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IN THE SUPREME COURT OF FLORIDA

WAYNE C. DOTY,

Appellant,

v.

CASE NO. SC18-973
Lower Tribunal No.
2011CF000498
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations in this brief will be designated as follows: the trial record shall be referred to as "R." followed by the page number and Appellant's brief shall be referred to as "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Background

Appellant pled guilty to the murder of fellow inmate Xavier Rodriguez. Doty v. State, 170 So. 3d 731, 733 (Fla. 2015).

> The evidence showed that Doty was, at the time of the murder, serving a life sentence for the shooting death of his former employer. Doty was transferred to Florida State Prison (FSP) and was assigned to the "K wing," working as a runner. Each wing at the prison had four runners, who worked in pairs and assisted in numerous duties, including distributing meals to the other prisoners and cleaning common areas. In return, the runners were given certain privileges. Doty's partner as a runner was Wells, who assisted in the murder of Rodriguez, another runner on the K wing.
>
> Doty began planning the murder after the victim, Rodriguez, called Doty names and stole some tobacco from Doty approximately two weeks prior to the incident. In exchange for tobacco, Doty convinced another inmate to make him a knife that he could use to murder Rodriguez. On the evening of May 17, 2011, Doty obtained the homemade knife, which was hidden in a newspaper, when he assisted in picking up inmate food trays after dinner. Doty deposited the knife into a trashcan, which he later retrieved and brought to the third-floor interview room that the runners were permitted to use. Doty then placed the weapon in the duct work there so he could easily retrieve it.
>
> That evening, Doty and Wells carefully watched when the officers made their rounds to determine the best time to kill Rodriguez. After convincing Rodriguez to meet them

> in the third-floor interview room, Doty and Wells tricked Rodriguez into letting them bind his hands by betting him some tobacco that he could not get out of "Coast Guard handcuffs." After his hands were bound, Doty approached Rodriguez from behind and placed him in a rear chokehold. At first, Rodriguez thought it was a joke but, as Doty explained in his confession, "Once I really got that chokehold locked down, he knew the game was over." After Doty felt Rodriguez "go slack," Doty let Rodriguez's body drop to the floor, and Doty later commented that the body made a "hollow thud" as it hit the floor.
>
> Wells ensured that nobody else entered the room, while Doty pulled the body around the desk and began to stab Rodriguez with the homemade knife. Although Doty admitted that he was hoping to pull out Rodriguez's heart "to make sure he was really dead," the knife was too dull and did not work for that task. Doty and Wells then tied a ligature around Rodriguez's neck, smoked a cigarette, took showers, and, after they were sure that Rodriguez was really dead, called a sergeant working at the prison and confessed to the crime.

Id. at 734.

Appellant, representing himself, pled guilty to first-degree murder but retained his right to a penalty phase jury. Id. at 738. By a vote of ten to two, the jury recommended that Appellant be sentenced to death. Doty, 170 So. 3d at 736. The trial court found three aggravating circumstances: (1) prior violent felony (very great weight), (2) committed by a person under sentence of imprisonment (great weight), and (3) cold, calculated, and premeditated (CCP) (great weight). Id. at 736-37. The trial court weighed the aggravating factors against seven non-statutory mitigating circumstances:

> (1) Doty was cooperative with authorities and reported the incident (given some weight); (2) Doty was emotionally neglected and abandoned as a child and exposed to physical abuse (given moderate weight); (3) the prison environment is a different environment from life outside of prison and Doty perceived the victim as a threat in that environment (given very little weight); (4) Doty had a diagnostic and mental health history for emotional disorder (given some weight); (5) Doty perceives violent behavior as acceptable (given little weight); (6) the juvenile justice system failed Doty (given moderate weight); and (7) Doty exhibited good conduct throughout the court proceedings (given some weight).

Id. at 737.

This Court affirmed the conviction and sentence. Doty, 170 So. 3d at 745. The judgment and sentence became final on October 28, 2015, when the time permitted for Petitioner to file a petition for writ of certiorari in the United States Supreme Court expired. Fla. R. Crim. P. 3.851(d)(1)(A) (A judgment and sentence become final "90 days after the opinion becomes final.").

During the pendency of Appellant's post-conviction proceedings, Hurst v. Florida and Hurst v. State were decided. Hurst v. Florida, 136 S. Ct. 616 (2016); Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, Florida v. Hurst, 137 S. Ct. 2161 (2017). Since that time, this Court has remanded all cases with non-unanimous jury recommendations that became final post-Ring for resentencing. Ring v. Arizona, 536 U.S. 584 (2002); see Mosley v. State, 209 So. 3d 1248 (Fla. 2016); State v. Murray, no. SC17-707, 2018 WL 6695986, *3 (Fla. Dec. 20, 2018). In accordance with that

case law, the post-conviction court remanded this case for re-sentencing.

New Penalty Phase

Jury selection for the new penalty phase took place on February 19, 2018. (R. at 1717). The new penalty phase took place on February 20, 21, 23, and 26, 2018. (R. at 1944-2614). During the penalty phase, the State called four fact witnesses, one victim impact witness, then rested. (R. at 1976-2173).

Lieutenant Homor Scott works for the Department of Corrections at Florida State Prison, a maximum-security prison. (R. at 1976-77). On May 17, 2011, Lieutenant Scott was in charge of K wing at Florida State Prison where Appellant, inmate Wells, and inmate Rodriguez were orderlies. (R. at 1992-93). On the evening in question, inmate Rodriguez requested to use the phone in a third-floor room. (R. at 1996). Soon after, Appellant approached Lieutenant Scott and told him there is "a dead body upstairs." (R. at 2001). After securing Appellant and inmate Wells, Lieutenant Scott went to investigate and found inmate Rodriguez "laying in the corner with his neck in a weird position, and he was blue in the face." (R. at 2003). Both of inmate Rodriguez's wrists were bound and a noose was around his neck. (R. at 2009). Attempts at resuscitation failed. (R. at 2011). Lieutenant Scott agreed that Appellant cooperated with authorities. (R. at 2017).

Inspector Kevin Snow works for the Florida Department of Corrections, Office of the Inspector General and investigated inmate Rodriguez's death. (R. at 2019). A homemade knife was found in the room in which inmate Rodriguez's body was found. (R. at 2031-32). Appellant admitted to investigator Snow that inmate Rodriguez had called Appellant a snitch and a "fuck boy" or homosexual on prior occasions and had stolen tobacco from Appellant. (R. at 2044-45). Appellant admitted having planned to kill inmate Rodriguez for two-and-a-half to three-and-a-half weeks. (R. at 2047). Inmate Wells helped Appellant with the plan because inmate Rodriguez had taken his orderly shift on one occasion. (R. at 2047). Earlier in the day on May 17, Appellant and inmate Wells had taken a sheet, ripped it into ligatures, and placed them in a desk drawer in the room in which they planned to kill inmate Rodriguez. (R. at 2048). Appellant requested another inmate to provide him with a weapon several weeks prior to the incident. (R. at 2052). Appellant received the weapon from the inmate, who put it in some newspaper, then placed it into a trashcan. (R. at 2050). Later, Appellant took the weapon from the trashcan and moved it into the ductwork in the ceiling in the room in which they planned to kill inmate Rodriguez. (R. at 2051). Appellant and inmate Wells put a phone in the same room, then told inmate Rodriguez that they want to talk to him about a new orderly, so he needed to tell the guards that he wants to make a phone call

and meet them in the room with the phone. (R. at 2056). When they met, Appellant and inmate Wells made a bet with inmate Rodriguez that he could not get out of a "Coast Guard knot," which involves the tying of his wrists. (R. at 2066). After tying inmate Rodriguez's hands, Appellant put him in a "sleeper-type choke hold" until he "felt the body go loose" and inmate Rodriguez "urinated on himself." (R. at 2067). While Appellant had inmate Rodriguez in a choke hold, inmate Wells was pinching his nose and mouth to make it "harder for him to breathe." (R. at 2068). Appellant then attempted to stab inmate Rodriguez with the homemade knife because he wanted to "open him up" and "pull his heart out to make sure he was dead," but the knife was too dull. (R. at 2069). Inmate Wells kicked inmate Rodriguez, then he and Appellant put the noose around inmate Rodriguez's neck. (R. at 2069-70). Appellant and inmate Wells left the room and went back to their cells to get any items that had been loaned to them by other inmates to return those items before inmate Rodriguez's body was discovered, as they knew they would be put in "confinement and all their property is going to be taken." (R. at 2071). Later, Appellant asked investigator Snow if he could see the autopsy because "he wanted to see his handiwork. It was like a trophy for him." (R. at 2076). Video evidence confirmed portions of Appellant's confession, for example, "the video shows three people go in the room and two come out." (R. at 2086). Investigator

Snow agreed that Appellant cooperated with authorities to resolve the crime. (R. at 2087-88).

Dr. William Hamilton is the District 8 medical examiner and examined the body of inmate Rodriguez. (R. at 2088, 2093). Dr. Hamilton noted ligature marks on inmate Rodriguez's neck and "a closely spaced pattern of 25 stab wounds" on the lower chest and mid abdomen. (R. at 2094). Dr. Hamilton opined that the cause of death was "ligature strangulation and multiple stab wounds." (R. at 2100).

Agent Gregory Laughlin works with the United States Secret Service and is assigned to the Miami field office. (R. at 2135). In 1996, Agent Laughlin worked for the Plant City Police Department. (R. at 2137). Agent Laughlin investigated the murder of Mr. Horne, who was a night watchman at Hardie Manufacturing, where Appellant had once worked. (R. at 2144-45). Appellant and another individual met with Mr. Horne to obtain methamphetamine. (R. at 2145). Mr. Horne denied having any methamphetamine, so Appellant and the other individual left. (R. at 2146). They went to purchase ammunition for a gun that Appellant had found two weeks prior and went drinking. (R. at 2146-47). They then returned to Mr. Horne's residence as Appellant said he was going to rob Mr. Horne of the methamphetamine. (R. at 2148). Appellant and Mr. Horne got into an argument and Appellant pointed the gun at Mr. Horne. (R. at 2148). Mr. Horne put his hands up and begged to

not be shot, telling Appellant to take his money and methamphetamine. (R. at 2148). Appellant shot Mr. Horne in the face, which caused Mr. Horne to fall down, and Appellant then shot him again. (R. at 2148).

Marisel Serrano is Xavier Rodriguez's mother. (R. at 2167). Ms. Serrano was unavailable at the time of the second penalty phase, so her victim impact statement which was given in the previous penalty phase was read onto the record. (R. at 2166-71).

Appellant called 11 witnesses (R. at 2202-2261, 2369-2603). Appellant did not testify. (R. at 2272).

Lieutenant Dennis Cauwenberghs works at Florida State Prison. (R. at 2202). Lieutenant Cauwenberghs testified that Appellant was a good worker both before and after the murder. (R. at 2205). He was aware of Appellant's cooperation with authorities, though, even without Appellant's confession, it would not have been difficult to determine what happened given the video surveillance and other security precautions of the prison. (R. at 2206, 2209).

Leo Boatman is a fellow inmate who has been in prison for 12 years. (R. at 2211). Inmate Boatman described intricacies of prison life to the jury explaining that "it's just a thousand little traps that you have to learn to totally recharge your thought process in order to survive in prison." (R. at 2212-14, 2229). Inmate Boatman describes that violent behavior is acceptable and rewarded in prison. (R. at 2258).

Mary Cole is Appellant's mother. (R. at 2371). When Appellant was around two years old, his father, Randy Doty, left town with Appellant. (R. at 2382, 2386). Ms. Cole did not hear from Mr. Doty until Appellant was arrested for murdering Mr. Horne. (R. at 2386). Around age 20, Appellant lived with his mother for a few months, and though he was polite and helpful, she described him as not being able to connect to people. (R. at 2387-89).

Dario Valdez is Appellant's half-brother. (R. at 2401). Mr. Valdez describes Appellant's father as abusive, "ruled with an iron hand," and that he would "smack us around." (R. at 2402). Appellant's main point appeared to be that his life would have been much different if he had not been abducted by his father. (R. at 2407).

Shelley Connor was Appellant's step-mother, married to Appellant's father when Appellant was 5. (R. at 2428-29). She was 18 at the time, did not have a phone or a car, and Appellant's father was usually out of the house, either at work or out drinking. (R. at 2432-33). Appellant's father was an alcoholic and beat Ms. Connor. (R. at 2433-34). After one instance, Appellant told someone at school that Ms. Connor was being abused and an investigation was started. (R. at 2436-37). Ms. Conner lied to the authorities about the abuse because Appellant's father threatened to kill her if she told the truth. (R. at 2437). Appellant started getting into trouble shortly after that

incident. (R. at 2438-39). Appellant's father told him that his real mother left and did not want him. (R. at 2442-43).

Robert Dayton Connor is Appellant's step-brother. (R. at 2466). Mr. Connor described an incident when Appellant's father put his mother in a chokehold "until she was purple." (R. at 2473). One time, Mr. Connor intervened when Appellant's father was hitting his mother. (R. at 2474). Appellant's father was arrested and threated Mr. Connor. (R. at 2474).

Robert Connor married Appellant's step-mother, Shelley Connor, after she divorced Appellant's father. (R. at 2489). Mr. Connor observed that Ms. Connor had suffered emotionally from her relationship with Appellant's father, and that Appellant suffered as well. (R. at 2491-92).

Ann Hertle was also in a relationship with Appellant's father. (R. at 2496). Appellant's father was physically abusive to her and her children. (R. at 2497). Ms. Hertle described Appellant's father as mentally and physically abusive. (R. at 2504). She learned that Appellant went from home to home, depending of his father's many different relationships. (R. at 2505). Her son, Randall, died in an accident a few months before the incident with Mr. Horne. (R. at 2495).

Randall Doty is Appellant's father. (R. at 2510). Appellant's father admits abusing the women he dated and/or married. (R. at 2530). He admitted that exposing his young son

to so many moves, so many different relationships, physical abuse, womanizing, and alcoholism was probably not good for Appellant. (R. at 2537-38). He also said that he has no "sympathy for somebody that kills two people." (R. at 2539). At the end of Mr. Doty's testimony, Appellant stated that Mr. Doty was "the first one that I should have shot in the head a long time. . . ." (R. at 2549).

Dr. Harry Krop is a licensed psychologist. (R. at 2553). In Dr. Krop's experience interviewing over 2,000 defendants charged with first-degree murder, it is rare for an individual to "fully accept responsibility for their actions," like Appellant has done. (R. at 2555). At age 12, Appellant was diagnosed with compulsive personality disorder. (R. at 2562). Dr. Krop also diagnosed Appellant with obsessive compulsive personality disorder as an adult. (R. at 2562). At 12, Appellant expressed his feelings that he did not like his father's drinking and chasing women and did not want to be influenced by his father's behavior because his father is "sick in the head." (R. at 2564-65). His father would have Appellant lie to his step-mothers and cover up for him regarding his whereabouts. (R. at 2565). Dr. Krop noted that Appellant's childhood contained at least four adverse childhood experiences, including abandonment, neglect, domestic violence, and no positive male role model. (R. at 2570-72). These factors "significantly contributed" to Appellant's adult lifestyle. (R. at 2572). From his unhealthy childhood, Appellant entered the

juvenile justice system, which continued the downward spiral. (R. at 2576). Appellant also has narcissistic and anti-social traits. (R. at 2593).

Louise Godfrey is Appellant's mitigation specialist and provided a report which summarized Appellant's school records and psychological records contained in those records. (R. at 2601).

The jury unanimously found that the three aggravating factors were proven beyond a reasonable doubt and unanimously found that the aggravation was sufficient to warrant a possible death sentence. (R. at 2329). Regarding mitigation, the jury found as follows: (1) 12 yes and 0 no (12-0), (2) 1-11, (3) 1-11, (4) 0-12, (5) 0-12, (6) 12-0, (7) 12-0. (R. at 2329-30). The jury unanimously found that the aggravating factors outweighed the mitigating circumstances and unanimously found that Appellant should be sentenced to death. (R. at 2330-31).

Spencer Hearing

On March 27, 2018, the trial court conducted a Spencer[1] hearing. (R. at 1569). The prosecution submitted a sentencing memorandum and Appellant orally presented additional argument and a written sentencing memorandum, but no additional evidence. (R. at 1585, 1586, 1662). Appellant stated "I don't think it's a hidden secret that I had preplanned everything in order to avoid

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

from having any DOC officials involved." (R. at 1582). After having spent about 20 years in prison, Appellant is "not acceptable or willing to take what rehabilitation the Department of Corrections has to offer, which is very minimal." (R. at 1582). "As far as I'm concerned, this is a case that qualifies for the death penalty, and if that's going to be my sentence, then I'm going to pursue for that sentence to be delivered . . . ." (R. at 1584).

On May 15, 2018, the trial court sentenced Appellant. (R. at 1662). The trial court found that the three aggravating circumstances had been proven beyond a reasonable doubt. (R. at 1662). Those aggravating circumstances were:

> One, the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment [(great weight)]; two the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person [(very great weight)]; three, the capital felony was a homicide and was committed in a cold, calculated and premediated manner without any pretense of moral or legal justification [(great weight)].

(R. at 1383, 1388, 1663). The Appellant agreed that no statutory mitigating circumstances were applicable, and the trial court found such. (R. at 1397, 1663). The trial court found seven non-statutory mitigating circumstances. (R. at 1663).

> One, the defendant had adverse childhood experiences, including abandonment, neglect and exposure to violence [(some weight)]; two, the defendant has shown mental health symptoms of obsessive focus on negative life events and experiences [(slight weight)]; three, the

> defendant experienced a life where violence is acceptable [(slight weight)]; four, the defendant was failed by the Florida Department of Health and Rehabilitative Services and the juvenile system [(moderate weight)]; five, the defendant has been affected by the prison milieu due to the similarities between the violent atmosphere in prison and at home as a child [(slight weight)]; six, the defendant cooperated with Department of Corrections' employees and law enforcement agencies by accepting responsibility [(moderate weight)]; seven, the defendant has conducted himself respectfully during all court proceedings [(some weight)].

(R. at 1390, 1392-96, 1663-64). The trial court found that the "aggravating circumstances far outweigh the mitigating circumstances" and sentenced Appellant to death. (R. at 1399, 1665-66).

Appellant requested that the trial court make a sentencing recommendation, which the trial court interpreted as "either order or recommend [Appellant's] transfer to Union Correctional facility." (R. at 1659). As authority for this request, Appellant cited the Florida Administrative Code, Chapter 33, Rule 601.210(2)(d)5, which states:

> (d) The custody grade resulting from an inmate's score may be modified if circumstances indicate the need for an exception. The specific reason for the modification shall be explained in the automated system. Reasons for increasing or decreasing the custody grade might, in appropriate cases, include one of the following comments with proper explanation:
>
> . . .
>
> 5. Community and public interest concerns (i.e., judge's or prosecutor's recommendation, victim/victim family interest, legislative inquiry, law enforcement interest, executive inquiry, personal notoriety, case notoriety).

Fla. Admin. Code R. 33-601.210. Appellant desired a recommendation similar to one that was made previously in his case that said Appellant "shall have no contact with Northwest Florida Reception Center personnel and for the safety of DOC employees, inmates, and the defendant." (R. at 1670).

The court denied Appellant's request. (R. at 1415-17). The court stated:

> [a]lthough this Court could make a non-binding recommendation that Defendant be placed at Union Correctional Institution, the recommendation would be just that, non-binding. Given Defendant's status as a death row inmate, this Court has no reason to believe that Florida State Prison officials would follow a non-binding recommendation as to his placement. Furthermore, this Court, as the criminal trial court, has absolutely no authority to order "no contact" between Defendant and a prison official who has no factual connection to this case.

(R. at 1416-17). The court suggested that Appellant utilize the grievance process in place and after exhausting administrative remedies, file a petition for extraordinary relief. (R. at 1417).

Appellant filed a notice of appeal and on December 31, 2018, Appellant filed his initial brief on direct appeal of the resentencing. This is the State's reply.

SUMMARY OF THE ARGUMENTS

The trial court did not err in instructing the jury because the only finding a capital sentencing jury must make beyond a reasonable doubt is whether a given aggravator is proven. This claim of instructional error is waived because, after raising the

claim in post-conviction, Appellant failed to re-raise the claim, and affirmatively agreed to the jury instructions that were presented to the jury. Further, there is no requirement that capital juries make findings beyond a reasonable doubt as to the sufficiency of the aggravation and whether the aggravation outweighs the mitigation. Thus, the trial court did not err in instructing the jury during sentencing and this claim should be denied.

The trial court did not err in refusing to make a non-binding sentencing recommendation as there was no requirement to do so. The trial court acknowledged that it could make a non-binding recommendation for Appellant to not be placed in the same prison as every other male death row inmate, but that it doubted the Department of Corrections would follow the recommendation. Thus, the trial court did not abuse its discretion in refusing to make a non-binding sentencing recommendation.

Appellant's death sentence is a proportionate punishment. Upon review of capital cases which are factually similar, and contain similar aggravating factors and mitigating circumstances, it is clear that this case is among the most aggravated and least mitigated cases. The death penalty is a proportionate punishment and this Court should affirm the sentence in this case.

ARGUMENT

ISSUE I: THERE WAS NO JURY INSTRUCTION ERROR BECAUSE THE ONLY FINDING A CAPITAL SENTENCING JURY MUST MAKE BEYOND A REASONABLE DOUBT IS WHETHER A GIVEN AGGRAVATOR IS PROVEN

Appellant claims that Hurst and Perry required the trial court to instruct the jury that they must make findings beyond a reasonable doubt regarding whether the aggravators were sufficient to justify the death penalty and whether those aggravators outweighed the mitigators. (IB at 33); Hurst, 136 S. Ct. at 616; Perry v. State, 210 So. 3d 630 (Fla. 2016). Since neither Hurst nor Perry require the jury to make findings beyond a reasonable doubt as to sufficiency and weighing, there was no error in the jury instructions and this claim should be denied. Further, this claim was waived at trial because, though Appellant had raised the issue during post-conviction, he did not re-raise the issue and affirmatively agreed to the jury instructions. If not waived, this claim was forfeited at trial because Appellant did not object to this specific instruction and agreed to the jury instructions, and any error does not rise to the level of fundamental error. (IB at 33; R. at 2275, 2292). Thus, this claim should be denied.

This claim is waived and should be denied. Where a defense attorney requests or affirmatively agrees to an erroneous jury instruction fundamental error review is waived. Universal Ins. Co. of North America v. Warfel, 82 So. 3d 47, 65 (Fla. 2012) (citing State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994)).

"Fundamental error is waived under the invited error doctrine because 'a party may not make or invite error at trial and then take advantage of the error on appeal.'" Warfel, 82 So. 3d at 65 (citing Sheffield v. Superior Ins. Co., 800 So. 2d 197, 202 (Fla. 2001)). However, fundamental error review is not waived where the defendant's lawyer merely acquiesced to the State's jury instructions. State v. Spencer, 216 So. 3d 481 (Fla. 2017). This Court has found that fundamental error review can be waived in capital cases. See Boyd v. State, 200 So. 3d 685, 702 (Fla. 2015) (relying on Warfel, 82 So. 3d at 65).

Here, the issue of the burden of proof for sufficiency and weighing was specifically raised during post-conviction by post-conviction counsel, Alice Copek. (R. at 440, 447). "Doty's jury was advised that its recommendation was merely advisory, and it was never required to find beyond a reasonable doubt sufficient aggravating circumstances not outweighed by the mitigating circumstances." (R. at 447). Standby counsel at the re-sentencing was also Alice Copek. Thus, both Appellant and his standby counsel were aware of this issue during the re-sentencing yet did not raise the issue or object to the jury instructions. A party is not permitted to invite error at trial and then complain of the error on appeal. Lowe v. State, no. SC12-263, 2018 WL 5095143, *15 (Fla. Oct. 19, 2018). Since this issue was known, it should have been objected to at re-sentencing. Appellant did not merely acquiesce

to this jury instruction. Instead, Appellant invited error by allowing the judge to instruct the jury using what he already argued was an incorrect instruction. Thus, this claim was waived.

Even if this claim was not waived, it was not objected to and the instruction did not create fundamental error. In order to constitute reversible error, an unpreserved claim "'must constitute a fundamental error,'" such that it "'reaches down into the validity of the trial itself.'" Lowe, 2018 WL 5095143 at *8 (citations omitted). Here, since Appellant did not object to this instruction, it is unpreserved. Since the instruction was proper, there cannot be fundamental error.

This Court has stated that

> Hurst penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred.

Foster v. State, no. SC18-860, 2018 WL 6379348, *4 (Fla. Dec. 6, 2018) (emphasis in original). Here, the Appellant pled guilty, and thus admitted all of the elements of first-degree murder. Doty, 170 So. 3d at 734; McCarthy v. United States, 394 U.S. 459, 466 (1969).

Regarding sentencing, under the Sixth[2] Amendment, "[a]ny 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." Alleyne v. United States, 570 U.S. 99, 103 (2013) (citing Apprendi v. New Jersey, 530 U.S. 466, 483 n.10, 490 (2000)). Aggravators are the only facts that increase the penalty. See Ring, 536 U.S. at 609 (finding that because Arizona's aggravating factors operate as the "functional equivalent" of an element of a greater offense, the Sixth Amendment requires that they be found by a jury). Since the aggravators here also acted as the "functional equivalent" of elements, they must have been proven beyond a reasonable doubt.

The standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before Hurst was decided. See Fla. Std. Jury Instr. (Crim.) 7.11; Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So. 2d

[2] There are also no Eighth Amendment concerns. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper v. Simmons, 543 U.S. 551, 568 (2005) (citations omitted). The State of Florida has a list of 16 aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, which they were in this case, any Eighth Amendment concerns have been satisfied.

127, 129 (Fla. 1991); Finney v. State, 660 So. 2d 674, 680 (Fla. 1995). Here, the jury was instructed that they must find that the aggravating factors were proven beyond a reasonable doubt, which they did. (R. at 1960).

"Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating factors." State v. Mason, 108 N.E.3d 56, 64 (Ohio 2018) (citing the 1st, 4th, 5th, 6th, 8th, and 9th circuits and Indiana, Maryland, Pennsylvania, Nebraska, Nevada, and New Mexico). The aggravating factors are the only part of Florida's capital sentencing scheme which increase the penalty, and thus are the only portion which act as the "functional equivalent" of elements. If the jury finds at least one enumerated aggravating factor beyond a reasonable doubt, a defendant becomes eligible to receive the enhanced sentence of death. See Fla. Stat. 921.141(2)(b)(2) (2017) (Upon unanimously finding at least one aggravating factor to exist beyond a reasonable doubt, a defendant becomes "eligible for a sentence of death").

After a defendant becomes "eligible," the jury then makes a sentencing recommendation based on a weighing of whether the aggravating factors are sufficient, whether the aggravating factors outweigh the mitigating circumstances, and whether death is the appropriate sentence. Fla. Stat. 921.141(2)(b)(2) (2017).

With this sufficiency and weighing part of the analysis, the jury is determining if the sentence should remain death or should be departed downward to the lesser sentence of life in prison.

Because only the aggravating factors increase a defendant's penalty exposure, only aggravating factors must be proven beyond a reasonable doubt. Here, since the jury was instructed that in order to find that the aggravating factors exist, it must first be proven beyond a reasonable doubt, there was no instructional error. (R. at 1960).

Neither Hurst nor Perry addressed the proof-beyond-a-reasonable-doubt standard. In Hurst v. Florida, the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional pursuant to Ring's determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. Hurst, 136 S. Ct. at 616. On remand, this Court held in Hurst v. State that in capital cases, the jury must unanimously and expressly find that the aggravating factors were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. Hurst, 202 So. 3d at 40. Perry merely affirmed the requirements in Hurst v. State and held that the statute as applied to Perry was unconstitutional

because it only required ten jurors to recommend death rather than a unanimous recommendation. Perry, 210 So. 3d at 633, 640.

Further, nothing in this Court's post-Hurst precedent, or in section 921.141, Fla. Stat., compels imposing a burden of proof on the jury findings regarding sufficiency of the aggravators and the weighing of the aggravation and mitigation. This Court recently amended Florida Standard Criminal Jury Instruction 7.11 and declined to include a standard of proof for the jury's findings of sufficiency of the aggravation and weighing of the aggravation and mitigation though the issue was specifically raised by the defense bar during oral argument on the amendments. In re Standard Criminal Jury Instructions in Capital Cases, 244 So. 3d 172 (Fla. 2018).

As related to the jury finding that aggravation is sufficient and the jury finding that the aggravation outweighs the mitigation, neither Hurst v. Florida nor Hurst v. State ascribed a standard of proof. Hurst, 202 So. 3d at 54. The weight that a juror gives to the aggravating factors or mitigating circumstances based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard. The aggravators themselves are sufficient on their face by nature of their inclusion in the statute. Whether a juror individually feels that the specific facts and circumstances surrounding the proven aggravating factor are sufficient is, like weighing, a questions of judgment or mercy.

The United States Supreme Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. See Zant v. Stephens, 462 U.S. 862, 875-76 n.13 (1983) ("specific standards for balancing aggravating against mitigating circumstances are not constitutionally required") (citation omitted); Kansas v. Marsh, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); Tuilaepa v. California, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."); Kansas v. Carr, 136 S. Ct. 633, 642 (2016) ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt."). Thus, because a beyond-a-reasonable-doubt standard is only required for proving aggravating factors and not for determining sufficiency of the aggravation or weighing of the aggravating and mitigation, there was no error in the jury instruction given in this case.

A majority of the states do not ascribe a burden of proof to the weighing requirement.[3] For example, Alabama, Connecticut,

[3] In 2001, the Court of Appeals of Maryland counted 26 States in which "no standard is set by statute," 9 states that used a beyond a reasonable doubt standard (Arkansas, New Jersey, New York, Ohio, Tennessee, Utah, and Washington

Indiana, Mississippi, Nebraska, Nevada, and Oklahoma have specifically rejected that the Sixth Amendment requires weighing to be assigned a burden of proof. See Ex parte Bohannon, 222 So. 3d 525, 532-33 (Ala. 2016), cert. denied, Bohannon v. Alabama, 137 S. Ct. 831 (2017) ("the weighing process is a 'moral or legal judgement that takes into account a theoretically limitless set of facts'" and is not a factual determination required to satisfy the Sixth Amendment) (citation omitted); State v. Rizzo, 266 Conn. 171, 206 (Conn. 2003) (concluding that "the jury need not be instructed that the aggravating factors must outweigh the mitigating factors by a quantum or degree"); Leonard v. State, 73 N.E.3d 155, 168-69 (Ind. 2017) (Hurst does not require the finding that aggravating circumstances outweigh the mitigating circumstances be made beyond a reasonable doubt); Evans v. State, 226 So. 3d 1, 39 (Miss. 2017), cert. denied, Evans v. Mississippi, 138 S. Ct. 2567 (2018) ("The Hurst decision did not rest upon or even address the beyond-a-reasonable-doubt standard."); State v. Lotter, 917 N.W.2d 850, 863 (Neb. 2018) ("Most federal and state courts agree that Hurst did not hold a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances."); Jeremias v. State, 412 P. 3d 43, 54

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by statute and Colorado and North Carolina by judicial construction), and two states utilized a preponderance standard, Maryland, which still does, and Delaware, which now has a beyond a reasonable doubt standard. Borchardt v. State, 786 A.2d 631 (M.D. 2001), cert. denied, Borchardt v. Maryland, 535 U.S. 1104 (2002).

(Nev. 2018) (describing weighing as "'part of the individualized consideration'" to determine an appropriate sentence, not a factual determination, and that ascribing a burden of proof "would be pointless") (citations omitted); Underwood v. Royal, 894 F.3d 1154, 1186 (10th Cir. 2018)(declining to overrule prior precedent that an Oklahoma jury was not required to find that aggravation outweighed mitigation beyond a reasonable doubt because "Hurst did not directly address Apprendi's application to the weighing"); see also Miles v. State, 28 A.3d 667, 673 (Md. 2011) ("the weighing process is not a fact-finding one deducible from the evidence, but rather is a matter of judgment" and ascribing a preponderance of the evidence standard).

Approximately nine states require the burden of proof for weighing to be beyond a reasonable doubt either by statute or by judicial construction. These requirements were in place long before Hurst or even Apprendi, except for those in Delaware. See Hill v. State, 713 S.W.2d 233, 238 (Ark. 1986) (1977 version of the statute requires aggravation to outweigh beyond a reasonable doubt all mitigating circumstances); People v. Tenneson, 788 P.2d 786, 790 (Col. 1990) ("We now hold that before a defendant may be sentenced to death the jury must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors."); State v. McDougall, 301 S.E.2d 308, 327 (N.C. 1983), cert. denied, McDougall v. North Carolina,

464 U.S. 865 (1983) (a jury must be "'persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation'") (citations omitted); State v. Biegenwald, 524 A.2d 130, 158 (N.J. 1987) (the statute requires that "the State must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors"); People v. Harris, 676 N.Y.S.2d 458, 459 (N.Y. 1998) (citing the statute requiring that a jury "unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors"); State v. McKinney, 74 S.W.3d 291, 319-20 (Tenn. 2002) (citing the 2000 statute requiring that the aggravating circumstance(s) outweigh any mitigating circumstance(s) beyond a reasonable doubt); State v. Wright, 90 P.3d 644, 647 (Utah Ct. App. 2004) (citing the 2003 statute requiring the jury to be "'persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation'"); State v. Jenkins, 473 N.E.2d 264, 275 (Ohio 1984) (citing the statute requiring that the State prove "beyond a reasonable doubt, that the aggravating circumstances" outweigh the mitigating factors).

Delaware is the only state that has held post Hurst that the weighing finding must be made beyond a reasonable doubt. Rauf v. State, 145 A.3d 430, 487 (Del. 2016). After acknowledging that Hurst only specifically invalidated judicial findings of aggravation, the Court determined that the reach, by implication,

was farther, extending to weighing. Id. The Delaware court reasoned that because the Supreme Court

> stated unequivocally that the jury trial right recognized in Ring now applies to *all* factual findings *necessary* to impose a death sentence under a state statute. The logical extension of that broader statement in Hurst is that a jury must determine the relative weight of aggravating and mitigating circumstances. Therefore, according to the broader statement in Hurst, the weighing process provision in the Delaware death penalty statute is unconstitutional because it violates the Sixth Amendment.

Id. (footnote omitted; emphasis in original). The Delaware court broadly construed the language in Hurst as holding that the weighing process is a factual finding necessary to impose a death sentence under the state statute and thus, as an element, requires a beyond a reasonable doubt standard of proof. Id. This change in the burden of proof from the former statutory requirement of preponderance of the evidence to beyond a reasonable doubt for weighing was the primary basis for the full retroactive application of Rauf. Powell v. Delaware, 153 A.3d 69, 76 (Del. 2016). This application of the "broader statement in Hurst" to require the beyond a reasonable doubt standard to apply to sufficiency and weighing has only been recognized by Delaware.

Because a beyond-a-reasonable-doubt standard is only required for proving aggravating factors and not for determining sufficiency of the aggravation or weighing of the aggravation and

mitigation, there was no error in the jury instruction given in this case. This claim should be denied.

ISSUE II: THE TRIAL COURT DID NOT ERR IN REFUSING TO MAKE A NON-BINDING SENTENCING RECOMMENDATION

Appellant claims the trial "court erred when it refused to consider the defense request for a non-binding recommendation" regarding where Appellant will be housed in the Florida prison system. (IB at 53). However, the trial court did in fact consider Appellant's request, and in its discretion, refused to make a non-binding sentencing recommendation. No error occurred, and this claim should be denied.

"[O]rdinarily the decision as to where to house an inmate is a decision outside of the authority of the trial court and properly within the authority of DOC." Fla. Dep't of Corr. v. Watts, 800 So. 2d 225, 231 (Fla. 2001). Here, the trial court acknowledged that it was without the power to direct the Department of Corrections regarding inmate housing decisions but could make a non-binding recommendation. (R. at 1416). However, the trial court recognized that it was highly unlikely that "Florida State Prison officials would follow a non-binding recommendation" for the placement of a death row inmate. (R. at 1416). Thus, after stating the correct applicable legal principles, the denial of the requested relief was well within the discretion of the trial court. No error occurred, and this claim should be denied.

STATEMENT REGARDING PROPORTIONALITY

Although Appellant does not contest the proportionality of his capital sentences, this Court is still compelled to conduct a proportionality review. The proportionality review of a capital sentence is not a simple comparison between the number of aggravators and mitigators, but instead focuses on the totality of the circumstances in the case and compares it to other capital cases. Muehlman v. State, 3 So. 3d 1149, 1166 (Fla. 2009). "Proportionality review is not a quantitative analysis involving comparing the number of aggravators and mitigators, but a qualitative review of the underlying basis for each aggravating and mitigating factor and of the totality of the circumstances as compared to other capital cases." Lowe, 2018 WL 5095143 at *28. In reviewing proportionality, this Court accepts the jury's recommendation and the weight assigned by the trial judge to the aggravators and mitigators. Id. (citing Hampton v. State, 103 So. 3d 98, 120 (Fla. 2012); Fla. R. App. P. 9.142 (a)(5)). This case is comparable to other cases in which this Court has upheld the death penalty as being proportional. Thus, the sentence should be affirmed.

Previously, this Court compared Appellant's case to Gill. Doty, 170 So. 3d at 745; Gill v. State, 14 So. 3d 946 (Fla. 2009). As this Court previously noted, the facts in Gill are very similar to those in this case and the aggravating factors were identical.

Id. After careful planning, Gill strangled his cellmate for the purpose of obtaining the death penalty. Id. (citing Gill, 14 So. 3d at 950-53). Like Appellant, the aggravating factors in Gill included under sentence of imprisonment at the time of the murder, prior violent felony, and CCP. Id. (citing Gill, 14 So. 3d at 964). Though Appellant was resentenced, the facts underlying the murder, the aggravating factors, and the mitigating circumstances remain the same. Id. at 744-45. This Court's prior comparison of this case to Gill remains sound.

This Court also cited to Kilgore as a comparable case for proportionality purposes. Doty, 170 So. 3d at 745 (citing Kilgore v. State, 688 So. 2d 895 (Fla. 1996)). Like Appellant, Kilgore stabbed a fellow inmate. Kilgore, 688 So. 2d at 897. Kilgore had two aggravating factors, under sentence of imprisonment and prior violent felony and two statutory mitigating factors, extreme mental or emotional disturbance and capacity to conform was substantially impaired. Id. In comparison, Appellant's case is more aggravating as there was an additional aggravating factor, CCP, and less mitigating as there were no statutory mitigating factors. (R. at 1397, 1663); Doty, 170 So. 3d 736-37. Like in Kilgore, the death penalty in Appellant's case is also a proportional sentence.

Appellant's case is similar in nature to Globe, where this Court upheld the death penalty as a proportional sentence. Globe

v. State, 877 So. 2d 663 (Fla. 2004). In Globe, the defendant was convicted of first-degree murder of another inmate. Id. at 666. This Court found the death sentence proportional where the trial court found four aggravating factors (under sentence of imprisonment, prior violent felony, HAC, and CCP), and weighed the aggravating factors against no statutory and 11 non-statutory mitigating circumstances, including having antisocial personality disorder and having an abusive relationship with his parents, none of which were given more than slight/little weight. Id. at 677. Here, there were three aggravating factors, under sentence of imprisonment, prior violent felony, and CCP like in Globe, all of which were given great or very great weight. Additionally, like Appellant's case, no statutory mitigating circumstances were found in Globe. Since this Court held the death sentence proportional in Globe, which was also an inmate murder, with similar aggravating circumstances as in this case, no statutory mitigating factors, and similar non-statutory mitigating factors, the death penalty in Appellant's case is a proportional sentence as was found in Globe.

The death penalty is a proportionate sentence in this case. Given the three significant aggravating factors, which were assigned great or very great weight in this case, and the much less weighty mitigation, the death penalty is appropriate as this case is one of the most aggravated and least mitigated. This Court should affirm the sentence.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 17th day of January, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Barbara Busharis, Esq., Barbara.busharis@flpd2.com, Attorney for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Jennifer A. Donahue
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