IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC20-60

CHRISTIAN CRUZ,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

A CAPITAL APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR VOLUSIA COUNTY

CRIMINAL DIVISION

****

INITIAL BRIEF OF APPELLANT

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Oral Argument Requested

Appellant, Christian Cruz, respectfully requests oral argument in this capital appeal.

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INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal and "T" will designate the trial transcripts.

STATEMENT OF JURISDICTION

This Court has appeal jurisdiction in this case. Defendant was sentenced to death. Rule 9.030(a)(1)(A)(i), Florida Rules of Appellate Procedure, provides that the Florida Supreme Court has jurisdiction of final orders of courts imposing sentences of death. *See also* §921.141(5), Florida Statutes.

STATEMENT OF THE CASE

Guilt Phase

Defendant Christian Cruz was charged by Indictment with one count of first degree premeditated murder of Christopher Jemery, or while engaged in the perpetration or attempted perpetration of burglary and/or robbery, in violation of §782.04(1)(a)1 and/or §782.04(1)(a)(2), Florida Statutes [**Count V]**; one count of burglary by entering or remaining in a dwelling the property of Christopher Jemery, while armed, and during the course of the burglary carrying a firearm, in violation of §§810.02(2)(b) and 775.087(2)(a)(3), Florida Statutes [**Count VI**]; robbery with a firearm by knowingly taking away a television and/or container of

medication or narcotics and/or U.S. currency, of some value, from the person or custody of Christopher Jemery, with the intent to permanently or temporarily deprive Christopher Jemery of the property, and in the course of the robbery carrying and discharging a firearm, causing the death of Christopher Jemery, in violation of §§812.13(2)(a) and/or 775.087(2)(a)(3), Florida Statutes [**Count VII**]; and kidnapping by forcibly, secretly or by threat, confining, abducting, or imprisoning Christopher Jemery against his will, with the intent to commit or facilitate the commission of any felony and/or inflict bodily harm upon or to terrorize Christopher Jemery, in violation §787.01(1)(a)(2&3), Florida Statutes [**Count VIII**]. (R. 2426-2428).[1] The State filed a notice of intent to seek the death penalty and a List of Aggravating Factors in Defendant's case. (R. 2672-2673).[2]

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[1] The indictment jointly charged Defendant Cruz and co-defendant Justen Charles with the same crimes but on different counts. Charles was subsequently tried and found guilty on all counts. (R. 3915-3917). Following a penalty phase, the jury in Charles's case found six aggravating factors but did not vote for death. (R. 3918-3924). The trial court sentenced Charles to life imprisonment. (R. 3925-3937).

[2] This notice listed six aggravating factors: 1) defendant previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; 2) defendant was engaged in the commission of, or in the attempt to commit, or flight after committing, robbery, burglary or kidnapping; 3) defendant committed the capital felony for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; 4) defendant committed the capital offense for pecuniary gain; 5) defendant's capital felony was especially heinous, atrocious, or cruel; and 6) defendant's capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Preliminary Proceedings

Prior to trial, the defense filed a motion to suppress physical evidence seized and statements made pursuant to an arrest on May 9, 2013. (R. 2818-2821). The State filed a response to the motion. (R. 2918-2921). On January 25, 2019, the trial court conducted a hearing on the motion to suppress. (R. 1007-1067). The State called Det. Graham Cage and Officer Dana Hilliker. (R. 1016-1042; R. 1043-1057). The parties presented their arguments. (R. 1058-1067). The court denied the motion to suppress. (R. 1067; R. 2972-2973). The defense filed several penalty phase motions.[3] On January 25, 2019, the court conducted a hearing on the motions. (R. 1068-1101). The court denied most of the defense motions. (R. 1070; R. 1075; R. 1076; R. 1079; R. 1086). The court granted the motion in limine regarding reference to non-statutory mitigators. (R. 1091). The court held in abeyance the motion to preclude or limit impact evidence pending a proffer. (R.

[3] The motions were as follows: 1) Motion to Preclude the Death Penalty Due to the State's Failure to Provide Timely Notice of Intent to Seek Death (R. 2822-2829); 2) Motion to Preclude the Death Penalty due to the Failure of Florida's Death Penalty Scheme to Genuinely Narrow Class of Eligible Offenders (R. 2873-2875); 3) Motion to Preclude the Death Penalty Due to Lack of Elements Within the Indictment (R. 2876-2879); 4) Motion to Preclude the Death Penalty *Ex Posto Facto* (R. 2880-2883); 5) Motion to Prohibit the Death Penalty based upon the Holding and Reasoning of *Roper v. Simmons* (R. 2884-2888); 6) Motion to Preclude or Limit Victim Impact Evidence (R. 2889-2897); 7) Motion in Limine regarding reference to "Non-Statutory Mitigators" (R. 2922-2924); and 8) Motion to Require Disclosure of Favorable Information Re: Prospective Jurors (R. 3939-3941).

1088-1089). The court granted in part the motion to require disclosure of favorable information re: prospective jurors. (R. 1099; T. 1101). The court entered an omnibus order on the foregoing motions. (R. 2974-2981).

The Trial

Trial commenced in the cause on February 12, 2019. The court conducted voir dire. (R. 40-983). The jury was selected and sworn. (R. 983-984). The court gave the jury preliminary instructions and excused the jury for the day. (R. 984-995). Prior to the presentation of testimony, an alternate juror was excused due to illness. (T. 7-9). The court gave jurors a preliminary instruction. (T. 11-19). The State presented an opening statement. (T. 19-31). Defendant's counsel thereafter presented opening statement. (T. 31-35). The defense invoked the rule of sequestration. (T. 35). At trial, the State called numerous witnesses in its case-in-chief. Prior to the testimony of Agent Craig Beers, the defense renewed its pre-trial motions. The court announced its previous rulings would stand, including the ruling on the motion to suppress. (T. 119). After Det. Mefford's testimony, the court considered, and denied, the State's request to introduce "suicide" letters written by Defendant two years after his arrest. (T. 396-403; T. 406-407). The court denied Defendant's motion in limine to keep out testimony by law enforcement officers that Defendant had said that they might as well have shot him upon his arrest. The court ruled that the testimony was relevant and reasonably

related to flight to avoid prosecution. (T. 403-406). The defense renewed its previous objections and motions, specifically the statement based on the motion to suppress. The court announced that its ruling would stand. (T. 408). During the testimony of Det. Graham Cage, the defense renewed its motion and objection to the testimony pertaining to Defendant's statement. The court renewed its ruling. (T. 566-567). Following the testimony of Det. Charles Lee, the State rested its case. (T. 598). The court conducted a colloquy with Defendant and ascertained that Defendant was not going to testify. (T. 598-601). The court read the instruction on stipulations and the defense read a portion of the report prepared by Deputy Drake, who had previously testified. (T. 603-605). The defense rested. (T. 605). Defendant presented his arguments on motions for judgments of acquittal. (T. 609-610). The court denied the motion. (T. 610). The court conducted an additional charge conference. (T. 610-657; T. 662-679). Subsequently, counsel for the State presented closing argument. (T. 681-723). The defense then presented closing argument. (T. 724-744). Counsel for the State presented a rebuttal closing argument. (T. 744-754). The court instructed the jury. (R. 3296-3319; T. 754-798). The jury retired to deliberate. (T. 798). The court reconvened to consider the jury's verdicts. Defendant was found guilty on all four (4) counts as charged in the indictment. (R. 3320-3324; T. 802-805). The jury was polled. (T. 805-806).

The court instructed the jury to return the following Monday for the penalty phase. (T. 806-807).

Penalty Phase

The court gave the preliminary instructions. (R. 1130-1135). The prosecutor gave an opening statement. (R. 1135-1147). The defense gave an opening statement. (R. 1147-1156). The State called several witnesses and presented victim impact statements. Thereafter, the State rested its case. (R. 1179). The defense called numerous witnesses. The defense rested its case. (R. 1792). The State presented a rebuttal witness. The State rested. (R. 1843). The court conducted a charge conference. (R. 1845-1854; R. R. 1855-1857; R. 1863-1869). The court conducted a colloquy with Defendant to ascertain whether he wanted to testify. (R. 1854-1855). The prosecution presented a penalty phase argument. (R. 1870-1893). The defense presented its penalty phase argument. (R. 1894-1920). The court instructed the jury. (R. 1920-1945; R. 3557-3566). After deliberations, the jury returned a verdict finding all six aggravating factors. These factors were sufficient for a possible sentence of death. The jury found that at least one or more of the jurors found one or more of the mitigating circumstances. Finally, the jury found that the aggravating factors outweighed the mitigating circumstances and that at least one aggravating factor or factors are sufficient to warrant a sentence of death and that the aggravating factor or factors outweigh the mitigating

circumstances. The jury unanimously found that Defendant should be sentenced to death. (R. 1946-1950; R. 3567-3573). The jury was polled. (R. 1950-1952).[4]

The *Spencer* Hearing and Final Order

On June 5, 2019, the court conducted the final sentencing hearing, pursuant to *Spencer v. State*, 615 So.2d 688 (Fla. 1993). (R. 1963-2031). The defense called three witnesses, Dr. Francisco Gomez, Dr. Pedro Sáez, and Dr. Randy Otto. (R. 1968-1975; R. 1976-1989; R. 1990-2023). The State did not present any additional testimony or evidence. (R. 2024; R. 2028). Defendant made a statement. (R. 2025-2027). The parties agreed to submit sentencing memoranda. (R. 2028). The sentencing hearing was reset for a later time. (R. 2029). On July 1, 2019, the Court reconvened to conduct a *Nelson* inquiry based upon Defendant's correspondence. (R. 2032-2045). Defendant asserted that defense counsel had failed to do certain things during the guilt phase. (R. 2035-2038). Counsel responded to Defendant's claim. (R. 2040). The court denied Defendant's motion to remove counsel. (R. 2041). The court delayed the sentencing hearing until after the co-defendant's trial. (R. 2042-2044). On August 6, 2019, the State filed a sentencing memorandum. (R. 3703-3720). On November 26, 2019, the defense filed a sentencing memorandum. (R. 3741-3774).

[4] The court reset the case for a *Spencer* hearing. (R. 1953-1954). No Pre-Sentence Investigation Report (PSI) was ordered in this case. (R. 2410-2411).

On December 18, 2019, the court issued its sentencing order. (R. 3778-3830). The court denied the motion of judgment of acquittal which it had taken under advisement. (R. 2419). The court announced it had found five aggravating factors great weight. The court considered all 37 mitigating circumstances and gave 24 slight weight, eleven moderate weight, one great weight and one extraordinarily great weight. (R. 2422). The court imposed the death penalty on Count V. The court sentenced Defendant to a term of life imprisonment term on Counts VI, VII, and VIII. (R. 2423; R. 3829; R. 3835). The court ordered all sentences to run concurrently. (R. 3844). Defendant filed a notice of appeal. (R. 3847; R. 3850). This appeal follows.

STATEMENT OF THE FACTS

Guilt Phase

At trial, the State called **Lt. Aaron Hinson**, Sanford Fire Department, who described his training and experience. (T. 37-39). Lt. Hinson testified that on April 26, 2013, he was working as a fireman/paramedic when he was dispatched to the area of 2291 West Airport Boulevard, which was a mixed commercial/residential area. (T. 40-42). Lt. Hinson identified various photographs of the area. (T. 42-44). Lt. Hinson was working with Lt. Mike Murphy, Ernest Singleton and Matt Allegro. Murphy was in charge of the scene and the other crewmembers were assisting in patient care. (T. 44-45). At the scene, the firemen were directed to a

person laying in some bushes. Lt. Hinson noticed the person was lying on his left side with duct tape wrapped around his head, covering his mouth, and on his hands. There was an extension cord behind his hands. The person was struggling to breathe. Lt. Hinson directed the others to bring him scissors and to arrange for the person's transport. Lt. Hinson cut his mouth and hands free and started to assess the person's ability to breathe. (T. 45-48). The person was obviously beaten. There was blood all over his body. (T. 50). Lt. Hinson found that the person had a strong pulse. Most of the person's bleeding had been controlled. It did not appear that he was continuing to bleed out. (T. 51-52). Lt. Hinson assessed the person's ability to look around, talk and response. The person was completely unresponsive. (T. 53-54). The paramedics started to give him oxygen. (T. 55). He was transported to Orlando Regional Medical Center, which is a Level One trauma center. (T. 56). During the ride, Lt. Hinson noticed some improvement. The man's oxygenation rose, he started to groan, and he appeared to respond to Lt. Hinson's request by squeezing his hand. (T. 58). Lt. Hinson testified that when the patient was transported, they left behind everything that was removed from the patient, including the tape and cord. (T. 59-60).

Donald Ripley testified he was employed with the Sanford Police Department as a crime scene technician. Ripley described his education and training as a crime scene technician. (T. 62-65). On April 26, 2013, he was called

to the vicinity of West Airport Boulevard in Sanford regarding an individual who had been shot. When he arrived, Ripley noticed that crime scene tape had already been placed in the area. The person who had been shot was no longer there. (T. 65-67). Ripley documented the area by taking photographs and locating potential evidence. He placed evidence markers on each piece of evidence he located. (T. 67-70). After leaving this scene, Ripley responded to Orlando Regional Medical Center to take photographs of the victim. He identified the photographs he took. (T. 70; T. 82-83). Ripley identified various photographs of the scene in the vicinity of West Airport Boulevard. (T. 72-77). These photographs included photographs of clothing, medical waste, duct tape, and a phone cord piece. (T. 70-72; T. 76-77). Ripley testified that he collected and transported the items of evidence. (T. 79-80). Ripley identified the items of evidence. (T. 80). At some point thereafter, Ripley turned over the evidence he collected to the Volusia County Sheriff's Office, which was conducting another investigation. (T. 81).

William Tucker, crime laboratory analyst, Florida Department of Law Enforcement, testified he examines physical evidence for the presence of latent fingerprints. Tucker testified about his education and credentials, and the science of fingerprint examination. (T. 85-89; T. 91-92). Tucker was asked to examine evidence related to the crime scene occurring in Seminole County and/or Volusia County. He received some items of evidence, specifically, a cardboard core of a

tape roll, pieces of duct tape, a receipt and a couple of fingerprint standards. (T. 90). Tucker visually examined the duct tape to see if there were visible latent prints, but did not see any fingerprint material. (T. 92-93). Thereafter, Tucker used the Super Glue fuming technique, but, again, Tucker did not see anything visible on the tape. (T. 93-94). Next, on the non-adhesive side of the tape, Tucker used fingerprint magnetic dusting powder and he was able to develop a print, which was photographically preserved. Tucker identified the photograph. (T. 94-95). Tucker described the latent impressions. The impression was the end joint of the finger, the left thumb. (T. 96-98). Tucker compared the latent print with the standards of two persons: Justen Charles and Christian Cruz. (T. 99). Tucker explained the comparison analysis. (T. 100-102). Tucker found the same characteristics in both the latent print and the rolled print standard of the left thumb of Christian Cruz. (T. 102-103). Tucker admitted that he could not state when the thumbprint was made on the tape. (T. 103; T. 108-109). Tucker found no other latent prints of value in the other items of evidence submitted. (T. 105-106). Tucker could also not state whether the latent print he found was located at the beginning of the duct tape roll or at the end. (T. 107).

Special Agent Craig Beers, Florida Department of Law Enforcement, testified that he previously worked at the Volusia County Sheriff's Office in the Major Crimes Squad. (T. 122-124). Agent Beers stated that he received a call on

April 26, 2013, regarding a suspicious incident at 530 Belltower, an apartment complex. (T. 124-125). Beers was aware that earlier that day a white male had been discovered in the West Airport Road area of Seminole County. The unidentified man had been found with duct tape on his mouth and had been bound. (T. 125). Beers had learned that the man was at Orlando Regional Medical Center and had been shot in the head. (T. 126). Beers was informed by officers that there was blood in the entrance way to the Belltower apartment complex and that an empty roll of duct tape and a mop were in the area of the blood. (T. 126-127). Beers realized there may be some connection between the two incidents and informed his supervisor. The Major Crimes Squad responded to Belltower and began their investigation. The scene had already been secured by the time Beers arrived on the scene. Beers received a photograph of the victim and was asked to respond to Deltona to contact next of kin for an identification. Beers met with Christina Raghonath, who positively identified the victim. Thereafter, Beers began interviewing individuals residing in the apartment complex. (T. 127-131). During the course of the investigation, Beers heard the names Justen Charles and Christian Cruz. Beers developed leads for about seven to ten days. Beers began to look for video evidence. Specifically, Beers learned that the Shotz Bar in Orange City, and the Circle K, the McDonald's and the Votran bus in Deltona possibly had videos. (T. 131-132). Beers obtained videos from these locations, reviewed them and

found photographic evidence that Charles and Cruz were together on the night of April 25 and the morning of April 26. Charles was spotted on the Spotz Bar video. Charles and Cruz were possibly in the McDonald's video and were on the Circle K video. Both Charles and Cruz were seen together in the Voltran bus video. Beers learned that the victim's car was close to the area of the Voltran bus stop. (T. 132-134). The victim's rental car was not at the scene where the victim lived. The car was later recovered backed into some bushes in the north end of the Publix parking lot in Deltona. (T. 135). Beers opened the trunk of the vehicle and saw a black electrical cord and a white cloth, which appeared to have blood on it. (T. 136-137). The vehicle was sealed until a search warrant could be obtained. The car was transported by a tow truck to an evidence facility in DeLand. (T. 137-138).

On May 10, 2013, Beers learned that Defendant Cruz had been arrested in Orange County. Beers traveled to Orlando to interview Cruz. (T. 138). Beers and two other law enforcement officers talked with Defendant. Defendant denied knowing Justen Charles and the victim. He denied being in Deltona, even after being shown still photos from the videos showing him in the company of Charles. After the interview, Beers returned to Volusia County. (T. 138-140). Subsequently, Justen Charles was located by law enforcement in the Deltona at 590 Belltower. Beers secured a search warrant for 590 Belltower and conducted a search with Investigator Josh Mott. Beers and Mott recovered a black baseball cap

with a red "YR," which matched the cap worn by Charles in the video surveillance. They also located various items of clothing, including a white T-shirt with a V-neck, similar to the one observed on the video surveillance worn by Defendant Cruz. They found various personal belongings, such as identification for both Charles and Cruz. (T. 140-143). Beers was aware of shoe impressions found at the scene, and he and Mott collected Nike style shoes found in the residence. (T. 144). Beers did not know who owned the shoes. (T. 152). Beers testified that the Belltower area was known for crime and drugs. It was a high crime area. (T. 146). Beers primarily had contact with Defendant Cruz. He never interviewed Charles. (T. 148). Cruz was younger than Charles. (T. 149).

Christina Curry, previously Christina Raghonath, testified that she dated the victim for nine years. She had a child with him. On April 26, 2013, the victim lived in the Belltower apartments. Curry lived with her father. Curry and the victim had recently moved back to Florida from New Hampshire. Initially, Curry lived with him at Belltower but the victim thought it was safer for Curry and their daughter to live with Curry's father. (T. 162-164). They found the apartment at Belltower through a family friend, Mark Walters. Walters used to live in that particular apartment and he allowed the victim, Curry and their daughter to stay there. (T. 165-167). Curry often visited the victim there after she moved out. The last time she saw the victim was the night before the incident happened on April

26. After she left, Curry spoke to the victim and talked about picking up their daughter at school. She never spoke to him again. (T. 167-169). When the victim failed to pick up their daughter, Curry tried to contact him but no one could find him. The victim was trying to become a commercial plumber at the time, but Curry did not have his workplace number. A lot of people were looking for him. She did not know of anyone who wanted to do him harm. (T. 169-170). Curry did not know if the victim was using drugs at the time. He did not keep drugs in the house. He did not keep a large quantity of money in the house. (T. 170). The last time she saw the apartment, everything was put away and kept in an orderly fashion. On the day the victim could not be found, Curry went to the apartment and found a blood everywhere. She saw a mop as if someone had tried to clean up the mess. When she got there, Mark Walters was already there. The door was already open. Curry had a suspicion that Walters was using the apartment to use or sell drugs. Curry was the first person to call 911. (T. 171-172). Later, Curry learned that the victim had been found in Sanford. She was asked by the police to identify the photograph of the victim. She found out the victim was at Orlando Medical Center and she rushed to the hospital. She sat with him. She noticed cuts, bruises, and scrapes that he never had before. (T. 172-174). Curry knew that the victim had had a car accident earlier in the week and had been injured. He was taking prescription medication. None of the injuries she saw in the hospital were

from the car accident. As a result of the accident, the victim had to rent a car. It was a silver Nissan Altima. (T. 174-176). Curry did not know either Justen Charles or Christian Cruz. (T. 176). After the investigation was completed, Curry got certain items from the apartment. She noticed that a television set was not retrieved. (T. 177).

Det. Michael Drake, Volusia County Sheriff's Office, testified that in April, 2013, he was assigned as a patrol deputy in Deltona. He was familiar with the area of 530 Belltower Avenue. He was dispatched to the area of 530 Belltower on the evening of April 26. (T. 179-181). Det. Drake stated he came on duty at 6 PM and he was dispatched at 5:52 PM. A female called in indicating that there was somebody at the apartment complex looking for a friend. There was a notation on the dispatch regarding somebody cleaning up blood. (T. 182-183). As Drake arrived at the apartment complex, he was met by Frederick Weissner and Michael Raghonath. Thereafter, Drake met with Mark Walters. Walters confirmed he was the renter of Apartment B1 and he stated there was a significant amount of blood inside the apartment. (T. 183-185).[5] Drake entered the apartment after Walters

[5] Prior to the defense resting its case, the court read the instruction on stipulations and the defense read a portion of the report prepared by Deputy Drake, who had previously testified. In this report, Deputy Drake related that Ms. Raghonath had told him she had seen Walters and others cleaning up the blood in the apartment. Drake reported that Walters immediately denied there was any blood and that anyone was cleaning up the blood. Walters said: "They're trying to

provided him with the key. Drake, Sgt. Lahey and Deputy Raileanu went to the front door. Drake knocked on the door and did not get a response. Drake checked the door and it was unlocked. Drake entered the apartment and noticed a red stained area on the tile floor. He also saw a mop next to it which appeared to be smeared with blood. Drake was concerned there was possibly an injured person or people hiding in the apartment. The officers began an initial search, taking care to work around the blood on the floor. Weissner had told Drake the name of the person everyone was concerned about. (T. 185-188). The officers did not find anyone in the apartment. Drake noticed in one of the bedrooms that there were clothes on the floor and the carpet appeared to have blood stains. The cabinets in the kitchen were all open and the living room was empty with no furniture. Drake smelled what appeared to be cleaning material. He did not notice any television. The police completed their initial sweep and closed the door to the apartment. The officers put up crime scene tape and secured the area. They created a crime scene log. (T. 188-192). Drake testified that Mr. Walters was placed in a patrol vehicle and Drake took a spot at the back of the apartment. (T. 192-193). The officers did not touch or manipulate any of the cabinets or items in the apartment during the sweep. (T. 193-194). Walters was later transported to the police station for

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get me in trouble." Walters told the deputy there was no one inside the apartment. Walters was confronted with changing his story about the blood. (T. 603-605).

questioning. (T. 200; T. 201-202). Walters did change his stories when questioned. (T. 203).

Mark Walters testified he resided at 530 Belltower, Apt. B1 in Deltona, Florida, from 2009 to 2013. Walters moved out in February or March, 2013, and moved to Normandy Blvd. in Deltona. He allowed Jemery to stay at the apartment. Walters left some items behind and kept a key to the apartment. He would visit Jemery on a daily basis. He was good friends with Jemery. He met with Jemery's girlfriend, Christina Raghonath, and his daughter. He would see both Christina and the daughter at the apartment on occasion. They kept a well-ordered apartment. (T. 205-209). While living at Belltower, Walters came to know various neighbors, including Christopher Spillman and Timothy Walker. Walters saw Justen Charles walking around sometimes. Charles did not live at Belltower. Charles was a friend of Christopher Spillman. Spillman, Walker and Charles were significantly younger than Walters. Walters also saw Christian Cruz at the apartment complex. Walters was not a friend of Cruz. Charles and Cruz visited Walters once or twice at the apartment weeks before Jemery moved in. (T. 209-213).[6] Charles came by to smoke marijuana. Walters also smoke marijuana at that time. Charles would come by to get marijuana from Walters. Walters would not

[6] Walters described Charles and older and bigger than Cruz. (T. 240). At trial it was established that Charles had a date of birth of 2/20/89 and Cruz had a date of birth of 7/23/93. (T. 475).

allow Charles to wander through the apartment but would stay in the living room. Charles would touch a chair or so, but he never saw him touch or go through drawers or closets. He did not pick up any duct tape or wires. (T. 213-216). Walters did not think Jemery and Charles were friends. To his knowledge, Jemery did not have any relationship with Cruz. Walters never saw the three of them together. (T. 216-217). Walters testified that when Cruz visited him Walters was staying in a different apartment. Cruz would smoke weed with Walters and would sometimes get weed. Cruz's visit was months before Jemery moved in. Walters did not allow Cruz to wander through his apartment and touch personal items. (T. 217-219). Walters admitted he sold small quantities of marijuana out of his apartment. The packages were usually $10 or $20 bags. These bags could easily fit in one's hand. Walters did not keep large amounts of money in his apartment and did not live a luxurious lifestyle or own expensive items. (T. 219-220). Walters believed that Jemery smoked weed and would take prescription drugs. Jemery did not keep large quantities in his apartment. Walters smoked weed with Jemery a few times. (T. 220-221). When Walters moved out, he did not leave behind any marijuana or large amounts of money. Walters did leave behind a television. He never got the television back. Walters believed that the television, a hat, and prescription Tylenol were taken from the apartment during the crime. (T. 221-222). Walters testified that on April 26, 2013, he went to the apartment

around 10:30 or 11:00 in the morning. He opened the door with his key. As soon as he opened the door, Walters saw a mop bucket and mop and blood on the floor. He walked through the apartment and entered Jeremy's room and saw stuff around the house out of place and blood in certain places. The place was a mess. Walters attempted to contact Jemery by calling his cell phone. He did not get an answer so he went to his father-in-law's house. He asked Jemery's father-in-law if he knew where Jemery was and was told he was at work. After that, Walters went back home to go to sleep and went to the casino that night. Walters did not call the police because he did not know if Jemery had hurt himself and had not gotten a chance to clean up before going to work. (T. 223-225). After he got up from his nap, Walters started calling Jemery's phone again and got no response. He returned to the apartment and met up with Jemery's girlfriend, Christina, who asked him where Jemery was. Walters let her into the apartment and she came out screaming. Walters asked a neighbor to call the police. (T. 225-226). Walters stated that the apartment looked the same as when he had seen it in the morning. Walters believed his girlfriend may have had a key to the apartment. Walters believed that he and Christina were the only persons who entered the apartment that day. (T. 226-228). Walters was unaware whether Jemery knew of anyone who would have wanted to create the mess in this apartment. (T. 228).

Timothy Walker testified that he lived at 530 Belltower in Deltona in 2013. He knows Mark Walters from the Belltower apartment complex. He first met him when he moved into Belltower. He never smoked marijuana with Walters and did not know if Walters smoked marijuana. However, Walker knew that Walters sold marijuana. Walters would sell to anyone who asked him. (T. 244-246). Walker knew Jemery, who lived in apartment B1. Jemery would visit the apartment complex frequently before he moved in. He considered Jemery a friend. Walker also knew Christopher Spillman. Spillman was about Walker's age while Jemery was older, perhaps 25 at that time. (T. 246-248). Walker knew Justen Charles for a long time and considered him a friend. Walker would smoke marijuana with Charles and go out partying almost on a daily basis. Walker knew Cruz but did not consider him a friend. He spent no time with Cruz in the months prior to April 2013. (T. 248-250).[7] On April 26, 2013, Charles and Cruz went to Walker's apartment around noon to chill. Walker was about to start a new job. The three of them stayed on Walker's front porch, smoking and talking. They spent the whole day together. Before Walker went to work, one of them asked about Mark Walters and his apartment. They had a conversation about marijuana.[8] Walker did not

[7] Walker testified that Charles was 24 in 2013. Charles was about 6`1", lean and in good shape. Walker agreed that Charles was "streetwise." (T. 263). He considered him a "hothead." (T. 264).

[8] Walker later clarified that Charles, not Cruz, asked about Walters. However, both were present when the conversation came up. (T. 266; T. 268).

believe that either Cruz or Charles knew that Walters had moved out. Walker told them. When Walker went to work, both Cruz and Charles were still at his apartment along with Walker's girlfriend, Alicia, and Charles's girlfriend, McKayla. (T. 251-253). When Walker returned from work he noticed that Charles had changed his clothes. In fact, Charles was wearing Walker's shirt, vest, pants and shoes. Later, Charles put on is own shoes. These shoes were black FUBUs with some red on them. Walker told Charles the shoes did not match his outfit. Everyone decided to go out and celebrate Walker's new job. They went to Shotz. They started drinking. At around 12 or 1, Walker decided to leave. They went to McDonald's and then returned home. Walker went through the drive-thru at McDonald's and Charles and Cruz were in the car. When they got home, Charles and Cruz told Walker that they were going to the store. It was about 2 AM. Walker stayed behind with his girlfriend and watched a move. Charles and Cruz did not return. (T. 254-259). Walker tried to call Charles three or five times but did not get a response. Walker went to bed. In the morning, Charles's girlfriend let Charles back into the apartment. He recognized Charles's voice. It was around 7 or 8 in the morning. He did not see Cruz that morning. Charles did not stay. Charles and Cruz were arrested a couple of weeks after April 26. He never saw either of them again. (T. 260-262). After the incident, Walker talked to the police about Charles and Cruz being involved. (T. 268).

Investigator Joshua Mott, Volusia County Sheriff's Office, testified about his credentials and experience as a crime scene technician and about the crime scene unit work within the Volusia County Sheriff's Office. (T. 271-273). Mr. Mott stated he was called to 530 Belltower on April 26, 2013 to investigate a scene regarding a missing person. Mott was aware that the subject living in the apartment in question could not be located. (T. 273-274). Mott was assisted by Eugene Mefford. Mott and Mefford worked at the primary scene. Mefford also responded to the hospital in Orlando and Mott worked on the Nissan Altima and the scene in Sanford where the victim was found. (T. 275-276).

Mott identified the crime scene photographs taken at 530 and 590 Belltower, the Nissan Altima and the scene in Sanford. (T. 277-278). Mott described the photographs in detail, beginning with the photographs of 530 Belltower. (T. 279-313). Mott pointed out the blood on the floor and a mop laying within it. (T. 281; T. 289-290).[9] He collected a sample of the blood. (T. 283-284). The swabs were introduced into evidence. (T. 284). The swabs were sent to the lab at the Florida Department of Law Enforcement for DNA analysis and serological testing. (T. 285-286).[10] Mott noted a photograph of a live .22 cartridge found on the floor just

[9] Mott stated he did not process the mop for fingerprints. The mop did not obtain anything of value. (T. 359-360).

[10] Mott testified that blood droplets from the foyer wall did not point to Defendant Cruz. (T. 360-361).

inside the doorway in the front foyer area. Mott collected the cartridge and identified the package containing the cartridge. (T. 286-288). Mott attempted to swab the cartridge for DNA or biological evidence. (T. 288). The swabs were sent to the FDLE lab. (T. 289). Mott also swabbed all areas within the apartment which contained possible blood. (T. 291-292). Mott also found footwear impressions inside the apartment and photographed those areas. (T. 292-294). Mott found one pair of shoes which may have gone through the area. Mott found two dissimilar shoe impression patterns throughout the apartment. These both tracked through the blood. (T. 294-295). Mott used magnetic powder to highlight the shoe impressions. He also took a wide roll of clear tape and adhered it to the surface as one piece and lifted an impression. These items were also sent to the FDLE lab. (T. 296-298). Mott inspected the first bedroom on the left as one enters the apartment. He did not find a bed. Rather, he found a sitting area, but no television. There were some McDonald's items on a table. (T. 299-300). The living room was sparsely furnished. A hallway led to the master bedroom and kitchen. A door led to a screened-in porch with a screen door. Mott noticed that the screen door was open. The apartment was disheveled. (T. 300-301). The kitchen drawers were open. (T. 302-303). Mefford helped Mott fingerprint the items in the trashcan. (T. 303). Mott found another footwear impression in the back porch. He preserved the impression. (T. 303-304). Mott identified the

footwear impressions within the apartment. (T. 311-312). In the master bedroom, Mott found what appeared to be blood on the floor in several areas. He also located the cardboard core of a roll of tape. A green bottle of prescription drugs in the name of Mark Walters was documented. (T. 304-306). Mott also identified the tape with wires and electrodes attached to the tape. (T. 311). Mott collected a shiny shoe box for fingerprint analysis. (T. 307-308). Mott inspected what appeared to be a child's room, which was relatively untouched compared to the rest of the residence. (T. 309).

Mott proceeded to the Sanford scene where the victim was found. Mott testified he was not involved in the retrieval of the victim. However, he understood the victim had been bound with tape and that tape had been found on the ground around him and collected. Mott identified items obtained by the Sanford police and transferred to the Volusia County Sheriff's Office. (T. 313-316). Mott was able to locate a spent .22 shell casing at the Sanford site by using a metal detector. (T. 317-318). This was the same caliber as the live round found in 530 Belltower. Both were Federal rounds brass in color. (T. 320). The spent casing was collected and sent to the FDLE lab. (T. 320-321). Mott identified the shell casing. (T. 321-322). Mott reviewed the photographs related to the Sanford scene. (T. 322-). The photographs depicted the area where the victim was found

and the casing located (T. 322-323) and the section of wire and pieces of duct tape (T. 324-325).

Mott took photographs of the Nissan Altima at the evidence facility. (T. 326-327). Mott found a damaged cell phone in between the front seat and the center console and a broken SIM card in the center console. (T. 328). Mott processed the vehicle for fingerprints. Mott worked with Deborah Dirienzo, an in-house fingerprint technician. (T. 328-330). In the car trunk, Mott photographed a hard hat, a cassette adapter and a white T-shirt with blood on it. (T. 332; T. 334). Mott identified all the items collected. (T. 334-335). He collected swabs from the right front kick panel (T. 336). the interior of the back windshield (T. 337-338), the inside of the left rear window, the door handle portions of the inside of each door (T. 338), the steering wheel and gearshift (T. 340), the broken SIM card and cell phone (T. 341), the inside of the car trunk (T. 341), and the cassette headphone adapter (T. 341).

Mott described the photographs of 590 Belltower. Mott responded to 590 Belltower several days after the original scene. He was informed that this was the location where Justen Charles was arrested. Mott located and documented a wallet with Social Security card and identification, clothing items, a baseball cap with initials on it, and several pairs of shoes. (T. 343-346). Mott identified a photograph of a pair of FUBU black and red sneakers, size 11. He photographed

the bottom of the sneakers. He compared those photographs with the impression evidence found within the apartment at 530. It appeared to Mott that the impressions were similar. (T. 347). Mott also found a pair of black and purple Nike Air Jordans, size 9 ½. He photographed the bottom of the tennis shoes for comparison analysis by FDLE. He visually found that there were similarities between these shoes and impressions lifted at 530 Belltower. (T. 348). Mott found a blue backpack and retrieved a wallet belonging to Christian Cruz. It included a Visa debit card and a Social Security card for Cruz. There was a USPS packing slip in Cruz's name. (T. 349-351). Mott found a vehicle in the garage. There was a prescription bottle for Mark Walters in the trunk of the car. (T. 351-352). Mott identified the white T-shirt taken from the trunk of the Altima (T. 352), the black wallet for Justen Charles (T. 352), the wallet of Christian Cruz with the items found inside (T. 352), the ball cap with the initials YR (T. 353), a red bandana found in 590 Belltower (T. 353), the black and purple Nike Air Jordans (T. 353), the pair of FUBU sneakers (T. 353), and the prescription bottle for Mark Walters (T. 353). Mott testified that the fingerprint standards and DNA standards of Justen Charles and Christian Cruz were taken for comparison purposes. (T. 354-355). In addition, a buccal swab was taken of Mark Walters. (T. 356). Mott identified the Charles, Cruz and Walters standards. (T. 356). Lastly, Mott testified that items (an

FTA blood card and a projectile) were retrieved by the Medical Examiner and provided to the Volusia County Sheriff's Office. (T. 357-358).

Det. Eugene Mefford, Volusia County Sheriff's Office, testified that he worked as a crime scene investigator since March, 2012. Det. Mefford testified about his credentials and training as a crime scene investigator. (T. 367-368). In April, 2013, Mefford was working as a patrol deputy, doing crime scene work on a part-time basis. Mefford was directed to go to Orlando Regional Medical Center to document the victim's injuries. (T. 368). At the hospital, Mefford spoke with the neurologist and saw the victim. He saw his ID bracelet and observed various physical injuries. (T. 370-371). Mefford took photographs of the victim. He noticed what appeared to be pattern consistent with the size and shape of duct tape. There was a laceration to his right ear and redness and abrasions to his face. The victim had an injury above his right ear consistent with a gunshot entrance or exit wound. Additionally, the victim had trauma to the top of his head. (T. 371-373). Mefford bagged the victim's hands for gunshot residue. He also took photographs of the victim's hands. He had some redness to his wrist. Mefford swabbed the victim's hands for DNA. (T. 374). Mefford did a cuticle scraping and swab. He noticed a small laceration to his thumb and his pinky finger. There appeared to be a pattern on the wrist consistent with what appeared to be tape. (T. 375-376). Mefford proceeded to 530 Belltower to assist Investigator Mott. When he entered

the apartment, he noticed bloody footprints in the entryway. The apartment was in some disarray. Mefford was directed to process the scene for fingerprints. They tried to obtain prints from various items, including a liquor bottle in the kitchen, a deodorant from the bathroom, the kitchen trash, personal items, and shoeboxes. (T. 376-378). They found a discarded McDonald's cup and a Walgreen's prescription bag in the trash. He lifted a latent from the cup. He also lifted a latent from the prescription bag. (T. 378-381). No prints could be lifted from the liquor bottle or two of the three shoeboxes. Mefford was able to lift a print from the Jordan shoebox. No other prints were lifted from inside the residence. (T. 382-385).

Dr. Sara Zydowicz, Orange County Medical Examiner's Officer, testified about her background, education and credentials. (T. 411-416). She described the process of conducting autopsies. (T. 416-417). Dr. Zydowicz testified she performed an autopsy on the victim Christopher Jemery on April 29, 2013. She obtained some records from the Orlando Regional Medical Center and she worked closely with the organ procurement organization since the victim was an organ donor. (T. 417-419). Dr. Zydowicz ascertained that the victim was 25 years old. He was 73 inches long and weighed 148 pounds, after the organs were procured. (T. 419-420). The doctor documented the autopsy through photographs and notes. (T. 420-421). She noted that the victim had a small abrasion to the right hand and wrist with some gummy residue. She also found abrasions and additional gummy

residue on his left hand and wrist. There was an abrasion to his thumb. She discovered ecchymoses or a collection of blood underneath the skin tissue from the wrist to the forearm. (T. 422-423). She determined that some type of blunt force was used to create the ecchymoses. (T. 424). There was a laceration on the left pinky finger with some contusion on the wrist. (T. 424-425). Dr. Zydowicz examined the victim's torso. There was ecchymoses on the top of the left shoulder caused by blunt force and there was ecchymoses on the front of the right shoulder caused by blunt force. (T. 425-426). The lower torso near the abdomen on the left side of the body showed ecchymoses (T. 426), and there were some faint areas of ecchymoses in the lower back. (T. 428). The lower part of the back had some severe wounds reaching the skeletal muscle. (T. 429). Dr. Zydowicz documented ecchymoses on the ear, the outer part of the eye, two lacerations in the eyebrow and some discoloration of the upper and lower eyelid. (T. 429). The lacerations appeared to have been caused by blunt force. The discoloration around the eye was a result of bleeding inside the skull. (T. 430-431). There was faint ecchymoses on the forehead caused by blunt force. (T. 431). The right side of the face showed similar gummy residue that was found on the hands. There was also some abrasion or laceration involving the right ear. (T. 431). She found two distinct lines on the cheekbone. She documented a laceration to the scalp which

was clearly caused by some implement. (T. 432-433).[11] Dr. Zydowicz located an entrance gunshot wound just above the right ear. Her internal examination revealed a defect in the skull associated with the gunshot wound. The trajectory of the bullet went from right to left and the bullet did not exit the head. It went through the right lobe and the left lobe and lacerated the corpus callosum, which allows each side of the brain to communicate with each other. She determined there was only one gunshot wound. She found a collection of blood within the scalp. There was no fracture of the skull. (T. 434-437). All the injuries to Christopher Jemery were inflicted while he was alive. (T. 437). Dr. Zydowicz extracted a projectile and placed it in evidence. It was turned over to Investigator Mott. (T. 437-438). Dr. Zydowicz was able to determine that the gunshot wound was not a contact wound, that is, the muzzle was not touching the skin. She calculated that the muzzle was about 3 to 4 feet away when the gun was fired. (T. 440). She agreed that the butt of a gun could have caused the blunt force injuries. It did not appear that a bat, pipe or hammer was used. (T. 441).[12] Dr. Zydowicz stated it was usual protocol to take fingernail clippings. (T. 442). She determined that some of the victim's injuries, particularly on the right arm, could be classified

[11] Dr. Zydowicz agreed that some of the injuries could have been caused in a fistfight. (T. 451-452).

[12] Dr. Zydowicz testified she could not render an opinion as to the victim's position, whether standing, or crouching or lying down, when he suffered the gunshot wound. (T. 452).

as defensive wounds. (T. 443). A blood sample was taken from the victim and it was given to Investigator Mott. (T. 443-444). The toxicology lab results on the victim showed a metabolite for a drug called Soma, or carisoprodol, a muscle relaxant. No other positive drug findings were made. (T. 446-447). The cause of death was penetrating gunshot wound to the head and manner of death was homicide. (T. 448).

Debra Dirienzo testified she previously worked at the Volusia County Sheriff's Office as a latent print examiner. Ms. Dirienzo described her prior experience and training in the field of latent print examination. (T. 457-462). Dirienzo explained what to look for during a latent print examination. (T. 462). She was asked to analyze latent prints in the case involving Defendant Cruz. She received 35 latent lifts and was provided standards for comparison. (T. 462-463). One of the latent print lifts came from a drink cup recovered by Det. Mefford. She looked for ridge detail to determine if there was a sufficient amount to make an identification. She found the print had value. (T. 464-466). She compared the latent to the standards of Justen Charles and Christian Cruz. It was identified with the right thumb from the standard of Justen Charles. (T. 467; T. 472-473). Dirienzo also analyzed a latent lift from a Jordan box. She was able to identify this latent to the right ring of Defendant Cruz. (T. 468). Dirienzo analyzed a latent lift from a Samsung phone submitted by Investigator Mott from a Nissan Altima. She

identified the right middle finger and the right index finger of Defendant Cruz. (T. 469). Dirienzo was able to positively identify eight of Justen Charles's prints to a group of 19 latent lifts submitted by Investigator Mott from a Scion vehicle. (T. 468-469). She identified the victim's prints to a Garmin in the Altima vehicle and from the vehicle, and four prints to Dashawn Burrell, from latent lifts submitted by Investigator Mott. There were some latent lifts from the Altima she could not identify. (T. 470-472; T. 473).

Nicole Lee testified she was employed at the Florida Department of Law Enforcement as a crime laboratory analyst working in the area of DNA analysis. She described her educational background and experience in DNA analysis. Ms. Lee also explained the science of DNA analysis and the process taken when items are submitted for analysis. (T. 477-483). Ms. Lee testified she received certain items for analysis from the Volusia County Sheriff's Office. Lee described the process of keeping her work area clean and uncontaminated. She followed this procedure for the items received in this case. (T. 483-486). Lee identified the bloodstain card from Christopher Jemery. (T. 487). She was able to obtain a partial DNA profile from this sample. (T. 488; T. 489). She also received a buccal swab from Christian Cruz and developed a DNA profile. (T. 488-489). She also received a buccal swab from Justen Charles and developed a DNA profile. (T. 490-491). Thereafter, Lee analyzed the swabs taken from the inside wall near the front

door of 530 Belltower. She was able to go through the extraction, quantification, amplification and visualization process with these items. She compared the evidence sample to the known standards and was able to get a complete DNA profile that matched Justen Charles. (T. 491-493; T. 515). She calculated the statistical significance at 1 in 8.2 quintillion. (T. 494). Lee also analyzed swabs from a live .22 cartridge found on the floor of the residence. She was unable to obtain any DNA result. (T. 495-496). Swabs from the floor of the southeast bedroom of 530 Belltower were analyzed and revealed a complete DNA profile for the victim. (T. 496-497). Swabs from the hallway floor near a mop revealed a complete DNA profile for the victim. (T. 497-498). Swabs from the northeast bedroom of 530 Belltower revealed a complete DNA profile for the victim. (T. 498). Lee also analyzed an adapter for a cassette player found in the trunk Nissan Altima revealed a mixed DNA profile, including the profiles of the victim and Defendant Cruz. Lee calculated that it was 700 billion times more likely to occur if the victim was present with another individual. (T. 499-500). Lee received a white T-shirt and carpeting from the trunk of a vehicle. There was a positive for a chemical test of blood in the carpeting. She was able to develop a complete DNA profile for the victim. This result was not used in a statistical calculation for the victim, but the frequency of occurrence of the profile for unrelated individuals was 1 in 1.3 quintillion. (T. 500-502). The white T-shirt revealed a mixed DNA

profile. The major profile was consistent with the victim. Both Charles and Cruz were excluded from the mixture. (T. 503-504). Lee also analyzed items submitted from a Nissan vehicle. A swab from the right front kick panel revealed a complete DNA profile for Defendant Cruz. The observed profile was greater than 700 billion times more likely to occur if the sample originated from Cruz than from some unrelated individual. (T. 505-506; T. 515). Swabs from the right front door of the Nissan gave a complete DNA profile for Cruz, resulting in the same statistical comparison of greater than 700 billion more likely to occur if the sample came from Cruz. (T. 506-507). Justen Charles's profile was included in a sample obtained from the left front door swab along with the victim. Statistically, the observed mixed DNA profile was 45 million times more likely to occur if the sample originated from Justen Charles and three unrelated individuals than from four unrelated individuals. (T. 507-509). The sample from the steering wheel and gearshift yielded a mixture of three persons, which included the victim and Justen Charles. (T. 509; T. 516). Lee did not develop a sufficient amount of DNA from swabs taken from the interior right windshield, left windshield. Also, swabs from the left rear door handle and the right rear door handle yielded mixtures which were not interpretable. (T. 510-511). The results from the SIM card showed a mixture which was not interpretable. The cell phone did not reveal any DNA

results. (T. 511). She tested the bottoms of each of the FUBU shoes for the presence of blood with negative results. (T. 511-513).

Steven Hanily, laboratory analyst supervisor for the Florida Department of Law Enforcement, testified that up to 2016 he worked in the trace evidence section. Mr. Hanily explained what the trace evidence section did and gave his educational, training and work history. (T. 519-521). Hanily was asked to examine evidence sent by the Volusia County Sheriff's Office. Hanily identified the photographs he took of the duct tape with electrode and the cardboard core of a duct tape roll to be examined. (T. 521-524). Hanily conducted a fracture match analysis during which he tried to do a comparison of the items. Initially, he did a visual examination and looked to see if there was an actual fracture contour at the line of break. Fracture breaks are unique and Hanily tried to see if the pieces fit. After the visual examination, Hanily conducted a microscopical analysis to determine whether individual characteristics are unique to the items. (T. 524-526). In his analysis, Hanily found that there was an area on the cardboard core that looked consistent with the duct tape item. In fact, on one of the duct tape specimens Hanily noticed what appeared to be actual cardboard attached to the tape. (T. 527-529). Hanily pointed out the fracture contour which lined up between the cardboard core and the piece of duct tape. The diagonal lines created in the manufacturing process for the tape and cardboard core aligned correctly. (T.

529-531). Hanily concluded that both items were at one time a single piece. (T. 532).

Elise Sosa testified she worked in the impression evidence section with the Florida Department of Law Enforcement in 2013. In that capacity, Sosa examined footwear impressions and do comparisons with submitted shoes. Sosa gave a brief description of her educational, training and work history. Sosa also described the science of footwear examination and comparison. (T. 534-539). Sosa identified the DVD that included photographs of the scene and the footwear impressions from the scene, and lifts taken at the scene. Sosa also received shoes for comparison purposes. (T. 539-541). Sosa testified that she examined a pair of black FUBU shoes and took photographs of the bottom of the shoes. She also created an impression of the bottom of the shoes. Sosa described the class characteristics of the size 11 shoes. (T. 541-544). Sosa testified that she examined a pair of black Jordan shoes and took photographs of the bottom of the shoes. She also created an impression of the bottom of the shoes. Sosa described the class characteristics of the size 9 1/2 shoes. (T. 544-545). Sosa was also given other shoes for comparison purposes. (T. 545). Sosa explained there was a hierarchy of comparison strength analysis. In descending order, first there is identification, followed by a high degree of association, correspondent class characteristics, shared design features, "not made," and elimination. (T. 546). She made one

identification related to the Jordan shoes. (T. 547-548). She was also able to make an identification with the right FUBU shoe. (T. 550). Sosa testified that comparisons with other footwear impressions allowed her to make determinations of high degree of association with the Jordan shoes. (T. 551-553). Sosa concluded that both the FUBU and Jordan shoes were associated with the bloodstain on the floor. (T. 553-554). Sosa testified about lesser degrees of comparisons between the FUBU and Jordan shoes and the footwear impressions submitted. (T. 552; T. 554; T. 555; T. 557-558). Sosa examined a shirt with a footwear impression on it. She determined that the FUBU shoe could have made the impression. (T. 556-557). Sosa examined another pair of size 11 Nike Jordan shoes. She was able to rule out those shoes as a contributor to the impressions. (T. 558-559).

Det. Graham Cage, Orlando Police Department, testified that on the evening of May 9, 2013, he was on patrol in the downtown district with his partner Dana Hilliker. Cage noticed a white Charger driving erratically, speeding and going through red lights. The vehicle turned east on West Jackson Street. Cage tried to follow it but lost sight of it. About a half hour later, Cage spotted the vehicle about a mile away. The car was hot to the touch. The car was unoccupied. Cage saw a Hispanic male in his late teens peeking around the corner at them. (T. 562-566). The officers approached him. They rounded the corner and saw the individual standing with two other persons standing on one of the patios of the

residences in the area. Cage saw the individual was in the company of slightly older black male and a black female. Cage noticed a smell of smoked marijuana. The officers began a search of the individuals. The black male had no car keys or cannabis. When Cage asked the white male to step forward for a search the male took off running southbound through the complex. (T. 567-569). Cage and Hilliker ran after the individual and ordered him to stop. The man did not comply. Cage used a taser on him to make him stop. (T. 570). The man fell on the ground. Cage ordered the man to take his hands out from underneath him. When the man did not comply, Cage used the taser again. The man was secured. (T. 570). After the man was handcuffed, Cage learned that his name was Christian Cruz. Cage identified him in court. He looked younger back then. He had longer hair and was lighter in weight. (T. 571). The officers were waiting on the curb for a supervisor, who had to come out and determine whether the use of force was justified. While they were waiting, Cruz told them, "Why don't just shoot and kill me now." He also said, "I'm as good as dead." (T. 572). Cage thought it was a very odd statement since he had been arrested for a fairly insignificant offense. (T. 573). After Cage learned that Cruz was being sought by police on a murder investigation, Cage attached a greater significance to Cruz's statement. (T. 573). Cage did not include the statement in his report of the incident because the

statement was not relevant to the offense for which Cruz had been arrested. It was just a bizarre comment. (T. 573-574).

Det. Charles Lee, Volusia County Sheriff's Office, testified he was assigned to the Major Case Unit in 2013. Det. Lee was the case agent in the death investigation of Christopher Jemery. (T. 575-577). Det. Lee was involved in the interview of Defendant Cruz on May 10, 2013. The interview occurred at the Orange County Jail in Orlando. The main interviewer was Investigator Beers. Lee and Investigator Pagliari were at the interview. Lee described it as a very laid back interview. Defendant was given *Miranda* and he opened up to them. Lee stood back and observed. He did not actively participate in the questioning. (T. 578-579). Defendant was made aware of the reason for the interview, namely, the death of Christopher Jemery. (T. 579). Defendant was provided photographs of various persons and photographs of video surveillance obtained during the course of the investigation. One of the photos was of Justen Charles. (T. 580-581). Defendant was also shown photos of the victim and several females identified at the Shotz lounge video, at the McDonald's and the Circle K. (T. 581). The Circle K video showed Justen Charles and Defendant Cruz inside the store. (T. 581). The officers did not identify anyone by name. Cruz stated he did not recognize anyone from the images shown to him. (T. 584). Cruz stated he had not been in Deltona on April 25 or April 26. He told the officers he had not been there for several

weeks and had not been in the general area for over a year. (T. 584-585). Cruz informed the officers he had never been to apartment B1 in the Belltower apartments. (T. 585).

Det. Lee was able to determine that the McDonald's items found in the victim's apartment came from the McDonald's at the corner of Dirksen and Deltona Boulevard. The police learned that because they found the receipt on the floorboard of the Nissan. (T. 586). Det. Lee knew of no evidence as to who brought the drink found in the trashcan. (T. 586). The Nissan vehicle was located on May 3, 2013. (T. 587-588). The police learned the car was rented from Enterprise by the victim's grandmother. (T. 588). The cell phone located in the vehicle was traced to the victim. (T. 588). Lee learned that a television had been stolen from the bedroom at 530 Belltower, apartment B1, along with medication and some cash. (T. 589). Lee learned from the victim's mother that the victim's bank account had been accessed. As a result, Lee obtained a surveillance video from SunTrust Bank for April 26, 2013. There are two transactions on the video about 45 minutes apart. The first transaction involved an older white male at the ATM who had nothing to do with the case. The second transaction showed a second individual with a tattoo on his right bicep. The victim's account was accessed at about 5:07 and $440 were withdrawn. When Cruz was interviewed on May 10, 2013, Lee noticed that he had a tattoo on his left bicep. The tattoo was

similar to the tattoo depicted in the bank surveillance video. Det. Lee confirmed on social media that Defendant Cruz had a single tattoo on his bicep. (T. 589-593). Det. Lee stated that at the time of Cruz's arrest Cruz looker younger than he did in the courtroom. He had longer hair and was lighter in weight. (T. 594-595). Lee testified that based on his observations Cruz was left-hand dominant. (T. 595). When Cruz was arrested, he was wearing size 9 shoes. (T. 596). Based upon his investigation, Lee could not say which of the two individuals, Cruz or Charles, fired shots in this case. (T. 597).

Penalty Phase

On March 4, 2019, the court commenced the penalty phase. The court considered some objections to the victim impact statements the prosecution intended to use. (R. 1124-1128). The defense renewed its prior motion on victim impact. The court renewed its ruling. (R. 1128). The court read a preliminary instruction to the jury. (R. 1130-1135). The State presented an opening statement. (R. 1135-1147). The defense presented its opening statement. (R. 1147-1156).

Prosecution's Case

The State called **Deandre Perez**, who testified that in 2013 he was employed at Hungry Howie's, a pizza restaurant, in Sanford, Florida. Mr. Perez stated he was working the night shift in May, 2013, when he was robbed. (R. 1157-1158). Perez recalled two individuals came through the rear entrance of the

restaurant. This entrance is usually used only by employees. There were two other employees with Perez at the time. The two men came in with guns. One grabbed a female employee by the hair. The other one hit Perez with the gun and took him to the front. (R. 1158-1159). The men took the money. One of the men asked if there was any additional money. When Perez told him there was no more money, the two men left. (R. 1160). The two men wore masks. There was surveillance video within the store. (R. 1160). Perez testified that he was hit twice with the gun. Once above his eyebrow and once on his cheek. Perez stated the one of the guns was black. (R. 1160-1161). Perez did not identify Defendant in the courtroom. (R. 1161). Perez identified the surveillance video and recognized himself on the video. (R. 1162). Perez pointed out his coworkers. He recognized the video as the video of the incident. (R. 1163-1164). As a result of being struck in the face and head, Perez had to get stitches above his eyebrow. (R. 1164). Perez testified he did try and knock the gun out of the man's hands. (R. 1165).[13] **Investigator Charles Lee** testified that the incident at the Belltower apartment was April 26, 2013, and the date of the Hungry Howie's incident was May 6, 2013. Defendant was arrested on May 10, 2013. (R. 1168-1169). Lee testified that the distance between 530 Belltower and the Airport Blvd. in Sanford is 9.8 miles which takes about 18

[13] Without objection, the court took judicial notice of Defendant's judgment and sentence. (R. 1167-1168).

minutes to drive. (R. 1169). The distance between the airport complex in Sanford and the SunTrust Bank used by Defendant later that morning is 13.7 miles, which takes about 27 to 29 minutes to drive. (R. 1170). The State called Vicki Schwartz, an employee of the State Attorney's Office, who read the letters prepared by **Samantha Jeffers and Leslie Welch**. (R. 1170-1173; R. 1174-1176). **Christina Curry** testified. She read out a letter. (R. 1176-1179).

Defense Case

The defense presented numerous witnesses, who can be categorized in four categories: 1) Family, 2) Church Relations, 3) Teachers, and 4) Expert.

1) Family. The defense called **Juan Cruz**, Defendant's father. Mr. Cruz testified that his father drank himself to death. He died when he was nine. Some other members of the family also suffered from excessive drinking. His uncle and aunt suffered from depression. His grandfather committed suicide. (R. 1180-1181). Mr. Cruz left Sonia and moved back to Puerto Rico. (R. 1185). When Cruz moved back, Defendant was already 15. His relationship with Defendant was good. His children would visit him. (R. 1192). Defendant was arrested in 2013. Cruz saw him on TV. Cruz recognized him from the video of the Hungry Howie robbery. He reported it to the police. (R. 1196-1197). **Sonia Cruz Santos**, Defendant's sister, testified she remembered the day her father left. He had taken all of this things and left a letter. She was three or four at the time and Defendant

was two or three. (R. 1281-1283). Ms. Santos explained that when she was growing up they moved from home to home and then shelters. Ms. Santos identified various family photographs. (R. 1284-1286). Her mother had a child, Lee Brandon Garrett, with Chuck Garrett. She recalled fights between her mother and Chuck Garrett. Defendant was about 8 at the time. Ms. Santos recalled that Chuck Garrett liked to manipulate and control her mother. He would get angry with the children if they got in the way too much. She felt she was walking on eggshells most of the time. (R. 1288-1290). She described various violent incidents. (R. 1290-1294; R. 1296-1298). Santos had to act as Defendant's protector during that time. (R .1295). There was a time the family ended up living with Javier Cintron. Cintron was a gang member and his brother was in a rival gang. Cintron took an interest in Defendant and Defendant started wearing dreads like Cintron. (R. 1301-1302). Santos herself was assessed for medication. She was going through a lot of stress and anxiety. (R. 1310). She learned Defendant tried to take his own life while in jail. She identified a suicide letter Defendant had written addressed to her. She first saw it the day before her testimony. She read the letter. (R. 1311-1313). **Lee Garrett** testified. Garrett stated that he currently goes to Deltona High School. His mother is Sonia Cruz and his father is Charles Garrett. He lives with his mother. Garrett said he grew up with Defendant. He was his closet friend growing up. He would listen to music and play games with

Defendant. Garrett was not very close to Sonita, his sister. Garrett remembered one time when his father tried to get into the house and there was a lot of violence. (R. 1465-1469). Garrett remembered Defendant telling him to do better in school. He taught him not to follow people. (R. 1470-1471). He did not want Garrett to follow what Defendant did. (R. 1472). Garrett believed Defendant was a good person. (R. 1474). **Sonia Cruz** testified that Defendant is her son. Ms. Cruz was first married with Juan Cruz. They had two children, Sonita and Defendant. In 1996, Juan Cruz left and returned to Puerto Rico. Sonia Cruz met Charles Garrett in 2000. Garrett eventually moved in with her and the children. On August 4, 2001, her son with Garrett, Lee, was born. (R. 1475-1479). After Garrett moved in with her, Ms. Cruz had to apply for injunctions against him. (R. 1480). She related several incidents involving Garrett's violence. (R. 1505-1506; R. 1506-1508; R. 1508-1510; R. 1512-1515; R. 1515-1518). Ms. Cruz recalled an incident when Defendant sustained a head injury when some other child, while playing golf with Lee, struck with a club, causing Defendant to bleed and be rendered unconscious. Defendant was taken to the hospital. A couple of months later, Garrett was arrested for violating one of the injunctions. Cruz took her children to a shelter. (R. 1481-1482). In high school, Defendant would often stay home with his sister while Ms. Cruz would go to church. (R. 1538). Ms. Cruz became concerned that Defendant was using drugs. (R. 1539). He would complain to her about

headaches. (R. 1540). Ms. Cruz testified that Defendant repeated third and ninth grades. (R. 1541-1542). **Lizzette Perez** testified that her husband is Defendant's uncle. She first met Defendant in 2009. (R. 1616-1617). Defendant stayed with her family for several months. Ms. Perez developed a bond with Defendant. Defendant confided in her about his family situation and living standards. She could tell that Defendant hurt a lot. Defendant's sister came to stay for a while and she also expressed a lot of anger. (R. 1622-1624). They decided they were going to enroll Defendant to get his GED and help him get a job. Defendant got a job at a nearby Pizza Hut and then a job at Sears. However, Defendant got sick and they let him go. Defendant loved the fact that he had a job. Ms. Perez placed him on a budget because he wanted to save money. (R. 1627-1630). Perez and Defendant agreed that he could get his GED in Florida and return to New York to go to college. (R. 1641-1642). Perez late learned Defendant was arrested. (R. 1642-1643). Perez was in shock. Since his arrest, Defendant has written to her 22 letters. (R. 1643). She read one of the letters on the record. (R. 1646-1651). She found out Defendant had attempted suicide. (R. 1651-1652).

2) Church. **Saul Areizaga** testified he has known Defendant since Defendant was 8 years old. Mr. Areizaga stated he first me him at church where he was the choir director and met his mother and sister as well. Defendant's mother was always struggling, asking for help. R. 1201-1204). Defendant was a

quiet, docile kind of kid. He was just a regular child, looking to play. He would often see him sad and would light up when in the company of other children. Areizaga's son, Brandon was with a group of other kids at the YMCA and smoking a joint. Defendant told him to stop it and drop it. He walked Brandon from Deltona to the house. Areizaga believed Defendant saved his son's life. (R. 1208-1211). **Irish Areizaga**, Saul Areizaga's wife, testified that she knew Defendant from church. He was 4 when she first met him. Defendant was very quiet and shy. He was playful with her sons but reserved around adults. She noticed he was sad and she learned he did not have a father around. Defendant's mother was very active in the church. (R. 1214-1216). Ms. Areizaga recalled one time when Defendant helped her son Brandon. Brandon had left school and had gone to a YMCA in Deltona and Defendant saw him there. Defendant told him to leave and accompanied him home. (R. 1219-1220). **Brandon Areizaga** testified that he knew Defendant, they shared a lot of interests and they used to play together a lot. He used to sit next to him in church. Brandon considered him his mentor. Defendant would tell him not to do the things he would do. Looking back on the relationship, Brandon now believed that Defendant was kind of depressed based on the music he would play. (R. 1224-1229). Defendant was always pushing Brandon to be a better person, asking him about school and telling him not to smoke weed. (R. 1229). **Luis Robles** testified he has known Defendant all his life. Robles is

just two months older than Defendant. Robles believed he began to have relationship with Defendant through church. He would play with Defendant. Robles would sometimes visit Defendant. Defendant lived in different homes. He remembered that sometimes there was nothing to drink and a lack of certain food. Defendant did not have a room of his own. He would share it with his brother. Robles would notice a certain amount of neglect from Defendant's mother. He did not see a loving connection. (R. 1238-1242). Robles recalled that a man named Javier Cintron ("X") at one time became part of Defendant's life. Cintron was very rough. Defendant told him that Cintron was gang-affiliated. Defendant created a strong bond with Cintron. Cintron had a big influence on Defendant. (R. 1248-1250). **Carmen Robles** testified she knew Defendant from church. She is the mother of Luis Robles. She met Defendant's parents at church around 1995 or 1996. (R. 1270-1271). Ms. Robles felt sorry for Defendant and his siblings because sometimes they would not have a place to be. She noticed that they did not look happy. She learned Defendant was sad and disoriented. (R. 1273-1274). **Joel Latorre** testified he knew Defendant from church where Latorre was the youth leader. He knew Defendant from age 3 or 4 to age 14 or 15. (R. 1323-1324). Latorre knew that Defendant's mother was always seeking financial assistance. (R. 1332-1333). Defendant's appearance started to change. His hair grew out and started dressing differently. He was a bit more confrontational with his mother. (R.

1339-1341). **Sonia Rodriguez** testified she met Defendant's mother in 2002 at church and became good friends. Ms. Rodriguez stated that she started helping take care of Defendant while Defendant's mother worked. Defendant was about 11 or 12 at the time. Rodriguez remembered that Defendant was always polite and passive. Rodriguez's children loved being with Defendant and his siblings. (R. 1365-1370). Rodriguez was able to assist Defendant's mother through her work in domestic violence advocacy. Defendant's mother did not know what to do if she left Garrett. At one point, Rodriguez stated she was going to report the situation to the authorities. Defendant was terrified of Garrett. (R. 1370-1374). Rodriguez identified injunctions she helped Defendant's mother on. (R. 1375; R. 1377-1378). Garrett showed up at Rodriguez's residence on two occasions when he found out she was helping her with the injunctions. He was screaming and yelling to the point she called the police. (R. 1380). She also witnessed Garrett being verbally abusive with Defendant's mother. (R. 1381-1382). **Emanuel Reyes** testified he knew Defendant from church. Defendant was always respectful and never combative. He remembered Defendant's mother was always present at church when Defendant was there. (R. 1445-1448). Reyes recalled that Defendant started to change when he became 17 or 18. He began to mimic "X" in the way he dressed, behaved and talked. Defendant started wearing dreadlocks and tattoos. He cut grooves into his eyebrows. (R. 1449-1450). Reyes testified Defendant's

mother was always seeking financial assistance. (R. 1451). **Luz Fantauzzi** testified she knew Defendant from church. Defendant would sometimes come to her home. Defendant behaved well. She recalled one time he visited when he looked very sad. He said he was missing the love of his father. Defendant would call Luz Grandma. Luz loved him very much and he became like a grandson to her. She could not believe it when she heard he had been arrested because that was not how she knew him. (R. 1455-1459). **Suheil Pizarro** testified met Defendant in 2007 at church. He was a very loving boy. He was very attentive with his siblings and with Pizarro's children. He would come over to Pizarro's house and they would watch movies. He remembered Defendant interacting with Pizarro's one-year old child as if he was his own brother. (R. 1461-1463). **Saul Areizaga** testified he was a childhood friend of Defendant. He knew him mainly from church. Saul would play a lot with Defendant. Later, Defendant and Saul were in the same high school. As a teenager going into high school, Defendant became more reserved. Saul became concerned that Defendant was depressed. (R. 1590-1593). Defendant once confided to him he was going through a lot and cried. (R. 1593-1594). Later, Saul himself went through a period of depression and he now knew what Defendant was going through. (R. 1594-1595). He noticed a change in Defendant's appearance in high school. Defendant began wearing dreadlocks and baggier clothes. (R. 1596-1597).

3) Tearchers. **Robert Bodiak** stated that he was a teacher for 42 years and is now retired. He remembered teaching Defendant basic American History at Deltona High School in 2003 or 2004. He would see Defendant about an hour and 15 minutes every day. (R. 1262-1264). Defendant was not the best student but he was very cooperative. He never caused trouble. Bodiak never had to write him up for anything, except for being tardy. Defendant kept to himself because he was an ESOL student. He was socially isolated. Bodiak never saw that he was bullied or harassed. Defendant was not defiant and always did the work that Bodiak assigned. When Bodiak would sometimes break the students up into groups for question solutions Defendant would never be the leader of the group. Bodiak believed his lack of English skills had a lot to do with that. (R. 1264-1267). **Marilyn Masilunis** testified that she taught at Deltona Middle School where Defendant was a student. She recalled she had him before and after school. She remembered Defendant. He was laid-back. He was always polite. (R. 1389-1393). Masilunis reviewed Defendant's school records and noted that his conduct was generally good. (R. 1395-1396). She considered him more of a follower than a leader. (R. 1399). Defendant's academic grades struggled. (R. 1401). **Catherine Connell** testified she worked in Exceptional Student Education for students with learning disabilities and behavior issues. Ms. Connell explained the program. She identified a psychological evaluation conducted on Defendant in 2002. (R. 1410-

1413). Connell stated the report provided a full-scale IQ of 95, which is average. (R. 1414; R. 1422-1423). **Sandra McGowen** testified she taught math at Deltona High School and remembered Defendant. Ms. McGowen identified Defendant's report card showing that Defendant attended her geometry class. McGowen remembered Defendant as a lost soul. He did not work and did not cause any problems. He was respectful. She believed he was in another world. School was not important to him. (R. 1426-1429).

4) Expert. **Dr. Francisco Gomez**, a neuropsychologist, testified about his education, credentials and experience. He also explained the field of neuropsychology and his research in the area. (R. 1675-1682). In Defendant's case, Dr. Gomez ruled out the risk factors of prenatal drug exposure and physical abnormalities (R. 1697), and the risk factor of family history of criminal behavior and substance abuse. (R. 1700). He was uncertain about brain injury because he had had a head injury when he was 9 years old and had been hospitalized. Brain injury could affect a person's ability to constrain impulse. Because Defendant had attempted suicide, however, testing would have been inconclusive as to whether the brain scan impairment dealt with the blow to his head or the attempted suicide. (R. 1697-1699; R. 1750). Dr. Gomez did find that Defendant suffered from trauma due to neglect, poverty, some physical abuse and exposure to domestic violence. (R. 1700-1701). He learned Defendant was very hyperactive and depressed most

of the time. He found out that in school he daydreamed a lot, a symptom of hyperactivity. His school records showed that later in life he was aggressive, got into fights and was suspended. He was arrested for marijuana at 17. He had problems learning, failing 3rd and 9th grades. An evaluation taken when he was at school showed an average IQ of 95. (R. 1702-1705). While in jail, Defendant has been given a diagnosis of bipolar disorder II, which refers to people who are mainly depressed. Defendant was depressed a lot and sad. He had some manic episodes. When a person has manic episodes their impulse control is poor. Defendant never received treatment for his disorder. Defendant's suicide attempt fit within the reactions of persons with this disorder. (R. 1705-1707). Dr. Gomez determined Defendant suffered from poor family bonding and family conflict, noting that Defendant's father had left, which is a particularly relevant factor in Hispanic family structure. (R. 1711-1712). Dr. Gomez found parental child separation. (R. 1714-1715). Defendant's family was disorganized and could not offer him assistance. (R. 1715). Dr. Gomez found Defendant dropped out of school and had problems with his grades. He never found school interesting. He was a loner and had difficulties at school including truancy. He started using drugs. (R. 1717-1718). He transitioned in and out various schools which was a negative factor. (R. 1719). Dr. Gomez noted Defendant had delinquent peers. At the time of this event, Defendant was associating with people doing negative

things. (R. 1723). Defendant told Dr. Gomez he had access to drugs and firearms. (R. 1725-1726). Defendant had a normal IQ (R. 1729-1731) but he did not have the benefit of a positive social orientation (R. 1731) or a resilient temperament. (R. 1732). He did not have good social bonding or consistent role models. (R. 1732-1735). Dr. Gomez concluded during the offense Defendant had significant risk factors and no protective factors. Dr. Gomez believed Defendant's action was an acute event since he could not see how Defendant would jump to the level of the crime. He would have expected to see a lot of lower-level behaviors gradually escalating over time. (R. 1739-1742). Dr. Gomez believed Defendant's risk factors combined with situational factors which resulted in toxic situation. The person he associated with was one he barely knew and he did not have the coping skills to deal with it. He may have been manipulated. He was suffering from bipolar disorder at the time. He may have been using drugs as well. (R. 1743-1747). Defendant was at an extremely high risk for a negative outcome. (R. 1748). Dr. Gomez read Defendant's letter to his brother Lee. (R. 1751-1753). Prior to resting, the defense read a stipulation that the injury to the victim by being shot rendered him immediately unable to feel pain. (R. 1792).

Prosecution Rebuttal

The State called **Dr. William Riebsame**, a licensed psychologist. Dr. Riebsame testified about his credentials and educational and training background

in the field of forensic psychology. He also discussed his work in *Miller/Graham* cases dealing with juvenile offenders. (R. 1793-1797). Dr. Riebsame interviewed Defendant on one occasion a few days before. Prior to the interview, the doctor reviewed numerous documents, reports, interviews and mental health evaluations. Riebsame wanted to assess mitigation and competency and offer a psychological impression at the time of the offense. (R. 1797-1799). He did not interview family or friends. (R. 1836-1837). Riebsame obtained an IQ score of 95 which was average. There was no evidence of cognitive dysfunction. The doctor's findings were contrary to Dr. Saez's 2016 findings which found Defendant's intelligence in the borderline or impaired range. Riebsame ascribed the discrepancy to the fact that the 2016 test was done a few months after Defendant's attempted suicide, which because of lack of oxygen and medication affected his brain (R. 1800-1803). Riebsame noted his findings were consistent with Defendant's early life. (R. 1804). The psychological testing revealed that Defendant had a likely diagnosis of impassive attention deficit hyperactivity. However, this disorder apparently did not impair his school functioning. (R. 1804). Riebsame pointed out Defendant had some indication of depressive symptoms growing up as a child. Further, a school assessment suggested a bipolar disorder. Although Defendant suggested some symptoms of manic depression, Riebsame did not see any such symptoms during his evaluation. Defendant was on four psychotropic medications. If there was a

bipolar disorder when Defendant was an adolescent it probably involved periods of moderate depression reflecting some mania. (R. 1805-1806). Riebsame noted Defendant may have developed bipolar disorder but that has been addressed through consistent mental health treatment in jail. (R. 1806-1807). Riebsame did not find Defendant experienced long periods of social isolation. (R. 1809). Reibsame agreed Defendant was suffering from an emotional disturbance at the time of the offense and might have been depressed and taking drugs as well. However, those factors did not amount to extreme emotional disturbance. His emotional disturbance was not directing his behavior. (R. 1809-1811). Riebsame noted that while Defendant may have been in a moderate-to-severe depressive state at the time of his attempted suicide, it did not appear that he was in such a state either when Riebsame interviewed him or at the time of the offense. (R. 1811-1812). There was no evidence of, and Defendant did not report, an extreme bipolar disorder. (R. 1812-1813). Defendant reported to Riebsame that he committed the crime because he needed the money for drugs. He stated that he had previously robbed a drug dealer in a similar manner. Riebsame was not allowed to question Defendant about who made decisions during the crime. (R. 1813-1814). Riebsame concluded, however, that Defendant was becoming an aggressive, rebellious adolescent and was living "the thug life, acting like a badass." (R. 1815-1816). He described the co-defendant as older but did not say he was coercive or

domineering. After the co-defendant implicated Defendant in the crime Defendant chastised him. (R. 1816). Defendant identified himself with a gangster lifestyle and that he was not forced or coerced. (R. 1816-1817). Defendant's early-child injury from a golf club did not appear to cause cognitive impairment. (R. 1817-1818). He was physically disciplined by his mother with a belt in early adolescence when Defendant became more rebellious. (R. 1818-1819; R. 1838-1839). He did not report abuse from his stepfather. (R. 1819). According to Riebsame, Defendant experienced both positive and negative influences from others during his life. (R. 1820-1822). Riebsame described a 2011 Stewart-Marchman Act Behavioral Health Care assessment of Defendant after he was caught in possession of cannabis and paraphernalia. In this report, Defendant stated he started drinking at 16 and smoking cannabis at 15. This self-report contrasted with his interview with Riebsame where he said he began drinking at 16 and smoking cannabis at 13, and taking Xanax and Oxy. These drugs could have impacted Defendant's decision-making ability. His rebelliousness and poor school performance would increase as well. He would tend to distance himself from relationships with friends who had church values. (R. 1823-1826). The 2011 Stewart-Marchman assessment identified various risk factors. It offered some treatment for Defendant. (R. 1829-1830). Riebsame agreed there is a consensus that the brain continues to develop after age 18. He noted that development

continues to age 25. The last part of the brain to develop is the decision-making part in terms of maturity. (R. 1841-1842). In this case, however, nothing suggested that Defendant did not recognize the consequences of his acts. Rather, Riebsame testified Defendant appeared to have wanted to make sure no witnesses to the crime were still available. (R. 1843).

Spencer **Hearing**

On June 5, 2019, the court conducted the final sentencing hearing pursuant to *Spencer v. State*, 615 So.2d 688 (Fla. 1993). The defense introduced various reports and CVs from its experts. (R. 1969-1974). **Dr. Francisco Gomez**, who had previously testified at the penalty phase, stated Defendant suffered from bipolar disorder type II. Defendant was suffering from this disorder at the time of the offense. The jail diagnosis confirmed what Dr. Gomez would have concluded in any event. (R. 1974-1975). **Dr. Pedro Sáez**, a neuropsychologist, testified about his background, credentials and experience in the field of psychology and neuropsychology. (R. 1976-1977). He evaluated Defendant in March, 2016. He noted Defendant had suffered brain damage as a result of his attempted suicide. He had required significant rehabilitation to regain basic motor skills, speech and sensory functions. Dr. Sáez conducted a series of neuropsychological tests. Sáez found Defendant legally competent. He also found Defendant had substantial impairments in various cognitive areas consistent with a major neurocognitive

disorder. His overall IQ score was 71. (R. 1977-1979). Sáez concluded the discrepancy in IQ scores from the earlier 95 to 71 was attributable to the anoxic brain injury he suffered in the suicide attempt in December, 2015. (R. 1980). Sáez expected a degree of recovery with the passage of time, usually within a two-year period. (R. 1981-1982). Sáez re-tested Defendant a month before the hearing to assess his improvement. In this testing, it was shown that Defendant continues to present residual cognitive disabilities meeting the criteria for a mild neurocognitive disorder due to anoxic brain injury. (R. 1982-1983). Defendant's overall IQ score was 79, in the borderline range. (R. 1984). The residual cognitive disabilities are permanent. Aspects of Defendant's executive functioning, or complex mental skills, were impaired. (R. 1985-1986). Sáez found signs of depression and mood disturbance. (R. 1986-1987). In 2019, Defendant reported taking Zyprexa (an antipsychotic medication), lithium (a mood-stabilizing medication) and Wellbutrin and Lexapro (anti-depressant medications). (R. 1987). Those medications do not enhance cognitive functioning. (R. 1988). **Dr. Randy Otto**, board certified in forensic psychology and clinical psychology, testified about his education, credentials and experience. (R. 1990-1992). Dr. Otto did not evaluate Defendant. Rather, Dr. Otto was asked to do a summary of Defendant's developmental factors and how they were relevant to his cognitive, emotional and behavioral functioning and delinquent and criminal behavior. (R. 1993). Adolescents, as compared to

young adults, are more present-focused and less future-focused. There is a less concern for negative outcomes. (R. 2000). Otto identified various factors including prenatal drug or alcohol abuse by the mother, nutrition during childhood, opportunities that were available, challenges which occur, results of poverty, abuse or neglect, drug or alcohol abuse, and proper parenting. (R. 2011-2014).

Defendant read a statement. Defendant apologized to the victim's family. He understood the victim's family's anguish. He told the judge that he was not blaming his father but believes he may have turned out differently had he had him in his life. He would have done things differently. He would have stayed in New York and finished school, starting out fresh. He would have hung out with real friends, positive people. Instead, he hung out with negative people and became one of them. He wished he could have been a better brother. He expressed his sorrow for what happened to the victim. (R. 2025-2027).

ISSUES PRESENTED

(I)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENT

(II)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY BY DET. CAGE REGARDING HIS STATEMENTS UPON BEING ARRESTED

(III)

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RESPONDED TO A JURY QUESTION DURING VOIR DIRE THAT THEY WOULD NOT BE ALLOWED TO ASK QUESTIONS

(IV)

DEFENDANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE PROSECUTOR'S IMPROPER COMMENTS DURING GUILT PHASE OPENING STATEMENT

(V)

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT FINDINGS THAT DEFENDANT POSSESSED AND/OR DISCHARGED A FIREARM

(VI)

DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS

(VII)

DEFENDANT WAS DENIED A FAIR PENALTY PHASE AS A RESULT OF THE PROSECUTOR'S IMPROPER COMMENTS DURING PENALTY PHASE OPENING STATEMENT

(VIII)

DEFENDANT WAS DENIED A FAIR PENALTY PHASE AS A RESULT OF THE PROSECUTOR'S IMPROPER COMMENTS DURING PENALTY PHASE CLOSING ARGUMENT

(IX)

DEFENDANT WAS DENIED A FAIR PENALTY PHASE AS A RESULT OF THE STATE'S IMPROPER PRESENTATION OF EVIDENCE OF THE ROBBERY AT HUNGRY HOWIE'S

(X)

DEFENDANT WAS DENIED A FAIR PENALTY PHASE AS A RESULT OF TESTIMONY BY THE STATE'S EXPERT THAT DEFENDANT WAS INVOLVED IN ANOTHER ROBBERY OF A DRUG DEALER

(XI)

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY TO MAKE AN *ENMUND-TISON* FINDING IN THE PENALTY PHASE VERDICT

(XII)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

(XIII)

FLORIDA'S CAPITAL PUNISHMENT SCHEME IS, AND AS APPLIED, UNCONSTITUIONAL

(XIV)

DEFENDANT'S SENTENCE OF DEATH MUST BE VACATED DUE TO THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS

STANDARDS OF REVIEW

(I) An appellate court affords a presumption of correctness to a trial court's findings of fact but reviews *de novo* the mixed questions of law and fact that arise in the application of the historical facts to the protections of the Fourth Amendment. *Wyche v. State*, 987 So.2d 23, 25 (Fla. 2008). **(IV, VII & VIII)** The control of comments by counsel is within the trial court's discretion. *Perez v. State*, 919 So.2d 347, 363 (Fla. 2005); *Bush v. State*, 295 So.3d 179, 208 (Fla. 2020). The propriety of a prosecutor's closing argument may be reviewed for fundamental error. *Id.,* at 212. **(II, IX, X)** A trial judge is afforded broad discretion with respect to the admissibility of evidence. *Sexton v. State*, 697 So.2d 833 (Fla. 1997); *Cole v. State*, 701 So.2d 845 (Fla. 1997); *Kearse v. State*, 662 So.2d 677 (Fla. 1995); *Smith v. State*, 28 So.3d 838 (Fla. 2009). **(III)** A trial court's response to a jury question is reviewed for abuse of discretion. *Green v. State*, 907 So.2d 489, 496-498 (Fla. 2005). **(VI & XIV)** An appellate court may consider the cumulative effect of errors even where each of the trial court's asserted errors, standing alone, are insufficient to merit reversal, and an appellate court may find prejudice requiring reversal. *See Parker v. State*, 904 So.2d 370, 380 (Fla. 2005). **(V)** An appellate court may review the sufficiency of the evidence to support a verdict finding of possession or

discharge of a firearm. *See, e.g. Sims v. State*, 44 So.3d 1222 (Fla. 5th DCA 2010). **(XI)** Where there is no objection, error in jury instructions may be reviewed for fundamental error. *Floyd v. State*, 850 So.2d 383, 403 (Fla. 2002). **(XII)** The standard of review applicable to a trial court's finding of a capital aggravator is whether competent, substantial evidence supports the finding. *Wood v. State,* 209 So.3d 1217, 1227 (Fla. 2017). The weight to be accorded an aggravator is within the discretion of the court. *Sexton v. State*, 775 So.2d 923, 934 (Fla. 2000). It is within the trial court's discretion to decide whether a mitigating circumstance is proven and the weight to be given each mitigating factor. *Frances v. State*, 970 So.2d 806, 810 (Fla. 2007). To determine whether death is a proportionate penalty, this Court must consider the totality of the circumstances and compare the case with other cases *Dessaure v. State*, 891 So.2d 455, 472 (Fla. 2004), and with any co-defendant sentencing. **(XIII)** The constitutionality of a statute is reviewed *de novo. State v. Catalano*, 104 So.3d 1069, 1075 (Fla. 2012).

SUMMARY OF ARGUMENT

(I) The court should have granted Defendant's motion to suppress. The police had no reasonable basis to conduct an investigatory stop of Defendant and no probable cause to arrest Defendant. **(II)** The court should have excluded Defendant's statement to police officers as irrelevant. **(III)** The trial court abused its discretion by telling jurors they could not ask questions in contravention of

Florida law and without input from the defense. **(IV)** The prosecutor improperly expressed his opinion as to the severity of the case. **(V)** There was insufficient evidence to support the jury's finding that Defendant possessed and/or discharged a firearm. The State's own witness testified he had no evidence as to who the shooter was. **(VI)** The cumulative effect of the guilt phase errors entitles Defendant to a new trial. **(VII)** The prosecution improperly referred to prosecutorial expertise in choosing to seek death in this case. (**VIII**) The prosecutor improperly denigrated mitigation, attacked Defendant, argued facts not presented, appealed to the fears and prejudices of jurors, manufactured an imaginary script and suggested the requirement of nexus for mitigation. **(IX)** Defendant was denied a fair penalty phase when the State introduced evidence of the robbery at Hungry Howie's. The evidence was extensive and unduly prejudicial. **(X)** Defendant was denied a fair penalty phase when the State's expert testified about Defendant's participation in another uncharged robbery of a drug dealer. Such testimony was not relevant and was unduly prejudicial. (**XI**) The trial court improperly failed to give an *Enmund-Tison* penalty jury instruction as required by this Court. (**XII**) The trial court committed several errors in its sentencing order which, individually and cumulatively, require reversal of Defendant's death sentence. The court relied on non-record evidence. Defendant's death sentence was disproportionate as measured by similar cases and by the co-defendant's life sentence. The court

applied a nexus test on some mitigators. The aggravating factors were not adequately established and the judge failed to properly give sufficient weight to the mitigating circumstances. **(XIII)** Florida's capital punishment scheme is, and as applied, unconstitutional on various grounds. **(XIV)** Defendant's death sentence must be vacated due to the cumulative effect of the penalty phase errors.

ARGUMENT

(I)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENT

The trial court erred in denying Defendant's motion to suppress statement. Prior to trial, Defendant filed a motion to suppress statement. Defendant alleged that his statement to law enforcement following his arrest was inadmissible because his detention had been illegal. (R. 2818-2821. At the hearing, Det. Graham Cage testified that on May 9, 2013, he was on patrol in the downtown Orlando, an area comprising the entertainment district and the Parramore neighborhood. He was in a marked patrol vehicle. It was around 10 PM. The Parramore neighborhood is considered a high crime and high drug area. (R. 1016-1019). Det. Cage and Officer Dana Hilliker noticed a white vehicle driving erratically, speeding, and running red lights. Cage believed the car was going about 15 to 20 miles over the speed limit. The car possibly run about 3 or 4 red lights. The vehicle turned eastbound and the officers lost sight of it. They began

an area search. About a half hour later, the officers spotted what appeared to be the vehicle parked off Dunbar Street, about half a mile from where they had first seen the car. (R. 1019-1021). The officers stopped and touched the suspect car, noticing it was very hot. They now believed it was the car they had previously seen, although they had not been able to get the car's tag number for confirmation. The officers noticed a male looking around the corner from one of the nearby duplexes or townhomes in the area. The male individual looked at them disappeared and then reappeared. Cage believed the man was taking an unusual interest in the police activity. (R. 1021-1024). Cage and Hilliker walked over to where the man was standing and found him along with two others sitting on a back porch facing a communal area. The officers noticed a smell of what they believed was burned cannabis in the immediate area. Cage could not discern which of the three persons smelled of cannabis or had been recently using the cannabis. There were no other persons in the area. (R. 1024-1026). Cage asked one of the persons, a black male, if he had anything illegal on him. The man denied it and allowed Cage to search him. Cage found nothing on him. Cage was looking for the cannabis or drug paraphernalia. Cage was also looking for the car keys of the suspect vehicle. After completing his search of the black male, Cage turned his attention to Defendant. (R. 1026-1027). Cage testified he believed Defendant was seated at the time. Cage asked him if he had anything illegal on him and he

recalled Defendant saying he did not. Defendant then walked between Cage and Hilliker and before allowing a search Defendant ran southbound through the courtyard. (R. 1027). Before Defendant ran everyone was standing about two or three feet apart. He asked Defendant to stand up. Defendant took a step or two in Cage's direction and was between the officers when he started to run. (R. 1028). Both officers ran after Defendant. Cage yelled at him to stop. Cage pulled out Taser from his belt and deployed it. Both prongs connected with Defendant's back. Defendant fell to the ground. (R. 1028-1029). Defendant only got about 15 feet away. (R. 1029; R. 1039). After falling, Defendant pulled his arms toward his waist. Hilliker told him to take his arms out from underneath him. Defendant took out one of them but did not take out the other. Cage administered a second Taser shock and Defendant complied by taking out his other hand. (R. 1030). Hilliker handcuffed Defendant. Hilliker found a handgun on Defendant's person. Because Cage had used a Taser, police department policy required a supervisor to come out and determine whether the use of force was justified. The officers took Defendant to a nearby curb to wait for the supervisor. (R. 1030-1031). While waiting on the curbside, Defendant stated: "Why don't you just kill me now?" (R. 1031-1032). Cage thought the statement was bizarre and did not attach any significance to it since it was going to be a simple weapons violation. (R. 1032). Later, Cage learned that the firearm was potentially used in a homicide and realized why

Defendant said what he said. (R. 1032-1033). The officers never found any keys or contraband on Defendant. The two other individuals disappeared and Cage was never able to obtain their identifications. (R. 1033). Officer Dana Hilliker testified that he was on patrol with Cage in the Parramore area, a very high crime area. They saw a white sedan vehicle operating in an illegal manner but lost sight it. Later they found what they believed was the same car. It was unoccupied. They started to run the car to see if it was stolen. (R. 1043-1045). Hilliker noticed a Hispanic individual standing along the sidewalk looking at what they were doing. The man did it several times. This lasted about 10 to 15 minutes. (R. 1045-1046). The officers walked over to the area where Defendant had been looking at them and saw Defendant along with a black male and a Hispanic woman standing at the doorway of a porch in the apartment complex. (R. 1046). Hilliker walked past them and stood to their right while Cage stood in front of them. Hilliker smelled burned marijuana. The officers wanted to know if the persons had anything to do with the vehicle and then, due to the smell of burned marijuana, the officers began a drug investigation. Cage asked the black man if he had any keys or drugs on him. He asked him if he would submit to a search and the man complied. Cage searched the black man and found nothing. (R. 1047-1048). Cage then asked Defendant about the car keys and drugs. Defendant said he did not. Cage asked him if he could search him. Defendant stood up and started to walk toward Cage.

When he got between the two officers, who were standing about 10 to 15 feet away from each other, Defendant paused momentarily and then took off running. (R. 1048). When Defendant had stood between the officers Cage told him to "stop, stop, police, don't do it." Defendant appeared nervous. (R. 1048-1049). Once Defendant ran, Hilliker yelled out: "stop, police." Defendant kept running. Cage deployed his taser and the taser probe struck Defendant's back. Defendant fell forward, face down. (R. 1049). Hilliker told him to place his hands on his back but Defendant placed them underneath his body in the waistband. (R. 1049). Hilliker grabbed his right hand and placed a handcuff on it but Defendant would not produce his left hand. Cage used his taser again and Hilliker grabbed his left hand and placed the other handcuff on him. (R. 1050). Hilliker searched him and found a .22 handgun in the pocket of his shorts. The serial number on the gun appeared to have been filed off. (R. 1050). Hilliker did not find any drug paraphernalia or car keys on Defendant. (R. 1051). The officers walked Defendant over to a curb. While at the curb, Defendant said something to the effect that they should have shot him and that he was as good as dead. (R. 1051). Hilliker did not attach any significance to the statement at the time. (R. 1052). Later, Hilliker learned more about Defendant and the statement became more significant. (R. 1052-1053). After the witnesses testified the parties presented argument. (R. 1058-1061; R. 1061-1064; R. 1064-1067). The Court orally denied the motion, noting the officers

conducted the stop legally based upon the circumstances. (R. 1067). In a written order, the Court reviewed the facts of the case. (R. 2972-2973). The Court ruled that the officers had a basis for conducting an investigation because of the defendant's actions in spying around the corner "or otherwise acting in a suspicious manner," acting nervous when approached, being in an area where the smell of cannabis was prevalent, running after another person had been searched at night, and being in a high crime/high drug area. The court found that these circumstances constituted a sufficient basis and created an articulable suspicion for detention, and subsequent probable cause for arrest since a concealed weapon was found on him. (R. 2973). At trial, the defense renewed its previous objections and motions, specifically the statement based on the motion to suppress. The court announced that its ruling would stand. (T. 119; T. 408; T. 566-567).

The trial court erred in denying Defendant's motion to suppress. In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the United States Supreme Court, for the first time, recognized an exception to the requirement that the Fourth Amendment seizures of persons must be based on probable cause. *See Dunaway v. New York*, 442 U.S. 200, 208-209, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979). In *Dunaway*, the Supreme Court explained that *Terry* declined to stretch the concept of "arrest," and the general rule requiring probable cause to make arrests "reasonable" under the Fourth Amendment, to cover "stop and frisk"

situations. *Dunaway, supra*, 442 U.S. at 209, 99 S.Ct. 2248, 2255. The sufficiency of information to support an investigatory stop is less than the sufficiency of information needed to support probable cause for arrest. *See Kansas v. Glover*, 589 U.S. __, 140 S.Ct. 1183, 1188, 206 L.Ed.2d 412 (2020)(quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). An officer may stop and question an individual suspected of wrongdoing if the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry v. Ohio, supra*, 392 U.S. at 21. Reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Alabama v. White*, *supra* 496 U.S. at 330, 110 S.Ct. at 2416. Reasonable suspicion to support an investigatory stop is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *See Ornelas v. United States*, 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), and *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Reviewing courts must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. The likelihood of criminal activity need not rise to the level required for probable cause. *See United States v. Arvizu*, 534 U.S. 266, 273-274, 122 S.Ct. 744, 750-751, 151 L.Ed.2d 740 (2002).

It has been recognized that a brief stop of a suspicious individual, in order to determine his or her identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of facts known to the officers at the time. *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972). In the present case, the officers lacked specific and articulable facts which reasonably warranted an investigatory stop. The *Terry* standard requires more than just an unparticularized suspicion or hunch. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). The officers lacked a reasonable, well-founded suspicion of criminal activity. *Popple v. State*, 626 So.2d 185, 186 (Fla. 1993). The officers were not seeking to clarify an ambiguous situation. Here, the officers were investigating the vehicle they suspected was involved in various traffic infractions. However, they did not identify anyone in the car. (R. 1035; R. 1054-1055). The single fact that Defendant may have been peeking at them while they were by the car was innocent behavior that did not warrant an investigatory stop. *See State v. Teamer*, 151 So.3d 421, 427-428 (Fla. 2014)(observation of one innocent factor insufficient to arouse reasonable suspicion). Officer Hilliker agreed that they approached Defendant on a mere hunch he had something to do with the car. (R. 1055). Further, the officers' detection of burnt cannabis coming from the area of the group of three persons did not furnish a well-founded basis to suspect Defendant of criminal activity. *See,*

e.g., State v. J.J., 143 So.3d 1050, 1052 (Fla. 4th DCA 2014)(odor of marijuana must be individualized to person to be searched who is part of group); *B.G. v. State*, 213 So.3d 1016, 1018 (Fla. 2d DCA 2017)(same). (T. 568). When an officer restrains the freedom of an individual that person has been seized. *Terry, supra*, 392 U.S. at 16. An officer directing a person to "stop" is a command and not a request. *N.S. v. State*, 227 So.3d 132, 133 (Fla. 4th DCA 2017). Here, Officer Cage stated that he told Defendant to stop before Defendant started to run. (R. 1038). Even a valid stop does not necessarily mean there can be a valid frisk. Rather, under *Terry*, an officer may validly frisk for weapons if the officer believes that the person stopped is armed and dangerous. *See Brown v. State*, 224 So.3d 806, 810 (Fla. 2d DCA 2017). Here, the officers did not suspect Defendant was armed. Defendant was well within his rights to run away when the officers were about to search him. The officers lacked articulable reasonable suspicion to justify a stop. In a consensual encounter, a citizen may choose to ignore an officer's request. *See N.J. v. State*, 275 So.3d 1270, 1272 (Fla. 5th DCA 2019). *See also A.L. v. State*, 133 So.3d 1239, 1241 (Fla. 4th DCA 2014). The facts in this case do not show "unprovoked flight." Rather, they demonstrate Defendant's refusal to cooperate with the officers. Flight alone is insufficient to give rise to reasonable suspicion of criminal activity. *See Majors v. State*, 70 So.3d 655, 660 (Fla. 1st DCA 2011). The officers' stop and ultimate arrest of Defendant were unlawful and Defendant's

statements given after the unlawful stop and arrest should have been suppressed. *See State v. Dickey*, 203 So.3d 958 (Fla. 1st DCA 2016). The State was able to use Defendant's statement as evidence of consciousness of guilt. (T. 25; T. 719).

(II)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY BY DET. CAGE REGARDING HIS STATEMENTS UPON BEING ARRESTED

The trial court erred in denying Defendant's motion in limine to exclude Det. Cage's testimony regarding Defendant's comments following his arrest. The court denied Defendant's motion in limine to keep out testimony by law enforcement officers that Defendant had said that they might as well have shot him upon his arrest. The court ruled that the testimony was relevant and reasonably related to flight to avoid prosecution. (T. 403-406). During the testimony of Det. Graham Cage, the defense renewed its motion and objection to the testimony pertaining to Defendant's statement. The court renewed its ruling. (T. 566-567). Det. Cage proceeded to testify that after Defendant was arrested and handcuffed, the officers were waiting on the curb for a supervisor, who had to come out and determine whether the use of force was justified. While they were waiting, Cruz told them, "Why don't just shoot and kill me now." He also said, "I'm as good as dead." (T. 572). Cage thought it was a very odd statement since Defendant had been arrested for a fairly insignificant offense. (T. 573). After Cage learned that

Defendant was being sought by police on a murder investigation, Cage attached a greater significance to Defendant's statement. (T. 573). Cage did not include the statement in his report of the incident because the statement was not relevant to the offense for which Defendant had been arrested. According to Cage, Defendant's statement was just a bizarre comment. (T. 573-574). The court should have excluded the statement as irrelevant and not clearly related to the charged homicide. The record shows that Defendant had been involved in the robbery at Hungry Howie's just days before his encounter with Officer Cage. It cannot be said that Defendant's statement was relevant or related to the homicide as opposed to the intervening robbery. *Cf., Twilegar v. State*, 42 So.3d 177, 196 (Fla. 2010)(evidence of flight must have nexus to crime charged in order to be admissible). The statement was vague on its face and depended upon the officer's later interpretation to have any semblance of relevancy. Admission was error.

(III)

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT INFORMED JURORS DURING VOIR DIRE THAT THEY WOULD NOT BE ALLOWED TO ASK QUESTIONS

During voir dire, one of the jurors asked the prosecutor if the jury would be allowed to ask questions during trial. The prosecutor answered: "Typically, no." (R. 590). The court proceeded to tell the jurors that they may generally not ask questions but the court may allow something to be explored if necessary (R. 590),

and that in criminal cases it is best to allow the lawyers to do the questioning and jurors to accept it and hold the party to their burden. (R. 591). At least five of the jurors who ultimately served on the jury panel deciding case where present when the court made the foregoing statement. Contrary to the court's ruling, Florida law permits jurors to ask questions in criminal cases. *See Ferrara v. State*, 101 So.2d 797 (Fla.1958); *Morris v. State*, 931 So.2d 821 (Fla. 2006). In fact, there is a jury instruction regarding the procedure to be followed. Rule 3.371, Florida Rules of Criminal Procedure. Further, the court's response was improper since there was no consultation with defense counsel. *Cf., Mills v. State*, 620 So.2d 1006, 1007 (Fla. 1993)(per se reversible error to respond to jury question during deliberations without consulting counsel).

(IV)

DEFENDANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE PROSECUTOR'S IMPROPER COMMENTS DURING GUILT PHASE OPENING STATEMENT

During opening statement, the prosecutor improperly expressed his personal opinions about the horrific nature of the crimes charged and inappropriately alluded to the victim's family's anguish. The prosecutor stated:

> MR. WILL: "Ladies and gentlemen, death is always tragic, but this case is *particularly upsetting*." (T. 29)(emphasis supplied).
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> ***
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> MR. WILL: "Two *unbelievably brutal strangers* invaded his [the victim's] home in the middle of the night and ransacked his apartment, in search of drugs. The facts will show that he was beaten and robbed,

> kidnapped and thrown in the trunk of his own car, that he was driven to the middle of nowhere, shot in the head and left to die in a ditch, and that somewhere along this *continuum of unspeakable acts*, Cruz was able to get [the victim's] PIN and access his accounts. Then the defendants went about their lives as if it were any other day, *and [the victim's] family waited at the hospital*. (T. 29)(emphasis supplied).
>
> ***
>
> MR. WILL: "Thank you for your time and attention this morning. I thank you for the attention you'll give this case as the State presents evidence of *this senseless and violent act*." (T. 30)(emphasis supplied).

An opening statement may not be used by a prosecutor to argue his case, attack the credibility of witnesses or to express personal opinions. *See First v. State*, 696 So.2d 1357, 1358 (Fla. 2d DCA 1997) (where prosecutor branded defendant's alibi witness a "liar" and expressed a personal opinion it was reversible error). On opening statement, a prosecutor may not attack the character of the defendant. *See Traina v. State*, 657 So.2d 1227, 1229 (Fla. 4th DCA 1995); *Post v. State*, 315 So.2d 230, 231-232 (Fla. 2d DCA 1975). The prosecutor's comments in this case clearly amounted to argument discrediting the defense, attacking the character of Defendant and expressing personal views and opinions. These were not isolated remarks. *Compare Heath v. State*, 648 So.2d 660, 663 (Fla. 1994)(single remark in opening); *Duest v. State*, 462 So.2d 446, 448 (Fla. 1985)(single incident where prosecutor insulted defense counsel). The prosecutor's arguments during opening statement, expressing his personal views on the "upsetting" "unspeakable" and "senseless" nature of the crimes, labelling Defendant "unbelievably brutal," and alluding to the anguish of the victim's family

while waiting at the hospital injected impermissible matters for the jury's consideration at the very onset of trial and deprived Defendant of a fair trial, under Art. I, §§9 and 16, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution. The improper comments amounted to fundamental error and cannot be considered harmless error. *See Pait v. State*, 112 So.2d 380, 384 (Fla. 1959)(prosecutor deeply implanted the seeds of prejudice).

(V)

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT FINDINGS THAT DEFENDANT POSSESSED AND/OR DISCHARGED A FIREARM

In Det. Charles Lee's direct examination, the following occurred:

> MR. WILL: "Do you have any information, as you sit here right now, to know which of the two individuals alleged actually fired any shots in this case?
> DET. LEE: "*No, sir, I do not*." (T. 597)(emphasis supplied).

Clearly, there was ***no evidence*** presented at trial or made part of the record showing that Defendant Cruz possessed or discharged a firearm in this case. The interrogatory questions regarding the firearm were answered as follows: 1) First Degree Murder-Defendant actually possessed and actually discharged a firearm (R. 3320-3321); 2) Burglary While Armed-Defendant actually possessed a firearm (R. 3322); 3) Robbery with a Firearm-Defendant actually possessed and actually discharged a firearm (R. 3323); and 4) Kidnapping-Defendant actually possessed and actually discharged a firearm. (R. 3324). These findings are incompatible with

the evidence and find no support in the record. Defendant's convictions for First Degree Premeditated Murder and First Degree Felony Murder, Armed Burglary, Armed Robbery, and Kidnapping, premised on the jury's firearm findings, should be reversed. *See, e.g., Sims v. State*, 44 So.3d 1222 (Fla. 5th DCA 2010) (insufficient evidence that defendant was shooter to satisfy 10-20-Life law).

(VI)

DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS

Should this Honorable Court find that the issues raised by Defendant constitute harmless error, Defendant would tender that the cumulative effect of the guilt phase errors (admission of Defendant's statement, prosecutorial misconduct, improper jury instruction and insufficient evidence to support the firearm findings) renders Defendant's convictions unfair under Art. I, §§9 and 16, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution. *See McDuffie v. State*, 970 So.2d 312, 328 (Fla. 2007).

(VII)

DEFENDANT WAS DENIED A FAIR PENALTY PHASE AS A RESULT OF THE PROSECUTOR'S IMPROPER COMMENTS DURING PENALTY PHASE OPENING STATEMENT

During opening statement at the penalty phase, the prosecutor made the following improper comment:

> MS. JAQUES: "As the prosecution, this *is not something that we take lightly* because, as we discussed, *not every murder is one that would be considered for the death penalty*. *So we take it very seriously* when we present this case to you as one that you should consider the death penalty." (R. 1135-1136)(emphasis supplied).[14]

The prosecutor improperly asked jurors to consider the fact that the State of Florida, through its court representatives, had made the decision to seek the death penalty in Defendant's case beyond other murder cases. It has long been recognized that statements suggesting prosecutorial expertise in death penalty cases are improper. *See Brooks v. State*, 762 So.2d 879, 901 (Fla. 2000); *Pait v. State*, 112 So.2d 380, 384-385 (Fla. 1959).

(VIII)

DEFENDANT WAS DENIED A FAIR PENALTY PHASE AS A RESULT OF THE PROSECUTOR'S IMPROPER COMMENTS DURING PENALTY PHASE CLOSING ARGUMENT

During closing argument at the penalty phase, the prosecutor made the following improper comments denigrating mitigation:

> MR. WILL: "*And there's at least one other person who grew up in exactly the same circumstances*, had exactly the *same risk and protective factors that we went through ad nauseum* yesterday, except that she was a female, and she was one or two years older. *She turned out fine. She's not calling a long list of friends to dig her out of a*

[14] This theme was developed from voir dire. MR. WILL: "*So this one of those special and few circumstances* where we're going to talk to you about what might happen before we talk to you about guilt or innocence of a particular person. (R. 189). MR. WILL: "*Our function* at the homicide unit *is to prosecute cases just like this*." (R. 497)(emphasis supplied).

hole. She's not torching their mother in public to improve her circumstances." (R. 1877-1878)(emphasis supplied).

The prosecutor improperly asked jurors to consider how Defendant's sister did not end up like Defendant. He converted what was mitigating into something aggravating by alluding to Defendant's sister. A prosecutor may not attach aggravating labels to factors that actually should militate in favor of a lesser penalty. *See Walker v. State*, 707 So.2d 300, 314 (Fla. 1997) (citing *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)). In addition, the prosecutor improperly denigrated Defendant's mitigation presentation as "calling a long list of friends" to dig him out of hole. He inappropriately attacked Defendant, labeling the mitigation testimony concerning Defendant's mother as "torching" the mother in public to improve his circumstances. A prosecutor may not denigrate mitigation during closing argument. *See Williamson v. State*, 994 So.2d 1000, 1014 (Fla. 2008); *Brooks v. State*, 762 So.2d 879, 904 (Fla. 2000); *Oyola v. State*, 158 So.3d 504, 512 (Fla. 2015). Subsequently, the prosecutor also stated:

MR. WILL: "*And the fact that he tried to commit suicide… that's not the kind of mitigation that should be important*—more important or more significant than the torturous death of another human being." (R. 1880).

The prosecutor also stated:

MR. WILL: "He had ADHD and bipolar disorder. Those are not conditions that blur the line between right and wrong. (R. 1879-1880).

The prosecutor improperly denigrated mitigation pertaining to the attempted suicide as unimportant, or at least not as important as the victim's torturous death and improperly denigrated Defendant's ADHD and bipolar disorder as unimportant conditions. This was error. *See Williamson v. State, supra*; *Brooks v. State*; *Oyola v. State.* He improperly implored jurors to disregard evidence of mitigation in contravention of *Eddings v. Oklahoma*, 455 U.S. 104, 113-114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), that a sentencer in a capital case consider mitigation evidence. He misled jurors by suggesting that these conditions related to the sanity standard of right and wrong. It is improper for a prosecutor to make misstatements of fact in closing argument. A prosecutor may not argue facts which are not supported in the record. *See Huff v. State*, 437 So.2d 1087, 1090 (Fla. 1983); *Garcia v. State*, 622 So.2d 1325, 1331 (Fla. 1993); *Fenster v. State*, 944 So.2d 477, 479 (Fla. 4th DCA 2006)(prosecutor improperly argued facts unsupported in the record).

The prosecutor argued a homicide nexus for mitigation:

> MR. WILL: "*He was struck by a golf club as a preteen. That has absolutely no bearing. None*. It's an event that occurred in his life. Sure. But it *was never connected* by any doctors to traumatic brain injury. (R. 1879).

This comment was improper. There is no nexus requirement which results in the rejection of mitigation unless it is connected to the murder. The comment was not just putting mitigation in context. *See Cox v. State*, 819 So.2d 705, 723 (Fla. 2002). The prosecutor appealed to fears and prejudices of jurors by stating:

MR. WILL: "This was a brutal crime. *It's the kind of crime that frightens you to your core. It's the reason that children fear the darkness. It's why people have locks on their doors and keep guns for protection*." (R. 1881)(emphasis supplied).

These remarks were undeniably aimed at frightening jurors and placing them and their families in the victim's situation as Defendant's targets. A closing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant. *See King v. State*, 623 So.2d 486, 488 (Fla. 1993)(quoting *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985)). The prosecutor manufactured an imaginary script and asked jurors to think about what the victim was hearing:

MR. WILL: "*You know they talked about it*. Christopher Jemery laid there bound and gagged, forced to listen to them. When they were satisfied that they had taken everything of value from his home, *you know, there was a conversation about how it was going to end. That poor man had to listen to it.*" (R. 1882)(emphasis supplied).

Comments such as these have been roundly condemned. *See, e.g., Garron v. State*, 528 So.2d 353, 358-359 n.6 (Fla. 1988)(improper to ask jurors imagine pain of the victim as she was dying); *Bertolotti v. State*, *supra* at 133 (improper to ask jurors to imagine victim's final pain, terror and defenselessness); *Urbin v. State*, 714 So.2d 411, 421 (Fla. 1998)(improper to put imaginary words in the victim's mouth).

The cumulative effect of the prosecutor's comments amounted to fundamental error. *See Card v. State*, 803 So.2d 613, 622 (Fla. 2001)(court to

consider cumulative effect of improper comments). *See also Cochran v. State*, 711 So.2d 1159, 1163 (Fla. 4th DCA 1998) (improprieties in the prosecutor's closing argument reached critical mass of fundamental error)(citing *Kilgore v. State*, 688 So.2d 895, 898 (Fla. 1996)); *Crew v. State*, 146 So.3d 101 (Fla. 5th DCA 2014) (same). This case was a circumstantial evidence case. The defense submits that the evidence at trial was not so overwhelming such as to render harmless the prejudicial impact of the prosecutorial misconduct. The fingerprint evidence linked Defendant to the victim's residence and his DNA was in the Nissan vehicle. Yet, there was no evidence that Defendant fired the gun which killed the victim. Defendant was not found in possession of any of the items taken from the victim's residence. Defendant did not admit to the homicide when interrogated. Although there was a finding of five aggravating factors (as merged), there was also a finding of no less than 37 mitigating circumstances. Under these circumstances, the prosecutor's numerous improper comments cannot be considered harmless.

(IX)

DEFENDANT WAS DENIED A FAIR PENALTY PHASE AS A RESULT OF THE STATE'S IMPROPER PRESENTATION OF EVIDENCE OF THE ROBBERY AT HUNGRY HOWIE'S

The State presented evidence of the robbery at Hungry Howie's. This evidence should have been excluded under §90.403, Florida Statutes. Deandre Perez testified about the robbery which occurred a few days after the charged

homicide. (R 1157-1166). The judgment of conviction was introduced into evidence (R. 1167-1168) and a video tape of the incident was played to the jury. (R. 1162). During opening the prosecutor referred to the incident as evidence of an aggravating factor (R. 1145-1146), and at closing the prosecutor referred to the robbery as evidence that Defendant was a violent person (R. 1883-1885). The prosecutor replayed the video for the jury. (R. 1885). The trial court exclusively relied on the incident in finding the prior violent felony aggravating factor, giving it great weight. (R. 3785-3787). This incident was not a small or insignificant part of the State's penalty phase presentation or argument. The testimonial and video evidence related to this robbery should have been excluded since its probative value was outweighed by its prejudicial impact. *See Lebron v. State*, 894 So.2d 849, 854-855 (Fla. 2005)(State may not introduce evidence to prove prior violent felony where probative value is outweighed by prejudicial impact). This evidence rendered Defendant's penalty phase unfair under Art. I, §§9 and 16, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution.

(X)

DEFENDANT WAS DENIED A FAIR PENALTY PHASE AS A RESULT OF TESTIMONY BY THE STATE'S EXPERT THAT DEFENDANT WAS INVOLVED IN ANOTHER ROBBERY OF A DRUG DEALER

Dr. William Riebsame testified during the State's rebuttal at the penalty phase. On direct. the prosecutor asked Reibsame if Defendant had told him the

motivation for the crime. (R. 1813). Riebsame testified Defendant reported that he committed the crime because he needed the money for drugs. (R. 1813). Riebsame added that Defendant had told him he had previously robbed a drug dealer in a similar manner. (R. 1814). The testimony concerning robbery of another drug dealer in a similar manner was unduly prejudicial. There is no *Williams* Rule notice regarding this alleged robbery. This collateral crime was not relevant. *Compare Victorino v. State*, 23 So.3d 87, 99 (Fla. 2009)(evidence of uncharged misconduct relevant to show a continuing chain of events leading up to the murders). *Cf. Geralds v. State*, 601 So.2d 1157, 1162-1163 (Fla. 1992)(State may not present otherwise inadmissible information of defendant's criminal history under impeachment guise). Riebsame's testimony was inadmissible and the trial court failed in its responsibility to monitor practices and control improper influences in imposing the death penalty. *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985). Defendant's penalty phase unfair under Art. I, §§9 and 16, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution.

(XI)

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY TO MAKE AN *ENMUND-TISON* FINDING IN THE PENALTY PHASE VERDICT

The trial court erred by failing to instruct jurors to make an *Enmund-Tison* determination in the penalty phase verdict. This Court has directed trial courts to

instruct jurors before its penalty phase deliberations that in order to recommend a sentence of death the jury must make findings satisfying *Enmund*[15] and *Tison*.[16] *Diaz v. State*, 513 So.2d 1045, 1048 (Fla. 1987); *Perez v. State*, 919 So.2d 347, 365-366 (Fla. 2005); *Jackson v. State*, 180 So.3d 938, 949 n.11 (Fla. 2015). Such a jury finding must be made during the penalty phase. *Perez, supra* at 366. The jury's guilt verdict finding that Defendant possessed and/or discharged a firearm finds no support in the record (*See* Issue V, *supra*), and does not satisfy the *Enmund-Tison* penalty phase jury finding requirement.

(XII)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

The penalty of death is qualitatively different from any other penalty and "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Here, the high standard for capital cases has not been met. The trial court committed several errors in its

[15] *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

[16] *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

sentencing order which, individually and cumulatively, require reversal of Defendant's death sentence and a remand for resentencing.

Disproportionality The trial court entered an order finding five (5) aggravating factors, as merged. (R. 3785-3799). The court accepted all 37 mitigating circumstances with varying weights. (R, 3800-3826). The law reserves the death penalty only for the *most* aggravated and *least* mitigated murders. In *Cooper v. State*, 739 So.2d 82, 85 (Fla. 1999), this Court found the death sentence disproportionate for an 18-year old with substantial mental health issues even though there were significant aggravating factors. In *Crook v. State*, 813 So.2d 68 (Fla. 2002), this Court found the death sentence disproportionate for a 20-year old although there were three aggravators in light of substantial mitigation). *See also Phillips v. State*, 207 So.3d 212 (Fla. 2016)(death vacated for 18-year old with compelling mental health issues even with two aggravators including prior violent felony); *Robertson v. State*, 699 So.2d 1343 (Fla. 1997)(death sentence disproportionate for 18-year old with mental health issues with two aggravators including EHAC). Defendant, 19 at the time of the offense, presented substantial mitigation including serious mental health conditions. His death sentence is disproportionate when compared to similar cases. The court rejected Defendant's argument (R. 3768-3772) that the co-defendant's life sentence should accord Defendant a life sentence as well. (R. 3769-3772). *The court accepted that both*

defendants were equally culpable. (R. 3822). *See Farina v. State*, 801 So.2d 44, 55-56 (Fla. 2001)(disparate treatment of equally culpable defendants may render defendant's punishment disproportionate). The State maintained that the jury made a specific finding that Defendant was the actual shooter, rather than placing blame on the co-defendant. (R. 3718). The State asserted that Defendant was found to be "solely responsible" for the shooting the victim. (R. 3718). This argument is wholly disingenuous since the State never offered the co-defendant's jury the option of deciding whether he had actually possessed or discharged the firearm. (R. 3957-3959). The Court noted that the case against the co-defendant was tried "in identical fashion," and that the jury heard virtually the same case. However, the jury reached a different conclusion. (R. 3779). The Court pointed out in Charles's case the State abandoned any efforts to establish Charles as the shooter. The jury in Charles's case did not determine who the shooter was because of the State's concession. The jury in Defendant's case did make the finding. As such, the Court found that Defendant did in fact kill the victim and "no further analysis is needed." (R. 3799-3800). In its order, the court noted that the co-defendant's case went exactly the same way as Defendant's with the exception that the jury determined that Defendant was the actual killer while the State conceded that Charles was not the shooter. (R. 3827). The jury in Charles's case found the same aggravating factors. (R. 3960-3966). The only thing that made a difference

in Charles's case and spared him the death penalty was the fact that the State stipulated he was not the shooter. (R. 3828). On that basis, the court found the death sentence would not be disproportionate. (R. 3828). This conclusion was made although there was ***no evidence*** that Defendant was the shooter. The State elicited on direct examination of Det. Lee that he had no information as to which of the two defendants actually fired any shots in the case. (T. 597). The court's analysis is flawed and in error. This finding also played a part in the court giving only slight weight to a minor role mitigating circumstance. (R. 3820-3821). Further, the jury finding does not inescapably establish Defendant's greater culpability since a triggerman is not necessarily more culpable than a co-defendant. *See, e.g., Craig v. State*, 510 So.2d 857, 870-71 (Fla. 1987)(non-triggerman's culpability fully equal to triggerman); *Sexton v. State*, 775 So.2d 923, 936 (Fla. 2000)(defendant more culpable than actual perpetrator of homicide). Here, the record shows that the cases against both Defendant and co-defendant were "identical" but for the jury finding regarding possession and discharge of a firearm. This option was not given to the co-defendant's jury. As such, Defendant maintains that his sentence of death was disproportionate since the verdict forms were drafted such as to virtually guarantee a disproportionate outcome.

Inappropriate Reliance On Non-Record Facts In its sentencing order, the court noted it had heard and considered evidence of the case in Defendant's trial

and the co-defendant's trial. (R. 3780). The court referred to the testimony of Justen Charles's girlfriend who saw Defendant in possession of a .22 caliber handgun. (R. 3782). The court also noted that a plan was formulated to rob the dealer. (R. 3782). In discussing the avoid-arrest factor, the court referred again to the testimony of Charles's girlfriend that Defendant "brandished" a .22 caliber firearm and that Charles carried a 9 mm handgun. (R. 3791). The court should not have premised its sentencing order, even in part, on facts not developed in Defendant's trial, where defense counsel would have been able to confront the witness and evidence. Mr. Charles's girlfriend did not testify at Defendant's trial and inclusion of her testimony regarding Defendant's possession of a .22 handgun or any plan to rob the drug dealer should not have been considered by the trial court in its order. This was error. *See Krawczuk v. State*, 92 So.3d 195, 201 (Fla. 2012)(error for court to consider extra-record information to impose death penalty)(citing *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)); *Dailey v. State*, 594 So.2d 254, 259 (Fla. 1991)(error to consider evidence from different trial in sentencing order where evidence not introduced in guilt phase of present trial). It cannot be considered harmless error as defense counsel had no opportunity to address the evidence. The testimony was discussed by the Court in finding the avoid-arrest aggravating factor and was instrumental in the Court's conclusion that Defendant obviously possessed a firearm even though the

record evidence in Defendant's case established no evidence as to who fired the fatal shot.

Aggravating Factors: **Prior Violent Felony**. The court gave great weight to the fact that Defendant was previously convicted of a felony involving the use of threat of violence to the person. The court relied on the Hungry Howie's robbery. (R. 3785-3787). This factor should have been given great weight because it occurred *after* the instant offense. Further, the evidence showed that Defendant exercised restraint during the episode when the manager attempted to knock the gun from Defendant's hands. Defendant did not retaliate or discharge the weapon. **Commission of a Felony**. The court gave great weight to the fact that the capital felony occurred during the commission of robbery, burglary or kidnapping. The aggravating factor should not have been given great weight since the State failed to present evidence that Defendant was the driving force in committing the burglary, robbery or kidnapping. **Financial Gain**. Although the court found that the felony was committed for financial gain, this circumstance was merged with the commission of a felony aggravating factor. (R. 3793; R. 3799). Defendant maintains, moreover, that this factor was entirely circumstantial. The State did not establish that murdering the victim would result in financial gain to Defendant. It is unclear whether the murder occurred prior to or after the ATM withdrawal. If prior to the murder, there was no evidence that Defendant was aware that the

victim was murdered or would be murdered. If after the murder, there would have been no reason to kill for financial gain. **EHAC.** The court stated that the victim was undoubtedly conscious when taped and placed in the trunk (R. 3795), however, this is pure speculation. While the victim may have been alive at the time (T. 437), the evidence presented does not show he was conscious or aware of his pending death. Indeed, the prosecutor alluded to the fact he may have been unconscious when he admitted the victim may have been carried to the place where he was shot. (R. 1883). EHAC only applies where it is shown the victim was conscious and aware of his/her impending death. *See Douglas v. State*, 878 So.2d 1246, 1261 (Fla. 2004). The court alluded to the Hungry Howie's robbery to find that the victim was beaten with a gun, apparently ascribing this action to Defendant. (R. 3794-3795). There is no such evidence. Moreover, since EHAC may not be applied vicariously [*Perez v. State*, 919 So.2d 347, 380-381 (Fla. 2005)], it must be shown that Defendant directed or knew how the victim would be killed. The record is devoid of this evidence. The court's conclusion that "it doesn't matter" which person inflicted the injuries (R. 3795) is at odds with well-established law. Moreover, it has been recognized that execution-style murders do not generally qualify as EHAC. *See Hartley v. State*, 686 So.2d 1316, 1323 (Fla. 1996); *Ferrell v. State*, 686 So.2d 1324, 1330 (Fla. 1996). The medical examiner's testimony established that the victim was shot through the head. There was no

testimony that the victim was conscious at the time. The EHAC finding was erroneous and not harmless as the court did not state that any one of the aggravators found was sufficient to outweigh the mitigators. *See Smith v. State*, 28 So.3d 838, 868 (Fla. 2009). **Avoid Arrest**. The court concluded that the avoid-arrest aggravating factor was established because the victim was transported to an isolated location and killed. (R. 3789-3793). However, there is no consideration given that the co-defendant may have been solely responsible for this action. After all, Charles was the driver of the car taking the victim. (R. 3791). *Compare Cannon v. State*, 180 So.3d 1023, 1040 (Fla. 2015)(avoid arrest factor proper where evidence showed defendant was driving force and dominant actor in taking victim to secluded area). Further, there was no evidence that the victim knew Defendant or could identify him. It cannot be said that the victim's elimination was Defendant's dominating intent. Mere speculation that witness elimination was the dominant motive cannot support this aggravator. *See Scull v. State*, 533 So.2d 1137, 1142 (Fla. 1988). **CCP**. The court reliance on the CCP factor is premised entirely on circumstantial evidence. The only arguable evidence of planning by either defendant was that of an alleged burglary of an unoccupied apartment. The fact that the victim was discovered does not support a finding of heightened premeditation or a careful plan or prearranged design by Defendant. Although there was no evidence to show the length of time it took to complete the crimes,

the court made a finding it took a substantial amount of time. (R. 3797). The Court found that the killing was done after careful consideration and thought, but it does not ascribe such consideration or thought to Defendant. (R. 3798). The court found heightened premeditation leading to the execution-style killing, however, there was nothing in the State's case which suggested or proved that Defendant was the person who decided to beat the victim, remove him from the premises, drive him to a secluded location, and shoot the victim. In fact, the State's evidence establishes that Defendant was the passenger, not the driver, in the vehicle which transported the victim. (R. 3791). The record does not show Defendant was the shooter. (T. 597). The court's reliance on this "fact" (R. 3796-3797) is error. For CCP to apply, the record must show that the defendant being sentenced had the state of mind to satisfy the elements of CCP. *Davis v. State*, 121 So.3d 462, 495 (Fla. 2013). It is not enough to suggest that two or more defendants acting in tandem had to have had the same state of mind. (R. 3822). Otherwise, there is no such thing as individualized sentencing.

Mitigating Circumstances: The defense presented substantial, compelling mitigation. The trial judge failed to give those mitigating circumstances sufficient weight. First, the court referred to Defendant's refusal to accept a plea prior to trial. (R. 3800-3801). This reference amounted to consideration of a non-statutory aggravator. *Cf., Wilson v. State*, 845 So.2d 142 (Fla. 2003)(a defendant may not be

subjected to more severe penalty for exercising right to trial). Second, the mitigating circumstances should have been accorded great weight by the trial court. Here, of the 37 mitigating circumstances considered, the court only gave one great weight and another one extraordinarily great weight. (R. 3802-3826). An order must evaluate each mitigating circumstance offered, decide if it has been established, and assign it a proper weight. *See Orme v. State*, 25 So.3d 536, 547-548 (Fla. 2009). Although clearly established, the court gave only slight weight to a host of factors related to Defendant's traumatic upbringing as demonstrated by abandonment by his father, substantial neglect by his mother who was obsessed with going to church above all things and who frequently beat her children, severe financial hardship, lack of treatment until incarcerated, permanent brain damage and improper gang influence. Only slight weight was given to unrefuted evidence of Defendant's positive actions. (R. 3817-3818; R. 3819). The court improperly noted a lack of nexus between the financial hardship and Defendant's life of violence (R. 3807), Defendant's head injury at 9 and Defendant's life thereafter (R. 3813), the bullying Defendant suffered and his actions in killing the victim. (R. 3814), Defendant's "poor thinking" and the killing. (R. 3815-3816), his mental illness and his actions (R. 3816), and his conflicting views on religion (R. 3819). These findings went beyond just placing mitigation in context. *See Cox v. State*, 819 So.2d 705, 723 (Fla. 2002). The court gave only moderate weight to

Defendant's depression, bipolar condition and his lack of treatment (R. 3816) and his lack of prior criminal activity (R. 3820). Yet, Defendant's depression, youthful drug abuse and bipolar disorder, and his lack of criminal history prior to the homicide, were overwhelmingly established. Clearly, the trial court failed to properly assess the mitigating circumstances and failed to accord such factors sufficient weight, especially as to the uncontroverted mitigating circumstances. *See Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990) (uncontroverted evidence of physical and psychological abuse and trial court's analysis inapposite). The court simply did not give sufficient weight to the *unrebutted* mitigating circumstances. Defendant's case is not one of the "most aggravated and least mitigated cases," warranting the death penalty. *See Green v. State*, 975 So.2d 1081 (Fla. 2008); *Cooper v. State, supra*. The death sentence should be vacated pursuant to Art. I, §§9 and 16, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution.

(XIII)

FLORIDA'S CAPITAL PUNISHMENT SCHEME IS, AND AS APPLIED, UNCONSTITUIONAL

Defendant maintains that the Florida's capital sentencing scheme is, and as applied, unconstitutional under the Florida and U.S. Constitutions. First, there are so many aggravators that almost every murder is death eligible. The statute fails to narrow the application of the law. Second, the indictment failed to allege any

aggravating factors. The 6th Amendment requires that any fact that increases the penalty for a crime beyond the statutory maximum qualifies as an element that must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Due process under the 5th Amendment and the jury guarantee under the 6th Amendment requires that any factor, other than prior conviction, that increases the maximum penalty must be charged in the indictment. *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Third, the jury was not given proper guidance on determining the existence of the sentencing factors or how to weigh them. Rather, the instruction simply tells jurors that the process is not mechanical or mathematical. Instr. 7.11, Fla. Stand. Jury Instr. Fourth, the felony-murder aggravating circumstance amounts to an "automatic" aggravating factor creating a presumption for a death sentence. In effect, once a defendant is indicted, and found guilty, on an accompanying qualifying felony, the aggravator is essentially "proved" as stated below. (R. 1137-1138; R. 1886-1887; R. 3787). Fifth, the jury was permitted to consider victim impact evidence, which is *not* relevant as an aggravating factor Instr. 7.11, Fla. Stand. Jury Instr. It amounts to a non-statutory aggravating factor. Sixth, the prior violent felony aggravating factor is improperly vague and overbroad, as it does not require the "prior" conviction used to be final and allows *contemporaneous* convictions and even offenses

occurring *after* the charged homicide to be used, thus impermissibly expanding the word "prior" beyond clear legislative language. Lastly, the EHAC factor is vague and overbroad. The jury is not properly instructed on the precise meaning and application of EHAC other than using undefined words such as "wicked," "vile," "pitiless," and "evil." Defendant recognizes that this Court has rejected constitutional challenges to Florida's capital punishment statute and instructions. *See, e.g., Miller v. State*, 42 So.3d 204, 214-219 (Fla. 2010). The defense raised these issues below and the court ruled against Defendant. (R. 2822-2829; R. 2873-2875; R. 2876-2879; R. 2880-2883; R, 2884-2888; R. 2889-2897; R. 1068-1092). Defendant preserves them here and for further review

(XIV)

DEFENDANT'S SENTENCE OF DEATH MUST BE VACATED DUE TO THE CUMULATIVE EFFECT OF THE PENALTY PHASE ERRORS

Defendant's sentence of death must be vacated due to the cumulative effect of the penalty phase errors. These involved prosecutorial misconduct, improper admission of evidence, the omission of a required jury instruction, and several sentencing order errors. The cumulative effect of these errors deprived Defendant of his right to a fair trial under Art. I, §§9 and 16, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution. *See Poole v. State*, 997 So.2d 382, 394 (Fla. 2008)(cumulative errors deprived Defendant of fair penalty phase).

CONCLUSION

Christian Cruz respectfully requests that this Honorable Court reverse his convictions and corresponding sentences, or alternatively, requests that this Court vacate his death sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing initial brief was electronically filed with the Clerk of Court, and that a true and correct copy of the foregoing initial brief was mailed to Christian Cruz, #D51268, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083, and electronically furnished via e-portal to Patrick A. Bobek, Esq., Office of the Attorney General, at email address CapApp@myfloridalegal.com, on this 24th day of August, 2020.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ

CERTIFICATE OF COMPLIANCE

Appellant states that the size and style of type used in his initial brief is 14 Times New Roman.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ