IN THE SUPREME COURT OF FLORIDA

CECIL SHYRON KING,

Appellant,

v. **CASE NO.: SC11-2258**

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 4 01
3 01 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-1000

ATTORNEY FOR APPELLANT
FLA. BAR NO. 201170

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	l
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	19
ARGUMENT	21
ISSUE I THE DEATH SENTENCE IMPOSED IS DISPROPORTIONATE.	21
ISSUE II THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.	25
ISSUE III THE TRIAL COURT PREJUDICED KING'S PENALTY PHASE BY ALLOWING THE PROSECUTOR TO MAKE IMPROPER CLOSING ARGUMENTS AND BY PROHIBITING DEFENSE COUNSEL FROM MAKING PROPER ARGUMENTS, DEPRIVING KING OF HIS CONSTITUTIONAL RIGHTS AND TAINTING THE SENTENCING PROCESS.	29
ISSUE IV THE DEATH PENALTY IS UNCONSTITUTIONALLY IMPOSED BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.	34
CONCLUSION	37
CERTIFICATE OF SERVICE AND COMPLIANCE	38

TABLE OF AUTHORITIES

PAGE(S)

CASES

Apprendi v. New Jersey, 530 U.S. 446 (2000) 34

Beaslev v. State, 774 So. 2d 649 (Fla. 2000) 27

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002),
cert, denied, 123 S.Ct. 662 (2002) 20, 35

Conahan v. State, 844 So. 2d 629 (Fla. 2003) 31, 32

Evans v. McNeil, NO. 08-14402-CIV
(S.D. Fla. June 20, 2011) 35

Green v. State, 975 So. 2d 1081 (Fla. 2008) 29

Heiney v. State, 447 So. 2d 210 (Fla. 1984) 27

Jones v. State, 332 So. 2d 615 (Fla. 1976) 23, 28

Jones v. State, 705 So. 2d 1364 (Fla. 1998) 22

King v. Moore. 831 So. 2d 143 (Fla. 2002),
cert, denied. 123 S.Ct. 657 (2002) 20, 35

Kramer v. State. 619 So. 2d 274 (Fla. 1993) 23

Marshall v. Crosby. 911 So. 2d 1129 (Fla. 2005) 35

Menendez v. State. 368 So. 2d 1278 (Fla. 1979) 29

Miller v. State, 373 So. 2d 882 (Fla. 1979) 23, 28

Miller v. State, 42 So. 3d 204 (Fla. 2010) 35

Nibert v. State. 574 So. 2d 1059 (Fla. 1990) 23

Of ford v. State, 959 So. 2d 187 (Fla. 2007) 21

Patterson v. State, __ So. 3d _ , No. SC10-274
(Fla. May 17, 2012) 35

Penn v. State, 574 So. 2d 1079 (Fla. 1991) 23, 27, 28

Rembert v. State, 445 So. 2d 337 (Fla. 1984) 22

Ring v. Arizona. 536 U.S. 584 (2002) 19, 34, 35

TABLE OF AUTHORITIES

PAGE(S)

Ross v. State. 474 So. 2d 1170 (Fla. 1985) 23, 28

Scott v. State. 66 So. 3d 923 (Fla. 2011) 21, 22

Scull v. State. 533 So. 2d 1137 (Fla. 1988) 28

Sinclair v. State. 657 So. 2d 1138 (Fla. 1995) 22

State v. Dixon. 283 So. 2d 1 (Fla. 1973) 21

State v. Steele. 921 So. 2d 538 (Fla. 2005) 35

Terry v. State. 668 So. 2d 954 (Fla. 1996) 21

Thompson v. State. 647 So. 2d 824 (Fla. 1994)..... 22

Tillman v. State. 591 So. 2d 167 (Fla. 1996) 21

Urbin v. State. 714 So. 2d 411 (Fla. 1998) 21, 29

Williams v. State. 707 So. 2d 683 (Fla. 1998)..... 22

Williams v. State. 37 So. 3d 187 (Fla. 2010) 25

Zakrzewski v. State. 717 So. 2d 488 (Fla. 1998)..... 25, 27

STATUTES

§ 921.141, Fla. Stat..... 34

CONSTITUTIONS

Amend. V, U.S. Const 25, 30, 33

Amend. VI, U.S. Const..... 19

Amend. VI, U.S. Const..... 25, 30, 33-35

Amend. VIII, U.S. Const 25, 30, 33

Amend. XIV, U.S. Const..... 25, 30, 33

TABLE OF AUTHORITIES

PAGE(S)

Art. I, § 16, Fla. Const 21, 25, 33, 36

Art. I, § 17, Fla. Const 21, 25, 30, 33, 36

Art. I, § 9, Fla. Const 21, 25, 30, 33, 36

IN THE SUPREME COURT OF FLORIDA

CECIL SHYRON KING,

Appellant,

v. **CASE NO.: SC11-2258**

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The record on appeal consists of 20 volumes. Volumes 1 through 9 contain the pleadings, pretrial hearings, and the sentencing hearings. These volumes will be referenced with the prefix "R." Volumes 10 through 20 are the transcripts of the jury selection and the guilt and penalty phases of the trial. The prefix "T" will be used to designate these transcripts. The presentence investigation report has been separately filed in this Court (PSI) . A copy of the trial court's sentencing order is attached as an appendix (App).

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On March 25, 2010, a Duval County grand jury indicted Cecil Shyron King charging him with first degree murder of Renie Telzer-Bain (Ct.I), armed burglary(Ct.II), grand theft of a motor vehicle (Ct.III) , dealing in stolen property (Ct. IV) , and false verification of a pawnbroker transaction{Ct.V). (Rl:21-22) The indictment superceded an information charging second degree murder, along with the other counts, filed on February 18, 2010. (Rl:11-12) King pleaded not guilty to the indictment on March 30, 2010, and the State filed an notice of intent to seek the death penalty. (R1:31;R8:1492-1493) A jury trial commenced on April 4, 2011. (T10-T20) The jury found King guilty as charged on all counts on April 8, 2011. (R6:952-958; T17:1490-1491) As to count one charging first degree murder, the jury returned a special verdict finding both premeditated and felony murder during a burglary. (R6: 952-953 ; T17:1490) At the conclusion of the penalty phase portion of the trial on April 14, 2011, the jury recommended a death sentence by a vote of 8 to 4. (R6:1029; T20:1733-1734) The State and the Defense filed sentencing memoranda. (R7:1214-1237) At the Spencer hearing on May 25, 2011, King presented two additional witness, and the court ordered a presentence investigation report that was reviewed on October 25, 2011.(R8:1745-1784; 1445-1449)

On October 27, 2011, the trial court imposed sentences.

(R7:1253-1262, 1265-1290; R8:1460-1468)(App) Circuit Judge Mallory Cooper adjudged King guilty on all counts and sentenced him to death for the first degree murder (Ct. I); life in prison for the armed burglary (Ct. II); ten years in prison for grand theft of a motor vehicle (Ct. Ill); thirty years in prison for dealing in stolen property (Ct. IV) ; and ten years in prison for false statement on a pawnbroker transaction. The sentences on counts II through IV were imposed under the statutory provisions for the habitual offender sentencing. (R7:1253-1262, 1265-1290; R8:1460-1468)(App)

In the sentencing order in support of the death sentence, the trial court found two aggravating circumstances. (R7:1271-1275) First, the court found the homicide was committed during a burglary and for pecuniary gain. (R7:1271-1273) Although listed as separate aggravating circumstances in the order, the court merged them and considered them as one (great weight). (R7:1272-1273) Second, the court found the homicide was especially heinous, atrocious or cruel (great weight) . (R7 .-1273-1275) In mitigation, the Defense did not assert any statutory mitigating circumstances, and the court found no statutory mitigating circumstances existed. (R7:1276) The trial court addressed 18 nonstatutory mitigating circumstances:

1. King is a good inmate, (slight weight)
2. King has the potential for rehabilitation, (slight weight)
3. King does not have a violent criminal history, (little weight)

4. The crime was situational, (no weight)

5. King loves his two-year old son. (moderate weight)

6. King loves children in general, (moderate weight)

7. King is his parents only biological child, (little weight)

8. King's parents divorced when he was young impacting his relationship with his father, (little weight)

9. King lacked positive role models, (no weight)

10. King was on the track and football teams in high school. (slight weight)

11. King graduated from high school and attended community college, (little weight)

12. King was close to his mother and was greatly impacted by her death, (some weight)

13. King attended church and considered the ministry, (slight weight)

14. King cared for his mother, grandmother and aunt when they were ill. (moderate weight)

15. King loves his sister and she loves him. (little weight)

16. King was employed, (no weight)

17. King has family who would visit him in prison, (slight weight)

18. King's being sentenced to death would affect his family. (some weight)

(R7:1276-1288)(App)

King filed his notice of appeal to this Court on November 21, 2011. (R7:1294-1295) Facts Developed At Trial

On December 29, 2009, Lyza Telzer attempted to call her

mother-in-law, Renie Telzer-Bain around 4:00 p.m. (T12:442-444) Renie Telzer-Bain was an active 82 years-old, and she lived alone. Lyza Telzer had visited her mother-in-law the previous afternoon, and she usually called her several times a day. (T12:444-445) Telzer could not reach her by telephone. (T12:445-446) After talking to a friend and neighbor of her mother-in-law, Richard Broxton, Telzer drove to the home around 7:00 p.m. (T12:446, 509-510, 513-514) Telzer and Broxton first opened the garage door using the opener code Telzer had for the door. (T12:446, 514) Broxton had noticed the garage was open earlier in the day, and Telzer-Bain's Cadillac was gone. (T12:447, 511-513) He closed the garaged door, thinking Telzer-Bain had simply not closed it when she left in the car. (T12: 511-513) The car was still missing, and Telzer found that the door between the house and garage was locked. (T12:447-448) Her mother-in-law typically left that door unlocked when she left in the car. (T12: 448) Telzer and Broxton pried open the door and entered the house. (T12:448-449, 514-515) Once inside the house, Telzer noted that the living room and dining room seemed normal. (T12:449) The kitchen was messier than usual with papers on the table as if her mother-in-law had been paying her bills. (T12:449) In the bedroom, Broxton entered first to turn on a light. (T12:449, 516) The room had been ransacked with drawers opened and contents piled on the bed. (T12:449-450) Telzer called her husband thinking there had been a burglary and

Telzer-Bain was not there. (T12:450) However, on a second look, they found Telzer-Bain dead on the floor on the other side of the bed. (T12:450-451, 516-517) Broxton called the police, and an officer police arrived within four or five minutes. (T12:517-521, 525-528)

Officer Jeffrey Liedke cleared the house and secured the scene. (T525-529) He allowed one medical rescue person to enter in order to confirm the death. (T12:529) Two other police officers also checked the victim. (T12:534-535) Liedke announced a BOLO for Telzer-Bain's missing vehicle. (T12:530, 536-537)

Crime scene investigators photographed the house and collected potential evidence. (T12:587-T13:678) A partial shoe impression was photographed on a locked outside door. (T13:597-599) Another shoe impression was in sand near a backyard gate. (T13:604) There was damage to a sliding glass door in the back of the house. (T13:600-601) On the ground near the sliding door, a tip to a flat-head screwdriver was discovered. (T13:638-639) Investigators collected many samples for possible DNA evidence from a variety of areas and items inside the house. (T13:601-678) Among the areas sampled were cabinets, dresser drawers, the sliding glass door, the garage door opener and a piece of cantaloupe on the kitchen table that appeared to have a bite mark. (T13:605-649, 779-784) The scene and items were also processed for possible fingerprints. (T13:601-678) Any potential fingerprint or DNA evidence, was later

submitted to experts for evaluation. (T13:663; T14:853; T16:1201)

Dr. Valerie Roa, the medical examiner, testified about the autopsy of Telzer-Bain performed by Dr. Magarita Arruza. (T12:539-544) Telzer-Bain died from blunt force trauma to the head. (T12:544-545) She sustained about 17 blows causing injury to her head, neck, upper back, right hand, right leg and left knee. (T12: 545-556) The blows appeared to be caused by both the face and claw part of a hammer. (T12:548-549) Three wounds to the top of the head fractured the skull and produced brain injuries causing death. (T12:550, 558, 573) A bruise to the back of the right hand could have been caused as she tried to ward off blows to the head. (T12:555, 557) Roa described this wound as caused by a reflexive, passive defensive action of protecting the head. (T12:557) Roa could not determine the sequence of the wounds. (T12:557) The wounds to the head would have produced unconsciousness, and the victim would have suffered no pain, if these were the first injuries. (T12:560, 573-574) Roa opined that the victim did suffer some pain because the bruise to the back of the hand and the injury to the knee are consistent with a reflexive, passive defense action. (T12:555, 557-558) The bruised hand could be the result of a passive reflex to raise the hand to protect the head from a blow. (T12:555, 557-558) If the person were lying down, the same reflexive action may have also consisted of drawing up the legs, and that would explain the injury to the knee. (T12:557-558)

(T12:561) Roa could not determine how long it required to inflict all of the injuries and render the victim unconscious and cause death. (T12:561) She did conclude that the wounds were probably administered "very fast" and all the wounds required more than a few seconds to perhaps minutes. (T12-.561)

After the police located Telzer-Bain's automobile parked on a street in front of some apartments, fingerprints in the car lead to Rashad Montfort. (T13:722; 14:878-801) Montfort said he borrowed the car from his cousin, Cecil King. (T13:704-713) Since he did not have a car, Montfort either rode a bicycle or used the bus. (T13:709) He knew that King did not own a car, and he also used a bicycle or the bus. (T13:708) On December 30 or 31, 2009, Montfort went to King's apartment. (T13:709) Montfort needed to run an errand to get some fast food for his girlfriend, and King suggested that he use this car that he had. (T13:711-714) King gave him the car keys and told him it was parked around the corner on Barnett Street. (T13:713-714) King told Montfort that he and his girlfriend could use the car, but he should return the car. (T13:713-714) Montfort found the Cadillac. (T13:715) He used the car to deliver food to his girlfriend's house, and he then picked up some marijuana from his friend, Marcus. (T13:716-718) Montfort picked up other friends, drove around, smoked marijuana and returned the car to King. (T13 :715-719) About 7:00 or 8:00 in the evening of the same day, Montfort borrowed the car a second time. (T13:719-721)

King never told Mont fort where he got the car, and Monfort did not ask. (T13:721) Detectives contacted Montfort, and he agreed to wear a recording device in an attempt to secure admissions about the car from Cecil King. (T13:724) Although Montfort tried on two different occasions, King did not admit he gave Montfort the car. (T13:724-740)

Detectives served an arrest warrant on Cecil King and a search warrant for his residence on February 1, 2010. (T14:906-907) After taking King to the police station, Detective Edwin Cayenne conducted an interview of King. (T14:907-T15:1051) The interview was videotaped and the tape was played at trial. (T14:913-T15:1051) Initially, the detective asked King about some stolen property and items he may have pawned. (T14:919) King acknowledged that he pawned an ankle bracelet he bought from a guy in the neighborhood that he knew as "Budha." (T14:919-927) King said he worked for J & J Lawn Service, does some computer repair and buys and sells items to make money. (T14:929-931) When mowing lawns, King had been to the Baymeadows area. (T14:932-934, 937) King rides the bus to meet his boss and owner of the lawn service, James Roman. (T14:934-937) King mentioned that the woman who had been recently murdered was one of the lawn customers. (T14:938) When King heard about the crime, he called Roman about it. (T14:943) He had worked on her lawn five or six times, and although he had spoken to her, he did not remember her name. (T14:938-939) Roman

contracts for the lawn work, and he paid King $10 an hour. (T14:939-941) King did not collect money from customers, except for passing along a check to Roman a couple of times. (T14:939-940) King said that they never went inside the home of any of the lawn customers. (T14:944) He had never been inside the house of the woman who was murdered. (T14:944)

During the interview, Detective Cayenne asked King about items found in his apartment during the search. (T14:949-967) Among the items were a luggage that had been filled with jewelry, silverware, purses, a hammer and a tool kit. (T13:795-815; T14:948-954) Later, Lyza Telzer identified recovered items as belonging to Telzer-Bain. (T12:456-472) King explained that he found the case in a vacant apartment near where he lived. (T14:950-954) A few weeks earlier, King's apartment had been burglarized, a fact the detective confirmed because King filed a report. (T14:951-954; T15:1022-1023) In the past, stolen items had been recovered from the vacant, open apartments. (T14 : 951-955) King looked through the vacant apartments for his property and found the suitcase with the items inside and a bag of clothes. (T14:951-956) Ultimately, King's missing property was found in one of the vacant apartments. (T14:958-959) Detective Cayenne asked King about the Cadillac automobile his cousin claimed he borrowed from King. (T14:968-971) King denied having a car and denied loaning a car. (T14:968-971) Before ending the interview, detectives used mouth swabs to obtain a DNA sample

from King. (T15:1005-1006) On February 5, 2010, detectives conducted a second interview of King. (T15:1025-1051) They, again, confronted King with items found in his apartment that belonged to Telzer-Bain. (T15:1030-1038) King, again, advised that he found the luggage and bag with items in the vacant apartments behind his residence. (T15:1030-103 8) King was also confronted about the cantaloupe found in the house and why his DNA might be present on the fruit. (T15:1043-1044) In response, King said the lady did serve them fruit when he was working on her lawn. (T15:1044)

James Roman owned a lawn service, and Renie Telzer-Bain was one of his former customers. (T13:679-682) She had been a customer for four or five years. (T13:683) In July 2009, Roman met Cecil King when he asked about work. (T13:682-683) King started working for Roman through October when the lawn work season ended. (T13:684) King was an excellent employee. (T13:693) Since King did not own a motor vehicle, Roman picked King up for the work day. (T13:685-686) Sometimes he picked up King at Town and Country shopping center where there was a bus drop of point or at the downtown bus station. (T13:686) Roman believed that King's transportation was either the bus or a bicycle. (T13:686) During the four months King worked with Roman, they serviced Telzer-Bain's lawn about eight to ten times. (T13:685) Roman was always present at the job site. (T13:685) Her lawn was small, and the job only took about 20 minutes. (T13:686) Telzer-Bain did not

typically come outside when they serviced the lawn; she left a check for Roman under the doormat. (T13:689) She did not come out to offer them food or drinks. (T13:689) At no time, did she offer them cantaloupe. (T13.-690) Roman had a policy about not entering customers' homes, but he went inside Telzer-Bain's residence once when she asked him to fix a toilet valve for her. (T13:687-688) Roman went to Virginia for Christmas holidays in 2009, and while there, he received a telephone call from King who told him something had happened to one of his lawn customers. (T13:691-692)

Kamangu Tube worked as an assistant manager at Cash America Pawn on January 8, 2010. (T14:843-8460) Cecil King, on that date, pawned a gold bracelet for $300. (T14:847-848)(State Exhibit 294) Nothing about the bracelet identified who might be the owner, since there were no initials or charms. (T14:849) The pawn transaction form included King's information from the identification he presented, and his signature and fingerprint were placed on the form as a customer. (T14:848-850) (State Exhibit 300) On the form, the customer asserts that the item pawned is not stolen. (T14:850) Later, Lyza Telzer identified that the bracelet belonged to her mother-in-law, Renie Telzer-Bain. (T12: 465-466)

Thomas Powell, a latent fingerprint examiner, analyzed some items submitted from the victim's house for possible fingerprint evidence. (T14:853-863) A fingerprint of Telzer-Bain was on a

plastic lid to a fruit container found on the kitchen table. (T14:864-865) No other latent fingerprints of sufficient quality for comparison were discovered. (T14:863) Powell did match a fingerprint on a pawn shop transaction form to Cecil King. (T14:863-864) Powell's examination of fingerprints found in Telzer-Bain's car revealed prints matching Robert Epps and Rashad Montford. (T14:867-868) No prints from the car matched Telzer-Bain or Cecil King. (T14:868-869) Other than the pawn form, no fingerprints linked Cecil King to other evidence in the case. (T14:869)

The State presented Jason Hitt to testify about DNA analysis. (T16:1201) Hitt works at the FDLE Jacksonville Regional Operations Center in the DNA section. (T16:1201) He examined a number of items for possible DNA evidence. (T16:1217-1244) Most of the items did not reveal any useful DNA results in that no genetic material was recovered or that genetic material found was insufficient to produce a DNA profile for comparison. (T16:1221-1242) Samples from fingernail clipping from Telzer-Bain, swab from a cable cord, swab from interior garage door, two socks, swab from guest roome toilet, swab from the steering wheel of a vehicle, and a hammer found in King's apartment fell into the category of no or no useful DNA results. (T16:1221-1241) Telzer-Bain's DNA was found present on a samples taken from a table near a telephone and a spot on the carpet near the victim's feet. (T16:1221, 1227-1229,

1232-1233) A duffel bag tested had a positive reaction for blood, but it was not human blood. (T16:121239-1241) Testing on a shirt found in King's apartment tested positive for blood, but DNA tests showed a mixture of three unknown persons--Cecil King, Renie Telzer-Bain, and her grandson, Miles Telzer were excluded. (T16:1241-1244) The sample taken from the piece of melon produced a DNA profile matching that of Cecil King in eleven of thirteen loci. (T16:1221, 1228-1230, 1253) Telzer-Bain and Miles Telzer was excluded as contributors to this DNA sample. (T16:1229, 1234) The statistical significance of the DNA match of King on the melon sample was calculated. (T16:1244-1256) Hitt used software to access validated population databases to calculate the statistical significance using the product rule. (T16:1244-1248) The results were that the DNA match of King to the sample from the melon had a frequency of 1 in 440 trillion Caucasians, 1 in 770 trillions African-Americans and 1 in 280 trillion southeastern Hispanics. (T16:1255)

Penalty Phase And Sentencing

At the penalty phase, the State relied on the evidence presented during the guilt phase in support of the three aggravating circumstances asserted. (T19:1556-1560) Four victim impact witnesses read prepared statements about the victim's life and the impact and loss due to her death. (T19:1568, 1572, 1577, 1581) The Defense presented six witnesses: King's father, Cecil

King, Sr. ; uncle, Rodney King; aunt, Cecelia Ealy; counsin, Michelle Ealy; Lavon Bracy, the pastor and founder of the church King and his mother attended; and Sakenia Fraser, King's sister. (T19:1592, 1614, 1625, 1631, 1635, 1639)

King's father, Mr. Cecil King Sr. , testified that his son was born on December 16,1969. (T19:1592-1593) Due to a divorce when King was six years-old, he and his mother moved to Orlando, and Mr. King had less contact with his son. (T19:1594-1595) They did continue to communicate. (T19:1594-1595) King graduated from high school, attended community college, and spent some time in the Navy. (T19:1596) After leaving the Navy, King stayed with is father for a time. (T19:1597) They built on their relationship during that time. (T19:1597-1598) Mr. King knew that when King's mother died, King was greatly affected. (T19:1596-1597) Mr. King had the chance to see King interact with his own son, and they had a close relationship. (T19:1598-1599) King lived in Chicago and North Carolina, but he called and stayed in contact. (T19:1597) King worked in a cell phone business. (T19:1597) When he was back in Jacksonville, King did an exceptional job caring for his grandmother, Mr. King's mother, who had Alzheimer's. (T19:1599)

Dr. Rodney King is Cecil King's uncle, his father's brother. (T19:1614-1615) He is the pastor of a church and director of parenting for the Christian Life Center in Philadelphia. (T19:1614-1615) During Cecil's early years, Dr. King lived in

Jacksonville and remembered him as a bright, playful child. (T19:1615-1616) After his move to Philadelphia, Dr. King remained in contact with Cecil. (T19:1616) They spoke about Cecil moving to Pennsylvania where he could pursue a degree in human services and perhaps going to seminary. (T19:1616) Cecil was articulate, intelligent and caring person. (T19:1616) Although the interest was genuine, the plans never worked out. (T19:1616-1617, 1619)

Cecelia Ealy, Cecil King's aunt, testified that Cecil cared for her when she broke her hip and she could not walk or take care of herself without help. (T19:1625-1626) King had also taken care of his grandmother, Ealy's mother. (T19:1628) Ealy learned that King learned to take care of others when he cared for his mother when she had cancer. (T19:1628) Ealy also had the opportunity to see King interact with his own son and the good relationship they had. (T19:1629)

King's cousin, Michelle Ealy, considered him like a brother. (T19:1631-1632) She observed how he cared for their grandmother who had Alzheimers's. (T19:1632) He did everything for her from bathing her, dressing her and finding her when she wandered away. (T19:1632-1633) Michelle's own children loved Cecil who was like an uncle to them. (T19:1633) He played with the children and spent time with them. (T19:1633) He picked up the oldest child from school and walked her to her grandmother's house almost every school day. (T19:1633) King's relationship with his son was a very

good, loving one. (T19:1633-1634)

Lavon Bracy and her husband co-founded the church King and his mother attended. (T19:1636) She was close friends with Cecil's mother and had known Cecil for about 20 years. (T19:1636) King participated in the church activities as a young man. (T19:1637) Bracy saw how King was an attentive caretaker for his mother during her illness with cancer and her final days before she died. (T19:1637-1638) King and his mother were very close, and he was quite distraught over her death. (T19:1638) Bracy lost contact with Cecil when he move from Orlando. (T19:1638)

Sakenia Fraser, King's half-sister, is related through King's father. (T19:1640-1641) King and Fraser did not grow up together, but they began a bond about the time Fraser graduated from high school. (T19:1641) She also was observed how King cared for their grandmother. (T19:1644) When Fraser married in 1999, she was pleasantly surprised when King came to the wedding. (T19:1642-1643) Since the wedding, Fraser said the family bond with King became closer. (T19:1647) When King's son was born, Fraser went over to be with her nephew. (T19:1644) Fraser's teenaged daughter refers to King as her favorite uncle. (T19:1646, 1648)

The court held a Spencer hearing on May 25, 2011. (R8:1332) King presented two additional witnesses. (R8:1750, 1764) Felicia Mintz met Cecil King through a mutual friend in 2005. (R8:1751) They dated consistently for a year and half, lived together for a

time and talked about marriage. (R8:1751-1752) Mintz said King was nice, articulate, smart, funny and serious at time. (R8:1753) He was close to his mother, and he had a hard time when she died. (T8:1752) She thought he was a good person. (R8:1753) The relationship ended on a friendly basis, and they stayed in contact off and on for another year until 2008. (R8:1753) Mintz was aware King spend time in jail in 2007, but she had no contact with him at that time. (R8:1756)

Officer Barnes, a corrections officer with the Jacksonville Sheriff's Office, had regular contact with King while was detained awaiting trial for the previous year. (R8:1764-1765) King does not cause problems, and Barnes said you hardly knew he was there. (R8:1765-1766) King had received no disciplinary reports while in the jail. (R8:1770) Barnes did state that before he arrived, according to records, King had been moved from one floor of the jail to another because of something related to gang activity in the jail. (R8:1767-1770) Barnes had no personal knowledge of the activity. (R8:1767-1768)

SUMMARY OF ARGUMENT

1. The death sentence imposed in this case is disproportionate. Based on the facts presented in this case, the homicide was committed during a felony in a reaction to the victim's unexpected presence during the burglary of her residence.

2. The trial court improperly instructed the jury and improperly found that the homicide was especially heinous, atrocious or cruel. Although several blunt force trauma wounds were present, the medical examiner could not sequence the wounds and could not conclude that the victim suffered pain for any significant time before becoming unconscious.

3. The trial court allowed the State to make improper closing arguments at penalty phase, and the court prohibited the Defense from making proper arguments, thereby tainting the penalty phase of the trial. Even though the avoiding arrest aggravating circumstance was not an issue because there was no evidence to establish the aggravator and the State never requested to use this factor at trial, the trial court permitted the prosecutor to argue in closing that the homicide was committed to avoid arrest. The trial court also prohibited defense counsel from properly arguing that the aggravation submitted in this case did not include that Cecil King had violent criminal history preceding this case.

4. The trial court erroneously imposed a sentence of death in violation of the Sixth Amendment principles announced in Ring

v. Arizona, 536 U.S. 584 (2002) . King recognizes that this Court has ruled contrary to the position asserted in this issue in previous cases. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), cert, denied, 123 S.Ct. 662 (2002); King v. Moore, 831 So.2d 143 (Fla. 2002), cert, denied, 123 S.Ct. 657 (2002). However, Cecil King now asks this Court to reconsider these decisions.

ARGUMENT

ISSUE I

THE DEATH SENTENCE IMPOSED IS DISPROPORTIONATE.

Death sentences are reserved for the most aggravated and least mitigated of murders. See, e.g.. State v. Dixon. 283 So. 2d 1, 8 (Fla. 1973). This Court conducts a proportionality review that requires an evaluation of the totality of the circumstances and compares the case to others to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g. . Scott v. State. *66* So. 3d 923 (Fla. 2011); Of ford v. State. 959 So. 2d 187 (Fla. 2007); Urbin v. State. 714 So. 2d 411, 417 (Fla. 1998); Terry v. State. 668 So. 2d 954, 965 (Fla. 1996); Tillman v. State. 591 So. 2d 167, 169 (Fla. 1996). Proportionality review is a qualitative review of the facts to insure uniformity in the application of the death penalty, not a mere counting of aggravating and mitigating circumstances. Ibid. A review of this case shows that the death sentence is not proportionate and must be reversed. Art. I, Sees. 9, 16, 17 Fla. Const.

The trial court found two aggravating circumstances and several nonstaturory mitigating circumstances. (App) (R8:1265-1290) Both of the aggravating circumstances in this case arose from the facts of the crime--the homicide occurred during a burglary (merged with pecuniary gain) and the homicide was especially heinous, atrocious or cruel. (App)(R8:1271-1275)

Several nonstaturory mitigators are present, including testimony from King's family and friend testimony that his life was characterized by his caring and loving nature. Although King had a history of property crimes, they did not involve violence. The trial court found King had no criminal history of violence. (App) (R8:1275-1288)

Initially, the heinous, atrocious or cruel aggravating circumstance was improperly found. See, Issue II, *infra.* Only one properly found aggravating circumstance exists for purposes of proportionality review--the homicide was committed during a burglary. This Court, in several cases, has reversed death sentences where only a single aggravator of the homicide being committed during a felony was present. See, e.g.; Williams v. State, 707 So. 2d 683 (Fla. 1998); Jones v. State, 705 So. 2d 1364 (Fla. 1998); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Thompson v. State, 647 So. 2d 824 (Fla. 1994); Rembert v. State, 445 So. 2d 337 (Fla. 1984). An unplanned, homicide committed in reaction to an unexpected event during a burglary or robbery, as occurred in this case, does not warrant a death sentence. See, Scott v. State, *66* So. 3d 923 (Fla. 2011). King's death sentence is, likewise, not appropriate to the crime.

Assuming for argument that this Court approves the heinous, atrocious or cruel aggravating circumstance, the presence of the circumstance does not change the outcome on proportionality.

Proportionality review still requires an overall qualitative review of the facts. While degree and duration of the pain to victim is the test for the HAC circumstance, the reasons why an aggravated manner of death occurred are important for the qualitative evaluation of the facts. An aggravated manner of death, such as those involving multiple and repetitive wounds, can be evidence of an emotion charged killing. See, e.g., Penn v. State, 574 So. 2d 1079 (Fla. 1991); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985); Miller v. State, 373 So. 2d 882, 886 (Fla. 1979); Jones v. State, 332 So. 2d 615 (Fla. 1976). Based on the circumstances of the crime, and King's nonviolent background, the manner of death was likely the result of panic or some short-term impairment when he was surprised during the burglary. The heinous, atrocious or cruel aggravator, under such circumstances, does not compel a death sentence. This Court has reversed cases on proportionality grounds where the heinous, atrocious or cruel aggravating circumstance was a prominent aggravator. See, Penn v. State, 574 So. 2d 1079 (Fla. 1991)(defendant killed his sleeping mother with a hammer causing her death from multiple blows); Ross v. State, 474 So. 2d 1170 (Fla. 1985) (defendant killed his wife in anger using his feet, and a blunt instrument); Nibert v. State, 574 So. 2d 1059 (Fla. 1990)(defendant stabs his friend multiple times killing him) ; Kramer v. State, 619 So. 2d 274 (Fla. 1993)(defendant killed a companion with multiple blows with a

blunt instrument) .

Cecil King's death sentence is also disproportionate. He asks this Court to reverse his death sentence and remand his case for imposition of a life sentence.

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

King objected to a jury instruction on the heinous, atrocious or cruel aggravating circumstance on the ground that the evidence of the aggravator was insufficient. (Tl9:1526-1527) The trial court overruled the objection, instructed the jury and later found the HAC aggravator. (T19.-1527, 1714 ;R8:1273-1275) (App) Including this aggravator in the sentencing process violated King's constitutional rights to due process, a fair trial and to be free from cruel and unusual punishment. Art. I, Sees. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. He now asks this Court to reverse his death sentence.

In the sentencing order, the trial court found the HAC circumstances based on the number of wounds and that the medical examiner found defensive wounds suggesting the victim was conscious and felt significant pain at the time of the attack. (R8: 1273-1275)(App) The presence or absence of defensive wounds can be evidence tending to establish whether or not the victim was conscious, felt pain and was aware of impending death at the time of the fatal wound. See, e.g., Williams v. State, 37 So. 3d 187, 198-201 (Fla. 2010); Zakrzewski v. State, 717 So. 2d 488, 492-493 (Fla. 1998). However, the medical examiner's testimony does not support the trial court's conclusion that the HAC factor was established.

Dr. Valerie Roa testified that Telzer-Bain died from blunt force trauma to the head. (T12:544-545) She sustained about 17 blows causing injury to her head, neck, upper back, right hand, right leg and left knee. (T12:545-556) The blows appeared to be caused by both the face and a claw part of a hammer. (T12:548-549) Three wounds to the top of the head fractured the skull and produced brain injuries causing death. (T12:550, 558, 573) A bruise to the back of the right hand could have been caused as she tried to ward off blows to the head. (T12:555, 557) Roa described this wound as caused by a reflexive, passive defensive action of protecting the head. (T12:557) Roa could not determine the sequence of the wounds. (T12:557) The wounds to the head would have produced unconsciousness, and the victim would have suffered no pain, if these were the first injuries. (T12:560, 573-574) Roa opined that the victim did suffer some pain because the bruise to the back of the hand and the injury to the knee are consistent with a reflexive, passive defense action. (T12:555, 557-558) The bruised hand could be the result of a passive reflex to raise the hand to protect the head from a blow. (T12:555, 557-558) If the person were laying down, the same reflexive action may have also consisted of drawing up the legs, and that would explain the injury to the knee. (T12 :557-558) Roa could not determine how long it required to inflict all of the injuries and render the victim unconscious and cause death. (T12:561) She did conclude that the

wounds were probably administered "very fast", and all the wounds required more than a few seconds to perhaps minutes. (T12:561)

The medical examiner's testimony supports the conclusion that the initial blow was to the head producing unconsciousness quickly. Based on the injury to the back of the hand, the left knee and right leg, the victim exhibited only one defensive action. Dr. Roa explained a reflexive, passive defensive action that would include raising the hand to protect the head and raising the knees up in a protective posture at the same time. The victim was aware of an initial blow, reacted, but she was likely rendered unconscious since there are no other defensive wounds. This is not a case where there are multiple defensive wounds that would suggest conscious, prolonged defense to a sustained attack as in the cases the trial court relied upon. (R8:1275) See, Beasley v. State, 774 So. 2d 649, 655, 669-670 (Fla. 2000)(multiple defensive wounds to both hands, both upper arms and left forearm; head hair pulled out) ; Penn v. State, 574 So. 2d 1079, 1083 f.n. 7 (Fla. 1991)(multiple defensive wounds; medical examiner testified victim may have lived 45 minutes after injuries). Heiney v. State, 447 So. 2d 210, 216 (Fla. 1984)(multiple defensive wounds to both hands and both wrists) Once the victim lost consciousness, no pain would be experienced from the additional wounds, and the heinous, atrocious or cruel factor would not be supported. See, e.g., Zakrzewski v. State, 717

So.2d 488, 492-493 (Fla. 1998); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988) .

The fact that there were multiple wounds does not mean the victim was conscious for those wounds. Killings involving many-wounds are indicative of a frenzied, panicked attack and reflect the perpetrator's loss of emotional control at the time of the homicide. See, e.cr. , Penn v. State, 574 So. 2d 1079 (Fla. 1991) ; Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) ; Miller v. State, 373 So. 2d 882, 886 (Fla. 1979); Jones v. State, 332 So. 2d 615 (Fla. 1976) . A suggestion, that if the victim were rendered unconscious or dead from an initial blow the perpetrator would have stopped the attack, fails to account for the likely panic and temporary loss of emotional control at the time of the attack.

The heinous, atrocious or cruel aggravating circumstance was not supported by the evidence. No jury instruction should have been given, and the trial court improperly found the circumstance. King's sentencing process has been tainted, and his death sentence must be reversed.

ISSUE III

THE TRIAL COURT PREJUDICED KING'S PENALTY PHASE BY ALLOWING THE PROSECUTOR TO MAKE IMPROPER CLOSING ARGUMENTS AND BY PROHIBITING DEFENSE COUNSEL FROM MAKING PROPER ARGUMENTS, DEPRIVING KING OF HIS CONSTITUTIONAL RIGHTS AND TAINTING THE SENTENCING PROCESS.

A. ***The Prosecutor Improperly Argued To The Jury That The Homicide Was Committed To Avoid Arrest Even Though No Evidence Supported The Aggravating Circumastance, The State Never Asserted The Aggravator At Penalty Phase, And The Jury Was Never Instructed On This Circumstance.***

During the prosecutor's penalty phase argument to the jury, he improperly argued that the homicide was committed to eliminate the victim as a witness to the burglary. (719:1663, 1665) The State never asserted the aggravating circumstance of avoiding a arrest through the elimination of a witness as an aggravating factor in this case because the evidence did not support it. See, e.g. . Green v. State, 975 So. 2d 1081, 1086-1088 (Fla. 2008); Urbin v. State, 714 So. 2d 411, 415-416 (Fla. 1998); Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979) . However, the prosecutor presented the elimination of a witness as a reason why this case was aggravated:

> Let's talk about what an aggravating circumstance is legally, because this is what the Court is going to instruct you. It's a standard to guide the jury in making the choice. That's what an aggravating circumstance is. It is a circumstance which increases the gravity of a crime or the harm to the victim. 17 — over 17 blows, that increases the gravity of the murder. He could have hit her really once. Why did he take so **long to kill her?** ***Why was it, first of all, necessary to kill her, unless he wanted to*** **make sure** ***she couldn't come into this courtroom and identify him when he was burglarizing her house. But that is what an aggravator***
>
> JL 8• • • •

(T19:1662-1663)(emphasis added)

> ...My God. He also knew she lived alone. He also knew **that she was elderly.** ***I mean how much harm could she do to him, other than he wanted to silence her so that he could do — he could commit the burglary without getting*** *caught*. . . .
>
> ... But he wasn't content with breaking into her house and taking her treasure. He killed her. ***He wasn't happy with just taking her stuff. . . . So he's willing to murder to cover his tracks. That's what this boils down to. By committing the burglary, it created an independent motive to kill because he knew she was going to be there.***

(T19:1665)(emphasis added)

The prosecutor injected an inappropriate aggravating factor into the jury's sentencing consideration. King's death sentence has been imposed in violation of his rights to due process and to be free from cruel and unusual punishment. Art. I, Sees. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII and XIV, U. S. Const. He now asks this Court to reverse his death sentence.

B. The Trial Court Erred In Prohibiting Defense Counsel From Arguing To The Jury That The Aggravation The State Used As Grounds For The Death Penalty Did Not Include Evidence That King Had A Long History Of Violent Crimes.

During defense counsel's penalty phase closing argument, he addressed that the burglary and pecuniary gain circumstances merged into one and they were both based on the circumstances of the crime itself. (T19:1685) Counsel noted the aggravators were based on the jury's verdict and not on King's having a long history of violent crimes:

Those two aggravtors that this prosecutor is seeking and

> asking you to kill Cecil King about count as one, not as two, and it's based on your verdict not any long history of significantly violent criminal acts.

(T19:1685) The State objected to this argument as improperly arguing that King had no significant history of criminal activity – a mitigator that had been waived because King had a history of theft and property crimes. (T19:1685-1688) Defense counsel correctly argued that he was merely commenting on the State's lack of evidence of prior violent criminal history because the aggravator of a previous conviction for violent crimes was not asserted at trial because King had no such history. (T19:1686-1687) Counsel was not claiming that King had no criminal history, rather he was arguing the lack of an aggravator of a prior violent conviction. (T19:1686-1687) The court sustained the State's objection, ruling that defense counsel could not mention King had no violent criminal history and instructed the jury to disregard counsel remarks. (T19:1688-1691)

Defense counsel had the right to argue lack of evidence to the jury. In Conahan v. State. 844 So. 2d 629 (Fla. 2003), this Court addressed the same question with regard to a prosecutor's argument. The prosecutor in Conahan addressed the lack of evidence of certain mitigators. Conahan objected to such argument, and after the trial court overruled the objection, Conahan appealed to this Court. This Court approved the trial court's ruling and held the prosecutor's comments were proper

writing as follows:

> One of the two preserved prosecutorial comments that Conahan challenged was as follows:
>
> > Clearly, early in his life, he was capable of and did do some good and commendable things. And yet, he makes this choice to do evil later in his life so hard to understand. He wasn't abused. He wasn't mistreated. There was no evidence of mental difficulties or substance abuse. No finacial -
>
> Conahan timely objected and complained that the prosecutor remarked upon the lack of certain mitigating factors. The trial court overruled the objection.
>
> The record reflects that in light of Conahan's presentation of mitigating evidence, the prosecutor commented in his closing argument there was no evidence presented regarding other possible mitigators. He pointed out that Conahan did not show that he suffered from prior child abuse or drug abuse, or had a history of mental difficulties and mistreatment. In making such a remark, th prosecutor was commenting upon the lack of certain mitigating evidence. His comment did not implicate the defendant's right to remain silent; rather, it concerned the dearth of mitigating evidence. See, People v. Lewis, 25 Cal.4th 610, 106 Cal.Rptr. 229, 22 P.3d 392, 433 (2001) (holding that the prosecutor's reference to the nonexistence of mitigating evidence was not a comment of the defendant's failure to testify). We find the assistant state attorney's remark was not improper and affirm the trial court's ruling.

Conahan, 844 So. 2d at 640. Just as the prosecutor in Conahan was permitted to argue the lack of evidence of mitigators, defense counsel in this case was entitled to argue the State's lack of evidence to support aggravators.

Moreover, in this case, the argument was also relevant to show a nonstatutory mitigating factor that King had no previous crimes of violence before this case. In fact, the trial court

ultimately found such a nonstatutory mitigator. (App) (R8:1278-1279) King was entitled to have his lawyer address this point in the penalty phase argument to the jury.

The restriction on defense counsel's closing argument deprived King of his due process rights to present his penalty phase case, his right to effective assistance of counsel and his right to be free from cruel and unusual punishment. Art. Sees. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U. S. Const.

ISSUE IV
THE DEATH PENALTY IS UNCONSTITUTIONALLY IMPOSED BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The trial court erroneously imposed a sentence of death in violation of the Sixth Amendment principles announced in Ring v. Arizona, 536 U.S. 584 (2002). King's motions to dismiss the death penalty as an option in his case should have been granted. (R2: 22-R3:412; R3:460; R9:1533) Ring extended the requirements of Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of the facts relied upon to increase maximum sentences to the capital sentencing context. Florida's death penalty statute violates Ring in a number of areas including the following: the judge and the jury are co-dec is ion-makers on the question of penalty and the jury's advisory recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to be unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State is not required to plead the aggravating circumstances in the indictment.

King acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court

previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g. , Bottoson v. Moore. 833 So. 2d 693 (Fla. 2002), cert, denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert, denied, 123 S.Ct. 657 (2002). Additionally, King is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005) . However, this Court continues to grapple with the problems of attempting to reconcile Florida' s death penalty statutes with the constitutional requirements of Ring. See, e.g., Patterson v. State, _ So. 3d _ , No. SC10-274 (Fla. May 17, 2012) (Pariente, J. dissenting as to sentence) ; Miller v. State, 42 So. 3d 204 (Fla. 2010); Marshall v. Crosby, 911 So. 2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So. 2d 538. A United States District Court has also ruled that Florida's death sentencing process violates Ring. Evans v. McNeil, NO. 08-14402-CIV (S.D. Fla. June 20, 2011). At this time, King asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in the constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty

scheme, and declare Section 921.141 Florida Statutes unconstitutional. Cecil King's death sentence would then fail to be constitutionally imposed. Amends. V, VI, VIII, XIV, U. S. Const.; Art. I, Sees. 9, 16, 17, Fla. Const. Cecil King's death sentence must be reversed for imposition of a life sentence.

CONCLUSION

For the reasons presented in this Initial Brief, Cecil King asks this Court to reverse his death sentence.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
Assistant Public Defender
Florida Bar No. 201170 Leon Co. Courthouse, #4 01 3 01
South Monroe Street
Tallahassee, Florida 32301
Bill.McLain@flpd2.com (850) 606-1000

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE AND COMPLIANCE I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Carolyn Snurkowski, Assistant Attorney General, Capital Appeals Division, PL-01, Tallahassee, FL, 32399-1050, and to appellant, Cecil King, #J25731, F.S.P., 7819 N.W. 228^{ch} St., Raiford, FL 32026, on this 4th day of June, 2012.

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

& W. C. McLAIN

IN THE SUPREME COURT OF FLORIDA

CECIL SHYRON KING,

Appellant,

v. **CASE NO.: SC11-2258**

STATE OF FLORIDA,

Appellee.

./

APPENDIX TO

INITIAL BRIEF OF APPELLANT

Trial court sentencing order

BILL 7068505151» 8506068501

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2009-CF-1450-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA,

vs.

CECIL SHYRON KING

_____ /

FILED
OCT 27 2011
CLERK CIRCUIT COURT

SENTENCING ORDER

Cecil Shyron King, the Defendant in this cause, was convjctpd by a jury of his peers on April 8, 2011,' of Count One - Murder in the First Degree (victim, Renie Telzer-Bain), Count Two - Armed Burglary of a Dwelling with an Assault/Battery, Count Three - Grand Thefl Auto, Count Four - Dealing in Stolen Property, and Count Five - False Verification of Ownership on Pawnbroker Transaction Form. As to Count One, the jury made a special finding that the killing was premeditated and was done during the commission of a felony, to wit: Burglary. The jury also found that trie Defendant did carry, display, or use a weapon during the commission of the offense. The penalty phase of the trial was held on April 14,2011, at which time both the State and the Defense presented evidence, The State presented the testimony of:

1. Myles Telzer (victim's grandson- read statement on behalf of victim's son, Dana Telzer)
2. Sue Oiddings (victim's former co-worker/friend)
3. Donna Broxton (victim's neighbor/friend)
4. Lyza Telzer (victim's daughter-in-law)

FILED
IN COMPUTER
J.S.

The guilt phase of the Defendant's trial began on April 5,2011.

In addition to testimonial evidence, the State introduced into evidence photographs of Renic Telzer-Bain (alone and with family members) at various stages of her life.

At the penalty phase of the trial, the Defense presented the testimony of:

1. Cecil King, Sr. (Defendant's father)
2. Dr. Rodney E. King (Defendant's uncle)
3. Cecelia Ealy (Defendant's aunt)
4. Michelle Ealy (Defendant's cousin)
5. Lavon Bracy (former fellow church member/friend of Defendant's family)
6. Sakenia Fraser (Defendant's sister)

Additionally, the Defendant introduced into evidence photographs of the Defendant and his friends and family members, as well as a letter written by the Defendant's niece.

Following! the testimony and other evidence presented during the penalty phase, the jury returned the following recommendation: As to Count One, by a vote of eight-to-four, that the Defendant be sentenced to death for the murder of Renie Telzer-Bain. Following the jury's recommendation, the Court held a SESUEST/ hearing on May 25, 2011. At the hearing, the Defense introduced the testimony of two additional witnesses: Felicia Mintz (Defendant's former girlfriend) and Officer Barnes, Jacksonville Sheriffs Office (corrections officer having frequent contact with the Defendant). The State introduced no further evidence.

As ordered>y the Court, subsequent to the Spencer hearing, the State and Defense filed their memoranda in support of and in opposition lo the death penalty. Further, the Court and counsel have received and reviewed the Presentence Investigation Report prepared by the Florida Department of Corrections. In rendering this sentence, the Court has taken into account

'Spencer v. State. 6(15 So. 2d 688 (Fla. 1993). 2

the evidence presented during trial (including both the guilt and penalty phases) and the Soencer hearing, the sentencing memoranda filed by the parties,[3] the list of proposed mitigating circumstances filed by the Defense/ and the Presentence Investigation Report.

FACTS

Renie Telzer-Bain was 82 years old and lived alone in a home located on the south side of Jacksonville. Ms. Telzer-Bain's family lived approximately four miles away and would frequently check; on Ms. Telzer-Bain in person or by telephone. On the afternoon of December 29, 2009, Lyza Telzer (Ms. Telzer-Bain's daughter-in-law) visited with Ms. Telzer-Bain, along with Myles Telzer (Ms, Telzer-Bain's grandson) and a friend, That visit ended around 4:30 p.m. Lyza Telzer was.one of the last people to see Renic Telzer-Bain alive and was the first to discover her brutally murdered.

On December 29, 2009, at approximately 10:00 a.m., Ms. Telzer-Bain's neighbor, Richard Broxton, noticed Ms. Telzer-Bain's garage door was open and her car was not parked inside the garage. Mr. Broxton, assuming his neighbor had left the house and forgot to close the garage door, proceeded to close the garage door for her. Latter that evening, Lyza Telzer became concerned when she had not heard from Ms. Telzer-Bain an 1 was unable to reach her by phone. Lyza Telzer went to her mother-in-law's house to check or her. When she opened the garage door, she discovered that Ms. Telzer-Bain's car was missing. Lyza Telzer spoke with neighbor Richard Broxton, and the two of them went inside Ms. Telz«r-Bain's home. They observed the home had been burglarized, as the television in the kitchen was missing, numerous other items

State's Memorandum in Support of the Imposition of the Death Penalty, filed July 11, 2011, and {Sentencing Memorandum of Defendant, filed June 29,2011,

Defendant's Requested Penalty Phase Jury Instruction Numbs r 19, filed April 12, 2011.

and papers were out of place, and cabinets and drawers were ransacked. Lyza Telzer continued through the house to the master bedroom. Upon entering the master bedroom, she first noticed it was messy. Upon a second look, however, Lyza Telzer saw her molher-in-Iaw's feet (the rest of her body was shielded by the bed). Lyza Telzer discovered the woman she refers to as her best friend and mother dead, lying face down on the floor. Lyza Telzer ran out of the room scared. She then ran back into the room and grabbed Ms. Telzer-Bain's hands, but they were "ice cold."

While entering the home, Lyza Telzer had called her husband Dana Telzer (Ms. Telzer-Bain's son) who ,was out of town. Dana Telzer was on still on the phone with Lyza Telzer when she walked into the master bedroom and saw Ms. Telzer-Bain on the floor. Dana Telzer heard his wife's screams as she discovered the brutally beaten body of his mother.

An autopsy revealed Ms, Telzer-Bain died from blunt force trauma, having been beaten to death with a claw hammer.* Approximately 17-20 blows were inflicted upon Ms. Telzer-Bain with the both the claw and head of a hammer. Ms. Telzer-Bain sustained injuries to her head, neck (front, side, and back), back, hand, arm, leg, and knee. The injuries to the back of her head consisted of three separate blows which tore her scalp and fractured her skull pushing the bone fragments from the skull into her brain, causing lethal brain injuries. Some of the several injuries to the back of her neck consisted of holes corresponding to the claw of a hammer which

r- --------■ ----------

Chief Medical Examiner Valerie Rao testified at trial based on everything she had reviewed, Ms. Telzer-Bain's injdries were consistent with having been caused by a claw hammer. Law enforcement discovered a Task Force tool bag belonging to Ms, Telzer-Bain in the Defendant's apartment. The tool bag did not contain a hammer. A hammer, bearing the brand name Task Force, was discovered injthe Defendant's apartment on top of a microwave located on top of a small refrigerator.

4

not only tore the skin but also the underlying fat and tissue, some of it being skeletal muscle.[9] The injuries on the upper right side of her back ere consistent with the claw of the hammer and the force of one of the injuries was sufficient to break her right fifth rib. The injuries sustained to the back of Her right hand and left arm consisted of bruises that Dr, Rao deemed defensive injuries obtained while Ms. Telzcr-Bain attempted to ward off the blows, Ms. Telzer-Bain also sustained an injury to her right leg and left knee.

Detectives with the Jacksonville Sheriffs Office processed the outside and inside of the home, determining the point of entry to be the sliding door at the back of the house, due to damage to the door that allowed entry into the home.[7] Among the items processed in the home were an open fruit container (containing cantaloupe) and a piece of cantaloupe sitting on the ltd of the container located beside the container. All of these items were located on a table in the kitchen. Detectives learned from speaking with family members that several items of personal property, including jewelry, were missing from the home.

Several pieces of evidence including, but not limited to, the following point to the Defendant as the perpetrator of Ms. Telzer-Bain's murder. On January S, 2010, the Defendant pawned a gold bracelet belonging to Ms. Telzer-Bain. In addition, investigation revealed the Defendant worked part-time for a lawn service and had mowed Ms. Telzer-Bain's lawn on more than one occasion. James Roman, the Defendant's employer, staled the Defendant had never

Dr. Rao testified it is difficult to tear skin with the claw of a hammer because it is so blunt, which speaks to the force used to cause the injury.

Law enforcement observed shoe prints on the side of the door on the side of the home leading into the garage, suggesting the Defendant first tried to enter the home by kicking this door. However, when that did not Wk, the Defendant opened a fenced gate leading into the backyard and using a screwdriver, was able to dislodge the sliding door and break into Ms. Telzer-Bain's home. Law enforcement documented damage to the sliding door and recovered a screwdriver tip near the point of entry. 5

gone inside of Ms, Telzer-Bain's home while they were providing lawn maintenance (a fact that becomes material upon discovery by law enforcement of the Defendant's DNA inside of Ms. Telzer-Bain's residence).[1]

Also, Ms. Telzer-Bain's car, which the State argued was used by the Defendant to transport the Defendant, along with the stolen property, back to his apartment, was discovered a few blocks from the Defendant's apartment on the north side of Jacksonville. Rashad Montfort, the Defendant's cousin, testified on December 29, 2009, the Defendant gave him a set of keys and allowed him to use Ms. Telzer-Bain's car. Mr. Montfort further testified he was unaware it was Ms, Telzer-Bain's car and agreed to go the Defendant's apartment wearing a wire to attempt to get the Defendant to talk about the car and the murder. While the Defendant never admitted to the murder, he did inquire as to what the detectives were asking Mr. Montfort about the car,

Further evidence pointing to the Defendant as the perpetrator were a number of items belonging to Ms. Telzer-Bain, including pieces of jewelry, tools, clothing, silverware, etc., discovered by law enforcement in the Defendant's apartment upon execution of a search warrant on February 1,2010.

Detectives interviewed the Defendant on February 1 and 5, 2010. The Defendant admitted knowing Ms. Telzer-Bain and having mowed her lawn, but denied being involved in the murder. The Defendant described Ms. Telzer-Bain as a nice lady who lived alone in a house off of Baymeadows Road on the south side of town. The Defendant denied ever going inside of her home and claimed he purchased the gold bracelet he pawned from someone else. The

i ----------:----------

Mr. Roman also informed law enforcement during their investigation that he received a somewhat unusual call from the Defendant which entailed the Defendant informing him the lady who lived in the house where the .Defendant used to go with him to mow had been killed.

■1

Defendant claimed he found the rest of Ms. Telzer-Bain's property, which was discovered by law enforcement in the Defendant's apartment, in a vacant apartment near where he lived.[9] Pursuant to a search warrant, a DNA sample was obtained from the Defendant, leading to the most damning piece of evidence against the Defendant.

On February 4, 2010, law enforcement learned the Defendant's DNA profile matched the DNA profile obtained tram the swab of the cantaloupe found inside of Ms. Telzer-Bain's home on the table in the kitchen. Jason Hitt, a DNA expert with the Florida Department of Law Enforcement, testified to the frequency of this match occurring in unrelated individuals in the following populations: one in 440 trillion Caucasians; one in 770 trillion African Americans; and one in 280 trillion Southeastern Hispanics. On February 5, 2010, when the Defendant was confronted by law enforcement with the fact chat his DNA was found inside of Ms. Telzer-Bain's house, the Defendant responded by stating he may have gone in her home one time. He also stated Ms. Telzer-Bain sometimes gave the lawn workers fruit Co eat.

AGGRAVATING CIRCUMSTANCES

During the guilt and penalty phases, the State proved beyond a reasonable doubt the following aggravating circumstances;

1. The capital felony was committed while the Defendant was engaged in the commission of a burglary. § 92M4l(5)(d), Fla. Stat. (2011).

The jury's verdict in the guilt phase, finding the Defendant guilty of Count Two, Armed

[9] Law enforcement orfginally told the Defendant he was being questioned in regards to the charge of Dealing in Stolen Property.

Burglary of a dwelling with Assault/Battery, is evidence this aggravating circumstance was proven beyond a reasonable doubt. In addition, this Court independently finds this aggravating circumstance was proven beyond a reasonable doubt based on the evidence presented at trial.

On December 29, 2010, the Defendant stealthily entered the home of Renie Telzer-Bain, likely under the cover of darkness. Evidence in the form of shoe prints suggests the Defendant first tried to enter the home by kicking the door on the side of the home leading into the garage. However, when (hat did not work, the Defendant opened a fenced gate leading into the backyard and using a screwdriver, was able to dislodge the sliding door and break into Ms. Telzer-Bain's home. Once inside of the home, the Defendant beat the sole occupant, Ms. Telzer-Bain, to death with a hammer and stole numerous items belonging to her, including pieces of jewelry, tools, clothing, silverware, etc. The Defendant also stole Ms. Telzer-Bain[1] s car, which was located inside of the garage attached to her home, On February I, 2010, just 34 days after the murder, law enforcement executed a search warrant upon the Defendant's apartment and found numerous items of stolen property belonging to Ms. Telzer-Bain in the Defendant's apartment. This aggravating circumstance has been given great weight in determining the appropriate sentence to 1?S imposed,

2. The capita) felony was committed for pecuniary gain. § 921,141(5)(f), Fla. Stat (2011).

There was no evidence to suggest the Defendant killed Ms. Telzer-Bain for any other reason than to steal from her. The Defendant, when interviewed by law enforcement, described Ms. Telzer-Bain as a "nice lady." Her death' was but a byproduct of the Defendant's quest to satisfy his greed.i However, while this aggravating circumstance has been proven beyond a reasonable doubt, the Court recognizes this aggravating circumstance merges with the 8

aggravating circumstance that addresses the fact the capital felony was committed during the commission of a burglary. During the penalty phase, the Court instructed the jury accordingly. Therefore, these two aggravating circumstances will be considered as one.

3. The capital felony committed was especially heinous, atrocious, or cruel. § 92U41(5)(h), Fla. Stat (2011).

Heinous, atrocious, or cruel ("HAC") has been held to be one of the most serious aggravating circumstances in the statutory sentencing scheme. Offord v. State. 959 So. 2d 187, 191 (Fla. 2007).; Sec also Sireci v. Moore. S25 So. 2d 882, 887 (Fla. 2002)(holding that prior violent felony conviction and HAC are two of the most weighty aggravating circumstances in Florida's sentencing scheme.) To quality for the HAC aggravating circumstance, "the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim." Hertz v. Slate, 803 So. 2d 629, 651 (Fla, 2001)(citation omitted). HAC has to do with "the means and manner in which the death was inflicted and the immediate circumstances surrounding the death." Brown v. State. 721 So. 2d 274,277 (Fla. 1998). The focus is on the victim's perception of circumstances as opposed to those of the perpetrator. Lvnch v. State. 841 So. 2d 362, 369 (Fla. 2003).

Ms. Telzer-Bain's perception of her circumstances no doubt involved extreme fear, tremendous pain, and impending doom. 82-year-old Renie Telzer-Bain was surprised in her home by a *6*5"*, 200 pound intruder whom she very well may have recognized. It is unclear if Ms. Telzer-Bain was asleep in the bedroom where she was found or was awake when the Defendant entered her home. What is clear is that she never had a chance. Most of Ms. Telzer-Bain's injuries wejre to her back- back of her head, back of her neck, and her right back. Other than her leg/knee, the only injury to the front of Ms. Telzer-Bain was an injury to the front of her

neck. The Defendant caused these injuries by taking a hammer and using the round, flat head to strike Ms. Telzer-Bain and using the claw portion of the hammer to rip and tear Ms. Telzer-Bain's skin, fat, and tissue. 17 to 20 times the Defendant struck this defenseless woman with such force that her skull was pressed into her brain and her rib was broken. Ms. Telzer-Bain, unwilling to just give up her life, tried to protect herself as is evidenced by the defensive injuries she sustained on her hand and arm.

Dr. Rao testified Ms. Telser-Bain was alive when she received all of these injuries and the injuries she sustained would have caused tremendous pain. While Dr. Rao testified the injuries to the head would have caused Ms. Telzer-Bain to have lost consciousness very quickly, and the fact that there were defensive injuries suggests the head injuries were not the first sustained. In addition, the presentation of blood on the carpet in the bedroom where Ms. Telzer-Bain was found suggests she tried to move around after sustaining one or some of the injuries. Further, if the head injuries were in fact the first Ms. Telzer-Bain sustained causing her to immediately fall unconscious, it would seem unlikely the Defendant would have continued to strike her 14 to 17 more times with the hammer. During this horrific murder, Renie Telzer-Bain had to experience disbelief and sorrow that, at 82 years old and all she had survived, this is how her life would end and how her family would find her.

The evidence presented during the guilt phase of the trial proves beyond ail reasonable doubt the existence of this aggravating circumsttuice, $££ Beaslev v. State. 774 So. 2d 649, *669-70*(Fla. 2000)(upholding HAC aggravator in a murder involving a victim that was bludgeoned to death with a homrner and had numerous defensive injuries); Owens v. Stftfy 596 So. 2d 985, 990 (Fla. 1992)(upholding HAC aggravator where the sleeping victim was struck on the face and

head with five hammer blows, awoke after first blow and lived anywhere from a few minutes to an hour); Penn v. State. 574 So. 2d 1079»(Fla. 199l)(upholding HAC aggravator where the victim was beat to death with a hammer, sustaining 31 injuries to her head and defensive injuries to her hands); Heinev v. State. 447 So. 2d 210, 216 (Fla, 1984)(upholding HAC aggravator where the victim received seven severe hammer blows to the head and had defensive injuries on his hands). This aggravating circumstance has been piven great weight in determining the appropriate sentence to be imposed.

The Defense responds in its Memorandum to an additional aggravating circumstance proposed by the State in a filing dated April 4,2011. The additional aggravating circumstance is set forth *in* section 921.141(5)(m), Florida Statutes; 'The victim of the capital felony was a person particularly vulnerable due to advanced age or disability." As the Defense notes in its Memorandum, the State abandoned this aggravatar prior to the penalty phase. As a result, the jury was not instructed as to this aggravating circumstance, nor has this Court considered it in determining the appropriate sentence."

No other aggravating circumstances enumerated by statute have been argued to apply in this case. Thus, no other aggravating circumstances are considered by the Court or addressed herein,

MITIGATING CIRCUMSTANCES

The Defense contends that, although the Stare abandoned this aggravating circumstance prior to the penalty phase, it is "important to address it because the State persisted in arguing it and making it a focus of the trial and sentencing hearing ...". (Def. Memo, pg. 7). The Court finds while the State did discuss aspects related to'this aggravating circumstance such as the victim's age and fact that she lived alone, during the trial and penalty phase, these facts were relevant to prove legal issues other than the aggravating circumstance pertaining to a vulnerable victim, set forth in section 921.141(5)(m), Florida Statutes. . *i*

The Court will consider each of theimitigating circumstances listed by the Defendant in Defendant's Requested Penalty Phase Jury Instruction Number 19 and presented during the Spencer hearing.

^Statutory Mitigating Circumstances

The Defendant did not request the jury be instructed on any statutory mitigating factor, nor did he present any evidence or argument before this Court at the Spencer hearing to suggest any statutory mitigating factor. The Court has reviewed each statutory mitigating factor and now finds no evidence has been presented to support any statutory mitigating factor, and none is found to exist. Non-Statutory Mitigating Circumstances"

In Defendant's Requested Penalty Phase Jury Instruction Number 19, the Defendant requested that 39" non-statutory mitigating circumstances be considered in this case. The Court, based on evidence presented by the Defendant during the penalty phase, has identified additional non-statutory mitigating circumstances. In this Order, the Court will address each non-statutory mitigating circumstance proposed by the Defendant[13] or otherwise established by the evidence.

ij

Section 921.141(6), Florida Statutes, setting forth a list of mitigating circumstances, contains a catch-ail provision set forth in subsection (6)(h), which allows the Court and jury to consider as mitigating circumstances, "[t]he existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty."

While the pleading proposes 41 non-statutory mitigating circumstances, the Defendant withdrew fjie first two circumstances on the list, emotional deprivation and lack of personality disorder.

The Defendant's proposed mitigating circumstances will not be addressed in the same order set forth by the Defendant 12

1. The Defendant is a good inmate.[11],

Officer Barnes, a corrections officer with the Jacksonville Sheriffs Office, testified at the Spencer hearing regarding the Defendant's behavior as an inmate. Officer Barnes stated while the Defendant was housed on 4W at the Pretrial Detention Facility, Officer Barnes would have contact with the Defendant every day. He testified he had no difficulties or problems with the Defendant, the Defendant didn't draw attention to himself, and the Defendant interacted fine with other inmates.'[3] The Court finds this mitigating circumstance was established and gives it slight weight in determining the appropriate sentence to be imposed in this case. 2. The Defendant has the potential *fat* rehabilitation[15] and would positively contribute to tbe prison population.

The Defendant was described by witnesses as being intelligent, articulate and caring, not just in his words but in his actions. There was also testimony the behavior exhibited by the Defendant in the commission of the crime at issue was contrary to the Defendant's normal

n ----------

This listed mitigating circumstance includes the following proposed mitigating circumstance listed j^y the Defendant; the Defendant is not a management problem.

The State, on cross-examination after having heard Officer Barnes briefly reference such when answering a question posed by the Defense on direct-examination, questioned Officer Barnes regarding several transfers of the Defendant within the Pretrial Detention Facility he had viewed on a computer and the listed reasons for those moves (stealing commissary, alleged gang activity, etc.) Officer Dames testified on re-direct, the Defendant had no disciplinary reports, which are reports issued after drastic or repeated misconduct. Out of an abundance of caution, and pursuant to Rodriguez v. State. 753 So. 2d 29, 43-45 (Fla. 2000), the Court will not consider the hearsay testimony by Officer Bames elicited on cross-examination and re-dircct in considering whether this mitigating circumstance has been established or the appropriate weight it should be given.

This.listed mitigating circumstance includes the following proposed mitigating circumstances listed by the Defendant: the Defendant's personality profile is not typical of a death row personality profile. 13

.

personality.[17] The Defendant's uncie, Dr, Rodney King, even testified the Defendant, who had graduated from high school and attended some college, was considering going into the ministry, which Dr. King believed to be a good occupation for the Defendant because of the personality traits possessed by the Defendant, discussed *supra.* This testimony, taken in conjunction with Officer Barnes' testimony that the Defendant (as an inmate) did not cause problems and got along fine with other inmates, leads one co believe that the Defendant has potential for rehabilitation and could positively contribute to the prison population. The Court is ever mindful, however, of the heinous nature of the crime recently committed by the Defendant, a crime one would believe it improbable, if not impossible, to commit by a person with the personality traits attributed to the Defendant by testifying witnesses. In addition, as discussed by the Court in paragraph four *infra,* the Defendant's criminal history as set forth in his Presentence Investigation Report establishes the criminal act at issue was not completely out of character for the Defendant considering his criminal conduct has been escalating for some period of time. These issues call into question the likelihood the Defendant can be rehabilitated." The Court finds this mitieating circumstance was established and gives it slight weight in determining the appropriate sentence to be imposed in this case.

3. The Defendant has a lack of a violent history and the incident at issue was situational.

IT" - ~— ■

While the Court was not presented any evidence regarding the typical personality profile of a death row inmate, the Court certainly takes into consideration that the Defendant's described personality prior to the commission of the crime at issue does not align with that of a person capable of committing First Degree Murder.

İt should be clearly noted the Court is not considering any of these prior crimes as aggravating factors. Instead, the Court mentions such crimes to explain the weight assigned to the proposed mitigating circumstance. 14

To determine whether the Defendant has a lack of a violent history, upon agreement of both the State arid Defense, the Court relied upon the Defendant's criminal history as set forth in the Presentence Investigation Report ("PSI Report").[1]" While the PSI Report revealed that the Defendant was charged in 1990 with Battery related to a fight with his pregnant girlfriend over money, the Court will not consider this charge as the Defendant pled *nolo contendere* and adjudication was withheld. Based on a review of the remaining criminal history, none of which reflects a violent history, the Court finds'the Defendant has a lack of a violent history. Jrjg Court finds the mitigating circumstance that the Defendant has a lack of violent history was established and gives it little weight in determining the appropriate sentence to be imposed in thiSCflafi. 4. The incident at issue was situational

The Court does not find, however, that the incident at issue was situational, considering the Defendant's escalating pattern of theft-related criminal conduct (embezzlement, obtaining property by false pretense, breaking and entering, dealing in stolen property)[20] Lhai evolved to the point the Defendant was willing to sacrifice a human life for the sake of money. The Court finds this mitigating circumstance was not established and gives it no weight in determining the appropriate sentence to be imposed in this case.

*** Both sides were given an opportunity to review the PSI Report and inform the Court of any inaccuracies or amendments. The Court was informed that under the "Criminal History" portion of the PSI Report, the disposition listed for the charge of Possession of Less Than One Ounce of Marijuana from Atkinson County, Georgia, dated March 11, 2009, was reported as unknown but instead, should reflect that the charge was *dimissedJnolle prossed*,**

[10] It should be clearly noted the Court is not considering any of these prior crimes as aggravating factors. Instead, the Court mentions such crimes to explain why the proposed mitigating circumstance has not been established.

15 !

5. The Defendant is a good parent, loves his two-year-old SOD Cecil Shyron King, Jr., and his son loves him.[1]'

Cecil King, Sr. testified he had observed the Defendant with his son, Cecil Shyron King, Jr., whom the Defendant nicknamed "Tookie" and they are "real close." Cecelia Ealy, the Defendant's aunt testified she has observed the Defendant with his son and they "get along real good." Ms. Ealy testified when Cecil Shyron King, Jr., sees the Defendant, he hollers, "daddy, daddy." Michelle Ealy, the Defendant's cousin, stated the Defendant is a good dad, and his son definitely loves him. Sakenia Fraser, the Defendant's sister, said the Defendant was at the hospital when his son was bora, texted her right after he was bom, and was excited. Ms. Fraser testified the Defendant and his son got along great. She stated she has taken Cecil Shyron King, Jr., to see the Defendant in jail on two occasions and each time the two of them bonded and (hey love each other. The Court finds this mitigating circumstance was established and gives it moderate weight in determining the appropriate sentence to be imposed in this case.

6. The Defendant loves children in general and they love him."

Cecelia Ealy testified at one time she had a daycare center, and the Defendant would play with the children in her care. Ms. Ealy testified when she first opened the daycare, there was a little boy who had just started at her daycare, and the little boy loved the Defendant and the two often played together. Michelle Ealy testified her two children, ages five and nine, loved the Defendant. Ms, Ealy stated the Defendant would take her oldest daughter to school and would pick her up. She testified the Defendant would take her children to the neighborhood store to

This listed mitigating circumstance includes the following proposed mitigating circumstances listed by the Defendant: the Defendant was in the hospital when his son was bom and the Defendant has $ nickname for his son- Tookie Pookie man.

While this mitigating circumstance was not proposed by the Defendant, the Court finds it was established by the evidence. 16

! " c 'J

buy them ice cream and popsicles and would spend time with them, playing and talking. Sakenia Fraser testified the Defendant gets along well with her 15-year-old daughter Venelia, and Venecia refers to the Defendant as her favorite uncle. The Court finds this mitigating circumstance was established and gives it moderate weight in determining. the appropriate sentence to be imposed in this case.

7, The Defendant is the only biological child of his mother and father.

Lavon Dracy, a close friend of the Defendant's mother, testified to this tact It should be noted the Defendant is not the only biological child of his father and his mother is no longer-alive. The Court finds this mitigating circumstance was established and gives it little weight in determining the appropriate sentence to be imposed in this case.

8. The Defendant's parents divorced when he was a young child, which negatively affected the Defendant's relationship with his father."

Cecil King, Sr_M the Defendant's father, testified the Defendant was around six years old when he and the Defendant's mother divorced. The Defendant's father testified after the divorce, the Defendant's mother moved to Orlando and took the Defendant with her, which greatly affected the relationship he had with the Defendant. The Defendant's father stated the Defendant's mother was keeping him "sheltered" and during this time period he did not see the Defendant and only wrote to him. The Defendant's father went on to remarry and have four more children. The Defendant's father testified he never saw his son run track, play football, *ox* graduate from high school. Felicia Mintz, the Defendant's former girlfriend, stated the

u

This listed mitigating circumstance includes the following proposed mitigating circumstances listed by the Defendant: the Defendant's mother kept him secluded from his father, the Defendant only saw his father a few weeks every summer, the Defendant's father remarried and had four children, and the Defendant's father never saw him run track, play football, or graduate from high school. 17

Defendant, contrary to the close relationship he described with his mother, described a more distant relationship with his father. The Court finds this mitigatingjircumstance was established and gives it little weight in determining the appropriate sentence to be imposed in this case. 9. The Defendant had a lack or deficiency of positive role models.

The Defendant presented evidence his father, Cecil King, Sr., had very little involvement in his life during his formative years. However, other evidence presented by the Defendant, suggested he was raised by a caring mother interested in the Defendant's education and spiritual well-being, who was described as a compassionate Christian and wonderful person. While it is difficult to establish time-lines in terms of .when the Defendant interacted during his life with certain family members, there was ample evidence presented that the Defendant was surrounded by family members who based on their occupations and testimony, appear to be hard-working,[14] decent people raising families, The Court finds that for the Defendant to have had the ability to show such compassion for his aunt, grandmother, and mother when they were ill, he likely was modeling his behavior after people who had a positive influence on him. The Court finds this mitigating circumstance was not established and gives it no weight in determininp % appropriate sentence to be imposed in this case. 10. The Defendant was on the track and football teams in high school.

The Defendant's father identified the Defendant in photographs depicting the Defendant as a member his high school's track and football teams. The_Court finds this mitigating circumstance was established and gives it slight weight in determining the appropriate sentence to be imposed in ithis case.

»

Michelle Ealy (accountant); Cecelia King (former security guard and detective at NAS Jacksonville for 17 years); Sakenia Fraser (mortgage customer service representative for 15 years).

11. The Defendant graduated from high school and attended Johnson Community College in Kansas.

The Defendant's father identified the Defendant in a high school graduation photograph and testified the Defendant attended college in Kansas. The Court finds this mitigating circumstance was established and gives it little weight in determining the appropriate sentence to freimpgSgdt'nthiggflSe.

12. The Defendant and hia mother were very close and the Defendant took his mother's death very hard.[1]*

Lavon Bracy, who attended the Defendant's mother's funeral, stated the Defendant was very distraught because he and his mother were very close. Ms, Bracy testified the Defendant was the only child his mother had and his mother was always very caring. Sakenia Fraser testified the Defendant's mother's death had a substantial effect on him, because it was just the Defendant and his mother and they were very close. Cecil King, Sr, testified while he was not in contact with the Defendant when the Defendant's mother was suffering from breast cancer, the Defendant did communicate to him after his mother passed that her death really affected him. Felicia Mintz testified the Defendant spoke highly of his mother and the great relationship they had and he took her passing hard. The Court finds this mitigating circumstance was established and eives it some weight in determining the appropriate sentence to be imposed in this case.

13. The Defendant went to church with his mother and even considered becoming a minister."

This listed mitigating circumstance includes the following proposed mitigating circumstances listed by the Defendant; the Defendant and his mother were always together, and the Defendant's mother gassed away from breast cancer in 1994 when the Defendant was *25 years* old.

While the Defendant considering the ministry was not proposed as a mitigating circumstance by the Defendant, the Court finds it was established by the evidence.

19

Lavon Biacy testified she and her husband founded New Covenant Baptist Church of Orlando and she met the Defendant 20 or more years ago when he was a member of their church. Ms. Bracy described the Defendant as an effervescent young man who participated in church activities. Dr. Rodney King, the Defendant's uncle and pastor of the Philadelphia Baptist Church for the past 19 years, kept in touch with the Defendant during the holidays and family visits after Dr. King moved to Philadelphia in 1981. Approximately five years ago, Dr. King spoke with the Defendant about coming to Pennsylvania to first attend Lincoln University to get a Master's Degree in human services and then possibly going to Eastern Seminary to get a degree in Divinity. Dr. King testified the Defendant showed an interest in the ministry and was considering it. Tfte Court finds this mitipatjnp circumstance was established and Eives it slight weight in determining the appropriate sentence to be imposed in. this case.

14. The Defendant cared for family members, including his mother, grandmother, and aunt, when they were ill.[27]

Cecelia Ealy, the Defendant's aunt, fell in September 2009 while hospitalized for other health issues. While in the hospital, the Defendant cared for Cecelia's mother and his grandmother, Annie King (who was in stage three of Alzheimer's at that time), as well as visited Ms. Ealy in the hospital. The Defendant would console Ms. EaJy, because she was constantly upset due to her involuntary inactivity, Michelle Ealy, Cecelia's daughter and the Defendant's cousin, testified when her mother was hurt, the Defendant took care of everything that needed to be done around the house in addition to taking care of their grandmother. Ms. Ealy testified the

3 ----------

This listed mitigaling: circumstance includes the following proposed mitigating circumstances listed by the Defendant: the Defendant and his cousin (Michelle Ealy) lived with their grandmother and helped to bathe her arid cook for her, the Defendant helped his mother while she was going through chemotherapy, and the Defendant went shopping with his mother to buy a wig after she lost her hair.

Defendant would sometimes have to go down the street to find their grandmother in 90 degree weather when she would wander outside. Ms, Ealy further testified the Defendant would bathe their grandmother (who would sometimes urinate/defecate on herself), feed her, and just sit with her lo make sure she didn't wander outside. Sakenia Fraser, the Defendant's sister, also testified to the care the Defendant gave their grandmother when their Aunt Cecelia was in the hospital, stating the Defendant would make sure their grandmother was dressed and fed and ready Co be picked up by the van to go lo a senior center, and would be waiting on her when she was dropped off. Cecil King, Sr., testified the Defendant did things for his grandmother (Cecil King, Sr.'s, mother) while caring for her that he didn't think the Defendant would do.

Cecelia Ealy testified the Defendant cared for his own mother when she had breast cancer. Lavon Bracy, a close friend of the Defendant's mother who was at the Defendant's mother's house often when she was battling breast cancer, had the opportunity to observe the Defendant care for his mother. Ms. Bracy stated the Defendant's mother had a couple of bouts with cancer, causing her to lose her hair two or three times and each time, the Defendant was right there. Ms. Bracy recalled the Defendant bought a wig for his mother, and she would tell her friends she was wearing a wig her son picked out for her. Ms. Bracy stated the Defendant was very attentive to his mother in her final days and she thought he was such a wonderful person. The Court finds this mitigating circumstance was established and gives it moderate weight in determining the appropriate sentence to be imposed in this case. 15. The Defendant loves his sister and she loves him.[1]*

IB

This listed mitigating circumstance includes the following proposed mitigating circumstances listed by the Defendant: the Defendant attended his sister's (Sakenia Fraser) wedding and took his sister to and from high school when he lived with her. 21

The Defendant is Sakenia Fniser's older half-brother by six years. She testified the Defendant would take her to and from school when she was in high school and the two of them became closer when she graduated from high school. She testified to really good talks between her and the Defendant and to an instance when the Defendant came back home and went out to movies and dinner with her and her husband and a close girlfriend, and all of (hem stayed up one night talking. She also testified regarding how much it meant to her when (he Defendant surprised her by showing up at her wedding in 1999, just before she walked down the aisle with their father. The Court finds this mitigating circumstance was established and gives it little weight in determining the appropriate sentence to be imposed in this case. 16. The Defendant waj employed throughout his life.

Felicia Mintz testified when she knew the Defendant, sometime between 2005 and 2008, he worked for a thrift center and was in the lawn service business (the same business the Defendant was in when he committed murder). The PSI Report revealed prior to becoming employed with the lawn service that brought him into contact with Renie Tclzer-Bain, the Defendant reports he worked for Recycling E-Scrap. Per the PSI Report, his employer at E-Scrap, Jack Jones, indicated the Defendant was asked to leave (he business when it was discovered he was stealing from the business. The Defendant, however, denies such allegations. Since the Defendant has not had the opportunity to confront Mr. Jones in regards to these allegations, the Court will not consider them in determining the weight to assign to this mitigating circumstance.

The Defendant reported that his longest period of employment was with a cellular telephone business in North Carolina. The Defendant, however, was fired from his position in

2000 upon being arrested for embezzlement from the company, a charge of which he was found guilty after a bench trial and sentenced to a period of incarceration. Essentially, the Court finds one being employed throughout periods of his life is not mitigating when the employment is used to gain access to victims to more easily commit crimes. The Court finds this circumstance was established but does not find it mitigating in nature and gives it no weight in determining.the appropriate sentence to be imposed in this case.

17. The Defendant has family who writes him letters and visits him and would continue to do so if (he Defendant was sentenced to life in prison,

Cecil King, Sr., visits the Defendant in jail every other week and would continue to visit him and take the Defendant's son to see him if sentenced to life in prison. Dr. Rodney King and Michelle Ealy testified they would visit and write the Defendant should he be sentenced to life in prison. Sakenia Fraser said she has taken the Defendant's son to see him in jail and each time he bonds with him. Sakenia's daughter, Venetia (the Defendant's niece), has written the Defendant since he has been in jail. Tfte Court finds this mitigating circumstance was established and rives it slight weight in determining the appropriate sentence to be imposed in tfrjgcasc. IS. The Defendant being sentenced to death would adversely affect his family.[27]

Cecelia Ealy testified it would really hurt her and the Defendant's son if the Defendant was sentenced to death as the Defendant could no longer be there for his son. Dr. King testified it would affect him tremendously if his nephew was sentenced to death, because he is still a young man and Dr. King could no longer talk with him. Cecil King, Sr., said it would have a

While this mitigating] circumstance was not proposed by the Defendant, the Court finds it was established by the evidence.

23 !

great impact on him, because he doesn't want to sec his son killed and wants the Defendant to be there for his son more than Cecil King, Sr., was for the Defendant. Michelle Ealy staled the Defendant is like a brother to her and if he were sentenced to death, she would no longer be able to sit down, talk to him, and have that brotherly relationship she does not have with her own brother. Sakeniu Fraser said it would adversely affect her, because she and the Defendant have a closer bond now than they ever have. Ms. Fraser said it would also negatively affect her daughter, Venetia, because she and the Defendant have grown closer and Venetia is distraught because she doesn't understand what is happening. The, Court finds this mitigating circumstance was established and gives it some weight in determining the appropriate sentence to be imposed in this case.

CQNq,VffiQy

The Court has carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case." Required by law to give great weight to the jury's recommendation,[31] the Court now does so without reservation, considering the Court wholly agrees with the jury's recommendation based on an assessment of the aggravating and mitigating circumstances presented to the jury as well as the Court at the Spencer hearing. Cecil Shyron King, you have not only forfeited your right to live among us, but under the laws of the State of Florida, you have forfeited your right to live at all. The scales of life versus death for the murder of Renie Telzer-Bain tilt unquestionably to the side of death.

B ---------- ■ ----------

Understanding this is not a quantitative comparison, but one which requires qualitative analysis, |(ic Court has assigned an appropriate weight to each aggravating and mitigating circumstance.

Blackwood vf. State. 946 So. 2d 960, 975 (Fla. 2006); Tedder v. State. 322 So. 2d 908,910 (Fla. 1975) (stating that under Florida's death penalty statute, the jury recommendation should be given great weight)]

... -I

It is therefore:

ORDERED AND ADJUDGED;

AS TO COUNT ONE: That you, Cecil Shyron King, are adjudicated guilty and hereby sentenced to death for the murder of Renie Telzer-Bain. It is further ordered that you be transported to the Department of Corrections to be securely held on Florida's death row until this sentence can be carried out as provided by law.

AS TO COUNT TWO: For the crime of Armed Burglary of a Dwelling with an Assault/Battery, you are adjudicated guilty and designated a Habitual Felony Offender and sentenced to a term of life imprisonment. You shall receive credit for 629 days you have already served.

AS **TO COUNT** THREE: For the crime of Grand Theft Auto, you are adjudicated guilty and designated a Habitual Felony Offender and sentenced to 10 years imprisonment You shall receive credit for 629 days you have already served.

AS TO COUNT FOUR: For the| crime of Dealing in Stolen Property, you are adjudicated guilty and designated a Habitual Felony Offender and sentenced to 30 years imprisonment. You shall receive credit for 629 days you have already served.

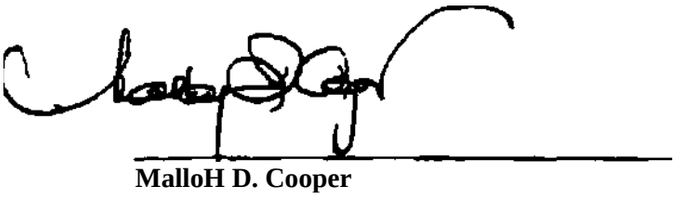
AS TO COUNT FIVE: For the crime of False Verification of Ownership on Pawnbroker Transaction Form, you are adjudicated guilty and designated a Habitual Felony Offender and sentenced to 10 years imprisonment. You shall receive credit for 629 days you have already served.

* ", "

You are hereby notified that these sentences are subject to automatic review by the Florida Supreme Court. Counsel will be appointed by separate Order to represent you for that purpose.

Cecil Shyron King, may God have mercy on your soul.

DONE AND ORDERED in Open Coun at Jacksonville, Duval County, Florida this C3£| day of October, 201**1**.



MalloH D. Cooper
CIRCUIT COURT JUDGE

Copies to:

fiemie De la Rionda, Esquire
John Rockwell, Esquire
Office of the Slate Attorney
220 East Bay Street
Jacksonville, Florida 32202

Quentin Till, Esquire Refik
Eler, Esquire Debra Billard,
Esquire Office of the Public
Defender 25 North Market
Street Jacksonville, FL 32202

Shawn Arnold, Esquire 6279
Dupont Station Ct.
Jacksonville, FL 32217

Case No.: 16-2010-CF-1450-AXXX-MA