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IN THE SUPREME COURT OF FLORIDA

ARTHUR JAMES MARTIN

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1762

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as Martin or the Appellant. The State will be referred to as State or Appellee. Citations to the twelve (12) volume record in this case will be "TR" followed by the volume and page number. Martin's initial brief will be referred to as "IB" followed by the appropriate page number. Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE

This is a case of premeditated murder. Martin was not charged with felony murder. There was no underlying felony charged and the jury was instructed only on premeditated murder as a theory under which they could convict the defendant of first degree murder.

Martin was 40 years old when he murdered Javon Daniels by shooting him multiple times with a .45 caliber handgun. Mr. Daniels was only 19 years old at the time he died at the defendant's hand. Javon Daniels did not do anything to provoke Martin. Not a single thing. Instead, the only thing Javon Daniels was guilty of was that he was "rumored" to have fired a shot (not at Martin) that grazed 25 year old co-defendant Franklin Clay Batie a day or two before the murder. Javon

Daniels did nothing to Arthur James Martin. Martin murdered him anyway.

On January 7, 2010, Martin was indicted on one count of first degree murder. (TR Vol. I 187). Martin pleaded not guilty and proceeded to trial. Martin was represented at trial by Frances Jerome Shea and Christopher Anderson. At the time of trial, Mr. Shea had been a member of the bar for over 30 years. Mr. Anderson had been a member of the bar for nearly 20 years. [1]

Jury selection began on March 26, 2012. (TR Vol. VIII 21-200, TR Vol. IX 205-254). Both sides presented an opening statement. The defense theory at opening statement was of "misidentification" and lack of motive. (TR Vol. IX 262-266).[2]

The State called a dozen witnesses then rested its case. After the state rested its case, the defendant made a motion for a judgment of acquittal. (TR Vol. X 489). Trial counsel argued that there was insufficient evidence to prove Martin was the shooter. (TR Vol. X 489). The trial judge denied the motion. (TR Vol. X 489-490).

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[1] www.flabar.org (find a lawyer).

[2] By the time of closing argument, Martin was not pointing the finger exclusively at Batie. Martin also suggested that perhaps one of co-defendant Batie's friends, who looked like Martin, may have committed the murder. Alternatively, Martin argued that, if the jury found Martin was the shooter, the shooting was not premeditated but instead warranted a verdict for 2d degree murder or manslaughter by act. (TR Vol. X 568, 581-587).

The defense rested without presenting any witnesses. (TR Vol. X 494). The defendant did not testify. The trial court conducted a colloquy with Martin to ensure he understood his right to testify and that his decision not to testify was freely and voluntarily made. (TR Vol. X 490-493). The defendant renewed his motion for a judgment of acquittal and the trial judge denied the motion. (TR Vol. X 508).

On March 28, 2012, contrary to his plea of not guilty, Martin was found guilty as charged. The jury also found that, in the course of the murder, the defendant discharged a firearm causing death during the commission of the offense. (TR Vol. IV 740-741).

The penalty phase commenced on April 2, 2012. The State called two victim impact witnesses. (TR Vol. XII 689-692). The State introduced the judgment of conviction and sentence for Martin's prior violent felony.

Martin presented two lay witnesses and a mental health expert, Dr. Stephen Bloomfield. (TR Vol. 694-747, 752-759). The state presented one rebuttal witness, a police officer who testified about Martin's ability to read the Miranda rights given to him in Miami-Dade County. (TR Vol. XII 748-752).

The trial judge instructed the jury on three aggravators; (1) prior violent felony; (2) CCP, and (3) HAC. (TR Vol. IV 748-749). The trial judge instructed the jury on the statutory age

mitigator and the catch-all. (TR Vol. IV 750). The jury recommended Martin be sentenced to death by a vote of 9-3. (TR Vol. XII 819).

The Court held a Spencer hearing on May 8, 2012. (TR Vol. VII 1251-1267). Neither side presented any additional evidence at the Spencer hearing. Both the defense and the state presented sentencing memoranda in opposition and in support to the jury's recommendation. (TR Vol. V 812-830).

Sentencing was held on August 3, 2012. (TR Vol. VII 1270-1273). The trial judge found three aggravators had been proven beyond a reasonable doubt and gave each great weight. The court found that: (1) Martin had previously been convicted of a violent felony; (2) the murder was cold, calculated, and premeditated, and (3) the murder was especially heinous, atrocious, or cruel. (TR Vol. VII 844-853).

The trial court found one statutory mitigator; the defendants age (slight weight). (TR Vol. V 853-860). The trial judge also considered sixteen non-statutory mitigators: (1) the defendant is functionally illiterate (slight weight); (2) the defendant has a learning disability (slight weight); (3) the defendant has low cognitive functioning (some weight); (4) the defendant suffered a lifetime of poor health including asthma, diabetes, and sleep apnea (slight weight); (5) the defendant was a loving and caring son (slight weight); 6) the defendant was a hard

worker (slight weight); (7) the defendant was generous (slight weight); (8) the defendant was reverent (slight weight); (9) the defendant was a loving and caring brother (slight weight); (10) the defendant's love of work was thwarted by poor physical health (very slight weight); (11) the defendant's childhood was plagued with excessive alcohol consumption and the fighting of his parents (some weight); (12) the defendant was respectful to the Judge and other officers of the Court (very slight weight); (13) co-defendant Batie's disproportionate sentence (not proven); (14) the jury's recommendation was not unanimous (no weight); (15) the defendant had temper issues (slight weight); and (16) the defendant was attacked by other children as a child (slight weight). (TR Vol. V 853-860).

The trial judge followed the jury's recommendation and sentenced Martin to death. In doing so, the trial court found that Martin was more culpable that co-defendant Batie. (TR Vol. V 861).

On August 20, 2012, Martin filed a notice of appeal. On March 25, 2013, Martin filed his initial brief. Martin raises four penalty phase claims. This is the state's answer brief. In addition to answering Martin's claims, the State has offered argument that Martin's sentence to death is proportionate and set forth the facts to show there is sufficient evidence

supporting Martin's conviction for first degree premeditated murder.

STATEMENT OF THE FACTS

The facts of this case are relatively straightforward. However, in addition to the transcripts of the witness' testimony, which in some respects do not paint the clearest word picture, it is important in examining this case to look at the exhibits introduced by the State. In particular, in determining the sufficiency of the evidence and in reviewing the issues on appeal, this Court should, and respectfully must, look at the photographs contained on a disc in the record on appeal and the photo arrays from which several witnesses picked out Martin as the shooter.

One other thing is also important to note. Arthur Martin is a big guy weighing some 300 pounds. However, he is short for a man, only 63 inches (5'3") tall. He has a 48" waist. (TR Vol. X 419). Photos in the record demonstrate that he has one rather significant and prominent feature. Although generally muscular in appearance, Martin has a large protruding belly. (State's Exhibit A86-A88).[3] At trial, one witness told the jury that

[3] Photos of the defendant are contained on a disc marked State's Exhibit 1. This disc contains color crime scene and autopsy photos as well as other relevant photos including photos of Mr. Martin.

Martin's nickname was "Beer Belly." (TR Vol. IX 396). Another testified he was called "Shorty Fat." (TR Vol. IX 385).

Martin's size is significant in that Martin's defense at trial was misidentification. At trial, Martin generally defended on the notion that he had no motive to shoot Daniels while co-defendant Franklin Batie (or maybe one of his unidentified hefty friends) did. While Batie arguably did have a motive to shoot Daniels, Martin's "misidentification" defense had one large, or rather thin, obstacle. Batie is not nearly as big as Martin. At the time of trial, Batie weighed 165-170 pounds. Batie told the jury that he was a little heavier than he is at the time of trial at the time of the shooting but that he has never weighed 300 pounds in his life. (TR Vol. IX 364). Another obstacle to Martin's misidentification defense was that none of the witnesses who witnessed the shooting identified Batie as the shooter. Several, however, identified Martin as the man who murdered Javon Daniels.

The evidence at trial demonstrated that Martin murdered Javon Daniels on October 29, 2009 at the Weber 5b Apartments off of 22d Street in Jacksonville, Florida. (TR Vol. I 1, TR Vol. IX 266-267)). The shooting was precipitated by an incident that had nothing to do with Martin. A couple of days before the murder, Martin's co-defendant, Franklin Batie, was at the Flag Street Apartments. While there, Batie was grazed by a bullet in

the back of the head. Batie's friend, Charles, was also hit by gunfire. Vol. IX 372, 387-388).

Batie was hit from behind and did not see the shooter. (TR Vol. IX 372). The shooter shot into a crowd of people and Batie had no idea whether he was the intended target. (TR Vol. IX 388).[4] Batie heard a rumor that it was Daniels who shot him. (TR Vol. IX 388). Batie had seen Daniels at the apartment complex that day. (TR Vol. IX 389).

Batie saw Martin between the time he was shot at and the date of the murder. Batie told the defendant about being shot at. At that time, Batie did not mention who he had heard had shot at him. (TR Vol. IX 359).

On the day Martin murdered Javon Daniels, Martin called Batie to get a ride to the Weber 5b apartments. Martin wanted to see a guy named Black Jack. Batie agreed.

On the afternoon of the murder, Batie went to Martin's home and picked him up. Batie was driving a white Ford Crown Victoria. (TR Vol. IX 360). Batie could not tell the jury what time he and Martin arrived at the apartment complex but it was

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[4] During cross, Batie said he did see the shooter. (TR Vol. IX 373). During re-direct, Batie clarified that he did not see the person who shot him on the day he was shot because he was shot from the back. (TR Vol. IX 387). He heard a rumor that it was Daniels who shot him. While Batie did not see Daniels shoot him (if he did), he did see Daniels there at the apartments on the day Batie was shot. (TR Vol. IX 388-389).

still daylight. (TR Vol. IX 361).[5] When they arrived, Martin got out of the Crown Vic and went over to talk to Black Jack. Batie stayed in the car. (TR Vol. IX 373).

After a while, apparently purely through happenstance, Javon Daniels, arrived at the Weber 5b apartments. Batie testified what while he was waiting on Martin, a little white SUV (Batie called it a little white truck) pulled up at the apartments close to where Batie was sitting in his Crown Vic. (TR Vol. 362-363). When the truck pulled up beside him, Batie could see that the driver was the dude they was saying shot him. (TR Vol. IX 363-364). The driver was Javon Daniels.

Daniels was not alone in the SUV. According to Batie, there were two passengers. One of the passengers got out of the SUV and went up to the apartments where a crowd of people was congregating between the apartment buildings. (TR Vol. IX 377). The passenger looked at Batie in, what Batie told the jury was, a threatening way. Batie told the jury he was scared because he did not want to get shot again.

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[5] The several witnesses to the shooting varied on the time of the shooting but all agreed it was daylight. The actual time was not relevant to Martin's defense or to the State's case. Logically, the fact it was daylight was relevant to show the witnesses were not hampered in their view of the shooting by darkness.

Batie testified that he had a .45 caliber pistol in the car with him. The pistol is an ACP Masterpiece with a 30 round extended magazine (clip). (TR Vol. IX 358).[6] When he saw the passenger look at him in a threatening way, Batie retrieved the gun from the backseat and "jacked" a round into the chamber. (TR Vol. IX 375, 377-378).[7]

Batie told the jury that, at first, he held the gun in his lap. He then tossed it into the back seat. Batie told Martin that the dude in the white truck was the dude who had shot him. (TR Vol. IX 364).

Batie told the jury that Martin picked up Batie's pistol [from the back seat] and walked over to the driver's side of the SUV. Martin started shooting. Batie pulled up his Crown Vic to where Martin was, right beside him. Batie told Martin to come on. (TR Vol. IX 365-366). Martin did not comply and Batie pulled up a little further. Martin was still shooting. (TR

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[6] People tend to use the word magazine and clip interchangeable although it is not technically accurate. *http://en.wikipedia.org/wiki/Clip_(ammunition)*.

[7] According to Batie, the gun was in his backpack in the back seat. (TR Vol. IX 375). Jacking a round into the chamber means Batie would have pulled back the slide to move a live round from the magazine into the chamber of the .45 caliber semi-automatic. "Jacking" a round into the chamber means that if the safety is off, the weapon is ready to fire simply by pulling the trigger. Evidence of cartridge casings at the scene also demonstrate the weapon used was a semi-automatic and not a revolver where the casings would remain in the gun.

Vol. IX 367). Finally, the shooting stopped. Martin ran straight to the Crown Vic and he and Batie fled. After they left, Batie dropped Martin off at Martin's house. (TR Vol. IX 368). Batie did not get his gun back. He gave it to Martin. (TR Vol. IX 368).

In addition to Batie, several people saw the shooting and described or identified Martin as the shooter. Allison Crumley testified that she saw a SUV pulled up on the grass in front of the apartments where she lived. She saw a black male shooting at the SUV. He was shooting from a couple of feet away. (TR Vol. IX 271). The shooter was kind of tallish and kind of heavyset. (TR Vol. IX 270). Ms. Crumley, who was 14 or 15 years old at the time of the shooting, told the jury that the shooter had a big belly. She noticed the shooter's belly was hanging over his pants. (TR Vol. IX 270).

Lauren Burns testified that on the afternoon of the murder, she was outside her apartment complex sitting on the stairs. As she was sitting there with her children, she heard a gun cock. She looked up and saw the shooting. Ms. Burns identified Martin, in court, as the person she saw shooting into the "Jeep" (which she described meant any SUV) from no more than ten feet away. (TR Vol. IX 308-310). Ms. Burns saw someone inside the Jeep. When she first saw Martin, he was on the driver's side

shooting into the vehicle. Then Martin walked around to the passenger side and continued shooting. (TR Vol. X 310).

After the murder, she was shown a photo spread and asked if she could pick out the shooter. (TR Vol. IX 311). The reason she picked Martin from the photo spread is that she positively identified him as the shooter. (TR Vol. IX 322).

State's Exhibit 27 is the photo spread shown to Ms. Burns. Ms. Burns picked Martin's picture from the photo spread on October 30, 2009, a day after the shooting. Ms. Burns wrote on Martin's photo: "This is Shorty Fat he is the one who shot and killed a person on 22 St." (TR Vol. IV 691).

Sebastian Lucas also witnessed the shooting. At the time, Ms. Lucas was sitting on the steps of the first building. Mr. Lucas saw two vehicles that were involved in the shooting, a white Ford Crown Vic and a white RAV4 SUV. (TR Vol. IX 329).

Mr. Lucas saw the shooter. The man was heavy set with a low cut hair cut, beard, brown skin. He was a black male. He was medium, short. (TR Vol. IX 330). Mr. Lucas saw this man walk from the White Crown Vic to the SUV and open fire. The man was shooting with a black handgun with an extended clip. (TR Vol. IX 331).

The shooter walked up first to the driver's side of the SUV first. That is where the shooting started. The shooter did not stay there. After the shooter shot through the driver's side,

the victim tried to escape out the passenger side. The shooter walked around to the passenger side and opened fire there and "shot him back down in the car." (TR Vol. IX 331). When he stopped shooting, the shooter got back into the Crown Vic and they left. (TR Vol. IX 331).

After the shooting, Mr. Lucas was approached by a detective to look at a series of photographs. State's exhibit 28 is the photo array at which he looked. Mr. Lucas wrote on the picture he selected "this appears to be the shooter. He shot with a MAC-11 or MAC-10 with extended clip." (TR Vol. IV TR Vol. IX 332). Later, Mr. Lucas heard the shooter was called "Shorty Fat." (TR Vol. IX 342).

Ronnie McCrimager also saw the shooting. He was in his home when the shooting started. He saw a man shooting at a white truck that was parked out in front of the house. (TR Vol. IX 347).

There were two cars involved. One was a Crown Victoria and the other was a SUV van. When the shooting started, Mr. McCrimager ran into the living room and stood right in front of the window to watch. (TR Vol. IX 348). He had never seen any of the people who were in the two cars before. (TR Vol. IX 348).

The shooter was about 5'8" or 5'7" and sort of round shaped, heavy set. He probably weighed 200 to 300 pounds, somewhere around that.

Mr. McCrimager told the jury that the shooter was first firing into the driver's side of the van shooting. Then he walked around to the other side of the car. (TR Vol. IX 348). When the shooting stopped, Mr. McCrimager got into the Crown Vic to help the kid who was shot. He was dying. Another young lady tried to help too. There was nothing they could do. (TR Vol. IX 349).

After the shooting, he met with Detectives from the JSO. They showed him a photo spread that is State's Exhibit 29. Mr. McCrimager did not really recognize the photo he picked out. (TR Vol. IX 349). He told the police that he did not have his glasses and could not see that well. (TR Vol. IX 350-351). Mr. McCrimager told the police he was not sure of the ID. Mr. McCrimager admitted, however, that it was his writing on the photograph. (TR Vol. IX 354).

State's Exhibit 29 is the photo spread shown to Mr. McCrimager. Mr. McCrimager wrote on Martin's photo: "It look like the guy." (TR Vol. IV 703).

Finally, Tasheana Hart witnessed the murder. (TR Vol. IX 392-400. TR Vol. X 405-414). She knows Martin. He is called "Beer Belly." (TR Vol. IX 393). She saw Beer Belly shoot J.P. On the day of the murder, Beer Belly had facial hair. (TR Vol. IX 394).

A few days after the murder, she saw Martin at the community center. Martin had shaved off his beard. She and Martin talked about the shooting. (TR Vol. IX 395; TR Vol. X 411). Martin told her "don't say nothing." (TR Vol. X 409). Martin asked her if she wanted some money. She would not accept it. She had already talked to the police by then. (TR Vol. X 409).

After the shooting, the cops showed her some pictures. She identified the person she knew as Beer Belly. She signed the photo identifying Martin as the person she knew was out there. (TR Vol. IX 396; TR Vol. X 414).

State's Exhibit 30 is the photo spread that police showed Ms. Hart. Ms. Hart wrote on Martin's photo: "Beer Belly got out of the car and shot PJ on 22d St at Weber 5B apartment." (TR Vol. IV 709).[8]

Thirteen expended .45 caliber cartridges were found at the crime scene in the vicinity of the SUV where Daniels was murdered. (State's Exhibits A2, A11-32; TR Vol. X 437-439, 451).

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[8] Evidence of an out of court identification, including the photo line-ups and an officer's testimony about the identification process, are admissible as long as the person who made the identification testifies at trial. (Section 90.801(2)(c), Florida Statutes. Of course they did in this case. Even if the witnesses, who made an earlier out of court identification, do not make an in court identification, the evidence is still admissible because Rule 801(2)(c) recognizes that an identification made shortly after the crime is more reliable in most situations than a later one. *See Ehrhardt, Charles W., Florida Evidence (2007) at page 811.*

All thirteen cartridges were fired from one single firearm. (TR Vol. X 454, 457).

Four fired bullets were also recovered. (TR Vol. X 451). A FDLE firearms examiner testified that she could not testify with certainty that the bullets were all fired from the same firearm. All of the bullets did have the same number of grooves (six) with a right twist, however.[9] The grooves and twists on the bullets were consistent with being fired from an ACP Masterpiece firearm. (TR Vol. X 457). She could not make a bullet to weapon comparison because she did not have a firearm to compare with the bullets. (TR Vol. X 456).

The medical examiner testified that Daniels was shot 12 times. (TR Vol. X 466). Daniels had no drugs in his system except for a very insignificant amount of hydrocodone, a prescription drug that is a generic pain reliever. (TR Vol. X 467).

Four of the gunshot wounds to Daniels' body were fatal; one through the heart, one through both lungs, one that went through the liver and one into the stomach. Both the bullets that went

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[9] Markings on bullets found at a crime scene may allow a firearm examiner, when the examiner has a gun for comparison, to opine whether the bullets were fired from that firearm (or type of firearm). Ms. Pagan could not do so in this case because Martin took the firearm from the crime scene and it was never recovered.

into his liver and stomach also went into his lungs. (TR Vol. X 470, 476).

Three other gunshot wounds were of particular significance. Two of the bullets broke both of Daniels' arms. Another bullet went through Daniels' hand, fracturing two bones in his hand. (TR Vol. X 473). The bullet wounds that broke both his arms rendered him incapable of moving his arms and hands. His hands would be basically limp. Daniels also could not operate anything with his left hand because of the fractured bones in his hand. (TR Vol. X 475).

Daniels' four fatal wounds would not have caused instantaneous death. There would be a period of survival in which Daniels would try to shield himself from the bullets. (TR Vol. X 477). The wounds would be painful until he lost consciousness. (TR Vol. X 477).

Dr. Rao testified that the bullet wound to Daniels' hand was obtained when the victim tried to defend himself. (TR Vol. X 473, 486). Dr. Rao demonstrated to the jury, as she did with the gunshot wound to the victim's hand, that the wound to the victim's left arm was consistent with throwing his arm up trying

to ward off the bullets (a defensive wound). (TR Vol. X 486-487).[10]

Both eyewitness testimony and the physical evidence at the scene, along with the reasonable inferences from the evidence, showed Martin's premeditated intent to kill and Mr. Daniels's attempts to escape from the barrage of bullets that Martin was firing into the white SUV. Two witnesses, Ronnie McCrimager and Sebastian Lucas described how the shooter started shooting into the driver's side and then walked around to the passenger side and continued shooting.

Crime scene photographs also depict Daniels' desperate but unsuccessful efforts to escape. First, are the crime scene photos that depict Daniels' attempt to escape the car. State's Exhibits (photos) A8-A10 show Daniels' body on the passenger side of the car. Daniels appears to have gotten his foot caught on the gear shift as he tried to move from the driver's side to the passenger side. (A10). These photos show that Daniels attempted to flee from the driver's side to the passenger side.

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[10] Dr. Rao's testimony about the victim's hand and left arm was fairly explained in the record when the prosecutor asked her about throwing her hand and arm up to demonstrate what would have been Daniels' reaction to the gunshots raining in on him. Dr. Rao's explanation about a similar break to the right arm was not so clear. (TR Vol. X 484). It appears that during her testimony, Dr. Rao was demonstrating to the jury that the wounds to Daniels' arms and hand were consistent with throwing up his hands to try and ward off the bullets. (TR Vol. X 486-487).

It is reasonable to conclude that Daniels made this attempt when Martin was first standing on the driver's side firing into Daniels' white SUV.

Second, is the fact that Daniels knocked out the passenger window. State's Exhibit A26 and A27 show the window on the ground by the SUV. The position of Daniels' body and the fact the passenger window was knocked out is evidence that Daniels was alive and so desperate to escape that he knocked out the passenger side window where it landed on the ground outside the SUV. (A26, A27). At first glance, it seems illogical that a person desperate to escape being shot at in a close confined car would knock out the passenger side window. Logically, the most expedient thing to do was keep as low as possible and try to escape out the passenger door. However, three of Martin's bullets broke both of Daniels' arms and two bones in Daniels' hand, rendering both of his arms and hands useless. (TR Vol. X 473-475). Unable to use his hands to open the door, it follows that Daniels' could only hope to escape by knocking out the window.

Finally, State's Exhibits A4 A57, A60, A69-A73 depict a great deal of blood on both the passenger side window and flowing down the outside of passenger side door. This blood evidence shows that after being shot multiple times, Daniels was fully conscious and attempting to escape through the passenger door

and/or window. He was unsuccessful because Martin made sure he could not escape that way. Most telling on this point was Sebastian Lucas's testimony. Lucas told the jury that after Martin shot through the driver's side, Daniels tried to escape out the passenger side. Mr. Lucas testified that the shooter walked around to the passenger side and opened fire there and "shot him [Daniels] back down in the car." (TR Vol. IX 331).

SUMMARY OF THE ARGUMENT

ISSUE I: The trial judge committed no error in failing to find the defendant is mentally retarded. While Dr. Bloomfield did opine that Martin has a very low IQ, Dr. Bloomfield came to no conclusion about Martin's adaptive functioning. Nor did he find onset before age 18. Accordingly, Martin does not meet the criteria for mental retardation. Indeed, Dr. Bloomfield admitted that this was the case. Additionally, the trial court found and weighed in mitigation that Martin had a low IQ. The weight given to a mitigator is within the sound discretion of the trial court and Martin has shown no abuse of discretion.

ISSUE II: The trial judge committed no error in failing to find in non-statutory mitigation that the defendant had a history of drug and alcohol abuse. In order to challenge the failure to find a non-statutory mitigator, the defendant must raise the proposed non-statutory mitigating circumstance before the trial court. Nowhere in his sentencing memorandum did the defendant

do so. Even if the trial court should have found the non-statutory mitigator, any error is harmless.

ISSUE III: The trial judge committed no error in finding the murder was CCP and HAC. The evidence showed that the defendant coldly picked up a gun from the car in which he was riding, walked over to the victim's car, who had offered him no resistance or provocation, and fired multiple bullets into the driver's side door. When the victim attempted to escape, rather than leaving the crime scene, Martin walked over to the other side of the car (passenger side) and continued firing so as to finish Mr. Daniels off. There is competent substantial evidence to support the CCP aggravator.

As to the HAC aggravator, this is one shooting death where the HAC aggravator is supported by competent, substantial evidence. This was not an instantaneous death. Daniels clearly suffered physical pain, terror, and knowledge of his impending death before succumbing to his wounds. Additionally, this Court has upheld the HAC aggravator even in cases where the evidence shows the victim was conscious for seconds after the attack began. In this case, the evidence showed that Mr. Daniels survived the initial barrage of bullets fired into his driver's side door and attempted to escape through the passenger side of the car. However, three bullets fired into Mr. Daniels's body broke both his arms and hands. The medical examiner testified

that the wounds were consistent with defensive wounds and would have been very painful. Whether HAC exists turns on the totality of the circumstances. There is no bright line rule that shooting deaths are not HAC. In this case, there was competent substantial evidence to support the HAC aggravator found by the trial judge and this Court should affirm.

ISSUE IV: In this claim, Martin avers his sentence to death is unconstitutional pursuant to the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). However, Martin had previously been convicted of a violent felony, including second degree murder and robbery. This Court has consistently rejected Ring claims when the defendant has previously been convicted of a violent felony. Martin has offered no compelling reason to recede from now over a decade of precedence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL JUDGE ERRED IN MAKING FINDINGS OF FACT AND WEIGHING MARTIN' LOW INTELLECTUAL FUNCTIONING AS MITIGATION(Restated)

In this claim, Martin alleges the trial judge erred in failing to make proper findings of fact. Martin also alleges the trial judge failed to give sufficient consideration, in mitigation, to Martin's low intellectual functioning.

Martin begins his argument by citing to the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002), and stating that a mentally retarded person may not be executed. True statement! But such an argument is irrelevant to this claim or to Martin's sentence to death because Martin offered no evidence that he is mentally retarded. While Martin points to Dr. Bloomfield's opinion as to Martin's low IQ, Dr. Bloomfield did not diagnose Martin as mentally retarded. (TR Vol. V 808). Indeed, Dr. Bloomfield advised that Martin did not meet the three pronged test for mental retardation. (GTR Vol. V 808).[11] Dr. Bloomfield did not find evidence of onset before age

[11] Dr. Bloomfield reported that Martin told him that he has been on SSI all his life. (GTR Vol. V 806) There is NO evidence that is because of mental retardation or low IQ. Martin has myriad problems included diabetes and asthma. No assumption should be made on this record that his SSI payments, if true, are because of low intellectual functioning.

18 and did not do any adaptive functioning evaluation. It is not enough for a finding of mental retardation that a defendant have a low IQ. Instead, in Florida, defendants claiming mental retardation are required to show that their low IQ is accompanied by deficits in adaptive behavior. Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. To be diagnosed as mentally retarded, Martin must have offered evidence to show he had significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, and work. *See* Atkins, 536 U.S. at 308 n. 3, 122 S.Ct. 2242. Moreover, sub-average intellectual functioning must exist at the same time as the adaptive deficits, and there must be current adaptive deficits. Jones v. State, 966 So.2d 319, 326 (Fla. 2007).

Martin offered no evidence at trial that he has, or had, significant limitations in his adaptive functioning. Martin also failed to offer any evidence at trial as to the third element of mental retardation;s onset before age 18. Phillips v. State, 984 So.2d 503, 512-513 (Fla. 2008). As Martin failed to

bear his burden to prove two of the three elements necessary for a finding of mental retardation, the trial judge committed no error in failing to find the defendant was mentally retarded.

Because he must, given the fact that his own expert observed that he could not diagnose Martin with mental retardation, Martin offers as an alternative argument that the trial judge made improper factual findings and gave inadequate consideration to Martin's low mental functioning. It appears that Martin's attack is two-fold.

First, the trial judge noted that one of the Defendant's IQ tests resulted in a score of 94. Martin claims this amounts to "improper factual findings" because the WAIS is a screening test. Second, Martin claims the trial judge should have assigned more weight to Martin's low IQ. (IB 18-19).

Martin is mistaken when he claims the trial judge made improper factual findings. In his report, Dr. Bloomfield reported that in 2009 there was an IQ score of 94 on the WAIS. (TR Vol. V 808). Dr. Bloomfield agreed, on cross-examination, that one of Martin's IQ scores showed an IQ of 94. (TR Vol. XII 734). Nowhere in the trial judge's footnote to her sentencing order did the trial judge conclude the WAIS was more than a screening test or was definitive. Instead, the trial judge simply noted a fact taken directly from Dr. Bloomfield's report and trial testimony. (TR Vol. V 856, n.6). It is axiomatic that

a trial judge does not make "improper factual findings" when there is competent substantial evidence to support the finding.

As to the trial judge's consideration of Martin's low intellectual functioning as a non-statutory mitigator, the trial judge also committed no error. In the defendant's sentencing memorandum, Martin suggested the trial court find the Defendant has low cognitive functioning. Martin suggested that he had borderline IQ and that his IQ is in the lowest 2%. (TR Vol. V 818).

In her sentencing order, the trial judge found, as a non-statutory mitigator, that the defendant had low cognitive functioning. In particular, the trial judge noted that "Dr. Bloomfield testified that Defendant has low cognitive functioning. Dr. Bloomfield stated that the Defendant's IQ falls in the lower 2%, meaning that ninety-eight to ninety-nine percent of the people his age have higher IQs. Dr. Bloomfield opined that the Defendant's most significant mitigation issue is his low cognitive functioning. This Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed." (TR Vol. V 855-856).

The trial court found exactly what the Defendant requested and gave this mitigator more weight than she assigned any other mitigator apart from one other mitigator; the defendant's childhood that was plagued by his parents' drinking and frequent

fighting, to which she assigned the same weight. (TR Vol. V 818, 858). Additionally, none of the trial judge's observations, in the discussion of the mitigator, including the 94 IQ on the WAIS was inaccurate. Instead, the findings were supported by the evidence in the record. (TR Vol. V 808; TR Vol. XII 734).[12]

Second, to the extent that Martin challenges the weight given to the Defendant's low IQ, the weight given to a mitigator is within the sole discretion of the trial court. The weight assigned to a mitigator will not be disturbed on appeal absent an abuse of discretion. Patrick v. State, 104 So.3d 1046, 1066 (Fla. 2012)(observing that as with the weight assigned aggravating factors, the weight assigned mitigation is within the sole discretion of the trial court); Oyola v. State, 99 So.3d 431, 445 (Fla. 2012)(noting that weight a trial court assigns to a mitigator is within its discretion and will not be disturbed on appeal absent an abuse of that discretion.).

In his initial brief, Martin has not offered any support, except in conclusory terms, why the trial judge abused her discretion or was required to give Martin's low intellectual

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[12] Even if the judge had made a factual error in noting the 94 IQ score, any error would be harmless because Dr. Bloomfield did not diagnose Martin with mental retardation. Moreover, the trial judge pointed to Dr. Bloomfield's testimony that Martin's IQ is in the bottom 2%. Merck v. State, 975 So.2d 1054, 1066 (Fla. 2007).

functioning more weight than she did. As pointed out above, the trial court gave Martin's low intellectual functioning more weight than any other mitigator, save for one, to which she assigned the same "some weight". Martin has made no showing the trial judge abused her discretion. Hampton v. State, 103 So.3d 98 (Fla. 2012).

Even if the trial judge should have afforded the mitigator more weight, any error is harmless. The trial judge found that Martin had low cognitive functioning and noted Dr. Bloomfield's testimony that Martin's IQ was in the bottom 2%. Nonetheless, the trial court found the quality of Martin's mitigation "pales in comparison to the enormity of the aggravating circumstances in this case." (TR Vol. V 861). Further, considering the aggravating factors found to exist, including CCP and a prior violent felony premised on a prior second degree murder, and the slight weight or very slight weight given to all but one of the remaining mitigating factors, there is no reasonable probability that the defendant's low IQ would be assigned weight sufficient to alter the outcome or counterbalance the significant aggravation found by the trial court. As such, any error in assigning only some weight to the defendant's low IQ is harmless. Hampton v. State, 103 So.3d 98, 117-118 (Fla. 2012). This Court should reject Martin's first claim on appeal.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONSIDER, FIND AND WEIGH AS A MITIGATING CIRCUMSTANCE THAT MARTIN HAD A HISTORY OF DRUG AND ALCOHOL ABUSE

In this claim, Martin alleges the trial judge erred in failing to find that Martin had a history of drug and alcohol abuse.[13] Martin avers that Dr. Bloomfield's report and the PSI supported this mitigator. This Court should find no error.

In order to challenge the failure to find a non-statutory mitigator, the defendant must raise the proposed nonstatutory mitigating circumstance before the trial court. Ault v. State, 53 So.3d 175 (Fla. 2010); Davis v. State, 2 So.3d 952, 962-63 (Fla. 2008). In his sentencing memorandum, Martin did not ask the trial court to find, in non-statutory mitigation, that he had a history of alcohol and drug abuse. (TR Vol. V 817-819).[14] Failure to ask the trial judge to weigh and consider his history of drug and alcohol abuse means the trial judge committed no error in failing to address it. Ault v. State, 53 So.3d at 191.

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[13] The remedy for any harmful error is not a new penalty phase but instead a new sentencing order. Of course, it is the State's position there is no error at all, let alone harmful error.

[14] Martin asked the trial court to consider that the defendant's childhood was plagued by excess alcohol drinking and fighting of his parents. Martin was not referring to his history of alcohol and drug abuse but his sister's testimony that both of their parents drank heavily and fought a lot. (TR Vol. XII 756).

Even if the trial judge erred in failing to find a non-statutory mitigator not suggested by Martin, any error is harmless. Martin acknowledges there is no evidence that he was under the influence of drugs and alcohol at the time of the murder. (IB 23). Additionally, the aggravation was strong. Among the aggravators were CCP and a prior violent felony, in particular, a second degree murder conviction for which Martin was released from prison only months before the instant murder. Moreover, Martin's mitigation evidence was far from compelling. Even if this non-statutory mitigation had been considered, the mitigation evidence would not have outweighed the aggravators. As such, any error is harmless beyond a reasonable doubt. Orme v. State, 25 So.3d 536, 543-544 (Fla. 2009); Bates v. State, 750 So.2d 6 (Fla. 1999).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS COLD, CALCULATED AND PREMEDITATED AND ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL

In this claim, Martin alleges the trial court improperly found the murder was cold calculated and premeditated (CCP) and that the murder was especially heinous, atrocious, or cruel (HAC). The State will take each allegation of error in turn.

A. ***Did the trial court err in finding the murder was CCP?***

The cold, calculated and cruel (CCP) aggravator pertains specifically to the state of mind, intent, and motivation of the

defendant. Wright v. State, 19 So.3d 277, 298 (Fla. 2009). It is the State's burden to prove beyond a reasonable doubt that the murder was the product of cool and calm reflection and not an act of emotional frenzy or panic, or a fit of rage. Walker v. State, 957 So.2d 560, 581 (Fla. 2007). A trial court's determination of whether CCP is present in a case is based upon the totality of the circumstances. Hudson v. State, 992 So.2d 96 (Fla. 2008).

CCP applies when four elements are present: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification. Baker v. State, 71 So.3d 802, 818-819 (Fla. 2011). This Court has explained what each of the elements means.

First, the murder must have been "cold," in the sense that the killing was "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." The "cold" element "generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts. Execution-style killing is

by its very nature a cold crime. Baker v. State, 71 So.3d 802, 819 (Fla. 2011). *See also* Durocher v. State, 596 So.2d 997, 1001 (Fla. 1992) (affirming the trial court's finding of CCP where only a few minutes passed between the defendant's decision to merely rob the store and his decision to shoot the clerk.

Second, the murder must have been calculated. To be calculated the defendant must have a careful plan or prearranged design to commit murder before the fatal incident. The calculated element applies in cases where the defendant arms himself in advance, kills execution-style, plans his actions, and has time to coldly and calmly decide to kill. Wright, 19 So.3d at 299. Proof there was weeks, days, hours, or many minutes of planning or prearranged design is not a necessary element of the calculated element of CCP. A plan to kill may be demonstrated by the defendant's actions and the circumstances surrounding the murder even when there is evidence that the final decision to kill was not made until shortly before the murder itself. Baker v. State, 71 So.3d at 819. *See also* Durocher v. State, 596 So.2d 997 (Fla. 1992).

Third, the circumstances of the crime must indicate that the defendant killed the victim with heightened premeditation. This Court has explained that heightened premeditation exists when the defendant has the opportunity to leave the crime scene but

instead commits the murder. Owen v. State, 862 So.2d 687, 701 (Fla. 2003). *See also* Russ v. State, 73 So.3d 178 (Fla. 2011).[15]

Legally sufficient evidence exists to support a trial court's finding on CCP where the defendant procures a weapon in advance, receives no provocation or resistance from the victim, and carries out the killing as a matter of course. McGirth v. State, 48 So.3d 777 (Fla. 2010). In this case, there is legally sufficient evidence to support the CCP aggravator.

Javon Daniels did nothing to Martin. There was absolutely no provocation on Daniels' part. Nonetheless, Martin grabbed a gun from Franklin Batie's car, walked over to where Daniels was sitting in his car, shot him multiple times, execution style at point blank range. When Daniels attempted to escape out the passenger side, Martin simply walked around and fired more rounds into the passenger side of Daniels' car. Twice, Martin could have left the crime scene and left the victim alive. Twice, Martin chose instead, without any evidence of rage, emotional frenzy or panic, to gun down a man, execution style.

Martin does not seem to deny that the murder was execution style, without provocation, and without panic, rage or emotional frenzy. Instead, Martin claims that his intellectual

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[15] Martin does not contest that there is no evidence establishing a pretense of moral or legal justification for these murders. Wright v. State, 19 So.3d 277 (Fla. 2009).

deficiencies preclude a finding of the CCP aggravator. (IB 28). This Court has consistently, and explicitly, held that a defendant can be emotionally and mentally disturbed or suffer from a mental illness and still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation. Kophso v. State, 84 So.3d 204 (Fla. 2012). There is competent, substantial evidence to support the CCP aggravator and this Court should affirm.

B. ***Did the trial court err in finding the murder was HAC?***

This Court normally does not uphold a trial judge's finding of HAC in a shooting death. This is so because a gunshot death is generally instantaneous. Heyne v. State, 88 So.3d 113, 123 (Fla. 2012). But this Court has, on many occasions, upheld HAC, where it is manifestly clear that the victim suffered pain and experienced fear and terror at the hands of a lawless killer. This is true even when the victim has suffered only a few seconds. Francis v. State, 808 So.2d 110, 135 (Fla. 2001)(noting that this Court has upheld a finding of HAC where the medical examiner has determined that the victim was conscious for merely seconds).

In determining whether the victim experienced such fear, the trial court views the circumstances "from the unique perspective of the victim," Banks v. State, 700 So.2d 363, 367 (Fla. 1997),

and "in accordance with a common-sense inference from the circumstances." Allred v. State, 55 So.3d 1267, 1280 (Fla. 2010). "[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." Lynch v. State, 841 So.2d 362, 369 (Fla. 2003).[16]

In this case, the medical examiner, Dr. Rao, testified that Mr. Daniels' four fatal wounds would not have caused instantaneous death. According to Dr. Rao, there would be a period of survival in which Mr. Daniels would try to shield himself from the bullets. (TR Vol. V 477). The wounds would be painful until he lost consciousness. (TR Vol. X 477).

There is no need to speculate in this case whether Mr. Daniels lost consciousness immediately. He didn't.

Dr. Rao testified that a bullet wound to Daniels' hand was consistent with a defensive wound. (TR Vol. 485-487).

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[16] In his initial brief, the defendant acknowledges the victim's hands and arms were rendered useless because of bullet wounds to his arms and hand. The defendant claims these wounds were the product of random gunfire and there is no indication these were inflicted as a means of tormenting the victim. (IB 32). First, the pictures of the gunshots into the car (fairly tight shot group) show the defendant's assault was anything but "random gunfire." Second, it is well established that when considering the HAC aggravator, the focus is on the means and manner of the death (suffering of the victim) and not the defendant's state of mind of the defendant. Oyola v. State, 99 So.3d 431 (Fla. 2012).

Additionally, the evidence showed the victim survived the initial onslaught and desperately tried to escape. Mr. Daniels' terror and desperation were manifest in the evidence showing that Mr. Daniels, wounded and bleeding profusely, knocked out the passenger side window because three bullets had already fractured both of his arms and one of his hands, making it impossible to escape out the passenger side door. (TR Vol. X 473, 475 486). Given the totality of the circumstances and the evidence that Mr. Daniels, who was only 19 years old at the time of his death, suffered fear and terror right up to the moment of his death, there is competent substantial evidence the murder was especially heinous, atrocious, or cruel. Lynch v. State, 841 So.2d 362, 369 (Fla. 2003). *See also* Allred v. State, 55 So.3d 1267, 1280 (Fla. 2010)(noting that we have held the perception of imminent death need only last seconds for the HAC aggravator to apply).[17]

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[17] It is true that in cases decided in the past such as the ones cited by Appellant as well as cases such as Diaz v. State, 860 So.2d 960 (Fla. 2003)(citing cases) and Bonifay v. State, 626 So.2d 1310 (Fla. 1993), this Court has declined to find HAC in shooting deaths even when there was evidence the victim survived for a time and pleaded for his life. However, this Court's more recent jurisprudence makes clear that the focus of HAC is on the suffering of the victim rather than the killer's intent to torture. Compare McGirth v. State, 48 So.3d 777 (Fla. 2010)(noting that the focus of the HAC aggravator centers on the means and manner in which the death is inflicted upon the victim and the victim's perceptions of the surrounding circumstances).

Even if the trial judge erred in finding the murder was HAC, any error is harmless. Without the HAC aggravator, there is still two strong aggravators, CCP and a prior violent felony that included a second degree murder conviction for which he had been released from prison only months before he murdered Mr. Daniels. Even if this Court strikes the HAC aggravator, this Court should find any error harmless and affirm. Aguirre-Jarquin v. State, 9 So.3d 593, 609 (Fla. 2009).

ISSUE IV

WHETHER MARTIN'S SENTENCE TO DEATH IS UNCONSTITUTIONAL UNDER RING V. ARIZONA, 536 U.S. 584 (2002)

In this claim, Martin avers his sentence to death is unconstitutional pursuant to the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). This Court should reject any notion that Martin's sentence to death is unconstitutional under Ring.

In this case, one of the aggravators found to exist was that Martin had previously been convicted of a violent felony, indeed more than three violent felonies, including second degree murder, armed robbery and burglary with an assault. (TR Vol. V 839). The United States Supreme Court's decision in Ring clearly exempts a previous conviction from facts required to be

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Accordingly, the cases cited by Appellant do not support the rejection of the HAC aggravator.

found by the jury. Ring, 536 U.S. at 602, 122 S.Ct. 2428. Likewise, this Court has consistently held that Ring does not act to disturb a sentence to death when the defendant was previously convicted of a violent felony. Hodges v. State, 55 So.3d 515, 540 (Fla. 2010) (noting that this Court has repeatedly held that Ring does not apply to cases where the prior violent felony aggravating factor is applicable."). Based on well-established case law, this Court should deny Martin's Ring claim.

PROPORTIONALITY

Although Martin did not raise a proportionality claim on appeal, this Court considers the proportionality of the death sentence in every capital case. Barnhill v. State, 834 So. 2d 836, 854 (Fla. 2002). In deciding whether death is a proportionate penalty, this Court considers the totality of the circumstances of the case and compares the case with other capital cases in Florida. Douglas v. State, 878 So. 2d 1246, 1262 (Fla. 2004).

In sentencing Martin to death, the trial judge found three aggravators had been proven beyond a reasonable doubt. They were: (1) Martin had previously been convicted of a violent felony; (2) the murder was especially heinous, atrocious or cruel (HAC); and (3) the murder was cold, calculated, and premeditated. (TR Vol. VII 844-853).

The trial court found one statutory mitigator; the defendant's age (slight weight). The trial judge also considered sixteen non-statutory mitigators: (1) the defendant is functionally illiterate (slight weight); (2) the defendant has a learning disability (slight weight); (3) the defendant has low cognitive functioning (some weight); (4) the defendant suffered a lifetime of poor health including asthma, diabetes, and sleep apnea (slight weight); (5) the defendant was a loving and caring son (slight weight); 6) the defendant was a hard worker (slight weight); (7) the defendant was generous (slight weight); (8) the defendant was reverent (slight weight); (9) the defendant was a loving and caring brother (slight weight); (10) the defendant's love of work was thwarted by poor physical health (very slight weight); (11) the defendant's childhood was plagued with excessive alcohol consumption and the fighting of his parents (some weight); (12) the defendant was respectful to the Judge and other officers of the Court (very slight weight); (13) co-defendant Batie's disproportionate sentence (not proven); (14) the jury's recommendation was not unanimous (no weight); (15) the defendant had temper issues (slight weight); and (16) the defendant was attacked by other children as a child (slight weight). (TR Vol. V 853-860).

Because Martin does not raise proportionality as an issue on appeal, Martin offers no case law in support of the notion his

sentence to death is not proportionate. There are several cases from this Court, however, that demonstrate it is.

In Heath v. State, 648 So.2d 660 (Fla. 1994), this Court upheld Heath's sentence to death. Heath shot and killed Michael Sheridan in the course of a robbery. It was not a robbery gone bad, but a deliberate killing. The trial court found two aggravators had been proven: (1) Heath had previously been convicted of a violent felony, specifically 2d degree murder and that Heath committed the murder in the course of a robbery. The trial judge also found one statutory mitigator, extreme emotional disturbance and two non-statutory mitigators. Heath v. State, 648 So.2d at 663.

Heath is a good comparator case. Heath, like Martin, had previously been convicted of second degree murder. Likewise, the trial judge in Heath found one statutory mitigator as did the trial judge in Martin. While the trial judge found more non-statutory mitigation in Martin's case than was found in Heath's, the trial judge gave almost all of Martin's non-statutory mitigation slight weight. Additionally, the trial judge in Martin found two additional and weighty aggravators, CCP and HAC. Heath is a good comparator case. Even if the trial judge in Martin's case had not found CCP or HAC, this Court's decision in Heath shows that Martin's sentence to death is proportionate.

This Court's decision in Peterson v. State, 94 So.3d 514 (Fla. 2012), is also a good comparator case. Peterson, who was 41 at the time of the murder beat and shot his stepfather to death because his stepfather had urged Peterson's mother to cut off Peterson's financial support. The trial court found three significant aggravators: (1) CCP; (2) HAC; and (3) pecuniary gain. The trial court considered numerous nonstatutory mitigators, weighing them as follow: (1) Peterson's history of drug abuse (slight weight); and (2) Peterson's positive qualities, including that (a) he was skilled as a mechanic (minimal weight); (b) sentencing Peterson to death would have a serious negative impact on others (no weight); (c) Peterson was a good friend (very slight weight); (d) Peterson contributed to his community (slight weight); (e) he has been an exceptional inmate (very slight weight); and (f) Peterson exhibited good and mannerly behavior throughout the court proceedings (no weight). Peterson v. State, 94 So.3d at 537.

This Court found Peterson's sentence to death proportionate. Both the aggravators and mitigators in Peterson's and Martin's cases are similar. In both cases, the trial court found the CCP and HAC aggravators. Although the trial court in Martin's case found the age mitigator, he gave it little weight. This is unsurprising since Martin was 40 years old at the time of the murder. Peterson was likewise of mature age; he was 41.

Peterson had not, however, been previously convicted of a violent felony. Martin had. Indeed, Martin had been convicted of second degree murder and murdered Mr. Daniels less than six months after he was released from prison for that murder.[18] Peterson is a good comparator case.

This Court's decision in Hayward v. State, 24 So.3d 17 (Fla. 2009) is a good comparator case. In Hayward, the defendant shot to death a paper delivery man. The victim was robbed and shot while filling up a newsstand at a convenience store in the early morning hours of February 1, 2005.

In aggravation, the trial court found three aggravators to exist: (1) prior violent felony (based on previous convictions for second-degree murder and two counts of armed robbery); (2) murder in the course of a robbery and (3) pecuniary gain (merged). The trial court found no statutory mitigators but found eight non-statutory mitigators to exist: (1) Hayward could have received a life sentence; (2) Hayward grew up without a father; (3) Hayward was loved by his family; (4) Hayward had academic problems; (5) Hayward obtained a GED in prison; (6) Hayward would make a good adjustment to prison; (7) Hayward had

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[18] Although the time between release from prison and the commission of another violent felony is not a statutory aggravator, this fact can justify giving the prior violent felony aggravator much more weight than one committed remote in time to the murder for which the defendant is being sentenced.

financial stress at the time of the crime; and (8) Hayward had some capacity for rehabilitation.

Hayward is a good comparator case. Both Hayward and Martin had been previously been convicted of other violent felonies, including second degree murder. Likewise, the mitigation is similar and unremarkable. In both cases, the trial judge found no statutory mental mitigation, no brain damage, and no major mental illness. Additionally, while Hayward committed the murder in the course of a robbery, Martin committed the murder in a cold, calculated, and premeditated matter. This Court may look to Hayward to determine that Martin's sentence to death is proportionate.

Finally, this Court can look to McMillan v. State, 94 So.3d 572 (Fla. 2012). McMillan murdered his former girlfriend as she lay in bed. McMillan first shot her in the arm. As she tried to escape from the bed, McMillan shot her again through the top of the head. The trial court found two aggravating circumstances: (1) McMillian was on felony probation at the time of the murder (great weight); and (2) McMillian was convicted of a prior violent felony based on his conviction at trial for the attempted near contemporaneous murder of a law enforcement officer (great weight). The trial court also found the following mitigators: (1) no significant history of prior criminal activity (little weight); (2) McMillian was raised in the church

as a child (very slight weight); (3) McMillian loves and is loved by his family and friends (little weight); (4) McMillian has a consistent history of employment (little weight); (5) McMillian's biological mother was not an active participant in his upbringing (slight weight); (6) McMillian has an IQ of 76 (little weight); (7) McMillian behaved appropriately during trial (slight weight); and (8) McMillian suffered from some mental or emotional distress at the time of the murder (some weight).

McMillan is a good comparator case. Both McMillan and Martin had low IQ's. Both were convicted of a prior violent felony. However, Martin was previously convicted of second degree murder and had been released from prison for less than six months prior to murdering Mr. Daniels. McMillan committed his "prior violent felony" after he murdered his girlfriend when a police officer tried to arrest his for the murder. Additionally, in McMillan, the trial judge did not find the murder was CCP. The trial judge in Martin did. This Court found McMillan's sentence to death proportionate. McMillan v. State, 94 So.3d at 582-583. Given that Martin's case is more aggravated and similarly mitigated as McMillan's case, this Court may look to its decision to find Martin's sentence to death proportionate. *See also* Bailey v. State, 998 So.2d 545 (Fla. 2008) (affirming death sentence as applied to a defendant who fatally shot a police

officer during a traffic stop based on trial court's determination that two weighty aggravators (avoid arrest and felony probation) outweighed the statutory age mitigator (very little weight) and eight nonstatutory mitigators including low IQ, history of mental illness, intoxication, and coming from a broken home (little weight as to each)); Rodgers v. State, 948 So.2d 655 (Fla. 2006)(affirming death sentence for defendant who shot his wife in a revenge killing (infidelity) and the trial court determined that one aggravator-prior violent felony, based on a 1963 robbery and a 1979 manslaughter conviction-outweighed five nonstatutory mitigators, including that the defendant had borderline intelligence at best); Ferrell v. State, 680 So.2d 390, 391 (Fla. 1996) (affirming death sentence where sole aggravator was prior second-degree murder and insubstantial mitigation); Duncan v. State, 619 So.2d 279, 284 (Fla. 1993) (affirming death sentence where sole aggravator was prior second-degree murder).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Court affirm Martin's conviction and sentence to death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by email to William McClain, Assistant Public Defender at bill.mclain@flpd2.com this 6th day of June 2013.

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CERTIFICATE OF COMPLIANCE

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

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