IN THE SUPREME COURT OF FLORIDA

DWIGHT T. EAGLIN,

Appellant,

v. **CASE NO. SC06-760**
Lower Tribunal No. 03-1525F

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Citations to the record on appeal will be referred to by the appropriate volume number followed by the page number.

STATEMENT OF THE CASE AND FACTS

Appellant, Dwight Eaglin, and two other inmates housed at Charlotte Correctional Institution (CCI), Stephen Smith and Michael Jones, were indicted and charged with two counts of first degree murder for the deaths of CCI Correctional Officer Darla K. Lathrem and fellow inmate Charles Fuston during an attempted escape.[1] (V1:6-7). Appellant's trial counsel filed numerous pre-trial motions and challenges to Florida's death penalty scheme. The Honorable William L. Blackwell presided over the jury trial conducted in this case on February 20-24, 2006. The jury returned a verdict finding Appellant guilty of the first degree murders of Darla Lathrem and Charles Fuston under both theories of prosecution; premeditation and felony murder.

While serving a mandatory life sentence for first degree murder at Charlotte Correctional Institution (CCI), Appellant began planning an escape attempt with Stephen Smith and Michael Jones.[2] Fellow CCI inmates Kenneth Lykins and Jesse Baker each

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[1] The State filed a *nolle prosequi* as to the murder count involving inmate Fuston for codefendants Smith and Jones. Stephen Smith was convicted for the first degree murder of Darla Lathrem and was sentenced to death. His direct appeal is currently pending with this Court. See Smith v. State, SC06-1903. According to online records at flccis.com, the Comprehensive Case Information System, Michael Jones plead guilty or no contest to the charge of murder and was sentenced to life.

[2] In the months leading up to the murders, CCI was undergoing major renovations to their dormitories and utilized

testified to hearing Appellant discuss his escape plans on a number of occasions. (V25:511-14, 533-38). Lykins testified that he was in charge of a security tool cart at CCI and often performed plumbing work for the prison. Lykins worked with fellow inmate plumbers Jesse Baker, Stephen Smith, and Michael Jones. (V25:501-03). Lykins testified that Appellant worked on the fencing crew, but Lykins' plumbing crew often worked with, or near, Appellant's fencing crew. (V25:505-06).

In the weeks leading up to the murders, Lykins heard Appellant, Smith and Jones talking about their escape plans. Appellant stated that he planned to build a ladder that would allow him to climb over the perimeter fences,[3] and then he would lie in wait for the guard driving by in the gun truck, at which time he would strike this individual with a hammer so that he could use the gun and the truck to help Smith and Jones escape. (V25:511-13). Prior to escaping, Appellant stated that he planned to kill Charlie Fuston because Fuston had disrespected him. Appellant also stated that if any guards attempted to stop

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inmates to perform various construction duties.

[3] The two perimeter fences at CCI were approximately twelve feet high and twenty feet separated the inner and outer fences. The fences also contained razor wire at the top and bottom. (V26:729-48).

him, he would kill them.[4] (V25:514).

Jesse Baker, another inmate plumber, testified that the plumbing crew often worked with Appellant's fencing crew. (V25:525). At CCI, Baker was housed in D-dorm with Appellant, Michael Jones, Stephen Smith, and Kenneth Lykins. (V25:530). Baker testified that he worked in A-dorm during its renovation, but never worked in A-dorm at night. The only inmates he knew that worked in A-dorm during the evening hours were Appellant, Michael Jones, Stephen Smith, Charles Fuston, and John Beaston. (V25:531). Appellant and the other inmates were all aware that the renovations to A-dorm were almost complete and it was scheduled for inspection on Thursday, June 12, 2003. The last day for any workers would be Wednesday, June 11, 2003.[5] (V25:532-33).

Baker testified that Appellant, Smith and Jones all bragged about their escape plans. They indicated that "they would kill any bitch that got in their way." (V25:535). Baker knew the inmates had previously made "a metal thing" that would hook to a

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[4] On cross-examination, Lykins admitted that he initially denied knowing anything about the escape attempt, but he explained that at that time, he was fearful for his life. Once he was moved to another correctional institution, he gave a statement to investigators regarding his knowledge of Appellant's plans. (V25:516-22).

[5] The murders in this case took place prior to 10:00 p.m. on Wednesday, June 11, 2003.

light post and enable them to avoid the perimeter fences, but it was destroyed approximately a month before the murders. Appellant blamed Charles Fuston and John Beaston for destroying the metal piece. Appellant stated his intent to kill Charles Fuston when he stated that if he ever got the chance, he would "straighten" Charles up. (V25:537). On cross-examination, defense counsel attempted to question Baker about a disciplinary report he received while incarcerated for lying to a correctional officer, but the trial court sustained the State's objection. (V25:540-43).

Shortly after 4 p.m. on June 11, 2003, CCI Correctional Officer Mary Polisco transported five inmates (Appellant, Jones, Smith, Fuston, and Beaston) to A-dorm to work on the construction project. (V25:470-73). Officer Polisco left the five inmates in A-dorm under the supervision of CCI Correctional Officer Darla Lathrem. (V25:474). At 8:30 p.m., CCI conducted its master roster count of inmates and Officer Lathrem accounted for the five inmates in A-dorm. (V25:491-94). CCI Correctional Officer Kenneth George received the count slip from Officer Lathrem at approximately 8:55 p.m. (V25:496).

Approximately an hour later, an alarm was triggered on the inner perimeter fence behind A-dorm. Officers responding to the scene observed Appellant in-between the two perimeter fences, and saw Stephen Smith climbing on a ladder with Michael Jones

standing next to the ladder inside the prison yard.[6] (V24:337-41; 411-14). Smith and Jones saw the officers and ran into A-dorm where they were quickly apprehended. (V24:414-16).

Appellant, located between the two perimeter fences, was very agitated and kept attempting to climb the outer fence even though there were rolls of razor wire at the base of the fence. (V24:382-91; Supp. V1:57-58, 63). Appellant was yelling to the officers, "You're going to have to shoot me; **I'll kill you too**; I'll make you kill me." (V24:390). Appellant would not comply with the officers' commands, so they eventually went in to the fenced area to apprehend Appellant. Officers Belfield and Cullember sprayed Appellant with chemical spray, but it did not work so they tackled him and eventually were able to restrain Appellant after a fight. (V24:396-98).

While some officers were responding to Appellant, other officers were attempting to contact the five inmates' supervising correctional officer, Officer Darla Lathrem, on her radio. Once inside A-dorm, officers discovered a locked mop closet with a large pool of blood coming from under the door.[7] (V24:344-48).

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[6] The "ladder" was actually multiple ladders bolted and taped together to form a "bridge" that would have allowed the inmates to scale the twelve foot high, twenty-foot-wide perimeter fences. (V26:732-43; Supp. V1:63-77).

[7] Officer Lathrem's radio and keys were subsequently located in the toilet of one of the cells. (V25:591-92).

After they were able to obtain a key from the control room, the officers opened the closet door and discovered Officer Lathrem lying in a fetal-type position. (V24:350). Officer Lathrem had no pulse, was not breathing, and had obvious injuries to her head.[8] (V24:350-52; V25:554-55). The medical examiner testified that Officer Lathrem died as a result of at least three blunt trauma injuries to her skull and head which caused extensive damage to her brain. (V27:912-15). The pattern injuries to her head indicated that the sledgehammer found in the mop closet most likely caused her injuries.[9] (V27:915).

Florida Department Law Enforcement crime analyst LeRoy Parker testified regarding his blood stain analysis of the crime scene. Parker testified that there were at least two impact blood spatter areas around the mop closet, one inside the closet and one outside. (V27:842-43). The blood stain patterns indicated that the victim, Officer Lathrem, was likely struck while on the ground, as the blood stain was only approximately two feet off the ground. (V27:844). The blood stain was

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[8] A sledgehammer was found in a pool of blood in the closet. (V24:350-52; Supp. V1:25-27). CCI nurse Robert Colgan testified that although he was not allowed to pronounce her dead, it was his belief that Officer Lathrem was dead when they opened the closet. (V25:554-58).

[9] The blood on the sledgehammer matched the victim's DNA. (V28:1018-22).

consistent with someone being struck with a hammer while lying on the ground in a prone position. It appeared that Officer Lathrem had been struck outside the closet and then dragged into the closet. (V27:845). The blood stain patterns inside the closet were consistent with someone taking a sledgehammer and striking someone on the ground, then drawing the hammer back for a another blow. (V27:846). Parker also examined Appellant's pants and found areas of blood spatter and contact stains. He determined that the height of the spatter on the pants indicated that the source of the blood was from someone on, or near, the ground. (V27:852-58).

In addition to finding Officer Lathrem locked in the mop closet, officers responding to A-dorm after the escape attempt also found inmates Charles Fuston and John Beaston locked in separate cells. Inmate Beaston was sitting in a locked cell downstairs and holding a rag to a head injury, while inmate Fuston was unconscious and lying in a massive pool of blood in an upstairs cell. (V24:417-20; V26:665-67). Inmate Beaston survived his head injury, but inmate Fuston died as a result of his head injuries.[10]

[10] The medical examiner testified that the head injuries to Fuston were similar to those of Officer Lathrem and were most likely caused by the same sledgehammer. (V27:919-38). The medical examiner did not observe any typical type of defensive wounds on Mr. Fuston. (V27:936).

The morning after the murders, Appellant gave a post-Miranda statement to Florida Department of Law Enforcement (FDLE) Agents Steve Uebelacker and Andrew Rose. (V28:1067-76). Appellant told Agent Uebelacker that he "would make it easy on" him . . . "he tried to kill those three people." (V28:1065). Appellant also indicated that he wanted to get the death penalty. (V28:1076-77).

After the State rested, Appellant moved for a judgment of acquittal which the trial judge denied. (V28:1083-1109). Thereafter, the defense also rested. (V28:1110). Following closing arguments, the jury returned a verdict finding Appellant guilty of first degree murder for both counts. (V28:1192-93). As previously noted, the verdict form indicated that the jury found Appellant guilty of first degree murder under each theory of prosecution; premeditated murder and first degree murder while engaged in the perpetration of, or in the attempt to perpetrate a felony, to wit: escape and, on the count involving Officer Lathrem, resisting an officer with violence. (V18:3600-01).

At the penalty phase, the State introduced evidence regarding Appellant's prior Pinellas County conviction for first degree murder committed in the course of a burglary. (V29:1238-44). At the time of the instant murder, Appellant was serving a

life sentence without the possibility of parole at Charlotte Correctional Institution. (V29:1243). As will be discussed in more detail, infra, Appellant presented numerous witnesses at the penalty phase proceeding regarding his proposed nonstatutory mitigation relating to the prison system's failures in this case.[11] (V29:1256-1327). Appellant testified before the jury and, and as the trial court noted when sentencing Appellant, his testimony did not express any genuine remorse. (V29:1344-53; V19:3689). After hearing all of the evidence, the jury recommended by a vote of 8-4 that Appellant be sentenced to death on both counts. (V18:3600-01).

At the Spencer hearing on March 10, 2006, the State introduced some victim impact statements and Appellant again testified on his own behalf. (Supp. V7:1261-62). On March 31, 2006, the trial judge followed the jury's recommendation and sentenced Appellant to death for the murders of CCI Correctional Officer Darla Lathrem and inmate Charles Fuston. The court found the following five aggravating circumstances applicable to the Lathrem murder: (1) the capital felony was committed by a person

[11] Defense counsel informed the trial court, that after numerous discussions with his client, Appellant did not wish to present any mitigation evidence regarding his childhood. The court conducted a colloquy with Appellant regarding this decision. Defense counsel further stated that he had made the strategic decision, after consulting with his client, not to present any mental mitigation. (V29:1341-43).

previously convicted of a felony and under a sentence of imprisonment; (2) Appellant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person; (3) the capital felony was committed for the purpose of effecting an escape from custody; (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (5) the victim of the crime was a law enforcement officer engaged in the performance of her official duties.[12] (V19:3683-85). The court found aggravating factors (1)-(4) applicable to the murder of inmate Charles Fuston. (V19:3685-86).

In mitigation, the court considered information regarding Appellant's background obtained from the Pre-Sentence Investigation (PSI) report. This information established that Appellant had a family history of neglect, abandonment, and cruelty, and the trial court gave this mitigating factor some weight. (V19:3686). The court also considered the mitigation evidence presented by Appellant regarding the alleged failures of the prison system. The court ultimately concluded that the allegations of prison negligence had to be rejected as a mitigating circumstance because, even if the negligence was

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[12] The court did not find aggravating factor (5) to be an additional aggravating factor because it merged with aggravating

established, it did not reduce the moral culpability for murder. The court further noted that even if this mitigation was entitled to any weight, it was incapable of changing the result in this case. (V19:3687-89). The court ultimately concluded that the aggravating circumstances in this case greatly outweighed the mitigating circumstances and sentenced Appellant to death for both murders. This appeal follows.

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factor (3). (V19:3685).

SUMMARY OF THE ARGUMENT

The trial court acted within its sound discretion in sustaining the State's objection to defense counsel's questioning of an inmate witness regarding a disciplinary report he received while incarcerated for lying to a correctional officer. A witness may only be impeached by a single bad act when the act results in a conviction for a crime punishable by imprisonment in excess of one year or if the crime involved dishonesty or a false statement. Because a disciplinary report is not equivalent to a conviction of a crime, the trial court properly precluded defense counsel from questioning the witness regarding the incident.

Appellant has failed to establish that the trial court abused its discretion in granting the State's motion in limine seeking to exclude evidence from the penalty phase from a local television news story. The statements made in the news story by unidentified individuals regarding working as a guard at CCI were irrelevant to the nature of the crime or the character of the defendant and were irrelevant to the penalty phase. Even if this Court were to find that the trial court erred, the error was harmless given the fact that Appellant presented similar evidence at the penalty phase that was ultimately rejected by the trial court as nonstatutory mitigation.

Appellant asserts that this Court cannot adequately conduct

its proportionality review because all of the available mitigation was not presented below. As the record indicates, trial counsel, after consulting with his client, decided which mitigation evidence to present to the jury. The record clearly establishes that trial counsel made a strategic decision regarding the presentation of evidence at the penalty phase. Any claim based on counsel's alleged ineffectiveness is only cognizable in a postconviction collateral proceeding. Furthermore, the trial court properly considered the mitigation evidence presented and the mitigation contained in the record, to the extent that it was believable and uncontroverted. The court properly rejected the proposed nonstatuotry mitigation proffered by Appellant that the prison system was negligent by placing the victim in a vulnerable position. Finally, contrary to Appellant's assertions, this Court is capable of conducting its proportionality review based on the record in this case. When conducting this analysis, this Court will find that Appellant's two death sentences are proportionate.

The trial judge did not factor Appellant's lack of remorse into his decision to sentence Appellant to death for the two murders. Appellant testified at both the penalty phase and the Spencer hearing. Because his testimony could arguably be considered as expressing remorse and, as such, constitute nonstatutory mitigation, the court was obligated to discuss this

evidence. In the court's discussion of nonstatutory mitigation, the court noted Appellant testified but rejected the notion that he expressed genuine remorse for the murders. The court properly explained its rationale for rejecting a potential mitigating factor.

The trial court properly found that the murders of CCI Correctional Officer Darla Lathrem and inmate Charles Fuston were done in a cold, calculated, and premeditated manner without any pretense of legal or moral justification. The State presented evidence that during Appellant's numerous discussions regarding his escape attempt, he indicated that he planned to kill any guard that got in his way and planned to kill Fuston before he escaped. Appellant eventually struck both Fuston and Lathrem numerous times in the face with a small hand-held sledgehammer causing massive injuries to their skulls. Based on Appellant's statements indicating his plans and his actions in carrying out the brutal murders, the trial court properly submitted the CCP aggravating factor to the jury and found it applicable when sentencing Appellant to death for both murders. Furthermore, contrary to Appellant's assertions, he did not have a pretense of moral or legal justification for committing the offenses based on his belief that he was unlawfully imprisoned.

This Court has consistently rejected Appellant's challenge to Florida's capital sentencing scheme based on Ring v. Arizona,

536 U.S. 584 (2002).

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN PRECLUDING DEFENSE COUNSEL FROM QUESTIONING AN INMATE WITNESS REGARDING A DISCPLINARY REPORT FILED AGAINST HIM FOR LYING TO A CORRECTIONAL OFFICER.

The State presented evidence from two inmates, Kenneth Lykins and Jesse Baker, regarding conversations they overheard involving Appellant and the other two codefendants' escape plans. On cross-examination of Jesse Baker, defense counsel asked Baker if he had received a disciplinary report (DR). (V25:540). The prosecuting attorney objected and argued that a prior bad act is not relevant unless there was a conviction or the witness had a reputation for dishonesty.[13] (V25:540-43). Defense counsel informed the court that the DR was for lying to a correctional officer and the witness had to serve 60 days in solitary confinement as a result. (V25:540-43). After hearing argument from counsel, the trial court sustained the State's objection based on section 90.405 and the two cases cited by the prosecutor. (V25:543).

Appellee submits that the trial court properly sustained the State's objection to defense counsel's questioning of an inmate

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[13] In support of his argument, the prosecuting attorney cited Florida Statutes, section 90.405 and two Florida cases: Holland v. State, 916 So. 2d 750 (Fla. 2005) and State v. Bullard, 858 So. 2d 1189 (Fla. 2d DCA 2003).

witness regarding a disciplinary report he received while incarcerated. The law is well established that a ruling on the admissibility of evidence is within the discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. White v. State, 817 So. 2d 799 (Fla. 2002); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000). In this case, the court acted within its discretion in precluding the inadmissible character evidence.

In State v. Bullard, 858 So. 2d 1189 (Fla. 2d DCA 2003), a case relied on by the trial court, the defendant was charged with, among other offenses, battery on a law enforcement officer. After the trial, defense counsel argued that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose that the State's primary witness, Deputy Broome, had been suspended for three days by the sheriff's office after an Internal Affairs investigation found that he had made false statements to the public regarding salary issues in the sheriff's office. Bullard, 858 So. 2d at 1191. While recognizing the general rule that a defendant in a criminal trial has a right to cross-examine a prosecution witness to show bias or motive to be untruthful, the Second District Court of Appeal noted that even this right has limits. Id. The court recognized cases where an Internal Affairs investigation may be relevant, such as when the

investigation arose from the same incident as the defendant's criminal charges, but found in the instant case that the Internal Affairs investigation was not relevant to the battery on a law enforcement charge and therefore would not have been admissible at trial. Id. at 1191-92; see also Holland v. State, 916 So. 2d 750 (Fla. 2005) (finding that internal police documents showing that officer used excessive force would not have been admissible when defendant alleged that officer's use of excessive force led to struggle and supported his claim of self-defense).

In the instant case, the trial court acted within its discretion in denying defense counsel the opportunity to cross-examine an inmate witness regarding a disciplinary report that did not result in a criminal conviction. Florida Statutes, section 90.405 provides that when character evidence is admissible, proof may be made by the person's reputation in the community for the character trait involved. § 90.405, Fla. Stat. (2003). Florida Statutes, section 90.609 states that "[a] party may attack or support the credibility of a witness, . . ., by evidence in the form of reputation, except that: (1) The evidence may refer only to character relating to truthfulness. (2) Evidence of a truthful character is admissible only after the character of the witness of truthfulness has been attacked by reputation evidence." § 90.609, Fla. Stat. (2003). Furthermore, section 90.610 allows a party to impeach a witness "by evidence

that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year . . . or if the crime involved dishonesty or a false statement." § 90.610, Fla. Stat. (2003).

In the instant case, Appellant asserts that he was entitled under Florida Statutes, section 90.610 to question inmate Baker regarding the disciplinary report because Baker was "convicted" of breaking the rules of the Florida Department of Corrections when he lied to a correctional officer. This argument is without merit. Obviously, there are major differences between a criminal conviction in a court of law and a "conviction" for a disciplinary incident while incarcerated by the Florida Department of Corrections. For example, an inmate charged in a disciplinary report is not represented by legal counsel; the inmate is not allowed to question or cross-examine witnesses at his disciplinary hearing and he "may request" that witnesses appear at the hearing, "but inmate witnesses shall not be routinely called before the disciplinary team or hearing officer to provide live testimony;" and the hearing officer or disciplinary team may use confidential informant information during the hearing. See generally Fla. Admin. Code R. 33-601.307; Redman v. Department of Corr., 1985 Fla. Div. Adm. Hear. Lexis 4543 (Jan. 31, 1985) (discussing the fact that the rules do not contain a burden of proof for a finding of guilt). Thus,

even a cursory review of Florida Administrative Code Rule 33-601.307 establishes that there is a major difference between what would be admissible impeachment under 90.610 as a conviction for a crime and a finding of guilt in a disciplinary proceeding. See also Torres-Arboledo v. State, 524 So. 2d 403, 408 (Fla. 1988) (stating that an arrest is not admissible to impeach under section 90.610); Jackson v. State, 545 So. 2d 260, 263 (Fla. 1989) (a police department reprimand is not a criminal conviction for the purpose of section 90.610); Brookings v. State, 495 So.2d 135 (Fla. 1986) (trial court did not abuse discretion by prohibiting questioning of state witness about a false statement arrest which occurred three years prior to trial and of which no record of conviction was presented).

Similarly, the cases relied on by Appellant in his brief to support his argument that the trial court abused its discretion are clearly distinguishable from the instant facts. Appellant relies on two Second District Court of Appeals cases, Cliburn v. State, 710 So. 2d 669 (Fla. 2d DCA 1998), and Williams v. State, 386 So. 2d 25 (Fla. 2d DCA 1980), to support his argument that the trial court committed reversible error by prohibiting defense counsel from questioning Baker regarding his disciplinary report. In Williams, the Second District Court of Appeal found that the lower court erred in preventing defense counsel from questioning the key prosecution witness about an incident where she lied to

the police on a prior occasion. Williams, 386 So. 2d at 26-27. Likewise, in Cliburn, the Second District found that the trial court erred in precluding questioning of the key prosecution witness regarding her prior filing of a false police report. Cliburn, 710 So. 2d at 670.

As was recently pointed out by the First District Court of Appeal in Roebuck v. State, 953 So. 2d 40, 43 (Fla. 1st DCA 2007), review granted, 959 So. 2d 717 (Fla. July 2, 2007),[14] the Second District Court of Appeal never "articulate[ed] a specific legal reason for its creation" of an exception to section 90.610. The Roebuck court properly noted that the clear language of section 90.610 does not allow a witness' credibility to be attacked by proof that a witness committed specific acts of misconduct which did not result in a criminal conviction. Id. at 42-44. Appellant's reliance on the Second District Court of Appeals' opinions in Williams and Cliburn is misplaced as these decisions are contrary to the clear language of Florida statutory law and are devoid of sound legal reasoning.

Additionally, unlike the facts in Williams and Cliburn, the witness in this case was not the key prosecution witness. In

[14] In Roebuck, the First District Court of Appeal certified conflict with Cliburn based on the Second District Court of Appeal's act of recognizing a non-existent exception to section 90.610 involving a witness' previous false report. Oral argument was conducted in Roebuck on December 6, 2007, and the case is

fact, even if this Court were to find any error in prohibiting the cross-examination of Baker, such an error would be harmless in the instant case. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Here, as the trial court noted, the jury was already aware that Baker had been convicted of nine felonies. (V25:542). More importantly, Baker's testimony of overhearing the escape plans was very similar to that of another inmate, Kenneth Lykins, who overheard the same conversations. Finally, the other evidence in this case clearly established that Appellant and his codefendants planned this escape attempt and murders and spent a considerable amount of time implementing their plans. Accordingly, this Court should find that the trial court did not abuse its discretion in precluding defense counsel from questioning inmate Baker regarding a disciplinary report he received while incarcerated.

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currently pending with this Court.

ISSUE II

THE TRIAL COURT PROPERLY GRANTED THE STATE'S MOTION IN LIMINE AND EXCLUDED EVIDENCE IN THE PENALTY PHASE FROM A LOCAL NEWSCAST INVOLVING AN UNIDENTIFIED FORMER EMPLOYEE AT CHARLOTTEE CORRECTIONAL INSTITUTION.

The State filed a motion in limine seeking to exclude from the penalty phase any evidence regarding a story from a local television station involving an unidentified guard trainee from Charlotte Correctional Institution. (V17:3341-44). At the outset of the penalty phase, the court heard argument from counsel on the State's motion in limine and viewed the three-minute videotape of the news story. (V29:1202, 1214-26). Thereafter, the court granted the State's motion in limine and found that the subjective feelings of the unidentified "Jane Doe" guard trainee and the television narrator were irrelevant to Appellant's penalty phase. (V29:1226).

The State submits that the trial court acted within its discretion in finding that this news story was inadmissible. A trial court's ruling on the admissibility of evidence is within the discretion of the trial court, and the court's ruling will not be reversed unless there has been a clear abuse of that discretion. White v. State, 817 So. 2d 799 (Fla. 2002); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000).

The transcript of the news story indicates that an

unidentified guard trainee at Charlotte Correctional Institution, "Jane Doe," resigned from her job after she was asked to perform an inmate "head count" of approximately 65 inmates three weeks after Appellant killed CCI Correctional Officer Darla Lathrem and inmate Charles Fuston. (V29:1222-24). According to "Jane Doe," "they were putting me in a situation . . . worse than Ms. Lathrem's situation. She was with five inmates and I would be with 65." (V29:1224). The story also contained a quote from Sterling Hunt of the Department of Corrections indicating that it was DOC's policy for guards to conduct head counts of inmates; "If it were an easy job, everyone would be signing up, coming in the fence here to work." (V29:1223).

After viewing the tape and hearing argument from counsel, the trial court ruled that the tape was not admissible because "the subjective feelings of this Jane Doe or whoever she is, is not relevant. I find that the subjective comments of the TV analyst or whatever he was, are impertinent to the issues in this case." (V29:1226). The trial judge properly found that the comments of the unidentified guard trainee and the television announcer were not relevant to Appellant's penalty phase.

Florida Statutes, section 921.141(1) provides that evidence may be presented at a penalty phase proceeding "as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." § 921.141(1), Fla. Stat. (2003);

see also § 921.141(6)(h), Fla. Stat. (2003), (stating that a mitigating circumstance is "[t]he existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty"). This Court has further noted that "evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Merck v. State, 763 So. 2d 295, 298 (Fla. 2000).

In this case, the news story regarding an unidentified guard trainee was not relevant as mitigating evidence and was properly excluded from Appellant's penalty phase. Although similar evidence was presented at the penalty phase without objection from the State,[15] it does not follow that the instant news story containing hearsay from an unidentified source and editing from unknown news personnel was relevant to mitigating evidence. As the trial court noted in its sentencing order, the evidence presented at the penalty phase regarding the alleged negligent operation of the prison was not mitigating, either individually or collectively. The court stated:

D. NON-STATUTORY MITIGATING FACTORS

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[15] Appellant presented testimony from two Charlotte Correctional Institution guards, Lance Henderson and Greg Giddens, regarding their safety concerns with supervising inmates at CCI prison. (V29:1284-1305).

Defense Counsel placed into issue the following non-statutory mitigators:

a. any other aspect of the Defendant's character, record, or background. This has been previously discussed in paragraph C. 1., above.
b. any other circumstance of the offense. There is no other evidence of mitigation under this topic which the Court could discuss.
c. inmate classification systems failure.
d. tool controls systems failure.
e. key control systems failure.
f. allowing inmate mobility.
g. inmate accountability systems failure.
h. construction supervision failure.
i. security staffing systems failure.
j. staff supervision systems failure.
k. monitoring systems failure.

The Court will now discuss proposed mitigators c.) through k.), inclusive. The evidence supporting these proposed mitigators came through the testimony of: Darrel McCaslin of the Office of the Inspector General of the Department of Corrections; Lance Henderson, a Corrections Officer at CCI; Greg Giddens, a former Corrections Officer at CCI; and James Aiken, a former Prison Official and Warden with the North Carolina Prison System who retired from there and now consults on prison matters.

McCaslin's testimony focused on the results of an inspection he made of conditions at CCI following the two murders which are the subject of this case. He compiled a large amount of documentary evidence in the course of his investigation, most of which was admitted into evidence when proffered by defense counsel. He concluded that there were several, perhaps numerous, faults in the manner in which CCI was operated.

Henderson's testimony was that of a former Corrections Officer at CCI who sometimes supervised night work details of prisoners on prison dormitories that were being renovated or remodeled. In April of 2003, he supervised a night work detail involving approximately eight inmates. In April of 2002, he filed an incident report outlining unsafe working conditions as he saw them.

Mr. Aiken's testimony was based on his evaluation and review of the operation of CCI at the time of the events described

in this case. He testified that there was a total systems failure based on the faults found in each of items c.) through k.),above.

To further lend emphasis to this aspect of this case, defense counsel attached to his *Spencer* Hearing Memorandum copies of complaints in civil actions filed in the Circuit Courts of Charlotte County and Leon County by the Personal Representatives of the Estates of Darla Lathrem and Charles Fuston, respectively, against the State of Florida Department of Corrections. Both complaints allege negligence in the operation of CCI in substantially similar language to the proposed mitigators now being discussed. These civil actions seek damages for the wrongful deaths of the two victims in this case.

In reviewing the circumstances and events leading up to these two murders, one could easily wonder if this is the right way to run a prison. However, the issue of negligent operation of a prison and proximate cause is to be determined in the Courts in which those actions lie. The issue for this Court is whether or not the manner in which CCI was operated can serve as a mitigator in a sentencing decision involving two counts of first degree murder.

This Court has considered at length each of the alleged mitigators c.) through k.). At the *Spencer* hearing, the Court inquired of defense counsel as to whether he considered any one or more of these nine elements more important than the others; the response was that they were all equally important and each required weighing. In response to the Court's inquiry as to whether they could be considered in the aggregate, he responded that they could not. The Court's view is that they collectively sound in negligence and could be weighed and evaluated in the aggregate, or collectively.

However, this Court concludes that these allegations of prison negligence must be rejected as mitigators, both individually and collectively. There appear to be no cases on point and none have been argued to the Court. The State contends that the case of *Howell v. State*, 877 So. 2d 697 (Fla. 2004) is pertinent because it considered the issue of defense counsel's fault, vel non, in not raising the negligence of a state trooper in opening a package in violation of state trooper policy as a mitigating circumstance in a trial for murder of the trooper. The *Howell* decision concluded that counsel's failure to raise

> the issue as a mitigator was within the scope of reason because it was reasonable to conclude that evidence of the alleged policy violation would not have impacted the defendant's moral culpability for the crime. Moral culpability is the issue.
>
> > ----evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. *Howell* at 697.
>
> One can hypothesize many situations where the negligence of someone with a duty to care makes it easier for a perpetrator to commit a crime. For example, what if a parent of a young child neglects to keep that child from playing in the street? Along comes an intoxicated driver who kills or maims the child playing in the street. Is moral culpability somehow lessened through the negligence of the parent? Or, even worse, what if that child is kidnapped and murdered? Is there any less moral culpability because of the parent's negligence?
>
> This Court concludes that even if negligence in these nine ways, c.) through k.), is conceded for discussion purposes, it cannot and should not reduce the moral culpability for murder. These nine proposed mitigators, individually and collectively, are, therefore, rejected as repugnant to order in a society which strives to live by the law. Even if the Court could conclude that these nine factors were entitled to weight, that weight they could receive is incapable of changing the result in this case.

(V19:3687-89).

Even if this Court were to find that the trial judge abused its discretion in precluding defense counsel from introducing the three minute videotape from the local television station, such an error was harmless in this case. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As previously noted, Appellant presented similar evidence at the penalty phase in the form of live

testimony from two CCI prison guards who echoed the same concerns voiced by the unidentified guard trainee in the news story. Additionally, Appellant presented evidence from Daryl McCasland, an inspector with DOC's Inspector General's Office, regarding his investigation of the murders at CCI which included his findings that there were numerous problems in the manner in which CCI was operated. (V29:1256-80). Finally, Appellant called James Aiken, a former warden with the North Carolina Prison System who was recognized as an expert witness in prison/inmate management. Mr. Aiken evaluated CCI at the time of the murders and concluded that there were numerous system failures in the prison system: inmate classification, tool controls, key controls, allowing inmate mobility, inmate accountability, construction supervision, security staffing, staff supervision, and monitoring systems. (V29:1305-27).

After hearing all of this evidence, the trial court rejected the allegations of prison negligence as a mitigating factor and sentenced Appellant to death for the two murders finding that the aggravating circumstances greatly outweighed the mitigating evidence.[16] The trial court further noted even if the prison

[16] The State's evidence established five aggravating circumstances applicable to Correctional Officer Lathrem's murder: (1) the capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment; (2) Appellant was previously convicted of another

negligence mitigating factors were entitled to weight, that weight "is incapable of changing the result in this case." (V19:3689). Thus, even if Appellant had been allowed to present the brief news story, it would not have changed the outcome of the proceedings. Accordingly, this Court should find that the trial court acted within its discretion in granting the State's motion in limine, and even if the court erred, such an error was harmless.

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capital offense or of a felony involving the use or threat of violence to the person; (3) the capital felony was committed for the purpose of effecting an escape from custody; (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (5) the victim of the crime was a law enforcement officer engaged in the performance of her official duties. All but the "victim was a law enforcement officer" aggravating factors applied to Charles Fuston's murder.

ISSUE III

THE TRIAL COURT PROPERLY CONSIDERED THE MITIGATING EVIDENCE PRESENTED AT THE PENALTY PHASE PROCEEDINGS.

In his third issue on direct appeal, Appellant argues that this Court cannot conduct its proportionality review because not all available mitigating evidence was presented below. Additionally, Appellant argues that the trial court erred by not considering all mitigating evidence available in the record. Because both of these claims lack merit, this Court should affirm the trial court's sentences of death.

Appellant did not waive the presentation of mitigation evidence in the instant case. Rather, Appellant presented testimony from four witnesses regarding the alleged negligence of the CCI prison system and Appellant himself testified before the jury and at the Spencer hearing. During the penalty phase, defense counsel informed the trial court that he had numerous discussions with Appellant "about putting on a lot of social work things, issues regarding childhood and things of that nature. And it was his opinions at the outset and I believe remains his opinion that we would not do that as far as putting his family through some things that he didn't feel would be fair to them, and as far as putting on Mr. Tim Wiggy who was a foster parent of his in the early years. And we have gone ahead with our

preparation on the basis of his wishes along those lines."[17] (V29:1341-42). Thereafter, the trial judge questioned Appellant about his desire not to present this type of mitigation evidence and he concurred with his counsel's representations. Defense counsel then informed the court that he also had discussed presenting mental mitigation with Appellant and counsel made the strategic decision not to present such evidence because it would be "dangerous" to present such evidence to the jury. (V29:1342-43). Appellant informed the court that he agreed with his attorney's decision regarding the mental mitigation and told the court that "when I talked to the doctor, he told me that it was just between him and I. And he wouldn't talk to anybody else. I wouldn't have made any discussion with him if I thought he was going to talk to anybody besides my attorney."[18] (V29:1343).

Appellant first argues that the jury's death recommendations cannot be considered reliable because the jury did not hear all the available mitigation evidence. Although couched in different

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[17] On February 17, 2005, a little over a year before the penalty phase, defense counsel informed the court that he had been "working on mental mitigation continuously and have been since day one; in fact, before we were appointed" and counsel had "been all over the county developing social information for purposes of Phase II." (Supp. V7:1200).

[18] A few days after the penalty phase, defense counsel filed a formal notice of Intent Not to offer Mental Mitigation and a Notice of Intent Not to Offer Dr. Harry Krop as a Defense Witness. (V17:3333-34).

terminology, Appellant's claim is actually one of ineffective assistance of counsel based on trial counsel's decision not to present certain types of mitigation evidence to the jury and court. Such a claim is not cognizable on direct appeal.

The law is well established that a claim of ineffective assistance of counsel is generally not cognizable on direct appeal. An exception to this general rule is recognized where the claimed ineffectiveness is apparent on the face of the record. Such an instance is not presented here. See Mansfield v. State, 758 So. 2d 636, 642 (Fla. 2000); Bruno v. State, 807 So. 2d 55, 63 & n.14 (Fla. 2001); Wuornos v. State, 676 So. 2d 972, 974 (Fla. 1996) ("We find that this argument constitutes a claim of ineffective assistance of counsel not cognizable on direct appeal, but only by collateral challenge."); Martinez v. State, 761 So. 2d 1074, 1078 n.2 (Fla. 2000); Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997); McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991) ("The trial court is the more appropriate forum to present such claims where evidence might be necessary to explain why certain actions were taken or omitted by counsel."); Gore v. State, 784 So. 2d 418, 437 (Fla. 2001) ("Even assuming that an ineffective assistance of counsel claim could be properly asserted under these circumstances, with rare exception ineffective assistance of counsel claims are not cognizable on direct appeal."); Consalvo v. State, 697 So. 2d 805, 811-812 n4

(Fla. 1996).

In the instant case, trial counsel stated on the record that he had conducted extensive investigation into nonstatuory mitigation, and in the case of the social background type of mitigation, counsel indicated that Appellant did not want to present this evidence. Clearly, the "defendant possesses great control over the objectives and content of his mitigation" and "has the right to choose what evidence, if any, the defense will present during the penalty phase." Boyd v. State, 910 So. 2d 167, 189-90 (Fla. 2005). As to mental mitigation, counsel indicated that his client did not want to present such evidence and that counsel had made the strategic decision not to present such evidence because it would be "dangerous." Because Appellant's instant claim is one of ineffective assistance of counsel that should only be addressed in a collateral postconviction proceeding, this Court should reject the instant claim.

Appellant next argues that the trial court erred by not considering all of the mitigation evidence available in the record. In Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993), this Court stated that "mitigating evidence *must* be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted." In this case, Appellant argues that the court erred by not considering mitigation

evidence contained in Appellant's presentence investigation report (PSI) and in a "report" authored by Dr. Harry Krop that was attached to Appellant's "Notice of Mental Mitigation Pursuant to FRCRP 3.202(b)(c)".

Clearly, the trial court did not err by refusing to consider the "potential" mitigation noted by Dr. Krop in his attachment to Appellant's notice of intent to present mental mitigation. This Court in Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990), established relevant standards of review for mitigating circumstances: Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard, and the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.[19] See also Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding that, although a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); Kearse v.

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[19] Appellant also notes that the court erred by not considering his evidence of the negligent operation of CCI as a mitigating factor when sentencing Appellant to death. As this issue was discussed by Appellee in Issue II, the State will not reiterate its argument in detail here. Simply put, the alleged negligence of Florida's Department of Corrections did not in any way constitute mitigation evidence that was "relevant to the nature of the crime and the character of the defendant." See § 921.141(1), Fla. Stat. (2003).

State, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court).

Here, although Dr. Krop's letter to defense counsel indicated that he had "potential mitigating" evidence regarding Appellant's suffering from a "serious psychiatric disorder," after having been diagnosed with bipolar disorder, this evidence is certainly not believable and uncontroverted. As previously noted, defense counsel made the strategic decision not to present evidence from Dr. Krop because it would be "dangerous," and defense counsel never proffered any mental mitigation at any time. The State most certainly would have attacked the credibility of any mental mitigation presented by Dr. Krop, as evidenced by defense counsel's decision not to present such evidence. Thus, because this evidence is not "believable and uncontroverted," and was never presented by defense counsel, the trial court was under no obligation to consider it in mitigation.

With regard to the information contained in the PSI, Appellant concedes in his brief that the trial court considered the information regarding Appellant's traumatic childhood and afforded this mitigation "some weight." Initial Brief of Appellant at 59. Appellant, however, argues that the court should have also considered the notation in the PSI that, "per a

report previously done by the Florida Department of Corrections related to the Pinellas [County murder] charge, it was noted that Eaglin had utilized cocaine and alcohol during his teenage years with prescribed Prozac." (Supp. V8:1296).

Although the trial court noted that Appellant's PSI contained references to his taking prescription medication for depression, the trial court did not specifically note that Appellant had apparently "utilized" cocaine and alcohol as a teenager. Even assuming *arguendo* that the lower court was obligated to treat the drug and alcohol usage information contained in the PSI as "believable and uncontroverted," any error in not considering this evidence was harmless. The substantial aggravators in this case clearly outweigh the slight mitigation evidence. See Bowles v. State, 804 So. 2d 1173 (Fla. 2001) (finding that aggravators of HAC, CCP, robbery-pecuniary gain and on probation at time of murder "patently overwhelm[ed]" the mitigation of abusive childhood, history of alcoholism, absence of father figure, and lack of education).

In this case, the trial court's failure to consider evidence that Appellant allegedly utilized cocaine and alcohol as a teenager was harmless. Appellant was serving a life sentence at CCI when he violently murdered a correctional officer and an inmate with a sledgehammer, and attempted to kill another inmate

all while trying to escape the prison.[20] The trial court found five aggravators applicable to the murder of Officer Lathrem and four aggravators as to the murder of Charles Fuston (the only difference was the aggravator relating to Officer Lathrem's status as a law enforcement officer engaged in the lawful performance of her duties at the time of the murder). These aggravating factors were: (1) the capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment (Appellant was serving a life sentence for first degree murder); (2) Appellant was previously convicted of another capital offense (the prior and contemporaneous murders); (3) the murder was committed for the purpose of effecting an escape from custody; (4) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (5) the victim was a law enforcement officer engaged in the performance of her official duties. (V19:3683-86). These aggravators patently overwhelm the nonstatutory mitigation involving Appellant's traumatic childhood and possible drug usage as a teenager.

Additionally, contrary to Appellant's assertion in his brief, this Court is capable of conducting its proportionality

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[20] Appellant also planned to attack the correctional officer driving the gun truck with a hammer and striking him in the head. (V25:513). Fortunately, Appellant was apprehended before he

review. This Court's proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the aggravating and mitigating evidence established in the instant case demonstrates the proportionality of the death sentences imposed. As previously discussed, the substantial aggravating factors in this case greatly outweigh the slight mitigation found by the trial court. A review of other death penalty cases establishes that Appellant's death sentences are proportionate. See Cox v. State, 819 So. 2d 705 (Fla. 2002) (upholding death sentence for murder of an inmate in prison by a defendant serving a life sentence when the four aggravators of CCP, HAC, prior violent felony conviction, and under sentence of imprisonment outweighed the thirty-two nonstatutory mitigating factors); Kearse v. State, 770 So. 2d 1119 (Fla. 2000) (upholding death sentence for murder of a law enforcement officer where

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could carry out this portion of his plan.

there were two aggravating circumstances, during the course of a robbery and to avoid arrest, and statutory mitigation of age and nonstatutory mitigation involving a difficult childhood resulting in psychological and emotional problems); Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990) (murder during escape attempt involving four aggravating circumstances and defendant testified and expressed remorse). Accordingly, this Court should affirm the trial court's sentences of death for the two murders.

ISSUE IV

THE TRIAL COURT DID NOT CONSIDER APPELLANT'S LACK OF REMORSE AS A NONSTATUTORY AGGRAVATING FACTOR.

Appellant asserts that the trial court erred by considering Appellant's lack of remorse as a nonstatutory aggravating circumstance and used it against him when sentencing him to death. Contrary to Appellant's position, the State submits that the trial court's brief mention of Appellant's lack of remorse, when read in context, was a rejection of this nonstatuory *mitigating* factor.

The law is clear that "lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor. Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983). However, this Court has permitted evidence of lack of remorse to rebut proposed mitigation, such as remorse and rehabilitation. See Singleton v. State, 783 So. 2d 970, 978 (Fla. 2001) (holding that "lack of remorse is admissible to rebut evidence of remorse or other mitigation such as rehabilitation).

In the instant case, Appellant testified at both the penalty phase and at the Spencer hearing. The State did not introduce evidence or question any witnesses, including Appellant,

regarding his lack of remorse. However, because Appellant's testimony could arguably be considered as a nonstatutory mitigating circumstance, the trial court obviously felt obligated to address Appellant's testimony in the sentencing order. The court stated, in the nonstatutory mitigation section of his sentencing order, the following:

> Finally, the Court recalls that this Defendant testified during the penalty phase and again in the *Spencer* hearing. At neither time did he express anything like genuine remorse. His attitude bordered on arrogance.

(V19:3689).

Clearly, the Court did not utilize Appellant's lack of remorse as a separate nonstatutory aggravating factor, nor did the Court utilize it to support the existence of any of the statutory aggravating factors. Rather, the court's order demonstrates that the trial judge considered Appellant's testimony as a possible attempt to establish remorse as a nonstatutory mitigating factor. As such, the court could properly consider Appellant's testimony when rejecting this potential mitigating circumstance. Even if the trial court erred by making this brief notation, this Court should find that the error was harmless.

ISSUE V

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY AND FOUND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

In order to establish that a murder was cold, calculated, and premeditated (CCP), the State must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. Rodriguez v. State, 753 So. 2d 29 (Fla. 2000). Appellant argues that the court erred in submitting this aggravator to the jury and in finding that it applied to the instant case. This Court has previously held that the issue of whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. This Court's function is not to reweigh the evidence, but rather to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding. Alston v. State, 723 So. 2d 148, 160 (Fla. 1998).

In finding that the murder of CCI Correctional Officer Darla Lathrem was committed in a cold, calculated manner without a pretense of moral or legal justification, the trial court found:

4. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. There is ample evidence to prove this aggravating circumstance. Inmates Lykens and Baker testified that they overheard the Defendant's discussion of his plan to escape and that he would kill anyone who got in his way, referring specifically to "any bitch" who got in his way. Besides Darla Lathrem, there was at least one other female corrections officer then working at CCI. Another female officer testified during the trial along with female nursing personnel who attended the victims. Dr. Imami, the medical examiner who performed the autopsy on the victim, testified as to the absence of any defensive wounds on this victim, explaining that when people know they are being attacked the instinctive reaction is to raise the hands and arms to fend off the attack. The absence of defensive wounds on this victim injects an element of stealth into the murder and provides additional support for a finding of the "cold, calculated, and premeditated manner." The victim did not know she was being attacked or there would have been some bruises, scrapes or similar injuries to her hands and arms and there were none. Thus, the stealth of the attack supports a finding of heightened premeditation and planning to accomplish the murder.

That murder was the objective was obvious given the multiple skull fractures identified by the medical examiner who also testified that any one of the several blows would have rendered her immediately unconscious and would likely have resulted in her death. Forensic testimony about the area in which her body was found and the blood spatter there show that she was struck once in a standing position and again on the floor. Her blood spatter was found in several places, one consistent with her being in a standing position and the other being prone on the floor. Also, the nature of the weapon used, a heavy, short handled sledge hammer admitted into evidence on the basis of its finding by her body, her blood thereon, and the medical examiner's comparison of the hammer to the indentation of her wounds leaves little question as to the lethal nature of the attack that took her life. At the time, she was supervising the Defendant and four other inmates in construction and renovation changes that were being made to Dormitory A. One of these inmates was also killed (Count II) and one other had a serious head

> wound but survived. This aggravator was proven beyond any reasonable doubt.

(V19:3684-85).

On Count II, the court discussed the CCP aggravator as it applied to the murder of inmate Charles Fuston:

> 4. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Inmates Lykens and Baker, although both admitted a large amount of previous felony convictions, testified credibly that the Defendant had something of a grudge against victim Fuston. Lykens' testimony was to the effect that the Defendant said he would "kill Charlie before he left because he didn't like him disrespecting him."
>
> Baker's testimony was that Eaglin said "If I get the chance I'll straighten Charlie." In prison parlance, to "straighten" someone apparently has lethal implications. Baker also testified that Eaglin's anger toward Fuston was because Fuston had destroyed an earlier ladder apparatus Eaglin was making for use in a future escape plan. The medical examiner testified that his autopsy of Fuston did not reveal any defensive wounds --- again, evidence of a stealthy approach and the administration of several lethal blows to the skull with a heavy sledge hammer before the victim had a chance to make any defensive efforts to thwart the attack. This aggravator is proven beyond a reasonable doubt.

(V19:3685-86).

As the trial judge properly concluded based on the evidence introduced, the murders were committed in a cold, calculated and premeditated manner. Cold, calculated, premeditated murder can be indicated by the circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.

Swafford v. State, 533 So. 2d 270 (Fla. 1988). Here, the State presented evidence that Appellant worked as an inmate welder and planned for weeks to escape from CCI with two other inmate plumbers. Their plan included building an elaborate ladder to avoid the perimeter fences and to "kill any bitch" that got in their way. The inmates were often under the supervision at night of CCI Correctional Officer Darla Lathrem. Additionally, two inmates testified to Appellant's statements indicating his intent to kill Charles Fuston prior to escaping. Contrary to Appellant's assertions, this is not a case where merely the escape was carefully planned and calculated.[21] Rather, the evidence supports the trial court's findings that both murders were the product of a cold, calculated and premeditated plan.

On the night of the escape attempt, Appellant procured a small hand-held sledgehammer and utilized it to kill both Fuston and Lathrem. As the trial court noted, the medical examiner's testimony showed that there were no defensive wounds on either

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[21] Appellant notes in his brief that counsel did not object when "the prosecutor emphasized the degree of planning that went into the escape attempt" during the penalty phase closing argument. Obviously, as a review of the argument demonstrates, defense counsel did not object to the prosecutor's closing argument because there was no valid legal basis to object to the prosecutor's argument. Furthermore, contrary to Appellant's claim, the prosecutor argued the applicability of the CCP aggravator based on Appellant's actions and his statements indicating his intent to kill "any bitch" that gets in his way and his intent to kill Fuston before escaping because Fuston

victim. Furthermore, as the court properly noted, murder was certainly the motive given the substantial, devastating blows to both victims' heads. Clearly, the evidence supports the trial court's finding that the murders were done in a cold, calculated, and premeditated manner. See Franqui v. State, 699 So. 2d 1312 (Fla. 1997) (holding that not only was robbery carefully planned in advance, but there also was a plan to kill the bodyguard based on defendant's statement that he would "take care of the escort").

Additionally, contrary to Appellant's assertion in his brief, he did not possess any pretense of moral or legal justification. According to Appellant, he had a pretense of moral or legal justification for the murder of a prison guard and another inmate because he was trying to escape an unlawful imprisonment. Appellant claimed in his penalty phase testimony that only inmates had to abide by rules, not the guards, and he further claimed that guards beat and killed inmates but never went to prison. (V29:1347).

A pretense of legal or moral justification is "any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the

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apparently disrespected Appellant. (V29:1360).

homicide." Walls v. State, 641 So. 2d 381, 388 (Fla. 1994) (footnote omitted); Nelson v. State, 748 So. 2d 237, 245 (Fla. 1999). In Nelson, this Court rejected the defendant's argument that he acted with a pretense of legal or moral justification when the victim may have committed a sexual battery on one of the defendant's friends. Id.; see also Cox v. State, 819 So. 2d 705 (Fla. 2002) (rejecting defendant's claim that he had a pretense of legal or moral justification for murder of fellow inmate based on theft of money); Zakrzewski v. State, 717 So. 2d 488, 492 (Fla. 1998) (noting that killing one's own family to save them from having to go through a divorce does not constitute a pretense of moral or legal justification); Hill v. State, 688 So. 2d 901, 907 (Fla. 1996) (stating that defendant's feeling that he was justified in killing to prevent abortions is not a pretense of moral justification); Williamson v. State, 511 So. 2d 289, 293 (Fla. 1987) (rejecting defendant's claim that he had a pretense of moral or legal justification for killing fellow prisoner because, if he did not murder inmate, inmate would have killed him for failing to repay $15 drug debt).

In this case, Appellant did not have a colorable claim based on uncontroverted and believable testimony that constitutes an excuse, justification, or defense to the murder. There is no evidentiary support for Appellant's self-serving testimony that the prison guards did not have to abide by any rules and that his

imprisonment was "unlawful." Even if this Court were to accept Appellant's testimony as establishing a pretense of legal or moral justification because of his feelings towards the prison guards, this argument does not apply to the murder of inmate Charles Fuston. See Cox v. State, 819 So. 2d at 721-22 (rejecting defendant's claim that he had a pretense of moral or legal justification for killing fellow inmate over theft of money where the record did not indicate any threat to defendant, either real or perceived, from the victim). Likewise, Appellant did not have any real or perceived threat from inmate Charles Fuston. In fact, the record demonstrates quite the opposite. Appellant blamed Charles Fuston for destroying a metal piece that he planned to use in his escape and, as a result of this "disrespect," Appellant indicated that he planned to kill Fuston before he escaped. Because there is competent, substantial evidence in the record to support the trial court's finding of the CCP aggravator as to both victims, the State urges this Court to uphold the trial court's finding of CCP.

ISSUE VI

APPELLANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

While recognizing binding precedent against his position, Appellant nevertheless asserts that Florida's capital sentencing statute is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). As this is a purely legal issue, appellate review is de novo. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

Appellant's argument has been consistently rejected by this Court, and there is no error presented in the trial court's denial of his motion to declare Florida's capital sentencing statute unconstitutional. See Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005) (noting that this Court has rejected Ring claims in over fifty cases); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

Additionally, Appellant's Ring claim is without merit in the instant case given his prior felony conviction for first degree murder. Since the defect alleged to invalidate the statute -

lack of jury findings as to an aggravating circumstance - is not even implicated in this case due to the existence of the prior felony conviction, Appellant has no standing to challenge any potential error in the application of the statute. See Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005) (citing the numerous cases wherein this Court rejected Ring arguments when the defendant had a prior felony conviction); Winkles v. State, 894 So. 2d 842 (Fla. 2005) (rejecting Ring claim when defendant has prior felony conviction and rejecting argument that aggravating factors must be charged in the indictment). Accordingly, this Court should deny Appellant's Ring claim.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, Appellant's convictions and death sentences should be AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Public Defender's Office, Polk County Courthouse, P.O. Box 9000—PD, Bartow, Florida 33831, this 28th day of April, 2008.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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