IN THE SUPREME COURT OF FLORIDA

RICARDO I. GILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC06-1572

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name ("Gill"). Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The following reference symbols will be used:

> "R19 356-58": Pages numbered 356 to 358 by a circuit clerk's stamp in the lower right corner of Volume 19 of the 21-volume record on appeal;
>
> "SR1 56-57": Pages numbered 56 and 57 by a circuit clerk's stamp in the lower right corner of Volume 1 of the six-volume supplemental record on appeal;
>
> "IB 24": Page 24 of the Initial Brief.

"CCP" refers to the aggravating circumstance of cold, calculated and premeditated, and "HAC" refers to the aggravating circumstance of heinous, atrocious, or cruel.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

OVERVIEW.

In another First Degree Murder case, Gill desired to have the death penalty imposed. (E.g., R5 713-15) In that case, on July 20, 2001, Judge Stan R. Morris rendered a 28-page order sentencing Gill to life in prison. (R5 713-40) After the life sentence was imposed, "Gill told Judge Morris that if he did not receive a sentence of death, he (Gill) would make the next judge impose the death penalty." (R5 695) Four days later, on July 24,

2001, Gill strangled his cellmate, Orlando Rosello, to death with parts of a bed sheet (See, e.g., R19 356-58; R5 695, 753, 798), resulting in this case (R1 1-2). After strangling Mr. Rosello to death, Gill confessed multiple times, essentially stating that he strangled the victim to death to fulfill his promise to Judge Morris and to ensure that the death penalty is imposed the next time (R5 753-54, 758-59, 763-65, 770-72, 782, 791-93, 861-63; R19 404-405; SR2 141-42, 144-46), which Judge Robert Cates, in fact, imposed on June 30, 2006, in this case (R5 695-711; R21 463-90). Judge Cates' Order sentencing Gill to death is attacked in this appeal.

Gill's saturation of the record in this case with his pro se letters, complaints, and pleadings further demonstrates his intelligence, manipulativeness, and mental capacity to coldly calculate with heightened premeditation. Gill has also filed a number of pro se documents in this Court.[1]

[1] Incidentally, Gill has also written the undersigned assistant attorney general and, among other things, discussed how the State's Answer Brief should argue in support of the death sentence in this case; on May 30, 2008, undersigned forwarded that correspondence to Gill's current appellate counsel.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

The Murder.

Gill pleaded guilty (R19 336-37, 347-55) to premeditatedly murdering Orlando Rosello on July 24, 2001, as charged (R1 1-2). The prosecutor stated the factual basis for Gill's plea of guilty to First Degree Murder:

> The state is prepared to prove that Mr. Gill was adjudicated guilty of a prior first degree murder on July 20th, 2001, in Alachua County in Case Number 99-2277-A[,] [h]e was sentenced to life in prison.
>
> Four days later, on July 24th, 2001, he was in a cell with his cell mate, the victim, Orlando Rosello. He was the only person in that cell with Mr. Rosello for the hours preceding Mr. Rosello's death.
>
> During the time that Mr. Gill was incarcerated and locked in the cell with Mr. Rosello, he strangled him to death. He used a bed sheet with a knot in it, tied it and strangled Mr. Rosello.
>
> That morning Mr. Rosello was found dead. Two written confessions were found. One was found in Mr. Gill's pocket, one was found in the plumbing of the cell, both authored by Mr. Gill and indicating his deliberate and premeditated killing of Mr. Rosello.
>
> Subsequently, post-Miranda Mr. Gill was interviewed and gave a comprehensive and detailed statement, which the state would introduce into evidence in a redacted form.
>
> In Mr. Gill's own words, the state would prove, quoting him: It only took four days, just like I promised. I wrapped that sheet around his neck and strangled the shit out of him. When I saw blood coming out of his ear and heart still beating, I started punching him in the chest, hoping I could bust his heart, then I tied the sheet in a knot and wrapped his neck with it and left him like that for two hours.
>
> That is a brief summary of the evidence the state would use to prove the premeditated murder by Mr. Gill of Mr. Orlando Rosello.

(R19 356-57) Gill had no objection to this recitation of the facts. (R19 358)

Judge Cates' sentencing order summarized the circumstances surrounding this murder:

> RICARDO IGNACIO GILL was sentenced to life in prison as a result of a murder he was convicted of in Alachua County, in Case No. O1-1999-CF-002277-A. GILL pled guilty to murder in that case, and was sentenced to life in prison by the Honorable Stan R. Morris, Circuit Judge. After the sentence, Mr. Gill told Judge Morris that if he did not receive a sentence of death, he (Gill) would make the next judge impose the death penalty. Judge Morris alerted the authorities to this threat, and Gill was transported to the Regional Medical Center at Lake Butler, Florida.
>
> Despite the warning from Judge Morris, Gill was placed in a cell with Orlando Rosello, and in the following week Gill strangled Rosello to death using a strip of cloth from a bed sheet. It is for the murder of Orlando Rosello that Gill is before the Court for a determination of sentence.
>
> ***
>
> … GILL sent to the Gainesville Sun [Exhibit F of the Order, R5 861-63], after his life sentence in Case No. O1-1999-CF-002277-A, and after the killing of Orlando Rosello, the following statement:
>
> > Each named persons (sic) [Judge Morris, state attorney Rod Smith and Robert Rush defense attorney] could have prevented this death [the death of Orlando Rosello] by taking the appropriate action in a number of ways (sic) [and] the most important of all was sentencing me to life without parole in which made each named persons (sic) therefore becomes an accessory before the fact and to the fact of first degree murder which was cold, calculated and premeditated manner without any pretense of moral or legal justification planned nineteen months ago. My victim, the first inmate I came in contact with and I was able to block all emotional feelings and put my mind in a state[] to actually take someone's life for the first time.
>
> RICARDO IGNACIO GILL asserted that if he were to receive a sentence of life imprisonment that he would kill again.
>
> ***
>
> ... Defendant asserted that he would kill again if given a life sentence. This statement was made at least four (4) days before he committed the actual offense of capital murder on Orlando Rosello.
>
> ***

> As GILL states in his letter to the Gainesville Sun, the murder was planned 'nineteen months ago. My victim was the first inmate I came in contact with and was able to block all emotional feelings and put my mind in a state to actually take someone's life for the first time.' Thus, by GILL's own admission, he meditated upon this killing, long before to the actual killing itself, and no sense of right or wrong, nor any other moral compunction dissuaded him from killing Orlando Rosello.
>
> ***
>
> … Defendant's repeatedly stated purpose for murdering Orlando Rosello was to insure that the Defendant received a death sentence and not life in prison. *** [T]he murder of Orlando Rosello had nothing to do with the relationship between the Defendant and the victim, but was predicated entirely on the Defendant's wish to be sentenced to death.

(R5 695, 700-702)

The medical examiner concluded that the cause of the death of the victim, Orlando Rosello, was "ligature strangulation." (R5 798) The medical examiner noted a 12-inch ligature furrow on the victim's neck (R5 796; see also R5 798, 800-801)

Event Timeline and Selected Events in Case History.

DATE	IF COURT HEARING OR ATTORNEY'S PLEADING, COUNSEL REPRESENTING GILL	NATURE OF PLEADING OR COURT EVENT
7/27/2000		Regarding another First Degree Murder case, Gill's letter to the State Attorney stating that the prosecutor should "stick to the motion you filed to seek the death penalty," that "I will not do the rest of my life in prison!," and that "'What the Judge doesn't do tomorrow, the next judge will do the day after tomorrow.'" (SR2 151)
8/10/2000		Regarding that other First Degree Murder case, Gill's letter to Judge Stan Morris, quoting his (Gill's) letter to a newspaper: "'I will make

		the Judge sentence me to death. *** If he does not act accordingly, I will kill someone, ….'" The 8/10/2000 letter continued: "Don't make the next judge do the job you should have done!" (SR2 150).
7/20/2001	Robert Rush & Bill Davis	In Alachua County First Degree Murder case number 99-2277-CFA, Judge Morris sentenced Gill to life (R5 713-40), and again Gill stated that he will ensure that the next Judge imposes the death sentence (See R5 695).
7/24/2001		Gill murdered Orlando Rosello by strangling him to death (See, e.g., R5 753, 763-4, 793, 796-801). The day prior to the murder (See R5 753, 755-56, 864), Gill had written a letter to a newspaper and the Circuit Court for case number 99-2277-CFA, stating that he "would not spend the rest of his life in prison for something I didn't do" and that he took the life of Orlando Rosello by strangulation and it was "cold, calculated, and premeditated manner without any pretense of moral or legal justification (R5 861-62); he disclaimed mental mitigation using statutory language (R5 862).
7/24/2001		Gill told FDLE that he killed Orlando Rosello to ensure that he is sentenced to death this time. (R5 764-65, 770-73, 791-92)
7/31/2001		Gill wrote a letter blaming Judge Morris for his (Gill's) murder of Orlando Rosello (SR2 141) and stating that "[i]t only took four days, just like I promised," again cross-referencing his "promise" in his prior letter, describing in detail how he strangled Rosello, SR2 141) and interjecting ethnic slurs (SR2 142).
The following pleadings and events occurred within this case's court history, unless otherwise noted.		
2/6/2002		Indictment charging Gill with Murder First Degree of Orlando Rosello (R1 1-2), resulting in this case.
2/15/2002	Ass't Public Defender Roger Blinn	Public Defender moved to withdraw because of an "irreconcilable conflict of interest." (R1 5-6)

2/20/2002	Public Defender & Stephen Bernstein	Judge Stan Morris granted Motion to Withdraw and appointed Stephen Bernstein to represent Gill. (R1 9-10)
2/20/2002		Gill pro se demanded a speedy trial (R1 7-8).
3/14/2002	Stephen Bernstein	Judge Stan Morris recused himself (R1 14), and case reassigned to Judge Robert Cates (R1 15).
7/11/2002	Lloyd Vipperman	In open court, Lloyd Vipperman requested the appointment of a psychiatrist or psychologist to determine Gill's competency and sanity, Vipperman also noting that the request for examination constitutes a waiver of speedy trial. (R9 6-12)
2/14/2003	Lloyd Vipperman & Huntley Johnson	Hearing at which Huntley Johnson appeared with Lloyd Vipperman to represent Gill (R10 14-36); they attempted to obtain access to a law library for Gill and for greater access to Gill for themselves, Gill's attorneys indicating that Gill has done some "very competent" legal research (R10 22) and Judge Cates noting that Gill is "extremely intelligent." (R10 24)
4/4/2003	Lloyd Vipperman & Huntley Johnson	Hearing at which Gill's counsel noted Gill's understanding of his pro se postconviction motion in another case (R12 47, 49) and Gill's "fascinating" legal mind (R12 49), and at which Wayne Mack, an official at the Alachua County Jail testified concerning Gill's disruptive "incidents" June 1999 to July 2001 (R12 52-55) that did not rise to the level of disciplinary reports (R12 61).
6/27/2003	Lloyd Vipperman	Hearing on State's motion regarding defense counsel's qualifications, at which Judge Cates noted that the State's motion "mirrors a motion made pro se by Mr. Gill earlier in the case" (R13 75); attorneys and the Judge also discussed the pending mental health evaluations (R13 77-81) and Gill's claim that the State had not filed a notice of intent to seek death penalty (R13 80-82).
6/30/2003	Lloyd Vipperman & Huntley Johnson	State's Declaration of Intent to Seek Death Penalty. (R1 130-31)

11/21/2003	Lloyd Vipperman & Patricia Coker Jenkins	Hearing at which Patricia Jenkins, a death-qualified attorney appeared with Mr. Vipperman (R14 88); discussion regarding mental health experts, and their examinations, and the sequence of a Nelson hearing and competency hearing (R14 88-96, 98-99, 102-103, 106-107); Nelson inquiry at which Gill elaborated at great length concerning his complaints about counsel (R14 98-108), resulting in the Judge concluding that Gill expressed himself very well (R14 108) and "allow[ing]" Gill's counsel (Vipperman and Jenkins) to withdraw and indicating an intent to "appoint substitute counsel for [Gill] from the registry" (R14 109); the Judge refused Gill's pro se request to "conduct a Faretta inquiry" (Gill's word) until after Gill meets with new counsel (R14 110).
6/18/2004	Bill Salmon & possibly Patricia Jenkins	A hearing at which Bill Salmon appeared for Gill and at which Tricia Jenkins' co-counsel status was discussed (R15 116-19, 153-54); Gill abandoned his previous motions for a Nelson hearing and a Faretta hearing (R15 132-34); three mental health experts (Krop, Levin, and Werner) also attended the hearing, and during a recess interviewed Gill, then testified that he is competent to proceed (R15 127-32, 135-37); Gill endorsed a limited waiver of speedy trial (R15 138-44); and Mr. Salmon adopted and argued Gill's motion for law-library access (R15 145-48); and the Judge indicated he "believed Mr. Gill is an intelligent man" (R15 146).
10/8/2004	Bill Salmon	Hearing at which Bill Salmon argued various defense motions and requests (R16 158-187, 191-95) and against a State motion (R16 188-91) and which an investigator for Gill also attended (See R16 174-75); Gill personally argued to the judge for an order returning his watch to him (R16 200-202).
2/18/2005	Bill Salmon	Judge Cates conducted another Nelson inquiry at Gill's request (R17 205-56), which included testimony, with Judge Cates ultimately denying Gill's motion to have Bill Salmon discharged (R17 256); Gill then requested "an evaluation, a competency hearing, and a Faretta hearing also" (Id.); Gill requested that Dr. Helen

		Cadiz examine him (R17 257-58), and Judge Cates requested that Mr. Salmon prepare the order and announced that if Cadiz finds Gill competent, he will conduct a Faretta inquiry (R17 258)[2]; Judge Cates announced a jury selection date of July 11, 2005 (R17 263).
4/15/2005	Bill Salmon	Competency report from Dr. Helen Cadiz (R3 481-93); the Report discussed the sources of information on which she relied (R3 482) and details of 10 letters she received from Gill (R3 484-86), including his "exhaust[ing] 12 attorneys (R3 484), his calling her "Helen" (Id.), and his noting that Gill thought that Cadiz was "attractive" (R3 487).
4/15/2005	Bill Salmon	Hearing to determine Gill's competence to proceed and, if so, to determine if Gill wants to discharge counsel and represent himself (R18 271-72); Gill announced that he wants to withdraw his request for a Faretta hearing and "enter a plea today" because he says that Salmon wrote him a letter that instilled fear in him (R18 273, 291-93); the Judge accredited (R18 303) Salmon's testimony that he did not write the letter (R18 294-96) and denied Gill's request to discharge Salmon as Gill's counsel (R18 303); prosecutor also noted indicia that the letter was fabricated (R18 322-23), and Gill responded that the prosecutor is the only one who saw "that" (R18 323); Judge found that Dr. Cadiz' report did not conclude that Gill was competent or incompetent (R18 278), noted that three experts previously found Gill competent, and indicated that Gill is competent (R18 282-83); Gill refused to discuss his case with his attorney (R18 287) and filed a Florida Bar inquiry (R18 284), a complaint to the Judicial Qualifications Commission (R18 285), a Motion to Enter Plea, and a Waiver for Jury Trial for Sentencing Proceedings (R18 285-86); Judge explained to Gill the procedure for accepting Gill's plea and took a short recess

[2] Therefore, the State takes issue with Gill's version (IB 8) of who initiated what in the hearing reported at R17 256-58.

		(R18 287-88); Judge then conducted a Faretta inquiry (R18 289-322) and found that Gill has not made a "clear and convincing waiver of his right to counsel" (R18 322); Judge refused to accept Gill's guilty plea (R18 326) and said that "this case will be tried" (R18 328); Gill said there will be no defense at trial (R18 331).
5/5/2005	Bill Salmon (initially) then pro se	Hearing (SR1 55-68) at which Salmon indicated that Gill has rejected multiple opportunities to speak with Salmon (SR1 59) and at which Salmon told the Court that he does not see any issues of competency that still need to be raised (SR1 62); Judge found that Gill is competent to waive his right to counsel, directed that Gill represent himself, and appointed Salmon as standby counsel (SR1 65-66).[3]
7/8/2005	Bill Salmon & John Stokes as standby counsel	Pre-trial conference at which the Judge began to discuss jury selection (R19 335), and when the Judge asked Gill, now representing himself, if he is ready to proceed to trial, Gill responded that he wished "to enter a plea today" (R19 335-36); when the Judge offered Gill more time to think about it, Gill responded, "I've already thought about it" (R19 336-37); after standby counsel discussed what additional steps could be taken on Gill's behalf (R19 342-44), Gill indicated that is "not what I want" and cited to the Florida Rules of Criminal Procedure (R19 344-45); later, when Salmon presented a case during a discussion of the penalty phase, Gill essentially objected to any participation by Salmon (See R19 371); Judge conducted an extensive plea colloquy (R19 337-56), including renewing the offer of counsel (R19 337-38; see also R19 377-78); Gill stated that he is

[3] The Initial Brief notes (IB 13) that, "without further inquiry of Gill, the court ruled that Gill waived his right to counsel and could represent himself," but the Initial Brief omits that Gill voluntarily chose to remain silent at the hearing (SR1 56-57, 65); during the hearing Gill also spat on Salmon (SR1 65, 68).

		thinking clearly and pleading guilty is what he wants to do regardless of whether he is on medication (R19 350-51); ultimately, Judge accepted plea and adjudicated Gill guilty (R19 355-56); prosecutor provided factual basis in support of the charge (R19 356-57); Judge again found Gill competent (R19 362); Judge conducted a colloquy concerning Gill's right to a penalty-phase jury and Gill waived jury (R19 373-78); prosecutor introduced various documents in support of aggravation and mitigation (R19 378-402); prosecutor (R19 402-403) and Gill 404-405) argued for the death sentence.
11/18/2005		Gill filed several pro se motions (R4 563-77); Gill's Motion Opposing Dr. Alan Waldman to Testify at the Sentencing Hearing contended that Waldman had "concocted" a theory for mitigation (R4 575); Gill disputed any "rage" explanation for this murder arguing that there is no supporting "scientific proof" and no supportive "undisputable facts" (R4 575). Gill explained his premeditation for the murder (R4 576).
12/2005		Gill filed several additional pro se motions, including a Motion to Withdraw Plea. (R4 578-618)
2/1/2006	Bill Salmon & John Stokes (standby counsel)	Court resumed the penalty phase of the case. The trial court again renewed its offer of counsel and Gill again refused (R20 411-12); Dr. Waldman testified (R20 415-41).
2/2006		Gill filed several more pro se motions. (R4 622-55)
2/28/2006	Bill Salmon (standby counsel)	State's Sentencing memorandum, in which the State argued for four aggravators and against all statutory mitigation. (R4 656-63)
6/30/2006	Bill Salmon (standby counsel)	Sentencing hearing at which the Judge again renewed the offer of counsel and Gill again refused (R21 459-62); after the Judge mentioned Gill's motion to withdraw his plea (R21 449), Gill repeatedly told the Judge that he wanted to proceed with sentencing (R21 454, 455, 459, 461, 462); Judge informed Gill that he has prepared an order imposing a death sentence,

		and Gill still refused counsel and refused to bring anything else to the Judge's attention (R21 463); Judge summarized the facts of this murder (R21 463-64); Gill had no objection to those facts (R21 464-65); Gill affirmed his prior waivers of counsel and guilt-phase jury trial and penalty-phase jury trial (R21 464-65); Judge enumerated his findings of aggravating and mitigating facts and sentenced Gill to death (R21 467-89); Gill contended that the exact words of his threat were not as described by the Judge, but Gill said it does not matter because it does not excuse him from "the cold, calculated and premeditated finding" (R21 477-78).
6/30/2006	Bill Salmon (standby counsel)	Judge filed Order Imposing Sentence of Death (R5 695-711) including extensive supportive documentation (R5 712-904). The Judge's findings are detailed in the next sections of these Facts as well as discussed in the issues.

Aggravating Circumstances.

1. RICARDO IGNACIO GILL previously committed a felony, Murder in the First Degree, and was under a life sentence of imprisonment at the time he committed the murder of Orlando Rosello. Florida Statute 921.141(5)(a), Fla. Stat. (2002). Great weight. (R5 697)

Judge Cates' order explained:

> A copy of the Life Sentence imposed on RICARDO IGNACIO GILL in Case No. 01-1999-CF-002277-A is attached hereto as Exhibit "A." This aggravating factor is proved beyond and to the exclusion of a reasonable doubt.
>
> The Court gives great weight to this aggravating factor.

(R5 697)

2. RICARDO IGNACIO G1LL had previously been convicted of another capital felony. Florida Statute 921.141(5)(b), Fla. Stat. (2002). Great weight. (R5 697)

The trial court explained:

> The Defendant was convicted of the offense of capital murder in Alachua County, Case No. 01-1999-CF-002277-A, a copy of the Judgment is attached hereto as Exhibit "B."
>
> This aggravating factor is proved beyond and to the exclusion of a reasonable doubt.
>
> The Court gives great weight to this aggravating factor.

(R5 697) The prosecutor introduced a certified copy of the judgment and sentence for Gill's Murder conviction in Alachua County Case Number 1999-CF-2277-A. (R19 380)

In addition, the prosecutor introduced judgments and sentences for several other violence-related felonies (R19 380-85), including --

- Attempted First Degree Murder in Gilchrist County Case Number 21-2000-CF-0007 (R19 381);
- Two counts of Battery on Detention Staff in Alachua County Case Number 99-4240 (R19 382);
- Battery upon a Law Enforcement Officer in Alachua County Case Number 2000-2185-CFA (R19 382);
- Burglary of a Dwelling with Battery in Ninth Judicial Circuit Case Number CR-86-5568 (R19 382);
- Armed Robbery and Burglary of Dwelling with an Assault in Ninth Judicial Circuit Case Number CR-86-6240 (R19 382).

3. Homicide committed in a cold, calculated and premeditated manner without a pretense of moral or legal justification. Section 921.141(5)(l), Fla.Stat. (2002). Great weight. (R5 699-702)

Judge Cates explained his reasoning for finding this aggravator:

> In order to establish the cold, calculated and premeditated ('CCP') factor, the State must prove four elements beyond a reasonable doubt. The first is that 'the killing was the product of cool and calm reflection and not an act prompted by a emotional frenzy, panic, or a fit of rage.' Walls v. State, 641 So.2d 381, 387 (Fla. 1994) (*quoting* Jackson v. State, 648 So.2d 85, 89 (F/a. 1994)). Second, the murder must be the product of 'a careful plan or prearranged design to commit murder before the fatal incident.' Id. At 388. Third, 'heightened premeditation' is required - a premeditation 'over and above ways required for first degree murder.' Id. And finally the murder must have 'no pretense of moral or legal justification.' Id.

In Exhibit 'F,' GILL sent to the Gainesville Sun, after his life sentence in Case No. O1-1999-CF-002277-A, and after the killing of Orlando Rosello, the following statement:

> 'Each named persons (sic) [Judge Morris, state attorney Rod Smith and Robert Rush defense attorney] could have prevented this death [the death of Orlando Rosello] by taking the appropriate action in a number of ways (sic) in the most important of all was sentencing me to life without parole in which made each named persons (sic) therefore becomes an accessory before the fact and to the fact of first degree murder which was cold, calculated and premeditated manner without any pretense of moral or legal justification planned nineteen months ago. My victim, the first inmate I came in contact with and I was able to block all emotional feelings and put my mind in a statement to actually take someone's life for the first time.'

RICARDO IGNACIO GILL asserted that if he were to receive a sentence of life imprisonment that he would kill again. See for example RICARDO IGNACIO GILL's full statement to the Gainesville Sun attached Exhibit 'F.' A copy of the Sentencing Transcript is attached hereto as Exhibit 'E.'

The killing of Orlando Rosello was 'calculated' to insure that the Defendant received a death penalty. Defendant's correspondence makes it clear that the Defendant intended to kill again for the purpose of receiving a sentence of death and not life imprisonment. A copy of the Defendant's correspondence to Judge Morris and to this Court are attached hereto as Exhibit 'F.'

The offense was 'premeditated' because the Defendant asserted that he would kill again if given a life sentence. This statement was made at least four (4) days before he committed the actual offense of capital murder on Orlando Rosello. See the sentencing transcript and correspondence (Exhibits E and F).

Florida Jury Instruction 7.2 defines murder in the first degree. In defining murder in the first degree the instructions specifically define 'killing with premeditation.' It states:

> 'Killing with premeditation' is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated attempt to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.'

Thus, 'heightened' premeditation is premeditation that occurs in the mind a significant period of time before the killing takes place. As previously stated, Walls v. State and Jackson v. State, cited above,

require heightened premeditation, which is described as premeditation over and above that required for first degree murder. Thus, premeditation that is formed and exists in the mind of the killer for a significant period of time prior to performance of the actual[] killing is heightened premeditation.

As GILL states in his letter to the Gainesville Sun, the murder was planned 'nineteen months ago. My victim was the first inmate I came in contact with and was able to block all emotional feelings and put my mind in a state to actually take someone's life for the first time.' Thus, by GILL's own admission, he meditated upon this killing, long before to the actual killing itself, and no sense of right or wrong, nor any other moral compunction dissuaded him from killing Orlando Rosello.

Defendant murdered Orlando Rosello without a pretense of moral or legal justification. Defendant's repeatedly stated purpose for murdering Orlando Rosello was to insure that the Defendant received a death sentence and not life in prison.

Justification, if it may be called that, for the murder of Orlando Rosello had nothing to do with the relationship between the Defendant and the victim, but was predicated entirely on the Defendant's wish to be sentenced to death.

There was no legal justification for the murder, because the Defendant was not acting in self defense, as he admits in his confession, nor was there any possibility that the murder was merely an act of culpable negligence or accident.

The Court finds this aggravating factor to be proved beyond and to the exclusion of a reasonable doubt.

The Court gives great weight to this aggravating factor.

(R5 699-702, underlining in original)

The Circuit Court explained why it rejected heinous, atrocious, or cruel. (R5 697-99)

Mitigation.

In this case, the Circuit Court found, weighed, and provided reasoning for, the following two statutory mitigating circumstances:

1. The capital felony was committed while the offender was under extreme emotional or mental disturbance. Substantial weight, weighed less because CCP applies. (R5 703-704)

The Circuit Judge reasoned:

> The Defendant's emotional disturbance was illustrated by his threat, indicated to the presiding Judge in his prior capital murder case, that he intended to kill again. The Court finds it likely that the Defendant may have experienced anger when he did not receive the sentence for which he wished. Therefore, his behavior was to some extent guided by anger at receiving a sentence of life in state prison. This is evidenced by Exhibits C and F (Defendant's correspondence and confession).
>
> The Court has not attempted to distinguish the extreme emotional or mental disturbance suffered by RICARDO IGNACIO GILL for virtually his entire life (as more fully set forth in Statutory Mitigating Factor No. 2 below) and any immediate exacerbation of his emotional disturbance or mental disturbance relating to Case No. 01-1 999-C F-002277-A.
>
> After reviewing the various opinions of the experts who have seen RICARDO IGNACIO GILL during Case No. 01-1999-CF-002277-A and the instant case, there seems to be little point in trying to differentiate between a life long mental disturbance and one that is exacerbated by the penalty phase of a murder trial (keeping in mind, that RICARDO IGNACIO GILL did not undergo a guilt phase trial nor did he or his attorneys present any mitigating evidence in the penalty phase of the 01-1999-CF- 002277-A trial).
>
> In fact, the Court finds that the weight to be given this particular statutory mitigating factor is less than might have been given had GILL acted out of rage or great emotional disturbance, but rather, his behavior following Judge Morris's sentence was cold, calculated and premeditated. This man's behavior whom each expert has considered 'goal-oriented,' was not marked by suicide attempts, anger, rage, or the other factors he has previously shown, but by calm, or 'cold' reflection
>
> The Court give[s] substantial weight to this mitigating factor.

(R5 703-704)

2. The Defendant's ability to appreciate the criminality of his act or to conform his conduct to the law was impaired. Great weight. (R5 704-707)

The Circuit Court in this case found:

The Defendant has suffered a lifelong emotional disturbance frequently manifesting itself in anger or in inability to follow ordinary rules of behavior.

This Court reviewed the testimony of Dr. Clifford Levin, a psychologist who, among other things, interviewed Mr. Gill for the purpose of discussing mitigating factors during the penalty proceeding in Case No. 01-1999-CF-002277-A.

As preparation for his testimony, Dr. Levin reported to two interviews with Mr. Gill at the Alachua County Jail, and also, the following:

> 'I also, by the way, have reviewed medical records from his childhood, which included a report, the treatment summaries from the State Hospital in Macclenny. And in addition, I reviewed the Department of Corrections' records, which are extensive, regarding his medical records as well as his classification records... There is also a report, a treatment report packet, from Northeast Florida State Hospital, which I also did review...'

Dr. Levin testified on page 129 of the penalty hearing, beginning at line 14 that:

> 'I found the relevant statute was the capacity of the defendant to conform his conduct to the requirements of the law was substantially impaired.
>
> Q: So that I am clear on this, you're saying that, in your view, he was able to appreciate the criminality of his conduct?
>
> A: Yes.
>
> Q: But, that his ability to conduct or conform his conduct to the requirements of the law was substantially impaired?
>
> A: Yes, that is my testimony.
>
> Q: And, what is the basis for your testimony that his conduct, his ability to conform his conduct was substantially impaired?
>
> A: Well, it's based on the materials we just recently documented that I reviewed, and the finding that, in my professional opinion, that there is an underlying diagnosis of major depressive disorder, recurrent; chronic. That he also has a major mood disorder in the form of an intermittent explosive disorder and that there were other diagnosable disorders, including cocaine abuse, and antisocial personality disorder, and a borderline personality disorder. The reason I formulated those diagnoses, again based on the provided information, were the features that I gleaned from the information that I reviewed. And these features included these periodic suicide attempts, and his episodic failure to resist aggressive impulses, which is characterized throughout the Department of Corrections records over his years of

incarceration. Patterns of rage, violent outbursts, and inappropriate anger response to relatively benign events.

Also his self report of binge uses of cocaine in a statement to Detective Chase during his statement about the instant offense, also a pattern of impulsive behaviors; pattern of extreme poor judgment, reflective of mood swings, irritability, and also some behavioral patterns of self mutilation.

So, all of these features were taken into account to determine these (sic) array of diagnoses, and I also think greatly influenced my decision with regard to this statutory mitigation that at the time these variables came into play, along with his usage at the time of cocaine, interacting with these personality features and diagnosable disorders from the DSM-4, Diagnostic and Statistical Manu[a]l 4, to provide the professional opinion that this defendant did have a substantially impaired capacity to conform his conduct to the requirements of the law.'

Historical records indicate that the Defendant was removed involuntarily from two nursery schools, was removed from the first grade and was placed in an emotionally handicapped school at a very early age. Defendant was uncontrollable and was moved to the North Florida Hospital. According to at least some opinions RICARDO IGNACIO GILL did not receive appropriate treatment from age 10 to age 13.

While at the North Florida Hospital, Defendant was frequently kept in four-point restraints to control his behavior. One doctor indicated that intensive therapy was necessary to deal with the behavioral problems suffered by Defendant, Gill, but that the State of Florida offered no facilities under which proper treatment could be applied. (Exhibit 'J' - Doctor's opinion).

Thus, Gill has shown from the very earliest stages of his life, through the present, what must be considered an intermittent but uncontrollable ability to appreciate the criminality of his acts or to conform his conduct to the law.

The Court has relied to a great extent on Judge Morris's sentencing order in Case No. 01-1999-CF-002277-A. All parties and all attorneys have been aware that the Court had received a copy of this Order. The Court takes judicial notice of the Order and the Court recognizes that the Court in Case No. 01-1999-CF-002277-A had access to a much greater amount of mental health information than the Court possessed in this case. However, the mental health information in this case was more recent.

The Court did not rely heavily on Dr. Waldman's report even though he was the only medical doctor who interviewed RICARDO IGNACIO GILL. In reviewing Dr. Waldman's report, the Court specifically rejects the

statements contained in Dr. Waldman's 'Record Review' portion of his report.

The Court gives great weight to this mitigating factor.

(R5 704-707)

Concerning non-statutory mitigation, the trial court found:

Defendant suffers from a brain anomaly. Defendants behavior may have been affected throughout his life by an arteriovenous malformation which presses on the amydala, a gland which controls impulse behavior including rage. *See* Exhibits I and J.

Dr. Alan Waldman, M.D. has referred to this arteriovenous malformation "AVM" and indicates that the AVM may have caused uncontrolled fits of rage that further led to uncontrollable murderous behavior. This condition is untreatable according to Dr. Waldman.

The Court notes that Defendant's murder of Orlando Rosello was neither impulsive nor due to uncontrollable rage. *See* Exhibits C, F and G, and therefore gives this non-statutory mitigating factor weight, but not great weight.

(R5 708)

Additional Indicia of Gill's Mental Status.

Several of the above events demonstrate Gill's mental status, including Gill's intelligence and his ability to apply that intelligence to planning this murder well in advance of his execution of it. Since ISSUE II (IB 37-40) attacks CCP and ISSUE I attacks proportionality (IB 24-36), the State elaborates on parts of the record, including some of the events listed above, which it will argue support CCP and proportionality.

Gill's Extensive Planning for this Murder.[4]

About one year before Gill strangled Orlando Rosello to death, Gill wrote a letter, regarding a pending First Degree Murder case, to the State Attorney emphatically proclaiming that he "will not do the rest of [his] life in prison!" and threatening, "'What the Judge doesn't do tomorrow, the next judge will do the day after tomorrow.'" (SR2 151) A couple weeks later, Gill wrote a letter to Judge Stan Morris, reiterating his threat to premeditatedly murder if he is not sentenced to death: "'I will make the Judge sentence me to death. *** If he does not act accordingly, I will kill someone, ….'" The letter continued: "Don't make the next judge do the job you should have done!" (SR2 150)

Four days before Gill strangled Orlando Rosello to death, Gill yet-again threatened that if given a life sentence in First Degree Murder case number 99-2277-CFA, he will ensure that the next Judge imposes the death sentence. (See R5 695; see also R2 14142; R19 356-58)

July 20, 2001, Judge Morris imposed a life sentence on Gill in First Degree Murder case number 99-2277-CFA. (R5 713-40)

When Orlando Rosello was moved to Gill's cell, Gill decided to kill him. (R5 756, 759) The following weekend, Gill further committed himself to the murder by writing to a newspaper and to the Circuit Court regarding case number 99-2277-CFA that he had committed the murder. (R5 753, 755-6) His letter stated that he "would not spend the rest of his life in prison

[4] This discussion overlaps and amplifies points made in the sentencing order.

for something I didn't do" and that he took the life of Orlando Rosello by strangulation and it was "cold, calculated, and premeditated manner without any pretense of moral or legal justification planned 19 months ago" (R5 861-62); he disclaimed mental mitigation using statutory language (R5 862).

After writing the letter, Gill then deliberated more on the murder and followed-through, as he told FDLE:

> Q: Can you tell us what happened this morning, that would cause the death of Mr. Rosello?
>
> A: Well, I woke up about 2:30 this morning....3:00. And .....I had already wrote the, three statement confession letters. One for security supervisor, one for the Gainesville Sun, and one for Chief Judge Stan Morris, via the court file. For the case that I was sentenced for Friday. Those were mailed out Sunday night. And when I woke up this morning, I said well, I've already committed myself, and I've got to follow through with it. And about 5:00 this morning, when they turned on the lights and the officer came around and poked the flaps, eat breakfast ..... I took a piece of torn sheet, I wrapped it around Mr. Rosello's neck while he was asleep, and I strangled him to death.
>
> ***
>
> Q: Why did you wait till 5:00?
>
> A: I guess I was still trying to...how do you say it? Psyche myself up, and push out all kind of emotions...you know, that kind of stuff, just to put off any kind of emotional feelings out of my mind, of what I'm about to do. Just trying to build my nerve up to do it. I don't know about how ...what they call, rigor mortis, or whatever, I don't know, how that, how that goes about it ... person lo[]ses their... I think I, I think he urinated on himself, I don't know if he defecated on himself, I just ... I'd of did it then, I just didn't want to have to smell it until ... daytime. After 8:00, because ... I had planned that after 8:00 I was gonna declare a psych emergency and get out of the building before I turned over that statement. Because I didn't know if the same officers were gonna work there again that morning, who have been, I've had altercations with them immediately, but I wanted to get out of the building, and ...
>
> ***
>
> Q: All right. So you didn't actually plan to kill him at 5:00 in the morning? You were gonna wait till later, you said?

A: No. I planned I planned to kill him when they moved him in the room with me and I wrote those letters.

(R5 753, 758, 759)

In fact, Gill did murder Orlando Rosello by strangling him to death (See, e.g., R5 753, 763-4, 793, 796-801).

After the murder of Rosello, On July 31, 2001, Gill wrote Judge Stan Morris:

> How does it feel to know that you are solely responsible for the life of inmate Orlando Rosello? *** It took only four days, just like I promised. I wrapped the sheet around his neck and strangled the shit out of him. When I saw blood coming out of his ear and his heart still beating, I started punching him in the chest hoping that I could bust his heart. Then I tied a sheet in a knot and wrapped his neck with it and left him like that for 2 hrs. to make sure he was dead and no chance of him being revived. *** I have no feelings and no remorse. ***

(SR2 141-42)

On July 8, 2005, at the hearing in which Gill plead guilty, Gill reminded the circuit judge in this case that he killed inmate Orlando Rosello because Judge Morris would not impose a death sentence on him for a prior murder and threatened to premeditatedly murder again if death is not imposed in this case. In Gill's own words:

> Your Honor, this case can end with the imposition of the death penalty today. The case is then guaranteed a direct appeal, but less likely to be overturned, as the Court has found me competent in every step of the way and that every decision made by me was knowingly, freely and willingly, and furthermore you will save an innocent human life.
>
> On the flip side, if I am given life, something I do not want, there are no appeals, and I don't want to have an opportunity to take another human's life.
>
> I understand that death penalties are not given due to threats and the Courts do not rely on such threats, but for you to take my statements and promises, which is what they are and proven to be,

> with a grain of salt, like the Honorable Stan Morris, you will be second on a string of judges who has come to deliberately give me a license to take another human's life, knowing that the judges in this circuit will never give me the death penalty.
>
> Please make the right decision and don't be the fault of another loss of life. It may take longer than four days the next time, but it will be done, and I am one hundred percent sure that it won't be an inmate the next time.

(R19 404-405)

Gill's general Intelligence.

Gill scored an 85 on the verbal portion of an IQ test (R5 902), but Gill is a high school graduate who has attended community college and taken some paralegal courses. (R5 816) Gill's intelligence is manifest in the plethora of pro se pleadings and complaints he has filed. (See, e.g., in Volume 1 of the record: R1 20, 26, 31-34, 39-63, 67, 68, 69, 70, 71, 72, 77-78, 83-87, 88, 118-20, 138-40, 141-42, 144-46, 147-51, 162-66)

Gill's Other Actions Demonstrating his Mental Capacity.

There are numerous examples.

In a letter dated July 8, 2002, one of Gill's attorneys wrote to Gill, "Clearly, we have an irreconcilable conflict, I believe you are manipulating the system." (R1 86, filed as attachment to a pro se motion by Gill) In June 2004, Gill admitted to going on a hunger strike to get Oxycodone. (R3 371)

The record in this case reflects that, for another case, Gill pro se drafted a postconviction motion, which Gill understood better than his counsel (R12 47-48), and Gill was "very effective" in assisting his counsel (R12 49).

In arguing that Gill should be provided access to a law library, Gill's defense counsel observed that Gill has a "fascinating" legal mind. (R12 49)

Although Gill was otherwise disruptive in jail from 1999 to 2001, (R12 54-55), he did not destroy law books that he used (R12 60-61), and Gill usually maintained courtroom decorum when he advocated his positions (See, e.g., R19; R20 442).

In this case, on June 27, 2003, attorneys and the Judge discussed the pending mental health evaluations. Gill had cooperated with prior interviews, but he told his counsel that he will no longer cooperate with Dr. Waldman in the future. (R13 77-80) At Gill's direction, his counsel claimed that the State had not filed a notice of intent to seek the death penalty. (R13 80-81) The record shows that on April 12, 2002, the prosecution filed its Notice of Aggravating Circumstances (R1 21-22), but it did not file the Notice until June 30, 2003, (R1 130-31) that is, until after Gill brought the matter to everyone's attention (R13 80-81).

At a November 21, 2003, Nelson inquiry, Gill articulated at great length his complaints about counsel (R14 98-108), for example:

> Huntley Johnson argued that the Court move me back to the Alachua County Jail on February 14th, 2003 for reasonable access to counsel and access to the law library. The Court denied that motion but entered an order for Florida State Prison to allow me access to the law library to assist counsel in this case for two hours a day. All counsel in this office refused to review, endorse, or prepare any motions arising from my research, making me wonder why I'm there, why don't I just don't plead guilty and call it quits. I am doing more for myself than this office is.
>
> ***
>
> *** This Court appointed Ms. Jenkins as co-counsel to Mr. Vipperman, though Mr. Vipperman has never been designated in writing by this

> Court as lead attorney, this appointment of Ms. Jenkins clearly designates Mr. Vipperman as lead attorney and not in conformance to the rule 3.112(e), still equivalent to having no attorney at all, to my belief.
>
> If Ms. Jenkins is qualified at this point, it gives reason to doubt, as she has not moved the Court to do anything to correct any errors or correct any misrepresentation that Mr. Vipperman has done during his 14 months of nonqualifications.
>
> ***
>
> *** The constitutional right found in the Sixth Amendment is the right to effective assistance of counsel in Strickland versus Washington.
>
> Recently the Florida Supreme Court established minimum standards for attorneys in capital cases, Florida Rules of Criminal Procedure 3.112, to ensure particular performance in a death penalty case. In the instant case, Mr. Vipperman did not meet the qualifications standards of 3.112. As a result, I have suffered the above prejudices, would demonstrate that counsel is/was ineffective. It is my belief that I have no qualified counsel. I have no counsel at all. ***

(R14 103, 105, 107) After Gill finished his presentation to Judge Cates, the Judge concluded: "Mr. Gill, *** you have expressed [your objections] to me very well." (R14 108) Gill then volunteered copies of his presentation for filing and distribution. (R14 108-109)

Gill then argued to Judge Cates that since the judge ruled that he (Gill) stated a sufficient Nelson claim, he (Gill) must be competent. (R14 111) The judge responded that although Gill is "well qualified to present [his] position … today," and that he does not know Gill's condition when he is "not in front of the Court." (R14 111)

At the November 2003 hearing, the State argued that Gill's pro se pleadings should be struck because he was represented by counsel at the

time, and Gill responded that the "mere appointment of counsel" does not satisfy legal requirements of affording him counsel. (R14 113)

On June 18, 2004, after observing Gill testify in court (R15 132-33, 142-44), Judge Cates found that Gill "is freely, knowingly and voluntarily withdrawing his request" for a Nelson inquiry and a Faretta inquiry (R15 133-34) and, subsequently, after the prosecutor noted that Gill has presented "security issues" and has been a "very, very difficult management problem," Judge Cates addressed Gill's request for additional law-library access and observed:

> I believe that Mr. Gill is an intelligent man and has the right and ability to assist counsel and want him to have access to whatever he needs in order to assist his attorneys. *** Mr. Gill is entitled to research his problem, he knows far more about it than any of the rest of us, and I do want to give him the same opportunity that I previously gave him when he was at Florida State Prison.

(R15 146-47)

On February 18, 2005, at yet another Nelson hearing, Gill responded to Judge Cates' open-ended question:

> THE COURT: Is there anything else that you want to add in terms of explaining or adding to what you've written in this motion?
>
> THE DEFENDANT: That, therefore, the actions by counsel are not that of counsel performing at the level of a competent attorney reasonably skilled in the specialized practice of capital representation zealously committed to the capital case. Counsel cannot continue to represent me and provide effective assistance of counsel under the Sixth and Fourteenth Amendments. I move this court to reappointment of counsel.
>
> And I would also like to add on to that also that if this court wishes to proceed with a Faretta inquiry in this case, the defendant must be evaluated for competency. An order on that competency and then a Faretta hearing must take place, all simultaneously. ***

(R17 224-25) Towards the end of this same hearing Gill then insisted that the trial court "abide by Florida Rules of Criminal Procedure 3.210(b) as far as the timeframes for appointing the experts, the expert's evaluation and the competency hearing thereafter" (R17 261).

During the July 8, 2005, hearing at which Gill insisted on pleading guilty, after standby counsel discussed additional steps that could be taken in Gill's defense (R19 342-44), Gill responded:

> As far as what Mr. Salmon says, the Court allowed me to represent myself. If the Court agrees with Mr. Salmon or permits Mr. Salmon to do what he just stated he would like to do, then I'm going to -- I think the Court needs to reappoint the attorneys and not let me represent myself. That's not what I want.
>
> But besides that, under the Florida Rules of Criminal Procedure 3.111 under the Faretta issue, stand-by counsel can only address the Court to assist me only if I request it. That's my understanding of it.
>
> So what counsel is trying to do, counsel is trying to use the Court and try to make the Court take the representation from me so that they can represent me and do what they want. That's not what I want. That's not what I'm looking to have.

(R19 344-45) A little later, Gill moved to strike everything that standby counsel stated. (R19 346)

Mental Examinations and Gill's Rebuttals.

Several mental examinations are in the record. (See R2 363-64; R3 370-73, 433-36, 482-93, R5 866-904; SR3 passim) The State discusses a couple of them at this juncture as especially illustrating Gill's goal-directed behavior.

On February 18, 2005, Gill explicitly requested that Dr. Helen Cadiz examine him (R17 257-58) On April 14, 2005, Dr. Cadiz reported that Gill had written 10 letters to her. (R3 484-86) In one of them, he greeted her

as "Helen" (R3 484); in another one he essentially bragged about "exhaust[ing] 12 attorneys (Id.); and in another one, he sent her a photograph of himself and said he had "no problem keeping this relationship on a professional level" (R3 486). He told her that he thought she was "attractive." (R3 487) Cadiz described Gill when she met with him in March and April 2005:

> He appeared for interview unshaven, but neat and clean. He looked gaunt but smiled and appeared elated. Mr. Gill spoke clearly and fluently. His speech was normal in quantity, rate and tone. There were no impediments in his speech. His thoughts were organized but at times he digressed from the evaluation question to discuss tangential issues. He denied the experience of illusions or visual and auditory hallucinations. He denied the experience of delusions. He denied the experience of suicide or homicide ideation.
>
> He was alert and oriented to time, person, place and situation. He appeared to attend to information and did not initially demonstrate any difficulty with concentration. He did not have any problems with long or short memory but appeared to have problems with registration of information, i.e., immediate recall.

(R3 486-87) Gill said he is "dying" because of brain trauma in 2001 and expressed "ambivalence about whether he wanted to live so that perhaps he could see his mother again or continue with his appeal to obtain the death penalty." (R3 487) As mentioned above, Gill's verbal IQ tested at 85. (R3 489) Cadiz ultimately opined several diagnoses, including Axis I, Bipolar Disorder and Axis II, Borderline Personality Disorder. (R3 490) She reasoned, in part:

> *** Mr. Gill demonstrates paranoid trends in that he questions the credentials and goodwill of those who have been charged to assist him with his defense. While such mistrust/paranoia could be construed as manipulative or non-compliant, it is also reflective of underlying psychopathology.

(R3 488)

The State disputes the Initial Brief's assertion (IB 18) that the "prosecution acknowledged" mental conditions "which caused a loss of control over aggression. (T19: 399-401)" Instead, the prosecutor was reading from a report of Dr. Waldman (See SR3 164) who indicated that the diagnosis was "possible" and, moreover, unqualifiedly opined in an adjacent paragraph: "I have come to know Ricardo Gill well through the multitude of records that I have read and the one interview I have had with him. He is an individual who frequently lies, is manipulative with suicidal threats, and in my opinion within reasonable medical certainty, has no purely psychiatric disorder." (SR3 163; see also R5 890-91; SR3 182-83)

In the penalty phase, Gill, representing himself, reminded the trial court in this case that he killed inmate Orlando Rosello because Judge Morris would not impose a death sentence on him for a prior murder and threatened to premeditatedly murder again if death is not imposed in this case. (See R19 404-405)

After Gill pleaded guilty, he wrote in a Motion Opposing Alan Waldman to Testify at the Sentencing Hearing, in which he contended that Waldman had "concocted" a theory for mitigation (R4 575); Gill disputed any "rage" explanation for this murder arguing that there is no supporting "scientific proof" and no supportive "undisputable facts" (R4 575). Gill explained again his premeditation:

> The Defendant 'promised' the Alachua County Court that 'he will kill' once he got to the Department of Corrections. That 'promise' was kept. Not committed out of rage. *** The Defendant 'promised' the Union County Court that 'he will kill another officer' if he received a life sentence. Is this Court willing to see if the Defendant keeps this 'promise' by sentencing him to a life sentence on some concocted

theory to determine if this subsequent murder may have been committed out of rage?"

(R4 576)

On February 1, 2006, in the penalty phase of the proceedings, Dr. Waldman testified. (R20 415-41) He opined that Gill is competent to proceed. (R20 422) The prosecutor posed a long set of facts, mirroring those here, to Waldman and asked if this "scenario implicates in any way the rage response that you have described," to which Waldman responded, "Not as you described it." (R20 430-31) He continued by testifying that the facts of this case sound like "a thought-out, threatened, premeditated act, but I was not there that night." (R20 431) Waldman admitted that Gill had a "normal" electroencephalogram" when he was 12 years old (R20 431) and that he found no evidence of seizures (R20 432), but he said that "temporal lobe seizure foci are very difficult to find" (R20 431). When asked if there is "anything in the records" that suggests that this murder had "anything whatsoever to do with an interictal personality disorder," the doctor opined that since Gill was incorrigible as a child and since Gill appeared to have good parenting, it makes him "wonder whether this is going on and has been going on for most of his life." (R20 433-35) Waldman said that the condition in Gill's brain is "probably a factor in Ricardo Gill being the human being that he is today as opposed to a different human being, but a factor." (R20 436) Gill disputed Waldman's testimony. (R20 436-38) In response to a query from the Judge, Waldman testified: "I don't opine that Ricardo Gill has any impairment in his knowledge of knowing what's right and what's wrong. I opine just the opposite, that he knows those things,

that he is an intelligent man and knows those things. If we get to the grayer area of morals, it's my opinion Ricardo Gill does things to satisfy Ricardo Gill and Ricardo Gill only. That's how he's wired. But from a knowledge basis, he knows right from wrong." (R20 441) Gill then interjected concerning a question from the Judge to the expert that he would kill again and then did so by stating "He made that on his own volition." (R20 441) Gill reiterated, "there was nothing wrong with me" at the time of the murder. (R20 442)

Trial Court's Weighing of All Factors.

The Circuit Judge's order sentencing Gill to death concluded:

> The Court has examined the entire case file in State of Florida v. Ricardo Gill, Case No. 63-2002-CF-0028-A [this case], which consists of numerous file folders and a substantial amount of records, many of which are referred to in this Order, and are attached to this Order. The Court considered all statutory mitigating factors and the non-statutory mitigating factors and weighing them to determine the appropriate sentence in this case.
>
> The Court has also balanced all aggravators found against all mitigators discovered during its search of the record. Despite the fact [that] RICARDO IGNACIO GILL is a deeply troubled individual with a long history of mental health problems, mental disturbances, suicidal impulses, and a life primarily spent in penal institutions, the Court finds that the rationale set forth in Muhammad v. State, cited above [Muhammad v. State, 782 So.2d 343, 363 (Fla. 2001)], does not apply:
>
> > 'It is not necessarily those most deserving of the death penalty (e.g. the most aggravated and least mitigated) who seeks its imposition and refuse to present mitigation. Rather, in some cases those seeking the death penalty, while competent, may suffer from serious underlying illnesses.'
>
> The Court has considered carefully, over a lengthy period of time, the advice set forth in Muhammad but finds that the magnitude of Defendant's aggravating factors outweigh the magnitude of Defendant's statutory mitigating factors and non-statutory mitigating factors.

> NOW THEREFORE, it is hereby ORDERED AND ADJUDGED that Defendant, RICARDO IGNACIO GILL, be punished for his crime of Murder in the First Degree by a sentence of death.

(R5 708-709, underlining in original)

SUMMARY OF ARGUMENT

ISSUE I attacks proportionality, and **ISSUE II** attacks CCP. The facts and the Circuit Court's lawful evaluation of them belie both issues.

In 2001, Gill was determined to be sentenced to death for a 1999 First Degree Murder. However, he was unable to convince Judge Morris that he deserved death at that time. Judge Morris sentenced Gill to life in that case. He told Judge Morris that next time he would ensure that the judge sentenced him to death. Four days later, Gill killed the victim in this case, Gill's cellmate, Orlando Rosello. Gill told FDLE, and wrote letters essentially stating, that he delivered on his promise to kill again to ensure a death sentence. With this additional CCP in the extreme, with the prior murder as a prior capital, violent felony, and with Gill serving a life sentence when he murdered Mr. Rosello, Judge Cates lawfully sentenced Gill to death in this case. Whatever mental condition Gill may have had, it did not negate the extreme CCP or the additional prior capital, violent felony of First Degree Murder. Therefore, the death sentence in this case is proportionate and **ISSUE I** attacking proportionality is meritless, and **ISSUE II**, even, arguendo, overlooking the procedural bar as unpreserved and waived, attacking CCP is also meritless. There was abundant and compelling evidence supporting CCP.

A so-called Ring claim, constituting **ISSUE III**, has been repeatedly rejected by this Court, and, in any event Ring is inapplicable here.

The conviction and death sentence should be affirmed.

ARGUMENT

ISSUE I: HAS THE INITIAL BRIEF DEMONSTRATED THAT THE DEATH SENTENCE IS DISPROPORTIONATE? (RESTATED)

This Court conducts a proportionality review, regardless of whether it is raised on appeal. See, e.g., Rimmer v. State, 825 So. 2d 304, 331 (Fla. 2002). "In conducting its proportionality review, this Court must compare the **totality of the circumstances** in a particular case with other capital cases to determine whether death is warranted in the instant case. Rimmer, 825 So.2d at 331, citing Bates v. State, 750 So.2d 6 (Fla. 1999); Urbin v. State, 714 So.2d 411, 416 (Fla. 1998), quoting Tillman v. State, 591 So. 2d 167 (Fla. 1991).

Lawrence v. State, 846 So.2d 440, 452 (Fla. 2003), described the proportionality-review process as "not a comparison between the number of aggravating and mitigating circumstances; rather, it is a 'thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases,'" quoting Beasley v. State, 774 So.2d 649, 673 (Fla. 2000), quoting Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

Here, the Initial Brief (IB 24-36) attacks proportionality in the face of extreme facts supporting the "great weight" of the very serious

aggravating circumstances of prior violent felony, that is, a prior capital murder, and the extreme facts supporting the "great weight" of CCP.

Here, Gill asked for the maximum penalty (R19 354), and Gill deserves it.

The State, first, summarizes[5] the Circuit Judge's analysis of the aggravating and mitigating circumstances, and then elaborates on some supportive facts in the record, discusses the case law supporting proportionality, and, finally, demonstrates the inapplicability of the cases in the Initial Brief.

Aggravating Circumstances.

In this case, the Circuit Court found, weighed, and provided reasoning for, the following aggravating circumstances.

1. RICARDO IGNACIO GILL previously committed a felony, Murder in the First Degree, and was under a life sentence of imprisonment at the time he committed the murder of Orlando Rosello. Florida Statute 921.141(5)(a), Fla. Stat. (2002). Great weight. (R5 697)

2. RICARDO IGNACIO G1LL had previously been convicted of another capital felony. Florida Statute 921.141(5)(b), Fla. Stat. (2002). Great weight. (R5 697)

As noted by the Circuit Judge, prior to this Murder, Gill had been convicted of Capital murder in Alachua County, Case No. 01-1999-CF-002277-A. (R19 380) Moreover, Gill's violence-related convictions were plentiful (See bullet-list in Facts supra; R19 380-85) including Attempted First Degree Murder in Gilchrist County Case Number 21-2000-CF-0007 (R19 381).

[5] For a fuller rendition of the Circuit Judge's reasoning, see Statement of Facts supra.

3. The offense was a homicide and was committed in a cold, calculated and premeditated manner without a pretense of moral or legal justification. Section 921.141(5)(l), Fla.Stat. (2002). Great weight. (R5 699-702)

For this aggravator, the Circuit Judge provided extensive and well-reasoned support, including:

- About a year prior to murdering the victim in this case, Gill in another murder case essentially wrote to Judge Morris that he would kill again if given a life sentence in that other murder case (SR2 150); about the same time he wrote to the State Attorney that the State Attorney should persist in his motion to seek the death penalty, that he "will not do the rest of [his] life in prison," and "what you won't do, the next prosecutor will do with a passion. What the Judge doesn't do tomorrow, the next Judge will do the day after tomorrow" (SR2 151);

- Four days prior to murdering the victim in this case, Gill in another murder case asserted in court to Judge Morris that he would kill again if given a life sentence in that other murder case (R5 695, 753, 798; R19 356-58; SR2 141; compare R5 749 with R5 753);

- Gill wrote the Gainesville Sun, after his life sentence in Case No. O1-1999-CF-002277-A (R5 861-64) and immediately prior to murdering the victim in this case (R5 753, 759, 771-72, 791-93, 864), essentially re-affirming his promise to kill again to ensure he would be sentenced to death in this case;

- Soon after his murder of Orlando Rosello, in another letter to the Gainesville Sun and Judge Morris, Gill blamed for this murder those who he claimed were responsible for not giving him a death sentence for his Alachua Murder in Case No. O1-1999-CF-002277-A (SR2 141-42);

Moreover, additional indicia of CCP and the ability to plan this murder well-in-advance are the following:

- Gill's general intelligence, as illustrated by graduating from high school; attending community college; taking paralegal courses (R5 816); the plethora of pro se pleadings and complaints Gill authored in this case (See, e.g., R1 20, 26, 31-34, 39-63, 67, 68, 69, 70, 71, 72, 77-78, 83-87, 88, 118-20, 138-40, 141-42, 144-46, 147-51, 162-66);

- Gill's attorney noting that Gill is "manipulating the system" (R1 86, attachment to a pro se motion by Gill);

- Another one of Gill's attorneys noting Gill's skill in drafting a pro se postconviction motion in another case and remarking that Gill has a "fascinating" legal mind, and Gill's "effective[ness]" in assisting his counsel (R12 47-49);

- Although Gill was otherwise disruptive in jail from 1999 to 2001, (R12 54-55), his not destroying law books that he used (R12 60-61);

- Gill correctly ascertaining that the State had not filed a notice of intent to seek death penalty (Compare R13 80-81 with R1 21-22 and R1 130-31);

- Gill generally demonstrating logical, goal-directed, and complex thinking in open court throughout the proceedings: E.g., excerpt supra, including Gill stating "Recently the Florida Supreme Court established minimum standards for attorneys in capital cases" (R14 98-109); "mere appointment of counsel" does not satisfy legal requirements of affording counsel (R14 113); "counsel are not that of counsel performing at the level of a competent attorney reasonably skilled ***" excerpted supra (R17 224-25); Gill's insistence that the trial court "abide by Florida Rules of Criminal Procedure 3.210(b) as far as the timeframes for appointing the experts, the expert's evaluation and the competency hearing thereafter" (R17 261); "*** stand-by counsel can only address the Court to assist me only if I request it ***" and Gill moving to strike everything that standby counsel stated (R19 344-46);

- Judge Cates observing Gill's intelligence several times throughout the proceedings: "you have expressed [your objections] to me very well" (R14 108); Gill "well qualified to present [his] position … today" (R14 111); "Mr. Gill is an intelligent man and has the … ability to assist counsel *** Mr. Gill is entitled to research his problem, he knows far more about it than any of the rest of us" (R15 146-47);

- Gill essentially bragging that he had "exhausted" 12 attorneys (R3 484);

- Mental health experts opining that Gill is manipulative (SR3 51, 163; SR5 54; R5 890-91; see also R3 371, 488, SR5 63) and diagnosing him with antisocial personality disorder (R5 705; R5 891); accordingly; Gill found Dr. Cadiz attractive (R3 487), wrote her 10 letters (R3 484-86), in one of them, greeting her as "Helen" (R3 484), sent her a photograph of himself (R3 485-86), and requested that she be appointed to examine him for competency to proceed (R17 257-58);

- Gill personally disputing any "rage" explanation for this murder and arguing that there is no supporting "scientific proof" and no supportive "undisputable facts" (R4 575);

- In Gill's multitude of courtroom appearances (See Timeline supra), Gill almost always maintaining courtroom decorum; Gill vigorously and articulately advocating for the goals he sought;

- Gill's reiteration of his premeditation:

> The Defendant 'promised' the Alachua County Court that 'he will kill' once he got to the Department of Corrections. That 'promise' was kept. Not committed out of rage. *** The Defendant 'promised' the Union County Court that 'he will kill another officer' if he received a life sentence. Is this Court willing to see if the Defendant keeps this 'promise' by sentencing him to a life sentence on some concocted theory to determine if this subsequent murder may have been committed out of rage?"
>
> (R4 576)

Mitigating Circumstances.

In this case, the Circuit Court found, weighed, and provided reasoning for, the following two statutory mitigating circumstances:

> 1. The capital felony was committed while the offender was under extreme emotional or mental disturbance. **Substantial weight, weighed less because CCP applies.** (R5 703-704)
>
> 2. The Defendant's ability to appreciate the criminality of his act or to conform his conduct to the law was impaired. **Great weight.** (R5 704-707)

Concerning non-statutory mitigation, the trial court found that while "Defendant suffers from a brain anomaly,"

> Defendant's murder of Orlando Rosello was neither impulsive nor due to uncontrollable rage. See Exhibits C, F and G, and therefore gives this non-statutory mitigating factor **weight, but not great weight.**

(R5 708)

Trial Court Weighing Totality of Circumstances.

The trial court concluded that, after weighing all aggravators and all mitigators, "the magnitude of Defendant's aggravating factors outweigh the

magnitude of Defendant's statutory mitigating factors and non-statutory mitigating factors." (R5 709)

Case Law Supporting Proportionality.

Gill simply wanting a death sentence in 2001 and 2006 is, by itself, insufficient to support a death sentence. However, for this case in 2006, unlike his prior Murder case in 2001, Gill assured that there were facts to support a death sentence. In addition to the facts that existed for his First Degree Murder in 2001, here Gill had accumulated a prior violent/capital First Degree Murder and a prior Attempted Murder and saturated the record with evidence of his intelligence applied to extreme cold and calculated premeditation. Also, when he committed this murder, he was under sentence for murder. As such, the case law supports affirming the trial court imposition of the death sentence.

This Court has emphasized that CCP and prior violent felony are among the weightiest of aggravating circumstances, which can support the imposition of a death sentence. See, e.g., Lynch v. State, 841 So.2d 362, 377 (Fla. 2003)("both HAC and CCP are 'two of the most serious aggravators set out in the statutory scheme'"); Rodgers v. State, 948 So.2d 655, 661-62, 670-72 (Fla. 2006)(death sentence proportionate even though it was supported by a single aggravator--prior violent felony conviction--where that aggravator included a robbery and a similar shooting and killing offense; several non-statutory mitigators); Ferrell v. State, 680 So.2d 390 (Fla. 1996) (affirming a death sentence where the sole aggravator was a prior second-degree murder; several nonstatutory mitigating circumstances).

Here, Gill accrued CCP, prior violent felonies that included another capital murder, as well as committing this murder while he was incarcerated for the other murder.

Here and in Lawrence, 846 So.2d at 453, "The sentencing order … found extensive aggravating circumstances and substantial mitigating circumstances. The trial judge properly weighed these circumstances …."

Here and in Lawrence, aggravation included, "(1) … previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (great weight); and (2) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight)." Id. at 444. Here and in Lawrence, the prior violent felonies included "murder and attempted murder," 846 So.2d at 453. Moreover, here Gill was actually incarcerated for First Degree Murder when he committed this additional First Degree Murder.

Lawrence's mitigation included the two mental mitigators found here, but Lawrence's over-all mitigation was more extensive than here:

> The trial court found five statutory mitigating circumstances: (1) the capital felony was committed while Lawrence was under the influence of extreme mental or emotional disturbance (considerable weight); (2) the capacity of Lawrence to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (considerable weight); (3) the age of Lawrence (twenty-three years) at the time of the crime (some weight); (4) Lawrence's caring and giving relationship to his family, especially his mother, (little weight); and (5) the sick and disturbed home life in which Lawrence was raised (considerable weight). The trial court also found four nonstatutory mitigating circumstances. *See*: *State v. Lawrence*, No. 98-270-CFA (Fla. 1st Cir. Ct. order filed Aug. 15, 2000) (… sentencing order).

Id. at 445 (footnotes omitted).

Here and in Lawrence, there was some evidence of attempted suicide and prior institutionalization. Moreover, Lawrence's mental condition appeared to be substantially worse than Gill's: "The experts testified that Lawrence had organic brain damage and schizophrenia." Id. at 444. And, in contrast to Lawrence, the defendant was not mentally "slow," Id. Quite the contrary, as discussed supra, the record is replete with indicia of Gill's intelligence.

Here and in Lawrence, "the cold, calculated, and premeditated aggravator was given great weight due to … significant involvement in the planning, preparation, and execution of the murder," Id. Here and in Lawrence, "despite the existence of mental mitigation," the defendant "acted with a deliberate plan" to murder the victim, Id. at 455.

Lawrence held that "Lawrence's death sentence is proportionate," Id. at 455. Gill's death sentence should also be upheld. Lawrence relied on several cases that also support affirming the trial court here.

Robinson v. State, 761 So.2d 269 (Fla. 1999), included CCP and two other aggravators, like here, but it did not included the very weighty prior violent/capital felony present in this case. Robinson included the same two mental mitigators present in this case. Here and in Robinson, in spite of mental mitigation, the defendant "admitted that he calmly and deliberately waited," Id. at 278, until a time of his choosing to commit the murder. And Robinson included substantially more non-statutory mitigation than in this case:

> (1) Robinson had suffered brain damage to his frontal lobe (given little weight because of insufficient evidence that brain damage caused Robinson's conduct); (2) Robinson was under the influence of cocaine at the time of murder (discounted as duplicative because cocaine abuse was considered in statutory mitigators); (3) Robinson felt remorse (little weight); (4) Robinson believed in God (given little weight); (5) Robinson's father was an alcoholic (given some weight); (6) Robinson's father verbally abused family members (given slight weight); (7) Robinson suffered from personality disorders (given between some and great weight); (8) Robinson was an emotionally disturbed child, who was diagnosed with ADD, placed on high doses of Ritalin, and placed in special education classes, changed schools five times in five years, and had difficulty making friends (given considerable weight); (9) Robinson's family had a history of mental health problems (given some weight); (10) Robinson obtained a G.E.D. while in a juvenile facility (given minuscule weight); (11) Robinson was a model inmate (given very little weight); (12) Robinson suffered extreme duress based on fear of returning to prison because where he was previously raped and beaten (given some weight); (13) Robinson confessed to the murder and assisted police (given little weight); (14) Robinson admitted several times to having a drug problem and sought counseling (given no additional weight to that already given for history of drug abuse); (15) the justice system failed to provide requisite intervention (given no additional weight to that already given for history of drug abuse); (16) Robinson successfully completed a sentence and parole in Missouri (given minuscule weight); (17) Robinson had the ability to adjust to prison life (given very little weight); and (18) Robinson had people who loved him (given extremely little weight).

Id. at 273.

Robinson upheld the death sentence as "proportionate to the facts," Id. at 278. It should be upheld here.

Smithers v. State, 826 So.2d 916 (Fla. 2002), involved two murders; there, the murders were contemporaneous; here the murders were sequential with extreme premeditation between them. Smithers involved weighty aggravating factors of previous violent felony (contemporaneous murder), HAC; and CCP in one of the murders. Here, aggravators include the extremely weighty prior violent felony (sequential murders as well as other violent

felonies) and CCP. In Smithers the trial court found the two statutory mental mitigators, like here, and some non-statutory mitigation, which was even stronger than here. Smithers upheld the "sentences of death [as] proportionate." 826 So.2d at 931. The death sentence is proportionate here.

Moreover, as Lawrence noted concerning other cases supporting the death penalty:

> Additionally, this Court has upheld death sentences in other analogous cases where extensive aggravating circumstances outweighed substantial mitigating circumstances. *Cf. Chavez v. State*, 832 So.2d 730 (Fla. 2002); *Zakrzewski v. State*, 717 So.2d 488, 494 (Fla. 1998); *Gudinas v. State*, 693 So.2d 953, 968 (Fla. 1997); *Rolling v. State*, 695 So.2d 278, 297 (Fla. 1997); *Pope v. State*, 679 So.2d 710,716 (Fla. 1996)[two aggravating circumstances of prior violent felony and pecuniary gain, two statutory mental mitigating circumstances, and three nonstatutory mitigating circumstances]; *Henyard v. State*, 689 So.2d 239, 255 (Fla. 1996); *Branch v. State*, 685 So.2d 1250, 1253 (Fla. 1996); *Spencer v. State*, 691 So.2d 1062, 1065 (Fla. 1996)[death sentence proportionate with aggravating circumstances of prior violent felony based upon contemporaneous convictions for aggravated assault, aggravated battery, and attempted second-degree murder, HAC; mitigation included extreme mental or emotional disturbance, impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law; drug and alcohol abuse; paranoid personality disorder; sexual abuse; honorable military record; good employment record; and ability to function in structured environment]; *Provenzano v. State*, 497 So.2d 1177, 1183-84 (Fla. 1986).

Lawrence, 846 So.2d at 455.

Singleton v. State, 783 So.2d 970, 972-73, 979-80 (Fla. 2001) upheld a death sentence as proportionate where the trial court found prior violent felony and HAC aggravating factors and substantial mitigation, including extreme mental/ emotional disturbance and impaired capacity, and age of sixty-nine. Other mitigation included under influence of alcohol and possibly medication at time of offense; alcoholism; mild dementia; attempted suicide; honorable military service; and model prisoner during

prior sentence. Here, there is more aggravation and less mitigation, meriting affirmance of the death penalty.

See also Troy v. State, 948 So.2d 635, 654-55 (Fla. 2006)(four aggravating factors; both statutory mental mitigating circumstances; several nonstatutory mitigating factors; "we conclude that death is proportionate"); Johnston v. State, 863 So.2d 271, 278, 286 (Fla. 2003)(proportionate; prior violent felony and HAC; statutory mitigator of capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired; several non-statutory mitigators, including "(1) defendant has a long history of mental illness; (2) defendant suffers from a dissociative disorder; (3) defendant suffers from seizure disorder and blackouts; ***"); Ferrell v. State, 680 So.2d 390, 391 (Fla. 1996)(upheld death sentence; only one aggravator of defendant previously "convicted of committing … a second-degree murder bearing many of the earmarks of the present crime"; "a number of mitigating circumstances … assigned little weight"); Henry v. State, 649 So.2d 1361 (Fla. 1994)(death sentence proportionate; aggravators of previously convicted of capital felony and committed during kidnapping; two statutory mental mitigators and several nonstatutory mitigators, including "truly remorseful," "history of drug and alcohol abuse," and "Henry fell as a child and suffered some brain injury").

The Initial Brief's Discussion As Insufficient to Support Reversal and Its Case Law As Inapplicable.

The Initial Brief (IB 24-28) overlooks the abundant evidence demonstrating Gill's rational, goal-directed behavior 2001 to 2006[6] and points to selected aspects of remote records as purported support for mandating a life sentence in this case.

At the outset, the State disputes the gravamen of the Initial Brief's coverage (IB 26-27) of Dr. Waldman's report and testimony. While Gill's "brain anomaly" may produce murderous rages, it did not cause this murder. The Circuit Judge explicitly rejected the inference that Gill's murder of Orlando Rosello was due to a rage from a "brain anomaly":

> Defendant suffers from a brain anomaly. Defendants behavior may have been affected throughout his life by an arteriovenous malformation which presses on the amydala, a gland which controls impulse behavior including rage. *See* Exhibits I and J.

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[6] The State notes that the Initial Brief (IB 26) appears to assume that Gill actually attempted to commit suicide three times. The Initial Brief references "Exhibit S," which can be found at SR3 57-61. There are two copies of one report for July 3, 1999, (SR3 57-59), and the third report appears to indicate that there was no corroboration whatsoever for Gill's August 1999 claim that he attempted to commit suicide (See SR3 61). Dr. Levin concludes (S5 866) that there were three attempts but he fails to specify the basis of his conclusion, and he states that Gill was transported to Shands for Gill's self-reported August 1999 overdose, but the jail's report indicates that Gill's "vital signs were good" (SR3 61). Therefore, there **may have been** one suicide attempt contrary to the Initial Brief's and Dr. Levin's reading of Gill's medical records. It is also noteworthy that Dr. Waldman opined that Gill is an "individual who frequently lies, is **manipulative with suicidal threats** …." (SR3 163; see also R3 371; R5 890-91; SR3 182-83)

In any event, although any attempt of Gill to kill himself may confirm some sort of mental condition, it does not negate the extreme CCP, Gill's murderous and violent history, and the fact that he was serving a life sentence for murder when he committed this murder.

> Dr. Alan Waldman, M.D. has referred to this arteriovenous malformation "AVM" and indicates that the AVM **may have caused** uncontrolled fits of rage that further led to uncontrollable murderous behavior. This condition is untreatable according to Dr. Waldman.
>
> The Court notes that **Defendant's murder of Orlando Rosello was neither impulsive nor due to uncontrollable rage. See Exhibits C, F and G, and therefore gives this non-statutory mitigating factor weight, but not great weight**.

(R5 708)

Thus, on February 1, 2006, Dr. Waldman opined on the witness stand that Gill is competent to proceed (R20 422), and the prosecutor posed a long set of facts, mirroring those here, to Waldman and asked if this "scenario implicates in any way the rage response that you have described," to which Waldman responded, "Not as you described it." (R20 430-31) The facts of this case sound like "a thought-out, threatened, premeditated act, but I was not there that night." (R20 431) When asked if there is "anything in the records" that suggests that this murder had "anything whatsoever to do with an interictal personality disorder," the doctor opined that since Gill was incorrigible as a child and since Gill appeared to have good parenting, it makes him "**wonder** whether this is going on and has been going on for most of his life." (R20 433-35) Waldman said that the condition in Gill's brain is "probably a factor in Ricardo Gill being the human being that he is today as opposed to a different human being, but a factor." (R20 436) In response to a query from the Judge, Waldman testified: "I don't opine that Ricardo Gill has any impairment in his knowledge of knowing what's right and what's wrong. I opine just the opposite, that he knows those things, that **he is an intelligent man** and knows those things. If we get to the

grayer area of morals, it's my opinion **Ricardo Gill does things to satisfy Ricardo Gill and Ricardo Gill only**. That's how he's wired. " (R20 441)

In sum, Dr. Waldman's courtroom testimony confirmed the rational, "thought-out, threatened, premeditated" nature of this murder, and he only "wonder[ed]" about what was "going on" in Gill's life. Accordingly, the Circuit Judge disavowed relying much on Dr. Waldman's report. (See R5 707)

The Initial Brief (IB 28) also contests the weight the trial court afforded to each of the aggravating circumstances. However, he overlooks his heavy appellate burden:

> The weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard. *Sexton v. State*, 775 So.2d 923, 934 (Fla. 2000). '[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court.' *Huff v. State*, 569 So.2d 1247, 1249 (Fla. 1990) (*quoting Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980)). We affirm the weight accorded an aggravator if based on competent, substantial evidence. *Sexton*, 775 So.2d at 934. Here, the trial court assigned great weight the prior violent felony, avoid-arrest, HAC, and CCP aggravators. As discussed above, competent, substantial evidence supports the court's finding of these aggravators. We find no abuse of discretion.

Buzia v. State, 926 So.2d 1203, 1216 (Fla. 2006). See also Sexton v. State, 775 So.2d 923, 934 (Fla. 2000)("weight to be accorded an aggravator is within the discretion of the trial court and will be affirmed if based on competent substantial evidence"; reject attack on CCP "that the trial court should not have given that aggravator much weight because Sexton's significant mental illness prevented him from planning or orchestrating the murder"). Here, as in Buzia and Sexton, the Initial Brief has failed to demonstrate that "competent, substantial evidence" does not support the Circuit Judge's findings and the unreasonableness of their weight. Indeed,

as elaborated in detail in the Statement of Facts supra, as well as discussed in the foregoing discussions in this issue, the Circuit Court's sentencing order supplied, and was supported by, abundant **reasoning** (as in "reasonable") based upon "competent, substantial evidence." See also Bates v. State, 750 So.2d 6, 13 (Fla. 1999)(conflicting evidence does not render a trial court's ruling unreasonable; "both of these mitigators were established as nonstatutory mitigation"); discussion of ISSUE II infra.

Turning to the Initial Brief's case law, it (IB 29-30) first relies on Cooper v. State, 739 So.2d 82, 85 (Fla. 1999), but in Cooper, the aggravating factors were not nearly as strong as here, and in Cooper, the mitigation was much more substantial. In Cooper, the prior violent felony was **not** another murder and an attempted murder was **not** also evident. Cooper lacked the CCP here that endured for months and that was reinforced when Gill executed his plan as he had written multiple times. Cooper included mitigation of a "brutal childhood, brain damage, mental retardation, and mental illness (i.e., paranoid schizophrenia)" to a degree not present here. Indeed, unlike Cooper, Gill has proved his intelligence many times over. Cooper was only "eighteen years old at the time of the crime and had no criminal record prior to the present offense." In contrast, addition to the prior First Degree Murder and prior Attempted Murder here, Gill's criminal record is not only extensive and but also permeated with violence (See R5 851, 856; R19 380-85; SR3 65, 110-23). Gill was about 32 years old when he committed this murder. (See DOB of 7/2/69, SR3 110, 111, 115; R5 893) Cooper does not apply.

In Crook v. State, 908 So.2d 350 (Fla. 2005)(IB 30), unlike here, the Defendant had frontal lobe brain damage and was beaten at age 4 with a pipe; that Defendant's IQ ranged from 62 to the low 70s and also scored "a full scale IQ of 66," unlike Gill's repeatedly palpable intelligence; Crook's "personality development [was] that of a three-or four-year-old," unlike Gill's complex machinations. Crook was age 20, in contrast to Gill's 32. And, Crook did not involve Gill's extreme CCP and extreme prior violent felonies. See also list of mitigation in Crook, 908 So.2d at 355-56.

Deangelo v. State, 616 So.2d 440, 443 (Fla. 1993)(IB 30-31), also involved less aggravation and more mental mitigation than here. Deangelo suffered from "bilateral brain damage and … has hallucinations, delusional paranoid beliefs" exacerbated by "continuous conflicts and arguments" among the parties. Here, Gill calmly and coldly picked the victim. Here, Orlando Rosello was simply Gill's means to fulfill his promises to kill again to obtain a death sentence. Here, Gill's CCP endured for months. And, here, Gill carried with him to this murder an extensive violent criminal history, including a prior capital Murder and Attempted Murder.

Knowles v. State, 632 So.2d 62 (Fla. 1993)(IB 31), involved two murders, but this Court struck two aggravators and held that the trial court erred in not finding the two mental mitigators, leaving as unweighed, as such, by the trial court the sole remaining aggravator of prior violent felony, that is, the other murder, vis-à-vis the erroneously excluded mental mitigators. Here, the trial court was fully aware of all of the aggravating and mitigating facts and, even though it very generously

weighed the mitigation, it still found that the aggravation outweighed it. Here, Gill's lengthy cold planning of this murder and its execution stands in sharp contrast to Knowles' "acute psychotic state due to extreme intoxication," 632 So.2d at 67.

As in Knowles, McKinney v. State, 579 So.2d 80, 84-85 (Fla. 1991)(IB 32-33), struck aggravating circumstances, there the very weighty ones of HAC and CCP. In McKinney, there was "no evidence in the record that the defendant planned to commit any crime at all until the opportunity presented itself." Here, Gill planned to kill months in advance and was awaiting the opportunity. Here, in contrast to the one remaining aggravator in McKinney, extremely weighty CCP and prior violent felonies, as well as under imprisonment, remained to outweigh the mitigation.

Hawk v. State, 718 So.2d 159 (Fla. 1998)(IB 33), had no CCP and no under imprisonment, and the prior violent felony was an attempt rather than the prior murder (and attempted murder) here. The only other remaining aggravator in Hawk was pecuniary gain. Hawk's mental mitigation was more serious than here. For example, in Hawk, "meningitis … ravaged his nervous system as a child" and "took away his hearing." Further, Hawk was only 19 at the time of the crime, versus Gill's age of about 32.

Similarly, the aggravation in Besaraba v. State, 656 So.2d 441, 445-46 (Fla. 1995)[7](IB 33-34), was significantly less than here. In contrast to

[7] Justices Harding, Wells, and Grimes dissented from the reduction to life.

Gill's enduring plan, in Besaraba there was only "a suspicion that such a plan existed." Besaraba struck CCP, whereas here there is not only abundant evidence of CCP but also the other weighty aggravation, as discussed many times supra. In contrast to Gill's plan here, in Besaraba there was a history between the victim and the defendant's weakened state during the murder that triggered the murder. Here, the "trigger" was Gill's enduring plan. In Besaraba, the "defendant ha[d] no significant history of prior criminal activity," 656 So.2d at 447, where Gill's is extensive and violent.

White v. State, 616 So. 2d 21, 25 (Fla. 1993)(IB 34-35), in contrast to Gill's fulfilling an enduring promise to murder, struck CCP because of "White's excessive drug use and the trial judge's express finding that White committed this offense "while he was high on cocaine." **Gill was "high" only on premeditation when he killed Mr. Rosello.** There, the defendant and the victim had a history of prior altercations as a backdrop for the defendant's mental problems to play out, whereas here the defendant picked the victim to perpetuate his plan. There, the only remaining aggravator paled relative to Gill's CCP, prior violence, and under-imprisonment for Murder.

The final case the Initial Brief (IB 35-36) discusses is Kramer v. State, 619 So.2d 274 (Fla. 1993). The discussion of Kramer in Singleton v. State, 783 So. 2d 970, 979-980 (Fla. 2001), applies here: "This Court in ***Kramer***, however, characterized the murder as nothing more than a "spontaneous fight … between a disturbed alcoholic and a man who was

legally drunk." *Id.* at 278." Gill's murder of Rosello was as far from "spontaneous" as facts can get. Gill was not drunk, and Rosello was asleep when Gill began strangling him. Here, in contrast to the "no discernible reason" for the murder in Kramer, Gill made his reason for killing Mr. Rosello discernible multiple times to multiple parties in multiple formats.

In sum, Gill's death sentence is proportionate.

ISSUE II: DID THE TRIAL COURT REVERSIBLY ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED, AND PREMEDITATED? (RESTATED)[8]

1. ISSUE II is unpreserved and explicitly waived.

ISSUE II attacks the aggravating circumstance of cold, calculated, and premeditated (CCP). While this Court conducts a proportionality review regardless of whether it is raised below or on appeal, a claim attacking a trial court finding of a specific aggravating circumstance must be preserved by bringing it to the trial court's attention prior to raising it on appeal. See Stephens v. State, 975 So.2d 405, 426 (Fla. 2007)("Stephens argues that the aggravating circumstance and jury instruction for a 'victim under 12 years of age' is unconstitutionally overinclusive, arbitrary, and automatically applicable to homicides committed regardless of the circumstances. Stephens did not object at trial to the constitutionality of this aggravator in order to preserve the claim for appeal"; "appellate

[8] The State's discussion in ISSUE I and the State's Statement of Facts supra covered in detail evidence supporting CCP. Therefore, here the State incorporates its ISSUE I and Statement of Facts discussions, supra, by reference, and here it frequently refers explicitly to those facts.

counsel cannot be deemed ineffective for failing to raise this claim on direct appeal because even if he had done so, this Court would have declined to address the merits of the claim"); Willacy v. State, 967 So.2d 131, 148 (Fla. 2007)("Because the record does not indicate that counsel specifically requested a jury instruction distinguishing between "ordinary premeditation" and the premeditation required for the CCP aggravator "cold, calculated and premeditated," the issue was not preserved for appeal. Therefore, appellate counsel was not ineffective for failing to raise this claim"); Lukehart v. State, 776 So.2d 906, 925 (Fla. 2000)("procedurally barred in that Lukehart did not object at trial on constitutional grounds to the jury instruction on this aggravator"); Rutherford v. Moore, 774 So.2d 637, 644 (Fla. 2000)("Trial counsel objected to the applicability of the HAC instruction, but did not specifically object on the basis that the instruction was unconstitutionally vague. Although trial counsel did file a pretrial motion on the basis that the CCP instruction was unconstitutionally vague, counsel did not renew the objection in the sentencing hearing or submit an alternative instruction. Therefore, these claims were not preserved for appellate review"); Jackson v. State, 648 So. 2d 85, 88 (Fla. 1994)("Because the challenge to the CCP instruction has been properly preserved in this case…").

Here, not only was this claim unpreserved, procedurally barring it on appeal, it was explicitly waived below, as Gill, while representing himself, conceded that CCP applied (See, e.g., R5 861-62; R21 477-78) and even opposed evidence that he construed could be argued as suggesting to

the contrary (See, e.g., R20 436-42; R4 575). ISSUE II was waived, procedurally barring it here. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So.2d 734 (Fla. 1991).

Moreover, the constitutional citations (IB 39-40) were not preserved, if not also waived. In any event, these constitutional citations are undeveloped in the Initial Brief, and as such, procedurally barred. See Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence, that the prosecutor engaged in improper burden shifting"; "Because Lawrence's bare claim is unsupported by argument, this Court affirms the trial court's summary denial of this subclaim"), citing Shere v. State, 742 So.2d 215, 217 n. 6 (Fla. 1999), Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999), Coolen v. State, 696 So.2d 738, 742 n. 2 (Fla.1997).

2. ISSUE II is meritless.

If the merits of ISSUE II are reached, it has none. ISSUE II fails to meet its appellate burden of demonstrating that there was no competent substantial evidence supporting CCP. To the contrary, abundant competent substantial evidence supported the Circuit Judge's finding of CCP.

The State disputes purported factual foundations for ISSUE II. Most importantly, the allegation that Gill was "incapable of calculating the homicide with requisite 'cool, calm, reflection'" (IB 37) is belied by a record saturated with Gill's calculations to kill and Gill's calm and

reflective arguments, as extensively discussed and documented in the Statement of Facts and in ISSUE I supra.

ISSUE II's (IB 39) distillation that Gill's "statements and admissions about the offense" were "after-fact" is incorrect. As extensively discussed and documented in the Statement of Facts and in ISSUE I supra, Gill deliberated for months; deliberated about four days before the murder, essentially promising Judge Morris in another Murder case that he would kill again to assure the death penalty; a couple days before this Murder described the murder in writing; and multiple times after the murder, confirmed that the murder was perpetrated pursuant to his plans and promises.

Indeed, an "after-fact" confession would have been sufficient for CCP, but, here, Gill's pre-announced plan and promise to murder leaves no doubt whatsoever of his CCP.

ISSUE II (IB 39) posits Gills' "suicide attempts" as significant, but as footnoted supra, the factual foundation of the purported suicide attempts is very questionable, and Gill's extreme planning for this murder belies any significance to whatever such attempts may have transpired. See also, e.g., Lawrence. **Indeed, as this Murder illustrates, when Gill is really determined to kill, he is successful.**

ISSUE II's assertions that the trial court "failed to consider the impact of Gill's mental impairments on his state of mind at the time" (IB 38) and ISSUE II's reliance on Dr. Waldman (IB 39) are incorrect and misplaced. The Circuit Judge detailed crucial facts showing, whatever

Gill's mental condition, Gill was able to plan this Murder (R5 700-702) and analyzed CCP vis-a-vis mental mitigation:

> In fact, the Court finds that the weight to be given this particular statutory mitigating factor is less than might have been given had GILL acted out of rage or great emotional disturbance, but rather, his behavior following Judge Morris's sentence was cold, calculated and premeditated. This man's behavior whom each expert has considered 'goal-oriented,' was not marked by suicide attempts, anger, rage, or the other factors he has previously shown, but by calm, or 'cold' reflection[.]

(R5 703-704) In analyzing the other mental mitigator, the sentencing order explains that its application has been "intermittent" (S5 707) and did not heavily rely on Dr. Waldman's report (S5 708). As discussed in ISSUE I supra, Waldman's courtroom testimony belied any link between Gill's tumor-type formation and statutory mitigation. The trial court was very generous in finding and weighing the two statutory mental mitigators.

Any suggestion in ISSUE II that statutory mental mitigation and CCP are per se mutually exclusive would be incorrect. As illustrated by the case law discussed in ISSUE I (Lawrence, 846 So.2d 440; Robinson, 761 So.2d 269; Smithers, 826 So.2d 916), a trial court can find both of them in the same case.

Thus, the Circuit Judge, after extensively analyzing aggravation and mitigation (S5 697-708, detailed supra), explicitly stated that, on balance, "the magnitude of Defendant's aggravating factors outweigh the Defendant's statutory mitigating factors and non-statutory mitigating factors" (S5 708-709). ISSUE II's disagreement with the Circuit Judge's analysis and conclusion is not the appellate test for reversal. Moreover, for example, when Gill needed to control himself to present his point to

the trial court, it appears that he was in control of himself, responsive, rational and exhibited a capacity for long-term planning towards whatever was his goal at the time.

In contrast to ISSUE II's assertions, an appellant must demonstrate on appeal that competent substantial evidence do not support the finding of an aggravating circumstance, here CCP. See, e.g., Buzia v. State, 926 So.2d 1203, 1209 (Fla. 2006)("whether competent substantial evidence supports its finding"), quoting Owen v. State, 862 So.2d 687, 698 (Fla. 2003), quoting Way v. State, 760 So.2d 903, 918 (Fla. 2000). The State has detailed supra, in the Statement of Facts and in ISSUE I, the abundant competent substantial evidence supporting the Circuit Judge's finding of CCP and its elements, including, as the Circuit Judge discussed (R5 699-702), Gill's advance cool and calm promise premeditated over days and even months, the promise-fulfilled through a calculated pre-arranged design, and the promise confessed-multiple-times as planned and fulfilled. Moreover, as also discussed supra, there are numerous additional indicia of Gill's mental capacity to coldly calculate and execute a plan formulated days, if not months, in advance.

As discussed above, Lawrence, 846 So.2d 440, supports affirmance. There, as here, the "trial court's sentencing order clearly state[d] and applie[d] the correct rule of law for establishing the CCP aggravator, and sets forth the extensive factual information supporting that aggravator," Id. at 450. There, in rejecting a challenge to CCP, Lawrence held:

> Lawrence's confession regarding the Robinson murder, combined with the notes describing the planning of the murder as written by

> Lawrence, constitute competent, substantial evidence in the record that (1) the murder was the product of Lawrence's cool and calm reflection; (2) there was a careful plan or prearranged design to commit murder before the fatal incident; (3) Lawrence had heightened premeditation; and (4) there was no pretense of moral or legal justification for the murder. *See Hoskins v. State*, 702 So.2d 202, 210 (Fla. 1997).

846 So.2d at 450. Here, Gill's multiple confessions, combined with his multiple pre-murder oral and written statements satisfy the elements of CCP.

Robinson, 761 So.2d 269, where both statutory mental mitigators applied, rejected a challenge to CCP. Compare Robinson, 761 So.2d at 273 n.4 with Robinson v. State, 684 So.2d 175, 176 n.1, 180 n.6 (Fla. 1996). There, Robinson killed out of a determination not to be sent back to prison. 761 So.2d at 272. Here, Gill killed out of his determination not to spend his natural life in prison. Both Robinson and Gill "acted according to a deliberate plan and [were] fully cognizant of his actions on the night of the murder," 761 So.2d at 278. Both merited CCP.

Smithers v. State, 826 So.2d 916, 929-30 (Fla. 2002), upheld CCP based upon "competent, substantial evidence in the record to support the existence of the CCP aggravator for the Cowan murder," even though the trial court had also found the two statutory mental mitigators. In Smithers, there was circumstantial evidence that the killing was not perpetrated at the spur-of-the-moment during sex. In Smithers, the evidence included the "State attempt[ing] to prove this aggravator for the Cowan murder by establishing that Smithers murdered Roach in a similar fashion in the previous seven to ten days." Smithers reasoned that the "time between

the murders [committed in an identical manner] was a matter of days." Here, the evidence of planning for days and months was direct, explicit, and compelling. CCP should be upheld here.

Ferrell v. State, 686 So.2d 1324 (Fla. 1996); Gore v. State, 784 So.2d 418 (Fla. 2001); Sexton v. State, 775 So.2d 923, 934-35 (Fla. 2000); and Zakrzewski v. State, 717 So.2d 488 (Fla. 1998), also support affirming the Circuit Judge's finding of CCP here.

Ferrell, 686 So.2d at 1330, upheld CCP, where the perpetrators engaged in advanced planning by "obtain[ing] a gun and a getaway vehicle," taking "the victim to a remote area where there would be no witnesses," and shooting "the victim execution-style to prevent him from identifying codefendants." Here, Gill repeatedly manifested his advanced planning to kill to assure a death sentence and chose his moment to kill to execute his plan.

Gore v. State, 784 So.2d 418, 432 (Fla. 2001), upheld CCP. There, CCP was established through several items of circumstantial evidence proving an implemented plan. Here, evidence of the implemented plan was direct and overwhelming.

Sexton v. State, 775 So.2d 923, 934-35 (Fla. 2000), upheld a death sentence for a strangulation murder. There, the trial judge's finding and weighting of CCP, where there was also statutory mental mitigation ("great weight"), was upheld. There, the planning persisted for two or three weeks, and the Defendant decided to execute the murder the day of the murder. There, the Defendant was determined to "finish off" the victim. In Sexton,

the "trial court properly evaluated and weighed this statutory mitigator and considered it in light of the statutory aggravators, including CCP and avoiding arrest." 775 So.2d at 937. Here, the planning persisted for months. When the victim was placed in the same cell with Gill, Gill decided to execute the murder. And, Gill was determined to "finish off" the victim as he strangled the victim to death. Sexton held that "not only … competent substantial evidence supports the existence of the CCP aggravator, but also that the trial court did not abuse its discretion by affording it 'great weight.'" Here, the "trial court properly evaluated and weighed this statutory mitigator and considered it in light of the statutory aggravators." The facts support such an affirmance here.

Zakrzewski v. State, 717 So.2d 488, 492 (Fla. 1998), rejected a claim similar to ISSUE II:

> Zakrzewski asserts that because he was under extreme emotional distress at the time of the murders, it was impossible for him to commit the murders in a cold, calculated, and premeditated fashion. Further, Zakrzewski argues that the murders were committed with a pretense of moral justification. We disagree. On the day of the murders, Zakrzewski left work at lunch in order to buy a machete. Zakrzewski proceeded to set up the murder scene before his family arrived home, by placing the machete behind the bathroom door. We find these actions to be both calculated and premeditated.

Here, Gill's planning was done far in advance of the day of the murder, and he re-committed himself to the plan when the victim was placed in the cell with him and when he lay awake that night. Gill's CCP was stronger than Zakrzewski's.

In contrast to the forgoing authorities, the Initial Brief discusses the facts of no precedents. Since, however, ISSUE II (IB 39), as well as

ISSUE I, cite to Besaraba v. State, 656 So.2d 441 (Fla. 1995), the State notes here, in addition to the discussion of Besaraba in ISSUE I supra, that, in contrast to Besaraba, "we do know" from competent substantial evidence of Gill's plan to ensure he was sentenced to death for this murder. Unlike Besaraba, there was no evidence immediately surrounding the murder to indicate that it was spur-of-the-moment. Gill's acts were not "random" but rather designed to effectuate his pre-planned purpose of murder.

The Initial Brief cites multiple times (IB 38-39) to the 4-3 opinion in and Mahn v. State, 714 So.2d 391 (Fla. 1998), but there, unlike here, the evidence of CCP was circumstantial, which triggered the rule affording deference to a "reasonable hypothesis which might negate the aggravating factor," 714 So.2d at 398. There, the killing was "rash and spontaneous killing evidenced no analytical thinking, no conscious and well-developed plan to kill." Id. Here, in contrast, the evidence was direct, Gill's plan was announced, conscious, and explicit, not rash, and Gill repeatedly demonstrated analytical thinking in this murder as well as in numerous events related to the murder and this case. Mahn does not apply.

In sum, ISSUE II, if the merits are reached, should still be rejected.

ISSUE III: IS APPELLANT ENTITLED TO RELIEF BASED UPON RING V. ARIZONA? (RESTATED)

ISSUE III (IB 41-42) attacks Florida's death penalty statute by claiming that a jury should have decided facts on which the death sentence

was based. He cites to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002).

By failing to raise this claim with the trial court, ISSUE III was not preserved, thereby procedurally barring it here. See Evans v. State, 946 So.2d 1, 15 (Fla. 2006)("this claim is procedurally barred because Evans did not preserve this claim by challenging the constitutionality of Florida's sentencing scheme both at trial and on direct appeal").

Moreover, here, Gill waived a jury trial for the guilt and penalty phases. As such, he failed to perfect this claim by failing to suffer the alleged harm, See State v. Raydo, 713 So.2d 996, 997-1000 (Fla. 1998)(speculative harm; claim unpreserved); Brundige v. State, 595 So.2d 276, 277 (Fla. 3d DCA 1992)(defendant's decision not to display his voice rendered the trial court's ruling unreviewable), and, as such, this claim was explicitly waived, See Lucas, 645 So.2d at 427, citing Armstrong.

Moreover, if the merits are reached, this claim has none.

As the Initial Brief acknowledges (IB 41), this Court has decided this claim adversely to ISSUE III. See also, e.g., Lebron v. State, 982 So. 2d 649, 665 (Fla. 2008), citing Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), King v. Moore, 831 So.2d 143 (Fla. 2002), and Jones v. State, 845 So.2d 55, 74 (Fla. 2003); Merck v. State, 975 So.2d 1054, 1067 (Fla. 2007); Overton v. State, 976 So.2d 536 (Fla. 2007).

Moreover, here, as in Lebron, 982 So.2d at 665, "one of the aggravating factors found by the trial court was … previous conviction for a violent felony, 'a factor which under . . . ***Ring*** need not be found by the jury,'"

quoting Jones v. State, 855 So.2d 611, 619 (Fla. 2003), and citing Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003). See also, e.g., Evans, 946 So.2d at 15-16 ("Evans would not be entitled to relief under *Ring* because the trial court found the prior violent felony conviction aggravator applied in his case"), citing, e.g., Morris v. State, 931 So.2d 821, 837 (Fla. 2006).

Therefore, ISSUE III is procedurally barred for failing to advance the claim in the trial court, for failing to perfect it, and also waived, and, in any event, ISSUE III has no merit.

SUFFICIENCY OF THE EVIDENCE FOR FIRST DEGREE MURDER. (ADDED)

The State adds this section because this Court conducts an independent review of sufficiency of evidence for First Degree Murder in capital cases.

In determining the sufficiency of all the evidence, it is viewed so that "every conclusion favorable to [the verdict] that a jury might fairly and reasonably infer from the evidence," Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). See also, e.g., Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("fact that the evidence is contradictory does not warrant a judgment of acquittal since ...").

Multiple times, Gill confessed to committing this murder and premeditating it. See Statement of Facts supra and discussions of ISSUE I and II supra, rendering the evidence more than sufficient for First Degree Murder. See, e.g., Murray v. State, 838 So.2d 1073, 1087 (Fla. 2002); Lamarca v. State, 785 So.2d 1209, 1215 (Fla. 2001)("Appellant's statement,

five months before the murder, that he intended to kill the victim constitutes direct evidence of his 'fully formed conscious purpose to kill'"), citing Norton v. State, 709 So.2d 87, 92 (Fla. 1997); Meyers v. State, 704 So. 2d 1368, 1370 (Fla. 1997) ("Because confessions are direct evidence, the circumstantial evidence standard does not apply. . . ."); Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988) ("We disagree that the case was circumstantial, since Hyzer and others testified that Hardwick had confessed to the murder or told others of his plans in advance of the killing. A confession of committing a crime is direct, not circumstantial, evidence of that crime").

The evidence of guilt for First Degree Murder was much more than sufficient.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on August 18, 2008: W.C McLain, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee FL 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted, served, and certified,
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