC18-806**

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is a direct appeal from a judgment of guilt for first-degree murder and a sentence of death for Angel Santiago-Gonzalez. Against the advice of his attorneys, Mr. Santiago-Gonzalez entered an open plea of guilty to first-degree murder and waived a penalty phase jury. This case arose when an inmate with mental health issues killed a fellow inmate, a convicted sexual offender against children, hours after a prison guard made an unauthorized transfer to place the men in the same cell. This Court has mandatory jurisdiction. Art. V, Section 3(b)(1), Fla. Const.

Judge David P. Kreider presided over all proceedings in the circuit court for the Eighth Judicial Circuit in Union County. Mr. Santiago-Gonzalez will be referred to by his proper name, Appellant, or Defendant. The State of Florida was the prosecution below and will be referred to as "the State". The record on appeal consists of all filings with the clerk of court, exhibits, and the majority of the pretrial motion hearings. It will be referred to as "R". The corrected trial transcript will be referred to as "T". The corrected supplemental record contains a transcript of the final motion hearing and the change of plea hearing. It will be referred to as "S". Each record citation will be followed by the appropriate page numbers in parenthesis.

STATEMENT OF THE CASE

Nature of the case:

This Initial Brief concerns: (1) whether the trial court deprived Mr. Santiago-Gonzalez of substantive and procedural due process by accepting his open plea of guilty and waiver of a penalty phase jury while incompetent; (2) whether the trial court erred in failing to sua sponte order new competency evaluations before the penalty phase after receiving new evidence suggesting Mr. Santiago-Gonzalez's incompetency; and (3) whether the trial court erred by failing to enter a written order of competency.

This appeal raises seven issues as to the penalty phase: (4) whether death was a disproportionate punishment; (5) whether the trial court improperly required a nexus between most of the mitigating factors and the crime; (6) whether the trial court erred in not finding the aggravating factors outweighed the mitigating factors beyond a reasonable doubt; (7) whether the State proved the cold, calculated, and premeditated ("CCP") aggravating factor beyond a reasonable doubt; (8) whether the State proved the especially heinous, atrocious, and cruel ("HAC") aggravating factor beyond a reasonable doubt; (9) whether Mr. Santiago-Gonzalez was eligible for the death penalty where the indictment did not allege an aggravating factor; (10) and whether the State could seek the death penalty in this case because there was not a constitutional death penalty law in Florida at the time of the indictment.

Course of proceedings:

On November 24, 2014, the State filed an indictment for first-degree premeditated murder for the death of Donald Burns. (R-57-58) Donald Burns died on July 3, 2014, of complications from injuries sustained when Mr. Santiago-Gonzalez stabbed him months earlier in the cell where they were temporarily housed. The State filed a notice of intent to seek the death penalty on January 15, 2015. (R-73) The trial court ordered competency evaluations on June 20, 2016, after Mr. Santiago-Gonzalez expressed his desire to plead guilty. (R-200-202) The court accepted his open plea of guilty to first-degree murder and waiver of a penalty phase jury on August 15, 2016. The court made an oral finding of competency during the plea colloquy, after ruling that a competency hearing would not be held because "competency is not at issue". (S-4605) The penalty phase trial took place throughout February of 2018.

Disposition in the lower tribunal:

On April 13, 2018, the trial court imposed the death penalty. (T-1254) It contemporaneously filed a written sentencing order. (R-4305-4343) Notice of Appeal was timely filed. (R-4366) The Office of the Public Defender was appointed for appeal. (R-4358-4359) This appeal follows.

STATEMENT OF THE FACTS

Guilt Phase

Mr. Santiago-Gonzalez initially pled not guilty to the murder of Donald Burns. (R-65) On June 23, 2016, the trial court issued an order in chambers appointing two experts for competency evaluations after Mr. Santiago-Gonzalez expressed his desire to enter an open plea of guilty at a case management conference the previous week. (R-200-202)

The court ordered the competency evaluations "after the Defendant's announcement that he wants to plead guilty to a capital crime against his attorney's advice and the defense attorney's suggestion that a competency evaluation might be in order under Fla. R. Crim. P. 3.210(b), and, further, the Court having reasonable grounds to believe that the defendant may be incompetent to proceed and that experts should be appointed to examine and evaluate this defendant." (R-200) The order directed the experts to include in their reports any factors they deem relevant, in addition to the ones specified in the order, *"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."* (emphasis in original) (R-201) A competency hearing date would be set by a separate order. (R-202)

Mr. Santiago-Gonzalez was 35 years old at the time of the competency evaluations. Dr. Almari Ginory evaluated him on July 6th. In his report, Dr. Ginory documented that he had reviewed the trial judge's order, a letter from an assistant public defender, and conducted an approximately 60-minute interview. (R-226) Dr. Ginory ultimately found Mr. Santiago-Gonzalez competent to proceed because he had "an adequate understanding of the proceedings and does have the ability to participate effectively in his own defense." (R-230)

Dr. William Meadows evaluated Mr. Santiago-Gonzalez nine days later. He diagnosed Mr. Santiago-Gonzalez with antisocial personality disorder and bipolar disorder. Mr. Santiago-Gonzalez was currently prescribed Clozapine, an antipsychotic medication. (R-222) His medical condition included head trauma from a gunshot wound in 2002. (R-222) Dr. Meadows concluded Mr. Santiago-Gonzalez's bipolar disorder was in remission and found him competent to proceed "based on the information available and the defendant's presentation". (R-224)

On August 15, 2016, Mr. Santiago-Gonzalez's defense confirmed at the change of plea hearing that he wished to enter an open plea of guilty and waive a penalty phase jury, against their advice. (S-4586-4587) The written petition to enter a plea of guilty was accepted by the court. The plea form documented that Mr. Santiago-Gonzalez was under medical treatment for self-inflicted physical injuries. It also documented Mr. Santiago-Gonzalez's current medications: Vistaril

and Celexa. (R-245) Vistaril is an anti-anxiety medication and Celexa is an anti-depressant. Both are classified as psychotropic medications. (T-1073)

Mr. Santiago-Gonzalez discussed the consequences of the plea on the record with his attorneys. He had changed his mind before about the plea, even since his last court date. (S-4593) He acknowledged that he had stated in the past that he just wanted to get it over with. (S-4594) He maintained that he was thinking clearly and would not change his mind again. (S-4593-4596)

After the defense tendered the plea agreement, the trial court began its colloquy. Mr. Santiago-Gonzalez participated with a Spanish interpreter. (S-4595-4603) He had previously told the court that he wanted the death penalty. (S-4598) When the court asked for a factual basis for the plea, the prosecutor reminded the court about the competency evaluations. (S-4603-4604) At that point, the defense stipulated to the admission of the two reports into evidence. The court had previously reviewed the reports. (S-4604)

The court stated that it had ordered competency evaluations because Mr. Santiago-Gonzalez had a history of mental illness and wanted to plead guilty. The court found that "competency has never been an issue in this case, but because of the seriousness of the offense, I went ahead and ordered Mr. Santiago-[Gonzalez] be evaluated." The court further stated that it had ordered competency evaluations because a fellow Judge in Union County (Judge Cates) had ordered competency

evaluations in a capital case, and the court had reviewed the order. The court ruled that it would not hold a competency hearing "since competency is not at issue." (S-4605)

The court made an oral finding that Mr. Santiago-Gonzalez was competent to knowingly, intelligently, and voluntarily enter a plea based on the doctors' reports, the court's interaction with him, and his trial attorneys' not expressing any concern about competency. In its oral finding, the court acknowledged Mr. Santiago-Gonzalez's history of mental illness. (S-4605) The court finished the plea colloquy, accepted the plea, and restated its oral finding of competency. (S-4606-4608)

Penalty Phase

Between the August 15, 2016 plea hearing and the start of the penalty phase in February 2018, Mr. Santiago-Gonzalez had numerous documented mental health issues. In an August 16, 2016 letter to the court, he claimed the mental health assistant warden was taking his legal mail and personal property. (R-249) A September 28, 2016, presentence investigation report ("PSI") documented he would kill again to receive the death penalty, and that he was "ready to go" and "tired". (R-269) The defense believed that the PSI was woefully undeveloped about his self-harming behavior. (R-4399)

Mr. Santiago-Gonzalez continued to compose handwritten letters to the court. In a letter dated October 11, 2016, he told the court he was hurting himself to try to get a discharge from a mental health treatment facility and he really wanted to "get over with this case". (R-278) He had been transferred to the facility in October 2015 and formally committed pursuant to a court order on October 21, 2016. (R-3848) On January 6, 2017, his psychiatrist diagnosed him with borderline personality disorder because of severe self-mutilation, anger, impulsivity, paranoia, mood swings, and feelings of emptiness. She found he was clinically incompetent to consent to treatment in a Baker Act[1] treatment report. (R-3848-3849)

On January 10, 2017, Mr. Santiago-Gonzalez wrote another letter to the court, asking for the penalty phase because he was ready to get it over with and receive a death sentence. It also expressed his desire to stop seeing his "psy doctor". (R-303-304) An April 2nd letter repeated these wishes. (R-309)

On July 12, 2017, the defense moved to strike the State's notice of death penalty, because the State was seeking the death penalty at the same time it was trying to protect Mr. Santiago-Gonzalez's life through involuntary civil commitment. The motion explained that Judge Bo Bayer had committed him for six months after the Union Correctional Institution warden had filed for a Baker Act commitment on July 5th. (R-321-323) The trial court denied the motion. (R-

[1] Florida's Baker Act law provides for court-ordered involuntary inpatient treatment for mental illness pursuant to Section 394.467, Florida Statutes.

366-367) Mr. Santiago-Gonzalez wrote the court again in August to express his desire for an immediate penalty phase. (R-353)

At a hearing on February 1, 2018, Mr. Santiago-Gonzalez confirmed his waiver of a penalty phase jury. The court found that his latest waiver was made freely and voluntarily. (S-4540-4542) The court then heard the defense's motion to house Mr. Santiago-Gonzalez in Union County at Reception Medical Center during the penalty phase trial. (R-206-207)

Assistant Warden Richard Lukens testified that Mr. Santiago-Gonzalez was housed there because it is a close management and mental health facility, with specially trained staff, for inmates with behavioral and mental health issues. Mr. Santiago-Gonzalez's mental health needs overtook security needs. He had daily meetings with mental health staff to provide adequate mental health care. (S-4549-4552) After the assistant warden's testimony, the court found:

> All right. After hearing the testimony here today and being aware of Mr. Santiago-Gonzalez having several medical emergencies while he's been in custody and that he is a [sic] maximum management at this point, and if not at Suwannee Correctional, he would be at FSP [Florida State Prison], I think DOC [Department of Corrections] is the best person to determine where it would be appropriate to house him.

(S-4458)

The presentation of evidence and simultaneous Spencer[2] hearing started five days later. The parties stipulated to Mr. Santiago-Gonzalez's prior criminal history. (S-4562-4563) The defense contested the CCP and HAC aggravating factors. The relevant testimony about the crime is as follows:

Captain William Hamilton (retired) was on duty on January 9, 2014, at Reception Medical Center, main unit. (T-29) At 9:30 PM, he made a routine visit to K dorm, a confinement unit. (T-29-31) Mr. Santiago-Gonzalez and Donald Burns were wearing boxers as they cleaned their cell. (T-42) About five to ten minutes later, Captain Hamilton received a call on his radio about banging noises. When he returned to the cell, it was very bloody and Mr. Burns was on the floor, apparently after being stabbed. (T-33-35) Mr. Burns was tied at the ankles and hands. Mr. Santiago-Gonzalez had a weapon. He refused to relinquish it until a video camera was present, a standard DOC protocol to document events where force is used. Once the camera arrived, he gave up the knife and was extracted from his cell. (T-37-39) He was calm and did not resist. (T-56-57) He said he was "not down with that homosexual shit" in reference to what had happened. (T-63) Officer James Reed recorded Mr. Santiago-Gonzalez saying "I ain't no fucking fag" twice. (T-66-70)

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

Mr. Burns was questioned on the videotape after he was removed from the cell, but before he was transported to the hospital. He gave conflicting statements about how he came to be tied up and stabbed. First, he said he did not know why Mr. Santiago-Gonzalez had stabbed him multiple times. Next, he said he let Mr. Santiago-Gonzalez tie him up, and that Mr. Santiago-Gonzalez had tried to rape him. After additional questioning by DOC staff, he denied letting himself be tied up. Mr. Burns reversed himself again and said that he did not know why he let himself be tied up, that he was a fool. He repeatedly expressed that he was going to die. After being told to be truthful by corrections staff, Mr. Burns at last said that Mr. Santiago-Gonzalez had held him down and tied him up out of spite. After the video recording was stopped, Mr. Burns expressed to staff that he did not want his mother to know what had happened in there. (T-94-97)

No additional statements were taken from Mr. Burns due to the loss of his ability to respond verbally. (T-126-127) He sustained nearly 50 stab wounds to his neck, chest, and abdomen. (T-177) He had a severe stroke after a neck wound was treated by a doctor. (T-180) He died from complications from multiple stab wounds about six months later. (T-199, 216)

Senior Inspector Jonathan Boone interviewed Mr. Santiago-Gonzalez at 12:30 A.M. (T-128) He appeared to be agitated about washing the blood off of himself, but he was otherwise respectful and appeared to understand what was

happening. (T-121-122) Mr. Santiago-Gonzalez waived his rights and answered questions. He said he was angry because Mr. Burns, with an erection, grabbed his rear end underneath his clothing. He was also angry because he knew Mr. Burns was a child molester. Mr. Santiago-Gonzalez talked about his own children, and how he did not want Mr. Burns to do this to other children. He repeatedly stated that he had been blind or blacked out, or lost his mind. (T-129-130)

In Senior Inspector Kevin Ortiz's videotaped interview, Mr. Santiago-Gonzalez said that he had asked an officer to transfer him to Mr. Burns' cell to get help with legal paper work. He knew Mr. Burns from Santa Rosa Correctional Institution. A few hours after the transfer, Mr. Burns started acting funny and "got his penis hard". As Mr. Santiago-Gonzalez cleaned the cell, Mr. Burns put his hand down his boxers, on his bare buttocks, and tried to grab his penis. Mr. Santiago-Gonzalez wanted to kill him. He used a knife tied to his left leg to stab Mr. Burns after knocking him over and tying him up. He blacked out due to anger and "psyche" medication. (T-140-144)

Mr. Santiago-Gonzalez said the corrections officer did not find his knife because he was not searched prior to the transfer. He planned to kill Mr. Burns because he was blind with anger after thinking about his children, and if Mr. Burns was doing the things he talked about doing on the street. He lost his mind when Mr. Burns "tried him". He ripped up a sheet to tie Mr. Burns up before knocking

him out. (T-145-146) He guessed that he said crazy stuff as he stabbed Mr. Burns: "Don't do that to me, you don't do this to nobody" and "you ain't going to touch no more kids out there." (T-152-155)

Inspector Ortiz testified that interviews and physical assessments are normally conducted of inmates before they are housed together, but the decision to pair Mr. Santiago-Gonzalez with Mr. Burns was not made by him or his office. (T-163-164) He never identified the corrections officer who made the decision to house them together. (T-169) The Department of Corrections knows that prisoners convicted of child sex offenses are despised in the prison community. (T-158)

Inspector Ortiz interviewed another inmate, Andrew Robles, who had heard from guards that Mr. Burns had molested two six-year-old boys. Mr. Robles knew that Mr. Burns had accused him, and Santa Rosa Corrections Institute guards, of sexual assault. Mr. Robles said that Mr. Burns talked about being a child molester. (T-159-163)

After evidence of the crime was presented to the court, the defense presented testimony from many of Mr. Santiago-Gonzalez's family members and other witnesses to provide mitigating evidence about his upbringing in a housing project in Puerto Rico so violent that the National Guard had to be deployed to restore order. These witnesses testified about the Luis Llorens Torres housing project, Mr. Santiago-Gonzalez's birth as the first of 11 children to a 15-year-old intellectually

disabled mother, abusive male family members, lack of supervision, poverty, hunger, physical abuse, sexual abuse, exposure to drugs and alcohol, juvenile commitment, lack of education, early mental health issues, and violent deaths of family members. (T-253-519) The defense also presented expert testimony about the impact of childhood trauma on Mr. Santiago-Gonzalez's brain functioning and his current mental health. (T-677-683); (T-952-968); (T-996-1002)

SUMMARY OF THE ARGUMENT

I. The trial court violated Mr. Santiago-Gonzalez's right to substantive and procedural due process under the federal and Florida constitutions by proceeding against him while incompetent. His mental condition was such that it precluded him from perceiving the plea proceedings accurately, and undermined his judgment and ability to make rational decisions regarding his defense. The trial court found that competency was "never" an issue during the plea colloquy and refused to hold a competency hearing, a position inconsistent with its order for competency evaluations. The trial court erred in accepting Mr. Santiago-Gonzalez's open plea of guilty and waiver of a penalty phase jury. As competency cannot reasonably be retroactively determined in this case, this Court must reverse Mr. Santiago-Gonzalez's involuntary plea and remand to the lower court.

II. The trial court failed to revisit the question of Mr. Santiago-Gonzalez's competency when presented with new information that raised reasonable grounds to question it. The trial court should have ordered new competency evaluations before the penalty phase, but it inexplicably proceeded despite new evidence of incompetency after the plea. This Court must reverse for a new penalty phase trial, where Mr. Santiago-Gonzalez will again have the opportunity to exercise his Sixth Amendment right to a unanimous jury to decide his sentence.

III. The trial court failed to enter a written order after it orally found Mr. Santiago-Gonzalez competent during the plea colloquy. At the very minimum, this case must be remanded to the trial court for the issuance of a nunc pro tunc written order of competency.

IV. A death sentence is a disproportionate punishment in this case. The prison killing, which was brought about by the unauthorized DOC transfer of Mr. Santiago-Gonzalez to the cell of a known sexual offender, is not among the most aggravated of murders. Donald Burns' videotaped statement just after the crime supported Mr. Santiago-Gonzalez's fear of sexual assault. Moreover, Mr. Santiago-Gonzalez's case was not among the least mitigated of murders, with extensive mitigating factors including childhood sexual abuse. This Court must reverse Mr. Santiago-Gonzalez's death sentence and remand for a life sentence to promote uniformity in the application of the death penalty.

V. The trial court erroneously required a nexus between the charged crime and almost every mitigating factor. The imposition of a nexus requirement caused the court to minimize Mr. Santiago-Gonzalez's mitigating factors and distorted its decision in favor of the death penalty. This Court must vacate Mr. Santiago-Gonzalez's death sentence and remand to the lower court for a new penalty phase trial where all mitigating factors are properly considered.

VI. The trial court's imposition of the death penalty must be reversed because the trial court only found that the aggravating factors far outweighed the mitigating factors. The finding that the aggravating factors outweigh the mitigating factors *beyond a reasonable doubt* is an element that must be proven to increase the penalty for first-degree murder from life in prison to the death penalty. Because the finder of fact did not making this finding with the correct burden of proof, Mr. Santiago-Gonzalez's death sentence must be vacated. The finder of fact must apply the correct burden of proof to this critical finding necessary to impose a death sentence at a new penalty phase trial.

VII. The State did not prove the cold, calculated, and premeditated ("CCP") aggravating factor beyond a reasonable doubt. Mr. Santiago-Gonzalez is entitled to a new penalty phase without this aggravating factor.

VIII. The State did not prove the especially heinous, atrocious, and cruel ("HAC") aggravating factor beyond a reasonable doubt. Mr. Santiago-Gonzalez is entitled to a new penalty phase without this aggravating factor.

IX. Mr. Santiago-Gonzalez was ineligible for the death penalty because he entered a plea to first-degree murder as charged in an indictment where the State did not allege an aggravating factor. An aggravating factor is required under Florida law to increase the punishment for first-degree murder from a life sentence to the death penalty. This Court must remand to the lower court to impose the only legal sentence: life without parole.

X. The trial court erred in failing to strike the State's notice of intent to seek the death penalty because Florida did not have a constitutional death penalty statute at the time it sought the death penalty for Mr. Santiago-Gonzalez. The Supreme Court of the United States declared Florida's death penalty unconstitutional in Hurst v. Florida, 577 U.S. ___ (2016).

ARGUMENT

I. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS, GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND BY ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION, WHERE HE ENTERED A PLEA WHILE INCOMPETENT.

Standard of review: "The trial court must consider all evidence relative to competence and its decision will stand absent a showing of abuse of discretion." Peede v. State, 955 So.2d 480, 497 (Fla. 2007) (citing Carter v. State, 576 So.2d 1291, 1292 (Fla. 1989)).

Preservation: This issue can be raised for the first time on appeal because it is a due process violation to hold criminal proceedings against a mentally incompetent defendant. Dougherty v. State, 149 So.3d 672, 676 (Fla. 2014). This Court has a mandatory duty to review the knowing, intelligent, and voluntary nature of the plea. Gill v. State, 14 So.3d 946, 958-59 (Fla. 2009) (citations omitted). "Under these circumstances, the proper review requires this Court to scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily." Id. at 959.

Merits: Mr. Santiago-Gonzalez was not competent to enter an open plea of guilty to first degree murder and waive a penalty phase jury, against the advice of his attorneys. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a defendant from being tried or punished for a crime if he is not competent. Drope v. Missouri, 420 U.S. 162, 172 (1975); See also Dougherty, 149 So.3d at 676. Proceeding against an incompetent person also violates Florida's due process guarantee. Art. 1, Section 9, Fla. Const. As Mr.

Santiago-Gonzalez's plea did not meet the constitutional due process requirements of being knowing, intelligent, and voluntary, this Court must vacate the plea.

A timeline of significant dates concerning competency is as follows:

Feb 11, 2016: Mr. Santiago-Gonzalez writes a letter to the court, asking for a trial regardless of the outcome and to complain that his lawyers are treating him like he is crazy. (R-101-103)

June 13, 2016: The docket reflects that a case management conference is held. (R-40)

June 20, 2016: The trial court issues an order in chambers appointing two experts for competency evaluations due to Mr. Santiago-Gonzalez's desire to plead guilty to a capital crime. (R-200-202)

July 6, 2016: Dr. Ginory conducts competency evaluation. (R-226-230)

July 15, 2016: Dr. Meadows conducts competency evaluation. (R-220-225)

August 15, 2016: Trial court finds Mr. Santiago-Gonzalez competent during his plea colloquy and accepts the open plea to first-degree murder. (S-4586-4608)

August 16, 2016: Mr. Santiago-Gonzalez writes the trial court to complain that the mental health warden is taking his property. (R-249)

September 28, 2016: The PSI report documents Mr. Santiago-Gonzalez's desire for the death penalty and self-harming behavior. (R-269)

October 21, 2016: DOC documentation reflects formal commitment date of Mr. Santiago-Gonzalez to a mental health treatment facility. (R-3848-3849)

January 6, 2017: Mr. Santiago-Gonzalez's DOC psychiatrist finds him clinically incompetent to consent to treatment. (R-3848)

July 5, 2017: DOC initiated a Baker Act proceeding against Mr. Santiago-Gonzalez. The defense files a motion to preclude the State from seeking

death at the same time it was trying to save his life through involuntary commitment. (R-321-323)

July 17, 2017: Mr. Santiago-Gonzalez has an outburst at a motion hearing and tells the court his attorneys lied to him and he does not want to wait to be sentenced. The defense argues a motion to the court to ensure that he does not try to restrict the presentation of mitigating evidence. The defense informs the court that he has been forced to take psychotropic medications. (R-4440-4441)

December 12, 2017: Mr. Santiago-Gonzalez is airlifted to a trauma center for treatment for self-harm. (R-3901-3902)

January 26, 2018: Mr. Santiago-Gonzalez is classified as mentally ill in a DOC petition for treatment order. (R-3899-3900)

February 1, 2018: The trial court hears testimony from an assistant warden that Mr. Santiago-Gonzalez is housed in a DOC mental health treatment facility with daily mental health care before ruling on the defense's motion on where to house him for the penalty phase. The trial court accepts Mr. Santiago-Gonzalez's continuing waiver of a jury for the penalty phase as voluntary. (S-4540-4558)

February 5-27, 2018: The penalty phase trial takes place.

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In determining competency, the test is whether the defendant has *"[s]ufficient 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."*(emphasis added) Hill v. State, 473 So.2d 1253, 1257 (Fla. 1985) (quoting Dusky v. United States, 362 U.S. 402 (1960)). This Court adopted the test set forth in Dusky to determine competency in its rules of procedure addressing competency. See Fla. R. Crim. P. 3.2111(a)(1).

The record contains ample evidence that Mr. Santiago-Gonzalez was unable to work with his lawyers with a rational degree of understanding about the consequences of a plea, and that he lacked a rational and factual understanding of what he faced. Simply put, he was too mentally ill to enter an open plea to first-degree murder and waive a penalty phase jury.

a. The State deprived Appellant of substantive due process by permitting him to enter an open plea of guilty to first-degree murder and waive a penalty phase jury while incompetent.

"The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting a mentally incompetent defendant." James v. Singletary, 957 F.2d 1562, 1569-70 (11th Cir.1992) (citing Dusky v. United States, 362 U.S. 402 (1960); Pate v. Robinson, 383 U.S. 375 (1966); Fallada v. Duggar, 819 F.2d 1564, 1568 (11th Cir. 1987)). This is a substantive claim of incompetency. James, 957 F.2d at 1572. Here, an incompetent defendant was proceeded against in a capital case even though he lacked sufficient ability to meaningfully consult with his attorneys about the implications of his plea and aid in the preparation of his defense. The trial court should not have accepted Mr. Santiago-Gonzalez's plea as knowing, intelligent, and voluntary.

The record shows that Mr. Santiago-Gonzalez was taking two psychotropic medications, Vistaril and Celexa, on the date that the court accepted his open plea. (R-245) The exceptions to physical and mental health documented on the plea

form were: “on mental health medications; under medical treatment for physical injuries (self-inflicted)”. He had changed his mind about entering the plea multiple times. (S-4593)

The competency evaluations ordered by the court each documented Mr. Santiago-Gonzalez’s mental illness. Dr. Ginory found that he suffered from bipolar disorder that was currently in remission. (R-229-230) The report notes his multiple hospitalizations for self-injurious behavior and suicide attempts while incarcerated; his most recent surgery for self-harm was three weeks prior the interview. (R-227) Dr. Ginory found that Mr. Santiago-Gonzalez met the criteria for recurrent, mild Major Depressive Disorder and Antisocial Personality Disorder. (R-229-230) His only in-person interaction with Mr. Santiago-Gonzalez was a single, 60-minute interview.

Dr. Meadows found Mr. Santiago-Gonzalez suffered from mood symptoms consistent with antisocial personality disorder. (R-221-222) Dr. Meadows noted in the “Relevant History and Background Information” section of his report that Mr. Santiago-Gonzalez has an eighth-grade level education obtained from special education classes in his native Puerto Rico, and previous intellectual testing reflected borderline intelligence. (R-221) Mr. Santiago-Gonzalez had two psychiatric hospitalizations in Puerto Rico for depression, and multiple admissions in prison for cutting his arms and suicide attempts. (R-221) The report diagnosed

him with antisocial personality disorder and bipolar disorder. He was currently prescribed Clozapine, an antipsychotic medication. (R-222) His medical condition also included head trauma from a gunshot wound in 2002. (R-222) The report concluded that his bipolar disorder was in remission and that he was competent to proceed. (R-224)

Despite the conclusions of competency reached by Dr. Meadows and Dr. Ginory, the medical records from Lake Correctional Institution reflect continued treatment for repeated instances of self-harm in 2016. Mr. Santiago-Gonzalez was observed with several foreign bodies inserted into his abdomen on January 21st. (R-677) On February 7th, the prison medical records document Mr. Santiago-Gonzalez's statement that he wanted to try to stop engaging in self-harm. (R-629) On February 8th, he was seen after inserting three objects into his abdominal cavity. (R-638) On February 17th, he reported for his daily assessment and said he had engaged in self-harm over the weekend to punish staff who he thought were playing mind games with him. (R-629)

On February 25th, he was observed with foreign bodies protruding from abdomen and remained at risk for self-harm. (R-605) On March 9th, he reported engaging in self-harm the day before, even though he has just returned from the hospital due to self-harm. He told the psychologist "he will be getting the death penalty and there is no reason to try anymore." (R-937) On March 16th , a judge

granted Lake Correctional Institution's request to place him in a mental health treatment facility for a period of up to six months. (R-563) The previous week, he had stuck an ink pen and paper clip into the side of his abdomen, and metal and plastic into a surgical site. (R-581) An essential treatment order request (submitted after the plea) noted that he started taking court-ordered psychotropic medications on July 20th. (R-3860) Thus, there is record evidence that Mr. Santiago-Gonzalez started a medication regimen less than a month before he entered the plea.

On this record, the judicial response to a mentally ill capital defendant turned Mr. Santiago-Gonzalez's plea hearing into a proceeding devoid of due process. The court's demonstrated willingness to go through the motions to determine competency in order to accept the plea does not comport with substantive due process. The court believed that it had met its obligation by merely ordering competency evaluations in an abundance of caution. By ordering competency evaluations in the first place, the court acknowledged that Mr. Santiago-Gonzalez's desire to enter an open plea was an indefensible legal position.

In Hill v. State, this Court held that the trial court failed to properly address competency in a capital case. 473 So.2d 1253 (Fla. 1985). In Hill, this Court vacated a death sentence after an appeal of a denial of post-conviction relief where the trial court did not properly address competency. Hill was diagnosed was grand

mal epileptic seizures five years before committing murder and he suffered from mental retardation. Id. at 1254. At trial, Hill exhibited unusual behavior, such as attempting to walk out of the courtroom, indicating his lack of appreciation of the nature of the proceedings against him. Id. at 1255. The defense reported that he had difficulty assisting the case in a normal manner. Id.

"Even if a defendant appears mentally alert at trial, it is not sufficient to eliminate the need for a hearing if other information brings a defendant's competency into question." Id. at 1257-58. A trial court cannot decide against holding a competency hearing prior to trial "[b]ecause the issue of competence was a judgment call to be decided by the defense attorney." Id. at 1259. This Court concluded that the trial court's failure to conduct a competency hearing before trial deprived Hill of his right to a fair trial based on its application of well-established constitutional principles of law. Id. at 1257-59.

Applying Hill to the instant case, the trial court failed to adequately address competency at the trial phase. The trial judge had knowledge of Mr. Santiago-Gonzalez's psychotropic medications, current treatment for self-harm, and wavering desire to plead guilty against his attorneys' counsel. The court relied on trial attorneys' lack of concern about competency, which was reversible error in Hill. Hill also makes clear that a trial court should take competency seriously even if the defendant appears mentally alert. In Hill, the controlling issue was the failure

to conduct a hearing on competency to proceed to the trial phase. Id. at 1260. This Court vacated Hill's conviction and sentence, and remanded to the lower court to proceed after his competency was determined. Id. The same outcome must happen for Mr. Santiago-Gonzalez.

The instant facts are distinguishable from a case where this Court found that a capital defendant, with a history of mental illness, entered into a knowing, intelligent, and voluntary plea. Gill v. State, 14 So.3d 946 (Fla. 2009). The trial court cited Gill as a basis for ordering competency evaluations. (S-4605) Gill strangled a cell mate and sought the death penalty after entering a plea and waiving a penalty phase jury. Id. at 950. Gill planned to kill a fellow inmate months before the victim's death to receive the death penalty because he did not want to serve a life sentence for a previous case. Id. at 952.

During the three years his case was pending prior to the entry of the plea, Gill sought numerous times to represent himself. Id. at 953. The trial court appointed five experts to evaluate Gill for competency. Id. The trial court reviewed all five current reports, plus the competency evaluations from his previous case. Id. The examinations and reports reviewed by the trial court spanned a five year period. Id.

The trial court held several hearings about Gill's physical brain anomaly and mental health. Id. The court also held a competency hearing and heard testimony

from three doctors, who all diagnosed Gill as competent to proceed. Id. About a year later, Gill withdrew his request to represent himself and the trial court reviewed another competency report by a doctor who found the question of his competency inconclusive. Id. at 954. Gill entered a plea and the trial court held a separate hearing to receive testimony about his brain malformation before imposing the death penalty. Id. at 955-56. At sentencing, the trial court stated that it relied greatly on the sentencing order from his previous murder case because that judge had access to a much greater amount of mental health information. Id. at 957.

In its mandatory review of the knowing, intelligent, and voluntary nature of the plea, this Court found that the trial court ordered extensive mental health evaluations of Gill, and reviewed the experts' reports and received testimony concerning his competence to stand trial before accepting the guilty plea. Id. at 959. In total, the trial court received examinations from five different doctors and their expert testimony. Id. at 960. The trial court conducted a plea colloquy, where Gill stated that he was not on any medication. He had not taken any of his prescribed mood-swing medication (lithium) that morning or the prior evening. Id. at 961. Given these facts, Gill was properly adjudicated competent and fully advised about entering his plea. Id. at 961-62.

The instant case is readily distinguishable from Gill. Here, the trial court announced on the record that competency was never an issue, a position directly at odds with its written order appointing experts for competency evaluations. It reviewed only two doctors' reports and heard no testimony because it ruled that it would not hold a competency hearing. The trial court did not rely on any mental health reports prior to the instant case or any other written medical records. Furthermore, it did not make a meaningful determination of competency before the plea colloquy, as the trial court did in Gill.

In another critical distinction, Gill was not on any psychotropic medications when he entered his plea. In contrast, Mr. Santiago-Gonzalez was taking Vistaril and Celexa, and the plea form documented current self-inflicted wounds. (S-4590) However, the trial court did not address the self-mutilation in its plea colloquy. The court was satisfied with Mr. Santiago-Gonzalez's assertion that he was thinking clearly, though he had changed his mind numerous times about entering the plea. Unlike Gill, this record does not support a finding that Mr. Santiago-Gonzalez knowingly, intelligently, and voluntarily entered his plea of guilty.

The trial court's reasons for finding competency included the defense attorneys' lack of expression of concern about Mr. Santiago-Gonzalez's competence at the plea hearing. (S-4605) However, ensuring a defendant's competence through an independent determination of competency is a non-

delegable duty of the trial court. See Dougherty v. State, 149 So. 3d 672, 677-78 (Fla. 2014) (a defendant cannot stipulate to competency because the trial court has an independent duty to make a determination of a defendant's competency to proceed).

Although criminal defendants are free to make unwise decisions against the advice of counsel, the record contains voluminous evidence that Mr. Santiago-Gonzalez suffered from mental illness, including suicidal thoughts and physical self-harm, which prevented him from making rational decisions regarding his defense and having the capacity to assist his attorneys before the plea. Notably, Mr. Santiago-Gonzalez entered an open plea in a case where he had some evidence of an affirmative defense (self-defense from sexual assault), which could have resulted in a jury verdict for a crime other than first-degree murder. In addition, he insisted on waiving a jury for the penalty phase, where he would have had the benefit of the latest capital statutory requirement of a unanimous jury to impose the death penalty. See Section 921.141 (2)(c), Fla. Stat. (2017).

Mr. Santiago-Gonzalez was incompetent throughout the guilt phase. He lacked sufficient capacity to assist in his defense, which led to the entry of a plea against his attorneys' advice. The trial court's acceptance of this involuntary plea was a violation of due process. No meaningful retroactive determination of competency for the 2016 plea can be made due to the passage of time, and as a

matter of law, "[a] hearing to determine whether a defendant was competent at the time he was tried generally cannot be held retroactively." Tingle v. State, 536 So.2d 202, 204 (Fla. 1988) (citations omitted). This Court must vacate Mr. Santiago-Gonzalez's involuntary plea, and remand for new proceedings after it has been determined that he is competent to proceed.

b. The State deprived Appellant of procedural due process when the trial court failed to hold a competency hearing.

The failure of the trial court to hold a competency hearing on its own initiative violates procedural due process rights under Pate v. Robinson, 383 U.S. 375 (1966). James v. Singletary, 957 F.2d 1562, 1569 (11th Cir. 1992). Florida has recognized the need for a trial court to ensure procedural due process by holding a competency hearing. If the State, or defense counsel, or the trial court has reasonable grounds to suggest that a defendant may not be mentally competent to proceed, then the court must conduct a competency hearing. See Fla. R. Crim. P 3.210(b); See also Tingle, 536 So.2d at 203 (the question for the trial court is whether the defendant *may* be competent, not whether he *is* incompetent). The trial court sua sponte ordered competency evaluations because Mr. Santiago-Gonzalez wanted to enter an open plea to first-degree murder where the State sought death. Therefore, the court had to hold a competency hearing.

The record shows that the trial court was intent on completing the plea colloquy. The court only superficially addressed Mr. Santiago-Gonzalez's competency when the prosecutor reminded the judge about the competency evaluations. At that point, the defense stipulated to the admission of the reports into evidence. The judge stated that he had read the reports prior to the hearing, but quickly ruled that he would not hold a competency hearing because competency was "never" an issue. (S-4604-4605) Thus, the court was not meaningfully considering whether Mr. Santiago-Gonzalez was competent to enter his plea. "Procedural due process requires adequate notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Jones v. State, 740 So.2d 520, 523 (Fla.1999) (quoting Boddie v. Connecticut, 401 U.S. 371, 378 (1971)).

At a competency hearing, the defense attorneys could have testified about their interactions with Mr. Santiago-Gonzalez and additional evidence could have been presented. The contents of the two reports could have been discussed and the court may have decided that additional competency evaluations were needed. At the very least, the court could have made additional observations of Mr. Santiago-Gonzalez. The court partially based its oral finding of competency on its interactions with Mr. Santiago-Gonzalez in open court. (S-4605)

In sum, the trial court denied Mr. Santiago-Gonzalez due process when it made a cursory competency determination in the middle of the plea colloquy. The

court's own words on the record reveal that it never considered Mr. Santiago-Gonzalez's competency a legitimate issue despite ordering him to be evaluated because of his desire to enter a plea. This Court must reverse the involuntary plea and remand to the lower court for new proceedings, provided Mr. Santiago-Gonzalez is found presently competent to proceed.

II. THE TRIAL COURT FAILED TO SUA SPONTE ORDER NEW COMPETENCY EVALUATIONS BEFORE THE PENALTY PHASE, WHERE REASONABLE GROUNDS EXISTED TO SUGGEST APPELLANT WAS INCOMPETENT.

Standard of review: Appellant adopts the standard of review in Issue I.

Preservation: As in Issue I, this issue may be raised for the first time on direct appeal.

Merits: The respective Due Process Clauses of the United States and Florida Constitutions prohibit a defendant from being tried or punished for a crime if he is not competent to be proceeded against. Amend. XIV, U.S. Const.; Article 1, Section 9, Fla. Const. Because Mr. Santiago-Gonzalez entered a guilty plea, the most critical proceeding in his capital case was the penalty phase. Yet, the trial court failed to order new competency evaluations before the penalty phase despite new evidence suggesting incompetency.

"Ensuring a defendant's competency is a *continuing obligation* of the court." Nowitzke v. State, 572 So.2d 1346, 1349-50 (Fla. 1990) (emphasis added). In

Nowitzke, the trial court failed to order a new competency evaluation after the defendant rejected a plea offer of a life sentence shortly before trial began because he said a judge in his dreams told him that he would be released, and he laughed at the possibility of a death sentence. Id. at 1349. The trial court should have held a second competency hearing because Nowitzke's reasons indicated a lack of rational thought process such that it was doubtful he could assist his attorneys or understand the proceedings. Id. at 1349-50.

As in Nowitzke, the trial court should have revisited the question of Mr. Santiago-Gonzalez's competency. After accepting the plea on August 15, 2016, the court moved forward with the penalty phase despite evidence that Mr. Santiago-Gonzalez was not competent to proceed. "Once a defendant is declared competent, the trial court must still be receptive to revisiting the issue if circumstances change." Hunter v. State, 660 So.2d 244, 248 (Fla. 1995). In Hunter, this Court emphasized the importance of "[m]aterially new" evidence of incompetency to find that a trial court erred in failing to hold another competency hearing after a defendant has been adjudicated competent. Id. The instant case is one in which materially new evidence was presented to the trial court to suggest incompetency. As described below, Mr. Santiago-Gonzalez was treated for severe mental health issues after he pled guilty on August 15, 2016.

As noted in the penalty phase statement of the facts, there is record evidence of incompetency starting the day after the plea. He wrote the court to accuse the mental health assistant warden of taking his property. (R-249) The PSI was completed in September 2016. Mr. Santiago-Gonzalez claimed he would kill again to receive the death penalty. (R-269) In October 2016, he wrote the court to say that he was hurting himself to get discharged from a mental health treatment facility where he had been formally committed. (R-278)

In 2017, Mr. Santiago-Gonzalez continued to experience mental health issues. On January 6, 2017, a psychiatrist at the mental health treatment facility found him *clinically incompetent to consent to medical treatment*. The report reflects a judicial commitment date of October 21, 2016. (R-3865-3866) It also documents his diagnosis of Borderline Personality Disorder and notes his severe and recurrent self-mutilation. (R-3848) In a defense motion dated July 12, 2017, the defense argued that the State could not seek the death penalty while it was trying to save his life by involuntarily committing him for psychological treatment under the Baker Act. Mr. Santiago-Gonzalez's last involuntary commitment took place on July 5, 2017, after two doctors opined that he was incapable of self-care. (R-321)

At a motion hearing on July 17, 2017, Mr. Santiago-Gonzalez's attorneys told the court he was being forced to take several psychotropic medications. (R-

4404) The trial court acknowledged that he was currently housed in a DOC mental health treatment facility. (R-4403-4404) The State argued that Mr. Santiago-Gonzalez undoubtedly had mental health concerns, but they were not the type to prohibit trial and execution. (R-4425) Mr. Santiago-Gonzalez had an outburst at the hearing, saying his defense attorneys had lied to him and he did not want to wait until February for sentencing, and he wanted to waive everything now. (R-4440-4441) The defense lawyers had to argue to the court that they, and not Mr. Santiago-Gonzalez, would be in charge of presenting mitigation. The attorneys' believed he might try to restrict the presentation of mitigating evidence. (R-4473-4478)

A mental health essential treatment order request dated December 13, 2017, documented bipolar disorder, mixed with severe with psychotic features. It also documented that Mr. Santiago-Gonzalez continued to engage in self-injurious behaviors, which required multiple emergency air-flights to trauma centers, most recently the day before. (R-3901-3902) A mental health treatment order was submitted on January 26, 2018, where he was classified as mentally ill. (R-3899-3900).

On February 1, 2018, just a few days before the penalty phase began, the trial court heard evidence from Assistant Warden Lukens that Mr. Santiago-Gonzalez was housed in a mental health unit, with daily mental health care from

specially trained staff. (S-4550-4552) Inexplicably, the trial court failed to order new competency evaluations, though it acknowledged "being aware of Mr. Santiago-[Gonzalez] having several medical emergencies while he's been in custody." (S-4558) The court instead focused on whether he would have physical access to his attorneys. The court continued to accept his waiver of a penalty phase jury as knowing and voluntary despite the new evidence suggesting incompetency. (S-4540-4542) Since the court received uncontested testimony that Mr. Santiago-Gonzalez required daily mental health care and had gone through several medical emergencies just before the penalty phase began, the court surely was on notice to order new competency examinations.

The trial court's prior oral finding of competency relied on the defense attorneys' lack of concern in making its adjudication of competency. Again, a trial court cannot abdicate its own duty to revisit competency to the defense attorneys—if the trial court has reasonable evidence that the defendant cannot understand the criminal proceedings, plan a defense, and assist his counsel, then it must revisit competency. "If, at any material stage of a criminal proceeding, the court of its own motion…has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition." Fla. R. Crim. P. 3.210(b). "At any time before or during trial of a criminal charge, the defendant's

irrational behavior, other abnormality of demeanor, and prior medical opinion or behavioral history may all be relevant and may be sufficient to call for further inquiry by the court on its own motion." Trawick v. State, 473 So.2d 1235, 1238 (Fla. 1985) (citing Drope v. Missouri, 420 U.S. 162 (1975); Lane v. State, 388 So.2d 1022 (Fla. 1980)).

After the close of evidence at the penalty phase trial, Mr. Santiago-Gonzalez continued to write letters to the court demanding the death penalty. (R-4138-4139); (R-4296-4297); (R-4302) The court did not view these letters because the parties had rested. However, they are potent reminders in the record of his ongoing mental illness. The court imposed the death sentence less than two months after he wrote these letters. (T-1253-1254)

This Court should find that the trial court failed in its continuing due process obligation to see that Mr. Santiago-Gonzalez received a penalty phase where he was competent to understand the proceedings and assist counsel. "Where a defendant is found to be incompetent after entering a plea of guilt, the adjudication and sentence imposed by the trial court is illegal and void." Perkins v. Mayo, 92 So.2d 641, 644 (Fla. 1957). Mr. Santiago-Gonzalez should have been found incompetent after he entered his plea, but the trial court failed in its duty to ensure competency for the penalty phase despite new evidence suggesting incompetency. This Court must vacate Mr. Santiago-Gonzalez's death sentence.

A new penalty phase is warranted, assuming Mr. Santiago-Gonzalez's present competency is legitimately evaluated and determined by the trial court. Once again, he will have the opportunity to exercise his Sixth Amendment right to have a jury unanimously decide whether he receives the death penalty.

III. THE TRIAL COURT FAILED TO ENTER A WRITTEN ORDER OF COMPETENCY.

Standard of review: This Court reviews whether the trial court made a determination of competency.

Preservation: The trial court made on oral finding of competency at the plea hearing. (S-4605)

Merits: Florida Rule of Criminal Procedure 3.212(b) provides that the trial "[c]ourt shall first consider the issue of the defendant's competency to proceed. If the court finds the defendant competent to proceed, the court shall enter its order so finding and shall proceed." In Dougherty v. State, this Court affirmed that the rule requires the trial court to enter a written order of competency as opposed to an oral pronouncement. 149 So.3d 672, 677 (Fla. 2014). "Additionally, this Court recently indicated that a trial court must delineate its findings regarding the competency of the defendant in the written order." Mullens v. State, 197 So.3d 16, 37 (Fla. 2016) (citing Dougherty, 149 So.3d at 676, 679). At the very minimum, this Court must remand for the trial court to enter a nunc pro tunc written order of competency.

IV. THE DEATH PENALTY IN APPELLANT'S CASE IS DISPROPORTIONATE.

Preservation: This Court must review the death sentence for proportionality. England v. State, 940 So.2d 389, 407 (Fla. 2006); see also Fla. R. App. P. 9.142(a)(5).

Standard of review: "The death penalty is reserved only for those cases where the most aggravating *and* least mitigating circumstances exist." Terry v. State, 668 So.2d 954, 965 (Fla.1996) (emphasis added). Accordingly, the Court considers the totality of the circumstances and compares the case with other capital cases. Id. (citations omitted)

Merits: This is not a death penalty case. Mr. Santiago-Gonzalez's death sentence is disproportionate because his case is not among the most aggravated *and* least mitigated of first degree murders. Mr. Santiago-Gonzalez was sexually abused as a child and raised in a culture where men who sexually abused children were killed in the streets. Child molesters were viewed as the worst of the worst in the Luis Llorens Torres housing project. Mr. Santiago-Gonzalez's upbringing and childhood trauma meant that under no circumstances should he be housed with a sexual offender against children. Yet, unidentified prison staff broke protocol and moved Mr. Santiago-Gonzalez into the cell of a known child sexual offender, which directly contributed to the charged offense. This Court's proportionality

analysis must lead it to vacate his death sentence and remand to the trial court to impose a life sentence to ensure uniformity in the application of the death penalty.

"The purpose of this Court's proportionality review is to 'foster uniformity in death-penalty law'". Tai A. Pham v. State, 70 So.3d 485, 499 (Fla. 2011). As the defense argued in closing, four jurors voted for a life sentence for a defendant who stabbed an inmate to death in prison. William Wells killed five people before he and another prisoner (Wayne Doty) tied up a third inmate and stabbed him to death out of a desire to receive the death penalty. (T-1244-1245) The Wells case happened at a correctional institution in neighboring Bradford County. Presumably, the jurors were from the same community that jurors in the instant case would have come from had Mr. Santiago-Gonzalez not waived the jury. Though the State sought the death penalty, William Wells is serving a life sentence because the jury did not see it that way. Four jurors found that life was the appropriate punishment. See Defense Exhibit 45a; (R-3963) Unlike William Wells, Mr. Santiago-Gonzalez had not killed anybody before the instant case.

In conducting a proportionality review, "[t]his Court conducts a two-pronged inquiry to 'determine whether the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders." Davis v. State, 121 So.3d 462, 499 (Fla. 2013) (citation omitted). "The analysis entails a

qualitative review of the underlying basis for each aggravator and mitigator." Id. at 499-500. Each prong of the analysis is discussed below:

a. Appellant's case is not among the most aggravated of first-degree murder cases.

Andrew Robles, a former bunk mate with Donald Burns, testified that Mr. Burns talked about his charges for sexual battery on minors. He also heard about Mr. Burns' crimes from other inmates. He believed Mr. Burns was joking about his charges. They did not get along. Later, he learned that Mr. Burns had accused him of starving him and forcing him to participate in homosexual activities. Mr. Burns accused three other people, including a ranking DOC officer, of the same thing. If Mr. Burns had tried to touch him when they were bunk mates, Mr. Robles believes he probably would have killed him. He probably would not have reported it to a guard because the guard probably would not have done anything. (T-920-924)

In Mr. Burns' own recorded words, he gave conflicting stories about how he came to be tied up and he did not want his mother to know what had happened. (T-94-97) Thus, there was evidence to support Mr. Santiago-Gonzalez's claim of fearing sexual assault from a known sexual offender while confined together in a small cell.

Furthermore, the death of Donald Burns in prison custody was entirely preventable. Two corrections officers from K dorm testified that they do not have

discretion to honor inmate verbal requests to be housed with specific inmates. They do not know why this transfer occurred in the afternoon on the day of the crime. Protocol requires approval from the chain of command. (T-667-671) The State's argument to the trial court that Mr. Santiago-Gonzalez's life sentences for previous crimes did not deter him from killing Mr. Burns ignores this fact.

This Court found that death was a disproportionate punishment where a victim was stabbed around 60 times, in a case where the defendant was not in fear of sexual assault. Morgan v. State, 639 So.2d 6, 14 (Fla. 1994). "Morgan was convicted of the brutal murder of a sixty-six-year old woman." Id. at 9. After entering her home, he crushed her skull with a crescent wrench and a vase and stabbed her approximately sixty times. Id. He also bit her breast and traumatized her genital area. Id. Numerous defensive wounds were found on her hands. Id. There, the trial court found the following aggravating factors: (1) committed during the course of an enumerated felony, and (2) HAC. Id. This Court found that death was disproportionate due to the mitigating factors of Morgan's young age (16 years old) and because he had a problem with sniffing gasoline. Id. at 14.

Though Mr. Santiago-Gonzalez was not a juvenile, the emphasis this Court placed on early drug use in Morgan applies to the instant case. Mr. Santiago-Gonzalez abused drugs, including sniffing inhalers, from a young age. In both cases, the victims were stabbed dozens of times. Unlike the instant case, Morgan

entered the victim's home. Here, Mr. Santiago-Gonzales was placed in a small cell with a sexual offender by DOC staff. Whether it was at his request, as the trial court found, is ultimately immaterial because the prison staff are in charge of the prison.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court found sufficient evidence to support the HAC aggravating factor but also found uncontroverted evidence that Nibert was a "[c]hild-abused chronic alcoholic who lacked substantial control over his behavior when he drank, and that he had been drinking heavily on the day of [the victim's] murder." Id. at 1063. This Court held the death penalty was disproportional in Nibert's case. Id. Nibert stabbed his drinking buddy 17 times. Id. at 1060. The mitigating circumstances in the instant case are far more compelling than in Nibert. Mr. Santiago-Gonzalez experienced physical, emotional, and sexual abuse as a child by male perpetrators, plus early exposure to drugs, and a culture where violence against sexual offenders was the norm. The trial court found that Mr. Santiago-Gonzalez suffered childhood sexual abuse by multiple perpetrators. (R-4320-4321); (R-4323) If he feared being touched by a male sexual offender, then everything in his background pushed him toward this outcome.

In Offord v. State, 959 So.2d 187, 193 (Fla. 2007), this Court found that the death penalty was disproportionate though "[t]here is no question that Offord

committed a brutal murder." In Offord, the 29-year old mentally ill defendant killed his wife by beating her with the claw end of a hammer. Id. at 188. "Offord stated that he hit [his wife] about fifty times with the hammer and that he believed he eventually broke her neck." Id. The trial court found that the HAC aggravating factor was proven. Id. at 191. However, Offord presented substantial mental health mitigation, including a history of lifelong mental illness and repeated institutionalization. Id. at 193. Significantly, the "[m]urder was unaccompanied by any motivation such as pecuniary gain or avoiding arrest." Id.

Similar to Offord, Mr. Santiago-Gonzalez suffered from mental illness as a child through adulthood, and was repeatedly incarcerated in Puerto Rican juvenile detention centers and various prisons. Certainly, he had no motive for pecuniary gain by killing Mr. Burns. He also knew he would not escape punishment. If any motive can be ascertained, it is the motivation to protect his body from sexual assault and to protect children from future sexual abuse. If Morgan, Nibert, and Offord were not among the most aggravated of first-degree murder cases, then neither is the instant case.

b. Appellant's case is not among the least mitigated of first-degree murder cases.

Mr. Santiago-Gonzalez's case is profoundly mitigated, with evidence of almost every kind of abuse and neglect imaginable. The defense presented

extensive mitigating evidence about Mr. Santiago-Gonzalez through family members, witnesses with knowledge of the housing project culture, and two psychologists.

I. Appellant's family members testified about his abusive childhood.

Mr. Santiago-Gonzalez's mother, Nilda ("Nildita"), was in special education as a child. His father, Radames Santiago-Medina, drank and cut himself on his arms. Nilda's home was filled with cockroaches and urine-soaked diapers. (T-262-265) The children were removed by social services. (T-268) Nilda had no rules, discipline, or educational materials for the children when they were in her home. (T-297-298) Mr. Santiago-Gonzalez did not have adult male role models, but he followed his cousin, Luis, when he was about 12 or 13 years old. (T-271)

Nilda is the youngest of 11 siblings. She had 11 children herself, and Mr. Santiago-Gonzalez is the oldest. She gave birth to him when she was 15. One of her sons was murdered. Social Services took eight of her children away, but Mr. Santiago-Gonzalez was living with his grandmother in a different unit of the housing project by then. (T-338-346) Nilda quit her special education classes in third grade, and stopped working so she could obtain more food stamps. (T-349) She acknowledged that Mr. Santiago-Gonzalez was hospitalized as a baby for malnutrition because she fed him macaroni and beef. (T-358) She also saw him purposely hit his head and throw himself on the ground when he was upset. (T-

365) He went to the United States after his cousin was killed during a gang war in the housing project. At one point, the National Guard had to be deployed to the housing project because of the gang war. (T-367-368) Mr. Santiago-Gonzalez was taken by force and beaten up, and if police had not intervened, the gang would have killed him. (T-383-384) She believes Mr. Santiago-Gonzalez currently needs a lot of help because he is not well in his head. (T-386)

Cousin Vilma Cruz-Gonzalez testified that Nilda did not cook for her children. They came to their grandmother's house when the food stamps ran out. The children were removed after a fire broke out in their house for the third time. Crack users would leave pipes in the home and start fires. (T-424-425) Nilda prostituted herself and continued to have children even after she acquired AIDS. (T-435) Omayra River Gonzalez, another sibling, recalled that Nilda never took her children to a dentist or doctor, though the children often ate candy and junk food. (R-2580) She believed men sexually abused Mr. Santiago-Gonzalez when he was a child. Men came into their home daily. Mr. Santiago-Gonzalez told her "it hurt him there" (his anus). She also saw red blood spots in his underwear when she cleaned the house. (R-2625-2626)

Damasa Gonzalez-Soto, his aunt, used to live in the housing project where Mr. Santiago-Gonzalez grew up. Mr. Santiago-Gonzalez's grandfather, Ignacio, was a violent alcoholic who sold bootleg liquor, made sexual advances to his

daughters, and served time in prison. (T-253-258) Maria Agosto, Nilda's niece, recalled that Mr. Santiago-Gonzalez was hit by his grandfather with belts and wires. (T-455) She also saw Mr. Santiago-Gonzalez with Guineo Pelao ("Peeled Banana"), who was known to try to have sex with children. (T-460)

Mr. Santiago-Gonzalez's uncle, Heriberto Gonzalez-Soto, lived in the Luis Llorens Torres housing project for 64 of his 70 years. (T-283) Ignacio was frequently violent and drunk when the grandchildren, including Mr. Santiago-Gonzalez, would visit on the weekends. (T-290) The housing project was dangerous in the 1980s-1990s, and still is today. There are always shootings and frequently there was street justice for pedophiles. (T-295-297)

Jesus Collazo ("Chu la Bruja") was a known child rapist who lived in the housing project. He gave children food and money before touching them. At nine years old, Mr. Santiago-Gonzalez ("Gordo") came back from an encounter with Chu la Bruja with blood in his pants. He never talked about what happened. (T-258-259) It would be frowned upon the housing project to speak about a male being sexually abused; he would lose credibility in the community. (T-509)

Rosa Gonzalez-Soto, Nilda's sister, provided similar testimony about Mr. Santiago-Gonzalez's parents and siblings. (T-330-333) Mr. Santiago-Gonzalez appeared to have mental health issues as early as eight years old because he talked to himself. (T-335-336)

Juan Baez Pagan testified that Mr. Santiago-Gonzalez used to refer to him as his father. They lived together for a while in the housing project. He was not close to Mr. Santiago-Gonzalez's biological father because of his self-cutting, alcohol use, and problems with many people. (T-310-313) His stepson, who was close to Mr. Santiago-Gonzalez, was shot and killed. (T-321)

Xiomara Rivera-Melendez testified that she had a relationship with Mr. Santiago-Gonzalez and they have a son together. He treated her son from a previous relationship as his own. He was unable to see the children frequently due to prison and gang warfare in the housing project. He sent money once from the United States after he was forced to flee due to the violence. (T-491-495); (T-510) He still writes the children from prison, asking for forgiveness for not having been the father he should have been. He also tells them he loves them, and asks them to help their mother and be good men. (T-505)

Christopher Munoz-Gonzalez, another brother, recalled the daily gunfights before the gangs declared peace four to five years ago. (T-523) He has never met Mr. Santiago-Gonzalez in person. (T-533) He never lived with Nilda because he was placed with his aunt by social services. From there, he was able to graduate high school and study nursing at an institute. (T-517-519)

II. Witnesses testified about the unique and violent culture of the Luis Llorens Torres housing project.

Dr. Audrey Winpenny, an urban ethnographer, completed her Ph.D. dissertation on the housing projects in Puerto Rico. (T-677) She became familiar with the Llorens housing project. (T-677-679) Llorens is one of the biggest housing projects, with drug spots, violence, and so much corruption that local police were abandoned in favor of state-level police. (T-681-683)

The culture in the housing projects created a street justice system ("voz y voto") with fierce consequences for rapists. Child rapists would be "disappeared" (dismembered and disposed of in the trash), and a community culture of silence meant that nobody would call attention to it. For child rapists, guns were often fired into their face ("borrar la cara") to show zero tolerance and to deprive the family members of an open casket. There are still issues of violence in the community. If a person says they are from Llorens, it is difficult for them to find a job. Some people call Llorens a social experiment that failed close to the beginning. (T-688-691) In the 1980s, the juvenile detention centers were sometimes referred to as "dungeons", with frequent riots, abandoned children, raw sewage, lack of healthcare, and sexually and physically abusive guards. (T-704-712)

Lizette Cora Camacho, a social worker, is familiar with the Luis Lorens Torres housing project. (T-389-394) She evaluated Mr. Santiago-Gonzalez when he was placed in a juvenile detention center at age nine. He reported experimenting

with cocaine, marijuana, valium, and inhalant thinner. (T-397-401) Through a case discussion with another practitioner, she concluded that he did not have a stable family. (T-402-403)

Mitigation Specialist Betty Fuentes traveled to Puerto Rico and created a visual exhibit to document the large number of Mr. Santiago-Gonzalez's family members who experienced self-harm, domestic violence, social services interventions, drug abuse, sexual abuse, and witnessed killings. (T-755-760); Defense Exhibits 37A-D. She had never seen a similar pattern in a family before despite having worked 75 capital case sentencings. (T-811)

The earliest psychological report Ms. Fuentes received for Mr. Santiago-Gonzalez was made in 1990, when he was in the Puerto Rican criminal justice system. The doctor noted in the report that Mr. Santiago-Gonzalez was a victim of neglect, abuse, and environmentally deprived. He appeared short for his age and malnourished. Another report from a social worker in 1990 found that he used money he obtained in order to buy food. His grandmother was unable to exercise control or supervision over him. (T-879-881) Subsequent social workers came to the same conclusion about his grandmother in 1992 and 1993. By 1996, after his grandmother had passed away, the reports reflect he was not benefiting from the juvenile justice system. He was addicted to drugs and he refused to participate in tests for "crazy people." (T-887-889)

After Mr. Santiago-Gonzalez left juvenile detention in 1990, he tried to hang himself at 10 years old and was sent to a mental health facility. He was released after a very short evaluation. (T-764-765) He started taking Xanax at five or six, and marijuana, cocaine, and Valium at nine. (T-778) His father died the year the National Guard was called in to quell the violence. (T-767)

Mr. Santiago-Gonzalez's brother, Harry, told Ms. Fuentes that he beat up two boys in juvenile prison. The boys admitted to sexually abusing Mr. Santiago-Gonzalez there. Mr. Santiago-Gonzalez left the housing project permanently when he was 22 years old. (T-893-895)

A Gainesville police officer, formerly employed in Puerto Rico, testified that sexual offenders are routinely killed in Puerto Rican prisons. (T-915-916) A prison gang has a law against prisoners who abuse the elderly, females, or kids. Prison guards in understaffed prisons do not get involved. (T-918-919) The culture in the housing project meant that Mr. Santiago-Gonzalez would feel shame if he allowed himself to be sexually assaulted, even as a child. There would also be a stigma of being labeled gay if you were sexually assaulted by a male. If you "allowed" yourself to be molested by a man, you would be a target for physical violence and other negative consequences in the housing project. (T-1051-1052)

III. Expert witnesses testified about Appellant's mental illnesses and impact of childhood trauma on his development.

Psychologist Dr. Steven Gold described adverse childhood experiences ("ACE") as childhood events that have a very long lasting, often permanent, effect on functioning. The ten identified ACEs can physically alter the brain.[3] Mr. Santiago-Gonzalez endured several ACEs. (T-946-948)

Dr. Gold found evidence of: (1) physical abuse, (2) verbal abuse, (3) physical neglect, (4) emotional neglect, (5) domestic violence, (6) substance abuse, (7) family mental illness, (8) parental figure loss, (9) family members who were incarcerated, and (10) childhood sexual abuse. Mr. Santiago-Gonzalez categorically met 9/10 ACEs, which is extremely unusual, and he may even meet 10/10. Someone with four of these factors has an average life expectancy of 20 years less than someone with none. The more ACEs you experience, the more serious and negative the consequences you are likely to manifest. ACEs refer to the household environment, but Mr. Santiago-Gonzalez also experienced growing up in the violent housing project. (T-951-960)

Dr. Gold found Mr. Santiago-Gonzalez suffers from major mental illness: substance abuse disorder, post-traumatic stress disorder, complex post-traumatic stress disorder, decreased ability to think ahead, greater emotionality and impulsivity that may include explosive anger, changes in consciousness, and

[3] In a concurrence, Justice Pariente wrote specifically to emphasize how important it is for judges and juries to understand the significance of ACEs in shaping a defendant's development and choices when evaluating mitigation. Tisdale v. State, 257 So.3d 357, 362-64 (Fla. 2018).

forgetfulness. He has altered perceptions of other people, mistrust in relationships, and a lack of a sense of direction in life. Mr. Santiago-Gonzalez also meets the criteria for bipolar disorder, major depressive disorder, anti-social personality disorder, and possibly borderline personality disorder. His manipulative behavior can be viewed as a coping mechanism for trauma, as well how he learned to obtain the necessities of life in the subculture of his environment. (T-961-967) In Dr. Gold's opinion, Mr. Santiago-Gonzalez was under the influence of extreme mental or emotional disturbance at the time he killed Mr. Burns. (T-968)

Dr. Michele Quiroga, a psychologist with a clinical neuropsychology subspecialty, spoke to Mr. Santiago-Gonzalez in Spanish during her work on his case. She believes he was more comfortable speaking about sensitive topics in his native language. They had a little over 30 hours of in-person contact. (T-996-997) Traditional neuropsychological IQ tests written for people in the United States can overestimate IQ by 15 points for Puerto Rican subjects, so it is important to give specialized tests. Mr. Santiago-Gonzalez tested in the extremely low range for language function, most likely due to lack of education and environmental factors. (T-998-1002) When she recalculated and adjusted his IQ score, it went from an 89 to 74, which is considered borderline intellectual functioning. (T-1004) The State's psychological records documented an IQ of 76 in 2015, with the validity in question. (R-1391)

In sum, the defense presented numerous witnesses to provide evidence about Mr. Santiago-Gonzalez's dysfunctional family, the violent housing project where he grew up, and his mental health conditions. Such overwhelming mitigation compels a life sentence. This Court held that a death sentence was disproportionate in a case with extensive mitigation. Crook v. State, 908 So.2d 350 (Fla. 2005).

In Crook, the defendant was found guilty of first-degree murder, robbery with a deadly weapon, and sexual battery of the victim, the co-owner of a bar where the crimes occurred. Id. at 352. Crook's stepfather severely abused Crook, and he failed kindergarten and had disciplinary problems in multiple schools after he was beaten in the head at age four with a metal pipe. Id. He dropped out of school in eighth grade and began using alcohol, drugs, and huffing paint by age twelve. Id. at 352-53. Experts testified that he had impulse control disorder and organic brain damage to his frontal lobe, plus mild mental retardation. Id. at 353.

This Court found that despite the presence of three aggravating factors[4], the death penalty was disproportionate. This Court focused on the extensive mitigation, especially mental mitigation:

> We conclude that this case falls squarely in the category of cases where we have reversed death sentences as being disproportionate in light of the overwhelming mitigation, especially the mental mitigation related to the circumstances of the crime. See, e.g., Hawk v. State,

[4] (1) The capital felony was committed during the commission of a sexual battery, (2) the capital felony was committed for pecuniary gain, (3) the capital felony was EHAC. Crook v. State, 813 So.2d 68, 73 (Fla. 2002).

> 718 So.2d 159, 163-64 (Fla.1998) (death disproportionate despite substantial aggravation, including contemporaneous attempted murder of separate victim, where mental mitigation was substantial); Robertson v. State, 699 So.2d 1343, 1347 (Fla.1997) (death disproportionate where HAC and other aggravation offset by age, impaired capacity, childhood abuse, and mental mitigation); Morgan v. State, 639 So.2d 6, 14 (Fla.1994) (death disproportionate despite HAC and other aggravation where copious mitigation included brain damage and youth). See also Larkins v. State, 739 So.2d 90, 95 (Fla.1999) ("The killing here appears to be similar to the killing that occurred in Livingston and to have resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces."); Urbin v. State, 714 So.2d 411, 417-18 (Fla. 1998) (death disproportionate despite multiple aggravators, including prior violent felony, where mitigation included impaired capacity, deprived childhood, and youth); Knowles v. State, 632 So.2d 62, 67 (Fla.1993) (death disproportionate despite contemporaneous murder aggravator where substantial mitigation included brain damage and impaired capacity); Nibert v. State, 574 So.2d 1059, 1062-63 (Fla.1990) (death disproportionate where HAC aggravator offset by abused childhood, extreme mental and emotional disturbance, and impaired capacity due to alcohol abuse); Livingston v. State, 565 So.2d 1288, 1292 (Fla.1988) (death disproportionate where aggravators, prior violent felony and murder committed during a robbery, offset by severe childhood abuse, youth and immaturity, and diminished intellectual functioning); Miller v. State, 373 So.2d 882, 886 (Fla.1979) (death disproportionate despite substantial aggravation, including HAC, where mental mitigation was substantial and related to crime).

Crook, 908 So.2d at 358.

In the instant case, the trial court found that 48 mitigating factors had been proven, including childhood sexual abuse, childhood drug addiction, mental illnesses, and Baker Act proceedings. (R-4337-4341) Undoubtedly, Mr. Santiago-Gonzalez's history of sexual abuse and culture of violence influenced his reaction to Mr. Burns. As in Crook, the death penalty is disproportiate.

The trial court imposed a disproportionate punishment for this prison killing because it is not among the most aggravated and the least mitigated of first-degree murders. Thus, Mr. Santiago-Gonzalez's death sentence violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, Section 17, Fla. Const. Given the totality of the circumstances, a sentence of life in prison is the only appropriate sentence to ensure the death penalty is applied uniformly to only the worst cases.

V. THE TRIAL COURT IMPROPERLY REQUIRED A NEXUS BETWEEN MULTIPLE MITIGATING FACTORS AND THE CRIME.

Standard of review: A purely legal issue is reviewed de novo. Insko v. State, 969 So.2d 992, 997 (Fla. 2007).

Preservation: The State argued to the trial court that it should look at the nexus between the mitigation and the crime. The defense objected that there was no requirement of a nexus. (T-1130); (T-1189) The trial court overruled the defense's objection, and stated that it would consider the weight to give to the mitigating factors at the appropriate time. (T-1190-1191)

Merits: "A trial court cannot require a nexus between the crime and mitigating circumstances." Fletcher v. State, 168 So.3d 186, 219 (Fla. 2015) (citing Martin v. State, 107 So.2d 281, 318 (Fla. 2012)). "A trial court may assign weight

based on the context of the mitigating circumstance." Id. (citing Cox v. State, 819 So.2d 705, 723 (Fla. 2002)). Here, the plain language of the trial court's sentencing order showed that it improperly required a nexus between the majority of mitigating factors and the charged crime. This legal error in the mitigation consideration process caused the trial court to minimize the extensive mitigation, which contributed to the death sentence. The sentencing order list of mitigating factors and their assigned weight reflects the imposition of the improper nexus requirement. (R-4337-4341) A new penalty phase trial is required.

The court found that there was not "any evidence that this mitigator is related to the reasons why the Defendant committed the murder of the victim in this case" for two mitigating factors:

(V) The Defendant was the product of statutory rape. (R-4317)

(VII) The Defendant's mother was intellectually disabled. (R-4318)

Continuing its requirement of imposing a nexus between the mitigating factors and the crime, the court found "there is no connection" or "no established connection" between these mitigating factors and the murder of Donald Burns:

(VI) The Defendant's father was absent. (R-4317-4318)

(VIII) The Defendant's mother's impaired parenting skills. (R-4318)

(X) The Defendant's grandfather was violent and abusive. (R-4319)

(XI) The Defendant's grandfather was a pedophile. (R-4319)

(XII) The Defendant's grandmother failed to protect children. (R4319-4320)

(XIV) The Defendant's early drug use. (R-4321)

(XV) The Defendant's lack of childhood health. (R-4321)

(XVII) The home of the Defendant's mother. (R-4322)

(XVII) The Defendant's mother was a prostitute. (R-4322)

(XIX) The Defendant's siblings were neglected. (R-4323-4323)

(XXII) The death of the Defendant's grandmother. (R-4324)

(XXIV) The Defendant's placement with his Aunt Maria as a child. (R-4324)

(XXV) The Defendant's lack of education. (R-4325)

(XXVII) Luis Llorens, the protector. (R-4326)

(XXIX) The Defendant's opiate addiction as a child. (R-4326-4327)

(XXXI) The death of the defendant's father. (R-4327)

(XXXV) The Defendant's family health issues. (R-4328-4329)

(XXXVIII) The Defendant is bipolar. (R-4329-4330)

(XL) The Defendant has post-traumatic stress disorder (PTSD). (R-4330-4331)

(XLI) The Defendant has complex post-traumatic stress disorder (CPTSD). (R-4331)

(XLII) The Defendant has borderline personality disorder. (R-4331)

(XLII) The Defendant has antisocial personality disorder. (R-4331-4332)

(XLIV) The Defendant's Baker Acts. (R-4332)

(XLV) The Defendant uses psychotropic medication. (R-4332)

(XLVI) The Defendant has a history of suicide attempts. (R-4332-4333)

(XLVII) The Defendant has a history of self-harm. (R-4333)

(XLVIII) The Defendant is an artist. (R-4333)

(LII) The Defendant pled to first-degree murder. (R-4335)

(LIII) The Defendant waived a jury. (R-4335)

(LIV) The Defendant's courtroom behavior. (R-4335-4336)

(LV) The love of Angel's family. (R-4336)

The trial court found as to one mitigating factor, "given the tenuous connection between this mitigator and the Defendant's murder of the victim, it is being given little weight":

IX. The Defendant's mother abandoned him. (R-4318-4319)

This Court "[w]ill not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent substantial evidence.'" Blackwood v. State, 777 So.2d 399, 412-13 (Fla.2000) (citations omitted). The trial court's determinations of weight for these mitigating factors are not supported by competent substantial evidence because the sentencing order shows that the court required a nexus

between these mitigating factors and the crime, despite a rule of law barring this consideration.

This Court should take the trial court at its written word; there is no need to analyze the context of the sentencing order because the plain language of the trial court imposes a nexus requirement for almost all of the mitigating factors. This error in the sentencing process requires reversal of the death sentence and a new penalty phase trial where all mitigating factors are properly considered.

VI. THE TRIAL COURT DID NOT DETERMINE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS, A REQUIREMENT TO IMPOSE A DEATH SENTENCE FOR CAPITAL MURDER.

Standard of review: This purely legal issue is reviewed de novo.

Preservation: This issue must be reviewed for fundamental error. Fundamental error "[g]oes to the foundation of the case…and is equivalent to a denial of due process." F.B. v. State, 852 So.2d 226, 229 (Fla. 2003).

Merits: The Sixth Amendment requires that a criminal defendant is entitled to a jury determination of guilt as to "*[e]very element of the crime with which he is charged, beyond a reasonable doubt*." Apprendi v. New Jersey, 530 U.S. 466,476-77 (2000) (emphasis added; quoting United States v. Gauldin, 515 U.S. 506, 510 (1995)). The entitlement to a jury determination beyond a reasonable doubt

extends to any determination that increases the penalty for a crime. Alleyne v. United States, 750 U.S. 99, 107-08 (2013) (citing Apprendi, 530 U.S. 466, 483 n. 10, 490) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.")

In other words, for sentencing purposes, any determination that increases the penalty to which a defendant will be subjected is an "element" for which the State bears the burden of proof beyond a reasonable doubt. The element of whether the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt was an element required to increase the penalty for first-degree murder from mandatory life without parole to the death penalty. The finder of fact did not find this element beyond a reasonable doubt in this case. The parties may have assumed the trial court would apply the correct burden of proof to find all elements to impose the death penalty beyond a reasonable doubt, without needing instructions intended for a jury. Because the finder of fact applied a lower standard, the finding was insufficient to impose the death penalty.

Both the trial court's oral and written rulings reflect that it did not find the element that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. At the sentencing hearing, the court pronounced the death sentence:

> After weighting the aggravating and mitigating circumstances, and finding that the aggravating circumstances far outweigh the mitigating

> circumstances, for the murder of Donald Burns, the Court sentences you to be put to death.

(T-1254) In the written sentencing order, the trial court found that "the aggravating circumstances in this case far outweigh the mitigating circumstances." (R-4341)

Under Florida's capital sentencing scheme, "[t]o increase the penalty from a life sentence to a sentence of death, the jury must unanimously find… that the aggravating factors outweigh the mitigating circumstances." Perry v. State, 210 So.3d 630, 640 (2016). Perry held that this finding must be made beyond a reasonable doubt. Id. at 633 (citing Hurst v. State, 202 So.3d 40, 44-45 (Fla. 2016)).

Though the jury was waived, the State still had the burden to prove each element to impose the death penalty beyond a reasonable doubt. Had Mr. Santiago-Gonzalez proceeded to a penalty phase with a jury, Section 921.141(2)(b), Fla. Stat., would have required the jury to find whether the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt because it was a critical finding. See Hurst v. State, 202 So.3d 40, 53 (Fla. 2016). To satisfy the Due Process Clause of the federal constitution, convicting an individual of a crime requires proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 362 (1970). This means "[p]roof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364.

Beginning with Apprendi and culminating in Hurst and Perry, the requirement of proof beyond a reasonable doubt is a "companion right" to the right to a jury determination of the findings that must be made before a death sentence can be considered. The finding that the aggravating factors outweigh the mitigating factors has to found with this burden of proof. If the jury had to make this finding in any other capital case to elevate the sentence from life to the death penalty, then the trial court had to make this finding as the trier of fact in this case.

This Court's recent decision in Foster v. State, 258 So.3d 1248, 1251(Fla. 2018), reh'g denied, 2019 WL 76862 (Jan. 2, 2019), rejected the argument that the defendant was entitled to a life sentence because a jury had not unanimously found beyond a reasonable doubt all elements of "capital first degree murder." Appellant respectfully argues that Foster is inconsistent with Apprendi , Hurst, and Perry. Whether the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt is a functional element that must be found to impose the death penalty, even if it is not an element of the statutorily-defined crime of first-degree murder. This Court must reverse the death sentence and remand to the lower court for a new penalty phase where the correct burden of proof is applied by the finder of fact.

VII. THE STATE DID NOT PROVE THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

Preservation: The defense preserved this argument for review. (T-222-225); (T-1122-1123).

Standard of review: *Each* element of the CCP aggravator must be proven beyond a reasonable doubt. Wood v. State, 209 So.3d 1217, 1228 (Fla. 2017) (citing Banda v. State, 536 So.2d 221, 224 (Fla. 1988)). "The standard of review this Court applies to a claim regarding the sufficiency of the evidence to support an aggravating circumstance is that of competent, substantial evidence." Guardado v. State, 965 So.2d 108, 115 (Fla. 2007).

Merits: The State did not prove beyond a reasonable doubt that the killing of Donald Burns was cold, calculated, and premeditated. Even if the killing was premeditated, the defense provided a colorable claim of moral and legal justification because Mr. Santiago-Gonzalez was a childhood sexual abuse survivor who feared sexual assault and feared for children being sexually assaulted in the future. This Court should find that the trial court erred in finding the CCP aggravating factor. As the trial court assigned this aggravating factor very great weight, the error was not harmless.

For the CCP aggravator to be justified, it must meet a four-part test: (1) the killing of the victim must have been the product of cool and calm reflection and

not an act prompted by emotional frenzy, panic, or fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation (premeditated); and, (4) there must have been no pretense of moral or legal justification. Lynch v. State, 841 So.2d 362, 371 (Fla. 2003) (citing Evans v. State, 800 So.2d 182, 192 (Fla. 2001)).

The Court found that Mr. Santiago-Gonzalez knew that Mr. Burns was a sexual offender, manipulated a guard into placing them together under a false pretense, tied him up or allowed him to be tied up, and stabbed him with precision consistent with a planned design. (R-4312) However, as the DOC internal investigation was unable to identify the guard who put the men in the same cell, there is not competent substantial evidence to support a finding that Mr. Santiago-Gonzalez manipulated a guard in an elaborate scheme. He may have simply asked to be moved, and the guard may have complied. The guard could have even been the primary facilitator of the unauthorized transfer.

Mr. Burns' videotaped statement shortly after the stabbing casts doubt upon his eventual story that Mr. Santiago-Gonzalez tied him up out of spite. He could have helped tie himself up because he regretted being "a fool". Mr. Burns was adamant that did not want his mother to know what he had done.

In Geralds v. State, this Court found that conflicting reasonable hypotheses of how the victim came to be tied up made the case susceptible to divergent interpretations. 601 So.2d 1157, 1164 (Fla. 1992). "Although one hypothesis could support premeditated murder, another cohesive reasonable hypothesis is that Geralds tied the victim's wrists in order to interrogate her regarding the location of money which was hidden in the house." Id. After she refused to reveal the location, Geralds could have become enraged and killed her in sudden anger. Id. In such a case, the State fails to meet its burden to prove the homicide was committed in a cold, calculated, and premeditated manner. Id. Like Geralds, there is evidence Mr. Burns was tied up before any premeditated plan for murder.

Importantly, Mr. Santiago-Gonzalez described during the investigation that he blacked out and lost his mind during the crime. A frenzied stabbing with dozens of stab wounds does not indicate a "level of precision consistent only with a planned design", as the trial court found. (R-4312) A 22-wound stab attack could be viewed as premeditated where the fatal wounds were grouped together in a way that was consistent with the defendant aiming at certain organs. Hall v. State, 107 So.3d 262, 281 (Fla. 2012). In contrast, Mr. Burns was stabbed all over. (T-204-205) There was no testimony from the medical examiner that specific organs were targeted.

The record also contains believable evidence that Mr. Santiago-Gonzalez had a pretense of legal and moral justification for the killing of Donald Burns. A pretense of moral or legal justification is "[a]ny colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Walls v. State, 641 So.2d 381, 388 (Fla.1994) (citations omitted). The record supports the colorable claim that Mr. Santiago-Gonzalez, a childhood sexual abuse survivor, feared sexual assault in prison by a known sexual offender.

In its written findings, the trial court found that even if Mr. Burns had tried a physical sexual advance, it would not legally justify the killing. (R-4312-4313) Naturally, the trial court found that a male physical sexual advance against another male does not legally justify a murder. However, that was not the question for the trial court. The appropriate inquiry was whether there was *any pretense* of moral or legal justification. Mr. Santiago-Gonzalez had both. The evidence supported moral justification because Mr. Santiago-Gonzalez was worried about children, and Mr. Burns was a known child molester with a prison release date. At the time of his death, Mr. Burns had about fifteen years of his sentence left to serve for two counts of attempted sexual battery against children under the age of twelve. (R-4460-4461)

Next, the evidence supported a legal justification of self-defense. Through his culture and upbringing, Mr. Santiago-Gonzalez was taught that sexual offenders received street justice. Mr. Robles' testimony established that guards probably would not have done anything to protect Mr. Santiago-Gonzalez from unwanted physical contact from Mr. Burns had he made a complaint. If Mr. Santiago-Gonzalez had to protect himself from assault, then he was on his own within the confines of the shared cell. The court found no legal support for this argument. (R-4312) There was record support because there was believable evidence from Mr. Burns' videotaped statements, the testimony of Mr. Robles, and Mr. Santiago-Gonzalez's statements after the stabbing. In his own words after the killing, he said he blacked out and was out of his mind after Mr. Burns tried him. He wondered what would happen to children if Mr. Burns was willing to do this to a grown man.

This Court has refused to find a colorable claim of legal or moral justification where a defendant offered evidence that he killed three people to prevent them from performing abortions, and where a defendant offered the justification of wanting to spare his family from having to go through a divorce. Lynch v. State, 841 So.2d 362, 373 (Fla. 2003). In Lynch, this Court rejected the defendant's justification of the victim's rejection of him as a lover as completely without merit. Id. Fearing sexual assault in a prison cell, and fearing for children

being sexually assaulted in the future, are qualitatively different justifications than preventing abortion, the stigma of divorce, or romantic rejection.

Childhood sexual abuse is widely accepted as a serious societal problem. Florida's strict sentencing laws (especially for crimes against children under age twelve) reflect how serious the people, through their elected representatives, consider these offenses. Indeed, those who are convicted for sexually abusing children in Florida are subject to indefinite involuntary civil commitment as sexually violent predators after finishing their prison sentence pursuant to Section 394.10, Florida Statutes ("Jimmy Ryce Act").

For these reasons, the trial court erred in finding that the State proved the CCP aggravating factor. There is not competent substantial evidence that the murder was planned out under the State's theory, and the defense presented a colorable claim of a pretense of legal and moral justification. This Court should remand for a new penalty phase trial without this aggravating factor.

VIII. THE STATE DID NOT PROVE THE ESPECIALLY HEINOUS ATROCIOUS OR CRUEL AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT.

Preservation: The defense preserved this argument for review. (T-223-225); (T-1122-1123)

Standard of review: Appellant adopts the standard of review set forth in Issue VII.

Merits: The evidence was insufficient to establish beyond a reasonable doubt that the killing was especially heinous, atrocious, and cruel. The trial court found the HAC aggravating factor was proven beyond a reasonable doubt and assigned it very great weight. (R-4309-4310) "HAC focuses on the means and manner in which the death is inflicted and the immediate circumstance surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death." Barnhill v. State, 834 So.2d 836, 849-50 (Fla. 2002) (citation omitted). The killing must be *especially* heinous, atrocious, or cruel. Section 921.141(6)(h), Fla. Stat. (2017) (emphasis added).

In Hall v. State, 614 So.2d 473 (Fla.1993), this Court defined the HAC aggravator as follows:

> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

Id. at 478 (quoting trial court's instruction). The trial court found Mr. Burns was stabbed at least 64 times while tied up and conscious, and that he was

aware of his impending death. The court also found that Mr. Santiago-Gonzalez was totally indifferent to his suffering. (T-4310)

This Court has upheld the HAC aggravator where the victim was repeatedly stabbed and remained conscious. Davis v. State, 859 So.2d 465, 478 (Fla. 2003) The trial court relied on Davis. (R-4309) In Davis, though, the facts were much more egregious than the instant case:

> The Defendant followed the victim out and into the kitchen where he placed the victim in a choke hold, almost to the point of unconsciousness. They struggled on the floor and the Defendant called for the victim's daughter to bring him the syringe of bleach while he sat on top of the victim. When she was unable to locate it, she came to the kitchen and held her mother down while the Defendant retrieved the syringe. Upon his return, the Defendant made several attempts to inject the bleach into the victim's neck and finally the needle went into the neck. The two of them continued to hold the victim down waiting for the injection to kill her. After a couple of minutes, the Defendant yelled "It's not working." ... By his own confession, the Defendant stabbed the victim several times, in the neck and in the back. Defendant Whispel heard the victim call out after which the victim's daughter and the Defendant, holding the bloody knife with blood on his hands, return[ed] to the bedroom. The Defendant washed his hands and the three of them began to smoke cigarettes. At that point, they heard the victim moaning. The Defendant responded that "The bitch won't die." He returned to the kitchen, stabbed the victim again and attempted to break her neck.

Id. at 478.

Unlike Davis, there is credible evidence that Mr. Burns consented to be tied up, and therefore was not in imminent fear of death at the beginning of the attack. Mr. Burns own videotaped statements, made just after the stabbing, were

conflicting about how he came to be tied up. As the first responding corrections officer testified, the attack took less than five to ten minutes. In contrast to Davis, there was not enough time or physical space in the cell for Mr. Santiago-Gonzalez to stop the attack, go elsewhere, and start it again for the victim to be in fear. Plus, Mr. Santiago-Gonzalez described blacking out during the stabbing, whereas Davis was fully alert during the prolonged attack on the victim.

Not only were the facts much worse in Davis, there is not competent, substantial evidence that Mr. Burns knew he was going to die. Mr. Burns made contradictory statements in his "dying declaration" videotape. DOC staff had to keep demanding that he tell the truth. He was obviously upset about his mother finding out what had happened. He kept changing his story, which is inconsistent with the presumed veracity of a dying person intent on telling the truth at the last opportunity.

As to whether Mr. Burns felt pain before his death, the medical examiner could not conclusively testify about that. Dr. William Hamilton, the medical examiner, was not aware of any reason Mr. Burns would have been unable to feel pain, but he testified that members of the medical team who cared for Mr. Burns could have given a more accurate assessment. (T-212-213) These medical professionals were not called by the State as witnesses. Mr. Burns would have been in a state of shock before he was taken to the hospital. (T-218) He was kept alive

with the assistance of a ventilator after the stroke. (R-203) Mr. Burns eventually died of malnutrition as a result of complications caused by the stab wounds. (R-215) There were no pathologic findings in the autopsy report concerning the portion of the brain that perceives pain. (T-212) This testimony was not enough to support a finding that Mr. Burns was in great pain with knowledge of his impending death.

The State had the burden to prove the HAC aggravating factor beyond a reasonable doubt. The State failed to meet this burden with competent, substantial evidence, yet the trial court assigned it very great weight. (R-4337) As in Issue VII, This Court should grant Mr. Santiago-Gonzalez a new penalty phase trial.

IX. APPELLANT DID NOT ENTER A PLEA TO A DEATH PENALTY-ELIGIBLE CRIME.

Preservation: This issue was preserved for review by motion to prohibit death as a possible penalty. (R-318-320) The trial court denied the motion after a hearing and issued a written order. (R-364-365)

Standard of review: A purely legal issue is reviewed de novo.

Merits: In a November 14, 2014 indictment, the grand jury charged Mr. Santiago-Gonzalez with a premeditated design to effect the death of Donald Burns by stabbing him multiple times with a sharpened homemade instrument. (R-58) The indictment did not allege any statutory aggravating factor enumerated in

Section 921.141(6), Florida Statutes, including the four aggravating factors the State argued to the trial court: (1) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (3) The capital felony was especially heinous, atrocious, or cruel; (4) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Thus, Mr. Santiago-Gonzalez entered a plea to an indictment for a crime where the maximum punishment was life.

"It is a fundamental principle of due process that a defendant may not be convicted of a crime that has not been charged by the State." See Thornhill v. Alabama, 310 U.S. 88, 96 (1940); Price v. State, 995 So.2d 401, 404 (Fla. 2008); Jaimes v. State, 51 So.3d 445, 448 (Fla. 2010). In Hurst v. State, 202 So.3d 40 (Fla. 2010), the Florida Supreme Court held the existence of aggravating factors, the sufficiency of aggravating factors to impose death, and whether the aggravating factors outweigh the mitigating factors are elements which must be found unanimously by a jury beyond a reasonable doubt. "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be *charged in the indictment*, submitted to a jury, and

proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 232 (1999) (emphasis added).

In the instant case, the grand jury did not consider any aggravating factors/elements because the State did not include any in the indictment. The State cannot seek a death sentence based upon elements not alleged in the indictment. Fla. R. Crim. P. 3.140(b) and (d)(1) require the State to plead the essential facts constituting the offense charged in an indictment or information. As such, the facts necessary to charge a first-degree murder punishable by death were not alleged in the indictment. Mr. Santiago-Gonzalez was entitled to grand jury determination as to whether evidence existed to support a capital murder indictment. Art. 1, Section 15, Fla. Const.

The State is bound by the indictment that Mr. Santiago-Gonzalez entered a plea to on August 15, 2016. This indictment charged a first-degree murder, punishable by the maximum sentence of life in prison. The plea colloquy did not contain an admission to an aggravating factor and no guarantee of the enhanced sentence of the death penalty, so Mr. Santiago-Gonzalez's open plea did not cure the defect in the charging information. See Bradley v. State, 3 So.3d 1168, 1171 (Fla. 2009) (defect in information omitting the element of discharge of a firearm for sentencing enhancement cured and waived by defendant's explicit stipulation

that he discharged a firearm during the robbery and voluntary plea to an enhanced sentence).

Appellant acknowledges this Court has repeatedly rejected this argument in capital cases and has "[n]ot receded from these cases." Tai A. Pham v. State, 70 So.3d 485, 496 (Fla. 2011). Nevertheless, this Court must vacate Mr. Santiago-Gonzalez's unconstitutional death sentence and remand to the lower court to impose a life sentence. A death sentence obtained by this indictment violates Mr. Santiago-Gonzalez's rights under the Florida Constitution as enumerated in Article 1, Section 22 (right to a trial by jury), Article 1, Section 9 (due process), Article 1, Section 17 (excessive punishments), Article 1, Section 15 (grand jury), and his rights under the United States Constitution as contained in Amend. V (due process), Amend. VI (right to notice, jury trial), Amend. VIII (cruel and unusual punishment), and Amend XIV (due process).

X. THE STATE COULD NOT SEEK THE DEATH PENALTY FOR APPELLANT BECAUSE FLORIDA DID NOT HAVE A CONSTITUTIONAL DEATH PENALTY STATUTE AT THE TIME.

Preservation: This issue was preserved for review by the trial court's denial of the defense's motions to strike the State's death penalty notice. (R-282-283); (R-349). The trial court issued an order denying the motions after a hearing. (R-4405-4409); (R-359)

Standard of review: A purely legal issue is reviewed de novo.

Merits: On November 24, 2014, the grand jury indicted Mr. Santiago-Gonzalez for first-degree murder. On January 13, 2015, the State filed a notice of intent to seek the death penalty. On January 12, 2016, the Supreme Court of the United States declared Florida's death penalty statute unconstitutional in Hurst v. Florida, 577 U.S. ___ (2016). On that date, Florida ceased to have a constitutional death penalty law.

After Hurst, the State had no legal procedure to seek the death penalty. Therefore, the trial court should have promptly granted the defense's first motion to strike the death penalty notice, filed on January 19, 2016. (R-97-98) The second motion to strike the death penalty notice was filed on November 1, 2016. (R-282-283) The third motion was filed on July 13, 2017. (R-348-349) As the motions made clear, the only legally permissible sentence for Mr. Santiago-Gonzalez was life in prison because Hurst rendered Florida's death penalty law unconstitutional.

Florida did not enact a new sentencing scheme in death penalty cases until March 7, 2016. On October 14, 2016, this Court held Hurst v. Florida did not declare the death penalty itself unconstitutional. Perry v. State, 210 So.3d 630, 633 (Fla. 2016). However, Perry held Florida's latest sentencing scheme did not comply with Hurst because it still did not require jury unanimity. "The Act cannot be applied constitutionally to pending prosecutions because the Act does not

require unanimity in the jury's final recommendation as to whether the defendant should be sentenced to death." Id. at 634. This Court granted review in Perry because the Fifth District Court of Appeal certified two questions of great public importance, the second one being whether the then-current death penalty law applied to pending capital prosecutions. Id. at 632.

This Court affirmed this position in Evans v. State, 213 So.3d 856, 859 (Fla. 2017), where it denied two petitions for writ of prohibition to prohibit the State from seeking the death penalty. Justice Pariente dissented in part, reasoning that penalty phase proceedings should be halted until the Legislature acts to remedy the constitutional problems with the death penalty law. Id. at 861.

Appellant maintains that the death penalty scheme in effect at the time the State indicted Mr. Santiago-Gonzalez could not be applied because it was unconstitutional. Because the trial court should have granted the defense's motions to strike the State's death penalty notice, the State should have been precluded from seeking the death penalty. As argued in Issue IX, Mr. Santiago-Gonzalez did not plea to a crime eligible for the death penalty. His case must be remanded for the imposition of the only legally available sentence at the time: a life sentence.

CONCLUSION

The trial court violated Mr. Santiago-Gonzalez's right to substantive and procedural due process when it failed to ensure his competency for both the guilt and penalty phases. Under Issue I, this Court must vacate his involuntary plea and remand to the lower court for new proceedings. Under Issue II, this Court must remand to the lower court for a new penalty phase trial, provided Mr. Santiago-Gonzalez is determined presently competent to proceed. He will have the opportunity to exercise his right to a jury. At the very minimum, under Issue III, this Court must remand to the lower court to enter a written order of competency.

Under Issue IV, Mr. Santiago-Gonzalez's death sentence is a disproportionate punishment. DOC put Mr. Santiago-Gonzalez, a childhood sexual abuse survivor who was taught his whole life that sexual offenders receive street justice, into a cell with a known sexual offender. Even if the killing is among the most aggravated of first-degree murders, it is not among the least mitigated of such cases. Mr. Santiago-Gonzalez endured an upbringing with potentially every ACE in a notoriously violent Puerto Rican housing project. This Court must vacate his death sentence and remand to the lower court for the imposition of a life sentence.

Under Issues V-VIII, the trial court made legal errors in the sentencing process. Mr. Santiago-Gonzalez is entitled to a new penalty phase trial for each of these issues, provided he is determined presently competent to proceed. Once

again, he will have the opportunity to have his sentence decided by a unanimous jury.

The final issues require reversal of the death sentence and remand to the trial court to impose a life sentence, the only legal sentence in this case. Under Issue IX, Mr. Santiago-Gonzalez was not eligible for the death penalty because he did not plea to a capital crime. Under Issue X, the State could not seek the death penalty because Florida did not have a constitutional death penalty law at the time.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Janine Robinson, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Appellant, Angel Santiago-Gonzalez, #167241, Florida State Prison, P.O. Box 800, Raiford, FL 32083, on this 1st day of April, 2019.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

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