IN THE SUPREME COURT OF FLORIDA

ARTHUR JAMES MARTIN,

Appellant,

v. **CASE NO. SC12-1762**

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

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PRELIMINARY STATEMENT

The record on appeal consists of twelve volumes. Volumes I through VII contains the clerk's records and trial exhibits. These volumes will be reference with the prefix "R" followed by the volume and page numbers. Transcripts of the trial proceedings are contained in volumes VIII through XII will be referenced with the prefix "T." Page numbering for the transcripts begins anew with pages one through 827. A copy of the sentencing order is attached to this brief as an appendix, referenced "App."

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On January 7, 2010, a Duval County grand jury returned an indictment charging Arthur Martin with first degree murder for the shooting death of Javon Daniels on October 28, 2009. (R1:187-189) Martin pleaded not guilty and the State filed its notice of intent to seek the death penalty on January 12, 2010. (R1:197; R7:1108) The case proceeded to a jury trial beginning on March 26, 2012. (T8:1-T12:827) On March 28,2012, the jury found Martin guilty as charged of first degree premeditated murder. (R4:740;T11:638-639) At the conclusion of the penalty phase, the jury recommended a death sentence by a vote of 9 to 3. (R4:753; T12:819) The State and the defense submitted sentencing memoranda, and the court held a Spencer hearing on May 8, 2012. (R5:812,821; R7:1253-1265)

On August 3, 2012, Circuit Judge Linda F. McCallum adjudged Martin guilty of first degree murder and sentenced him to death. (R5: 839; R7:1270-1273) In the sentencing order (R5:844-862)(App.), the court found three aggravating circumstances: (1) Martin had a previous conviction for a violent felony based on convictions in 2001, for second degree murder, armed robbery and burglary with an assault; (2) the homicide was especially heinous, atrocious or cruel; and (3) the homicide was committed in a cold, calculated and premeditated manner. (R5:847-853) Mitigation the court found included: (1) Martin's age of 40 as a statutory mitigator based on

evidence of his emotional immaturity. (R5:854-855) Several nonstatutory mitigating circumstances were addressed in the sentencing order:

(2) Martin is functionally illiterate (slight weight).

(3) Martin has a learning disability (slight weight).

(4) Martin has low cognitive functioning with an IQ in the lower two percent of the population (some weight).

(5) Martin in poor health suffering asthma, diabetes and sleep apnea (slight weight).

(6) Martin is a loving and caring son (slight weight).

(7) Martin was a hard worker (slight weight).

(8) Martin was generous with others (slight weight).

(9) Martin was reverent and served in his church (slight weight).

(10) Martin is a loving and caring brother (slight weight).

(11) Martin ability to work was thwarted by his poor health (slight weight).

(12) During Martin's childhood, his parents consumed alcohol excessively and fought frequently (some weight).

(13) Martin was respectful to the judge and court officers (very slight weight).

(14) Martin's sentence disproportionate due to the disparate sentence to his codefendant who pled to second degree murder (not proven).

(15) The jury recommendation of 9 to 3 was not a unanimous for a

death recommendation(not mitigating).

(16) Martin had problems controlling his temper (slight weight).

(17) Martin was attacked by other children when he was in school (slight weight).

(R5:854-860)

Martin filed his notice of appeal to this Court on August 16, 2012. (R5:866)

The State's Case

Around 6:00 in the evening on October 28, 2009, Officer Gary Tompkins responded to report of a shooting in northwest Jacksonville. (T9:279-280) Tompkins found a white, SUV type vehicle with a male showing no life signs in the passenger side of the vehicle. (T9:281-282) Other officers arrived, and a crowd of people had gathered in the area. (T9:282) There were expended cartridge casings around the vehicle, and Tompkins used crime scene tape to establish a perimeter around the potential evidence. (T9:284)

Allison Crumley was visiting her uncle on October 28, 2009. (T9:266-267) She was 14 or 15 years old at the time. (T9:272) Her uncle lived in Weber Apartments on 22d Street. (T9:266-267) She was present when a shooting occurred outside. (T9:267-268) When she first heard gunshots, she looked outside through the living room window and saw the shooting. (T9:268) Crumley heard eight shots. (T9:268) A black male was shooting at an SUV vehicle parked on the

grass area in front of the apartments. (T9:269) She described the man she saw shooting as tallish and heavyset. (T9:269) He had a large belly protruding over his pants. (T9:270) His hair was cut low, and he wore a white tank top and cargo pants. (T9:270) While shooting, the man was within a couple of feet of the vehicle. (T9:271) Crumley did not see the man's face. (T9:275) Crumley's uncle told her to get down away from the window. (T9:271) Later, when a police officer showed her photographs and asked if she could identify anyone, Crumley pointed out one photograph of someone who "looked something like the guy" she had seen shooting. (T9:273-274, 298-305)

Lauren Burns saw the shooting as it occurred in front of her apartment. (T9:306-307) She was sitting on the staircase watching her children play outside. (T3:307-308) There was a gray SUV and a white car parked in front of the apartments. (T9:308) A man approached the gray SUV, that Burns called a Jeep, and he started shooting at the man sitting in the SUV. (T9:308-310) The shooter had a handgun with a long cartridge clip. (T9:309) Burns saw the shooter fire into the driver's side of the SUV first, and then he moved to the passenger side and continued firing. (T9:310) The shooter then left the scene. (T9:310) When detectives asked her to look at photographs of possible suspects, Burns picked Martin. (T9:298-305, 310) She also identified Martin in court. (T9:308, 317-318, 321-322)

Sebastian Lucas was with his sister-in-law and his girlfriend at the front of the apartments when he witnessed the shooting. (T9:328-329, 334) When Lucas arrived from work, a white Crown Victoria was parked in the area. (T9:334) The Toyota SUV arrived about 30 minutes to a hour later. (T9:335) Lucas saw three people in the SUV. (T9:335-336) The person in the passenger seat got out and starting walking and talking to a number of people who were outside. (T9:336, 339) He spoke to a man named Corey Davis who was talking to the two people in the white car. (T3:336-339) One was standing outside he car, and he was heavyset with a low haircut. (T9:338) The conversation was brief and a normal conversation. (T9:338-339) Later, Lucas heard someone say, "He's got a gun." (T9:340) Lucas then saw the heavyset black male walk from the Crown Victoria to the SUV and shoot into the driver's side of the SUV with a black handgun with an extended cartridge clip. (T9:331) As the shooting victim tried to get out through the passenger side, the shooter walked to the passenger side and continued shooting. (T9:331) The backseat passenger in the SUV escaped out the back when the shooting first started. (T9:336) After the shooting, the shooter went to the Crown Victoria, and he and the driver left. (T9:331) Lucas identified Martin from a photographs detectives showed him. (T9:298-305, 332, 340-341) He described the shooter as medium to short, heavyset, low haircut and a beard. (T9:330, 340-342) The man wore a white shirt and shorts. (T9:343) Lucas saw the

man's face when he walked passed him twice going to, and returning from the store before the shooting. (T9:341) He noted that he had never seen him previously. (T9:341) Sometime after the shooting, he learned the man was called "Shorty Fat." (T9:342)

Ronnie McCrimage lived in a house across the street from the apartments where the shooting occurred. (T9:346-347) He heard gunshots, looked out his window and saw a man shooting into an SUV. (T9:347) A Crown Victoria was parked near the SUV. (T9:347) McCrimage had not previously seen either car. (T9:348) McCrimage did not see the shooter's face because his back was toward him. (T9:348, 351, 353) The man had a round shape and probably weighed between 200 and 300 pounds. (T9:348) Although McCrimage signed a photograph of Martin for the detective, he did so only after pressure to do so from the detective. (T9:298-305, 354)

Tasheana Hart lived at Weber Apartments at the time of the shooting. (T9:392-293) She was acquainted with a man through her family who was know by the name "Beer Belly." (T9:393, 406-407) On the day of the shooting, she saw a white SUV pull up in front of the apartments, and then a white Mercury Grand Marquis pulled in behind it. (T9:394, 398-399) After a time, "Beer Belly" shot the man in the SUV, Tasheana knew as J.P. (T9:394) On that day, he had a beard. (T9:395) A few days later, Tashenia saw "Beer Belly" and he was clean shaven. (T9:395,411) He offered Tasheana money not to talk about the shooting. (T9:395,408-409) She identified a

photograph of Martin as the shooter. (T9:298-305, 395-396, 412-414)

Martin's co-defendant in this case, Franklin Batie, pled guilty to second degree murder, and he testified against Martin. (T9:355, 358) Batie went to college with Martin's nephew, and he occasionally socialized with Martin and his nephew. (T9:356-357) A few days before October 28, 2009, Batie was shot, a bullet grazed the back of his head. (T9:358-359, 371-372) He did not see the person who shot him, but he heard rumors and received a name of the possible shooter. (T9:359) At some point before October 28, Batie told Martin that he had been shot, however he did not mention the name of the suspected shooter. (T9:359) On October 28, Batie drove his white Crown Victoria to Martin's house. (T9:360) Martin asked Batie for a ride to see someone named Black Jack at an apartment complex on 22nd Street. (T9:361) Batie agreed, and they arrived at the apartments sometime in the afternoon. (T9:361) Batie parked on a side road near a grassy area. (T9:362) While Martin got out of the car to talk to Black Jack, Batie stayed in his car. (T9:362) Another vehicle, Batie described as a little white truck, pulled up in the area. (T9:362) A passenger in that vehicle got out and walked up to a crowd of people gathered at the apartments. (T9:363) Batie saw that one of men who stayed in the vehicle was the person whom he had heard was responsible for shooting him earlier. (T9:364) Batie pulled his gun from the back seat, chambered a round in the weapon and held the gun in his lap. (T9:364) He then placed

the gun on the front passenger seat of his car. (T9:364) His gun was a .45 caliber ACP Masterpiece handgun with an extended thirty round clip. (T9:357) When Martin returned, Batie told him the driver of the white truck was the person who had shot at him. (T9:364) Martin picked up Batie's gun, walked to the truck and started shooting. (T9:365-366) Batie pulled his car up to Martin and told him to get in the car. (T9:365-367) Martin got in the car, and Batie drove away. (T9:367-368) Batie told Martin to keep the gun, and he drove Martin home. (T9:368,379, 385)

The medical examiner, Dr. Valerie Rao, performed the autopsy on Javon Daniels.(T10:461, 466) Blood tests revealed Daniels had a small amount of hydrocodone in his system. (T10:467) Daniels sustained 12 gunshot wounds. (T10:466) There were wounds to the left and right hands and the left and right arms, breaking both of them. (T10:468, 472-474) Additional wounds were present on the right flank and right thigh. (T10:471-472) A group of gunshots entered the left side and chest area. (T10: 469-471, 476-477, 481-) Additionally, there were wounds from shattered glass. (T10:471-473) Four of the gunshot wounds were fatal. (T10:476-477, 481-483) One wound went through both lungs, a second penetrated the liver, a third went into the stomach and lung, and a fourth went through the heart and aorta. (T10:476-477) Daniels would have suffered rapid blood loss rendering him unconscious before causing his death. (T10:475-478)

Diane Espie, a crime scene detective, testified about the photographing and collection of evidence from the scene.(T10:420) Several photographs of the vehicle where the victim died and the surrounding area were introduced at trial. (T10:424-436) Additionally, items of evidence were collected. (T10:436-441) Around the area of the vehicle, thirteen .45 caliber expended cartridge casings were collected. (T10:437-439) Seven bullet projectiles or projectile fragments were recovered from the area and the vehicle. (T10:440-441) One projectile was found on the street, a second on the rear passenger seat, a third from inside the victim's pants leg, a fourth from the top of the driver's door, and a fifth from inside the driver's door itself. (T10:440-441) Bullet fragments were found under the passenger seat and the passenger floorboard. (T10:440-441)

Maria Pagan, an FDLE firearms expert, performed a comparison analysis of the bullets and cartridge casings. (T10:449-461) No firearm was recovered. (T10:456) She determined that the 13 cartridge casings were all fired from the same firearm. (T10:451-455) Examination of the four bullet projectiles was inconclusive. (T10:455) Even though the bullets showed some similarity in markings, these were insufficient to draw any conclusion about whether they were fired from the same firearm. (T10:455-456) The bullets did have similar barrel markings from a gun with six grooves with a right twist. (T10:456) Pagan said that an ACP

Masterpiece firearm is consistent since it is included in the class of firearms with six grooves with a right twist. (T10:456-457)

Penalty Phase And Sentencing

The penalty phase commenced on April 2, 2012. (T12:662) Pursuant to a stipulation, the State introduced photographs, a time line from the Department of Corrections, and judgements for prior crimes. (T12: 662-663)(R4:758-797) (State Exhibits 1-5) Martin's prior convictions included convictions in Miami in 2001, for second degree murder, robbery and burglary for which he received ten years in prison. (R4:774-779) Two victim impact witnesses, Daniels' great aunt and cousin, read prepared statements. (T12:689, 692) The Defense presented Martin's mother and sister as witnesses about Martin's life with them. (T12: 694, 752) Dr. Stephen Bloomfield, a psychologist, testified about his assessment of Martin. (T12:709)

Dr. Stephen Bloomfield, a psychologist, evaluated Martin and found his intellectual functioning to be in the bottom two percent of the population his age, placing him in the mildly retarded range. (T12:719-747) Due to lost school records and insufficient information about Martin's ability to function outside of a prison or institutional setting, Bloomfield could not complete a diagnosis of mental retardation. (T12:723-727) There were no records to establish a mental retardation diagnosis before the age of eighteen. (T12:723-725)

Bloomfield used the latest Wechsler Adult Intelligence Scale,

Fourth Edition (WAIS-IV), as his testing instrument. (T12:722) The instrument consists of a number of subtests, and Martin scored from 55 to no higher than 69 on any of the subtests. (T12:730,742-743) [Dr. Bloomfield's written report provides the complete scoring of the test and concludes Martin has a full-scale IQ of 54. (R5:802-809)] Because Martin's school records had been destroyed, Bloomfield was unable to find any IQ testing performed before Martin was eighteen, and consequently, Bloomfield could not determine if Martin was diagnosed as mentally retarded before age eighteen. (T12:723-725) Department of Corrections records for Martin's prior incarcerations did have a number of IQ screening test scores. (T12:734-736) These screens are not diagnostic instruments and are used for determining placement and adaptability to the prison environment. (T12:735-736) Where the WAIS-IV has 12 to 14 subtests, these screen may have three or four. (T12:728, 734-738) Martin's scores on all but two of these screening tests were below an IQ range of 70. (T12:727) [Dr. Bloomfield's written report noted some of these IQ screening scores: 58, 63, 64, 94 and 71. (R5:802-809)]

The adaptive functioning portion of the mental retardation evaluation could not be completed for lack of information. (T12:726-727) However, Bloomfield did learn through an interview with Martin's mother, that Martin had been in special education programs when in school in Miami. (T12:723,725) Bloomfield

concluded that Martin is functionally illiterate (T12: 729) Martin spent his adult life on SSI due to disability. (T12:731) Martin reported a significant history of alcohol and drug abuse, but Bloomfield ruled out alcohol and drugs as a contributor to Martin's low functioning. (T12:733-734) Martin did complete a substance abuse class in prison at the Tier One level. (R5:808) Although time spent incarcerated is not relevant to determining the adaptive functioning evaluation, the prison's assessment of Martin's ability to adapt in prison was fairly low. (T12:740-741)

Iomia Sikes, Martin's mother, testified. (T12:694) Martin and his sister were her only children, and they have a good relationship. (T12: 700, 706-707) Martin grew up in Miami and went to school in Liberty City. (T12:701) She said he was a good child, helped her around the house. (T12:696) Martin was slow mentally and never learned to read well. (T12:698) Other children picked on him in school, they would beat him up, and one time, they glued his mouth shut. (T12:695) Sikes was proud that Martin completed a plumbing class in the jobs program at school, and he received a school certificate for working at Liberty City Vertical Blinds.(T12:701) He liked to work when he could, and once worked at a hotel in maintenance. (T12:697) Martin's physical problems keep him from working. (T12:696-697) He suffers from diabetes, severe asthma and sleep problems. (T12:696-697) When Martin had money, he always helped his mother pay the bills. (T12:698) Martin

does not bother anyone and spends time watching television in his room. (T12:699) If someone picks on him, he does have a temper problem. (T12:699) He asks his mother to tell the person to just leave him alone. (T12:699) Sikes also testified about Martin's certificate he received when he was saved and baptized in 1995. (T12:702-703) She said Martin was reverent, and he was a deacon in the church. (T12:704)

Martin's older sister, Jaclyn Martin, testified about their relationship. (T12:752) She said she basically raised him because she kept him while their mother worked. (T12:753) Their mother and father drank too much and fought. (T12:756) Once, they almost drove the whole family into a canal. (T12:756) Jaclyn said Martin is a good person. (T12:754) Because of his health, he could no longer work. (T12:754) He used to do "pipe work." (T12:754) He could not read or write. (T12:757) Martin now just stays home, eats, sleeps and watches TV. (T12:754) When Martin had money, he was generous, and he gave his mother money. (T12:755) Sometimes, Martin loses his temper, but Jaclyn said she could talk to him and help him with it. (T12:758)

In rebuttal, the State presented Detective Chris Stros who interviewed Martin regarding his case in Miami. (T12:748) Stros said Martin was able to read aloud the Miranda warnings. (T12:749-751)

On May 8, 2012, the court held a Spencer hearing. (R7:1253-

1266) No additional testimony was presented. (R7:1253-1266) The trial court had for consideration the sentencing memoranda that had been previously filed ((R5:812,821), the Pre-sentence Investigation Report(PSI), Dr. Bloomfield's psychological evaluation that had been previously presented to the court (R5:802; T12:676-677) and incorporated by reference in the PSI. (R7:1253) Included in the PSI and the psychological evaluation was Martin's report of his abuse of drugs and alcohol and his arrests on drug charges in 1990, 1996. (R5:806-807) Defense counsel argued against the finding of the aggravating circumstances of cold, calculated and premeditated and especially heinous, atrocious or cruel. (R7:1258-1259)

SUMMARY OF ARGUMENT

1. The trial court made improper findings of fact concerning Martin's low intelligence, failing to acknowledge his full-scale IQ score of 54. Additionally, the court failed to afford the mitigator the significance it is legally required. This inadequate consideration of Martin's low intellectual functioning in mitigation renders the death sentence unconstitutional. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VIII, XIV, U.S. Const.; see, Penry v. Lynaugh, 492 U.S. 302 (1989). Martin asks this Court to reverse his death sentence.

2. Arthur Martin has a history of alcohol and drug abuse starting in his early teen years. This information was presented to the trial judge through Dr. Bloomfield's report and again in the Presentence Investigation Report. A history of alcohol or drug abuse, even where the defendant was not under the influence at the time of the homicide, has been consistently recognized as mitigating. In this case, the trial court failed to even mention Martin's drug and alcohol abuse, much less evaluate it for mitigation purposes. Failure to even acknowledge this important mitigating factor violates Martin's constitutional rights to due process and a fair sentencing process in accord with the requirement set forth in Campbell v. State, 571 So. 415, 418-419 (Fla. 1990). See, Amends. V, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const.; Eddings v. Oklahoma, 455 U.S. 104 (1982).

3. The evidence was insufficient to prove the cold, calculated and premeditated and the especially heinous, atrocious or cruel aggravating circumstances. The trial court's erroneous use of these two aggravating factors in sentencing renders Martin's death sentence unconstitutional. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const.

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). Martin 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, Martin now asks this Court to reconsider these decisions.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN MAKING IMPROPER FINDINGS OF FACT AND GIVING INSUFFICIENT CONSIDERATION IN MITIGATION TO MARTIN'S RETARDED INTELLECTUAL FUNCTIONING.

A defendant in a capital case who is determined to be mentally retarded may not be sentenced to death because such a sentence constitutes cruel and unusual punishment. Amend. V, VIII & XIV, U.S. Const.; Atkins v. Virginia 536 U.S. 304 (2002); see, also, Sec. 921.137, Fla. Stat. (2001); Fla. R. Crim. P. 3.203. Martin has a full scale IQ of 54. (T12:730, 742-743; R5:802-809) His IQ scores places him in the retarded intellectual range -- the lower two percent of the population. (T12:730, 742-743; R5:802-809) Nevertheless, the psychologist in this case could not determine if Martin was mentally retarded under the legal definition because Martin's school records had been destroyed. (T12:723-727) The psychologist was left with insufficient information to conclude that Martin had been diagnosed as mentally retarded before age eighteen as the legal definition requires. Additionally, due to lack of information, the expert could not evaluate Martin's adaptive functioning as legally required. See, Sec. 921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b). Even assuming that the legal bar to the death penalty may not have been established, there was strong support for Martin's low mental functioning in the mentally retarded range.

The trial court made improper factual findings and gave

inadequate consideration to Martin's low mental functioning as a mitigating circumstance. In the sentencing order the trial judge wrote:

> C. The Defendant has a low cognitive functioning.
>
> Dr. Stephen Bloomfield testified that the Defendant has low cognitive functioning. Dr. Bloomfield stated that the Defendant's IQ falls in the lower two percent, meaning that ninety-eight to ninety-nine percent of the people his same age have higher IQs.[fn6] This Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed.
>
> * * * *
>
> [fn6]
>
> Dr. Bloomfield found that the Defendant was competent to stand trial, and could not diagnose the Defendant as mentally retarded. Dr. Bloomfield administered the WAIS-R to the Defendant, and he registered with an IQ of 71. However, Dr. Bloomfield's research revealed one the Defendant's prior IQ tests resulted in score of 94.

(R5:855-856)(App)

The footnote in the order reveals that the trial court did not understand Bloomfield's testimony and written report. Bloomfield administered the WAIS-IV test, and Martin's full-scale IQ is 54. (R5:802-809)(T12:730,742-743) Dr. Bloomfield's written report provides the complete scoring of the test and subtests. (R5:802-809)] This was the only full-scale IQ test administered to Martin, Bloomfield never found a previous one in any of the records. (12:728)

Department of Corrections records for Martin's prior incarcerations did have a number of IQ screening test scores. (T12:732-736) These screens are not diagnostic instruments and are

used for determining placement and adaptability to the prison environment. (T12:735-736) Where the WAIS-IV has 12 to 14 subtests, these screens may have three or four. (T12:728, 734-738) Martin's scores on all but two of these screening tests were below an IQ range of 70. (T12:727) Dr. Bloomfield's written report noted some of these IQ screening scores: 58, 63, 64, 71 and 94. (R5:802-809) The IQ screening test score of 71 that the trial court referenced was performed when Martin was 23 years-old. (R5:808) Martin was 41 years-old when Bloomfield examined him. (R5:805) The WAIS-R was used when Martin was 23 years-old was an abbreviated form with only some of the subtests. (T12:736-737) (R5:808) Nevertheless, that test showed Martin with a second grade reading level. (R5:808) The score of 94 noted in the trial court's order was also from a screening test, the WASI, performed in 2009. (R5:808)(T12:728, 736)

Mental retardation was considered a significant mitigator even before being a legal bar to execution. See, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989); Thompson v. State, 648 So.2d 692 (Fla. 1995). This Court in Thompson wrote,

> In *Penry v. Lynaugh, 492 U.S. 302, 340, 109 S.Ct. 2934, 2958, 106 L.Ed.3d 256 (1989)*, the United States Supreme Court found that execution of the mentally retarded does not violate the cruel and unusual punishment provisions of the Eighth Amendment to the Unites States Constitution. The court cautioned, however, that such a factor must be considered as a mitigating circumstance. *Id.* This Court has not established a minimum IQ score below which an execution would violate the Florida Constitution. We have, however, elected to follow the approach suggested by the United States Supreme Court and treat low intelligence as a significant mitigating factor

> with lower scores indicating the greater mitigating influence....

Thompson, 648 So.2d at 697. This Court in Thompson, directed that low intelligence be considered as a "significant mitigating factor with lower scores indicating the greater mitigating influence." Ibid. The trial court's order in this case fails to acknowledge Martin's correct IQ scores and fails to follow Thompson's directive to consider Martin's low intelligence as a significant mitigating circumstance.

An analogous situation occurred in cases involving the age mitigator before the constitutional ban on executing juvenile offenders was set at age eighteen. This Court had held that the state constitution prohibited a death sentence on juveniles seventeen or below. Brennan v. State, 754 So.2d 1 (Fla. 1999). In cases where a juvenile was older than seventeen, but below age eighteen, this Court held the age mitigator must be found and afforded extra significance in mitigation. See, e.g., Bell v. State, 841 So.2d 329, 335 (Fla. 2003); Urbin v. State, 714 So.2d 411, 418 (Fla. 1998); Ellis v. State, 622 So.2d 991, 1001 (Fla. 1993). In Bell, this Court discussed this position as follows:

> This Court has determined that "[t]he relative weight given each mitigating factor is within the discretion of the sentencing court" *Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000)*. However, in *Urbin v. State, 714 So.2d 411, 418 (Fla. 1998)*, we stated that "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier [the age] statutory mitigator becomes." .....
>
> * * * *

> Although the Court in *Ellis* [622 So.2d at 1001] acknowledged that the assignment of weight falls within the trial court's discretion, when the statutory mitigator is age and the juvenile is a minor that discretion is limited. Indeed, the *Ellis* Court also stated that "there must be some evidence tending to support the finding of unusual maturity. Otherwise, the mitigator of age must be accorded full weight as a statutory mitigating factor." [*Ellis* 622 So.2d at 1001, fn 7].

Bell, 841 So.2d at 335. The same analysis is applicable to this case regarding Martin's low mental functioning in the mentally retarded range, where the legally defined mental retarded diagnosis could not be determined because of missing records --- records the Florida school system had destroyed. Just as the seventeen-year-old defendants in Bell, Urbin, and Ellis were entitled to have their age of seventeen afforded extra significance in mitigation because it approached the constitutional bar, Martin is entitled to have his low intellectual function in the mentally retarded range give extra significance in mitigation.

In conclusion, the trial court made improper findings of fact concerning Martin's low intelligence and failed to afford the mitigator the significance it is legally required. This inadequate consideration of the mitigation renders Martin's death sentence unconstitutional. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VIII, XIV U.S. Const.; see, Penry v. Lynaugh, 492 U.S. 302 (1989). Martin asks this Court to reverse his death sentence.

ISSUE II

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

Arthur Martin has a history of alcohol and drug abuse starting in his early teen years. This information was presented to the trial judge through Dr. Bloomfield's report and again in the Presentence Investigation Report. (R5:806-807)(PSI) A history of alcohol or drug abuse, even where the defendant was not under the influence at the time of the homicide, has been consistently recognized as mitigating. See, e.g., Morris v. State, 811 So.2d 661, 667 (Fla. 2002); Mahn v. State, 714 So.2d 391, 401 (Fla. 1998); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). When such information is present, the trial court is required to consider and evaluate it as mitigation. Ibid. In this case, the trial court failed to even mention Martin's drug and alcohol abuse, much less evaluate it for mitigation purposes. (R5:844-862)(App) Failure to even acknowledge this important mitigating factor violates Martin's constitutional rights due process and a fair sentencing process in accord with the requirement set forth in Campbell v. State, 571 So. 415, 418-419 (Fla. 1990). See, Amends. V, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const.; Eddings v. Oklahoma, 455 U.S. 104 (1982).

In Dr. Bloomfield's written report and the PSI, information about Martin's long-term abuse of alcohol and drugs was presented. (R5:806-807)(PSI) Martin's substance abuse was mentioned and

referenced in the Spencer hearing. (R7:1255) Martin reported that he used alcohol for the first time at age six (R5:806), and as a teenager he used alcohol regularly on the weekends. (PSI) He began smoking marijuana at age 12, and he continued to use marijuana and last smoked the day of his arrest for this offense. (R5:806) (PSI) Martin also smoked powder cocaine starting at age 13. (R5:807)(PSI) He was using cocaine daily by age 15. (R5:807)(PSI) At various times as a teenager, Martin used heroin, Quaaludes and Valium. (PSI) While incarcerated, Martin participated in substance abuse classes, Alcoholics Anonymous, and anger management classes. (R5:807) (PSI) Department of Corrections records show he completed a drug abuse program in tier one.(R5:808) Martin has also been arrested for drug related offenses at least in 1988 and 1990, when he was in Georgia. (PSI) Martin said he used drugs the day of the homicide and may have had some alcohol as well. (R5:807)

Evidence of Martin's drug and alcohol history was particularly important in evaluating the mitigating impact of Martin's low intellectual functioning. Although Dr. Bloomfield did not conclude the substance abuse caused Martin's intellectual disabilities, the long-term impact of the abuse could have been an important factor on Martin's behavior. Martin's drug and alcohol abuse should have been considered in conjunction with his low intellectual abilities. See, e.g., Morrison v. State, 818 So.2d 432, 457 (Fla.2002)("low intellectual ability combined with drug

and alcohol abuse would result in exercise of bad judgment");Robinson v. State, 684 So.2d 175 (1996)(court failed to consider mental problems and chronic drug and alcohol abuse noted in psychiatrist report and PSI); Campbell v. State, 571 So.2d at 418-419 (low IQ and chronic drug and alcohol abuse mitigation).; Mahn v. State, 714 So.2d 391, 401 (Fla. 1998)(error not to consider history of drug and alcohol abuse with defendant's mental problems). Collectively, these factors were significant mitigation.

The failure of the trial judge to consider the evidence of Martin's history of alcohol and drug abuse renders the death sentence unreliably imposed in violation of Martin's constitutional rights. See, Amends. V, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const. Martin now asks this Court to reverse his death sentence.

ISSUE III

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCES THAT THE HOMICIDE WAS COMMITTED IN A COLD CALCULATED AND PREMEDITATED MANNER AND WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

A. The Evidence Failed To Prove Beyond A Reasonable Doubt That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner.

The aggravating circumstance that the capital felony was committed in a cold, calculated and premeditated manner as provided for in Section 921.141(5)(i), Florida Statutes has been defined as requiring the four elements. See, e.g., Jackson v. State, 648 So.2d 85 (Fla. 1994); Walls v. State, 641 So.2d 381 (Fla. 1994). This Court, in Walls, discussed them as follows:

> Under Jackson, there are four elements that must exist to establish cold, calculated premeditation. The first is 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."
>
> * * * *
>
> Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident."
>
> * * * *
>
> Third, Jackson requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder.
>
> * * * *
>
> Finally, Jackson states that the murder must have "no pretense of moral or legal justification." ... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide...

Walls, at 387-388. The aggravator "pertains specifically to the

state of mind, intent and motivation of the defendant." Wright v. State, 19 So.3d 277, 298 (Fla. 2009). A heightened form of premeditation is required. See, e.g., Kaczmar v. State, 104 So.3d 990, 1006 (Fla. 2012). In evaluating the element of cold, calculated and premeditated, the trial court must consider the totality of the circumstances. See, e.g., Patrick v. State, 104 So.3d 1046, 1067-1068 (Fla. 2012); Kaczmar v. State, 104 So.2d at 1006. The State must prove beyond a reasonable doubt that the defendant carefully planned or prearranged the murder before the crime began. Ibid. There must be sufficient time for the defendant to contemplate and plan the homicide -- a homicide committed as the result of a spontaneous decision does not qualify for the aggravating circumstance. See, e.g., Smith v. State, 28 So.3d 838, 867-868 (Fla. 2010).

In this case, the State failed to prove that Martin carefully planned or prearranged the murder. The trial court addressed facts regarding this element of the aggravator as follows:

> The evidence presented at trial proved beyond a reasonable doubt the existence of this aggravating circumstance. First, the Defendant's actions were a product of cool, calm reflection in that no evidence was presented which indicated his actions were prompted by emotional frenzy, panic, or a fit of rage. Second, the Defendant planned to murder Mr. Daniels when he retrieved the .45 caliber pistol from Mr. Batie's car. Third, the Defendant exhibited heightened premeditation. The Defendant could have left Mr. Daniels after firing the first round of shots into the driver's side of the vehicle. Instead, the Defendant tracked Mr. Daniels around the car as he attempted to escape the vehicle, firing once into the windshield, and firing several times

into the passenger's side. The Defendant ultimately fired at least thirteen shots, and did stop firing until he was sure he completed his objective. Finally, the Defendant had no pretense of moral or legal justification for the murder.

Overall, the totality fo the circumstances indicate that the Defendant carried out Mr. Daniels' murder in a cold, calculated, and premeditated manner. The Defendant was told a rumor that Mr. Daniels was the person who caused Mr. Batie to be grazed by a bullet. The Defendant then armed himself with a .45 caliber pistol with an extended magazine and approached Mr. Daniels. The Defendant's intent was not just to commit a felony, it was to kill. After the Defendant fires six shots into the driver's side of the vehicle, he continued to follow Mr. Daniels around the vehicle as Mr. Daniels tried to escape. The Defendant could have stopped shooting and left Mr. Daniels, but did not. See, Lynch, 841 So.2d at 372-73 (holding the trial court's finding that the murder was calculated where the defendant had time to reflect between firing the first shot and the final shot). The Defendant was not prompted by frenzy, panic, or rage, and Mr. Daniels did nothing to provoke the Defendant. By all appearances, this murder was carried out as a matter of course....

(R5:852-853).

The homicide was the result of a spontaneous act of a man who suffers from intellectual deficiencies in the mentally retarded range that make him prone to bad judgements and impulsive behaviors. As noted in Atkins v. Virginia, 536 U.S. 304, 318 (2002), "...they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Franklin Batie, the co-defendant, testified that when Martin returned to the car, he told Martin the driver of the SUV was the person who shot

at him. (T9:364) Martin immediately picked up the pistol Batie had placed on the front passenger seat, and he walked to the SUV and began shooting. (T9:365-366) There was no time for Martin to engage in reflection, calculation or preplanning -- he simply committed an impulsive act. Contrary to the trial court's finding, it was Batie who had the gun and brought it to the scene, not Martin. (T9:964) Batie had the motive to kill the victim, and he had the firearm. (T9:358-359, 364, 371-372) Although Martin picked up the gun that was made available to him when Batie left it in the passenger seat of the car, this did not demonstrate that Martin procured a weapon in advance as part of a calculated plan. Martin picked up the gun as a weapon of opportunity that was already at the scene. Martin fired numerous shots, no doubt partly because of the extended 30 round clip Batie bought for his pistol. (9:357) The accounts of the witnesses demonstrate that this entire shooting occurred quickly. As a result, the trial court's conclusion that Martin had sufficient time to reflect and calculate between the first and fatal shots do not have an adequate factual basis. Moreover, the trial court's reliance on Lynch v. State, 841 So.2d 362 (Fla. 2003), is misplaced because the defendant in Lynch wrote a letter with a murder-suicide plot two days before the murder, held the victim's daughter hostage for forty minutes waiting for the victim, and there was a five to seven minute delay between the initial shots and the final shots he fired. Lynch, 841 So.2d at

372.

The trial court erred in finding the CCP aggravating circumstance, and the use of that factor in sentencing violates Martin's constitutional rights to due process and protection from cruel or unusual punishment. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const. Martin now asks this Court to reverse his death sentence.

B. The Evidence Failed To Prove Beyond A Reasonable Doubt That The Homicide Was Committed In An Especially Heinous, Atrocious or Cruel Manner.

In State v. Dixon, this Court defined the especially, heinous, atrocious or cruel aggravating circumstance provided for in Section 921.141 (5)(h) Florida Statutes as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crimes apart from the norm of capital felonies the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

The trial court improperly found the murder in this case to be especially, heinous, atrocious or cruel (HAC). (R5:848-851)(App) Although acknowledging that shooting deaths are not usually HAC, the court did not find additional facts that legally qualified the murder for the aggravating circumstance. Shooting murders

typically do not qualify for the aggravating circumstance, unless there are other factors showing significant, prolonged physical or emotional pain to the victim. See, e.g., Ferrell v. State, 686 So.2d 1324, 1330 (Fla. 1996); Shere v. State, 579 So.2d 86, 96 (Fla. 1991); Lewis v. State, 398 So.2d 432, 438 (Fla. 1981); Cooper v. State, 336 So.2d 1133 (Fla. 1976).

First, the trial court relied on the medical examiner's testimony that there were twelve gunshot wounds. (R5:849) This Court has held that multiple gunshot wounds alone, do not qualify to establish HAC. See, e.g., McKinney v. State, 579 So.2d 80, 84 (Fla. 1991); Shere v. State, 579 So.2d at 96; Lewis v. State, 377 So.2d 640 (Fla. 1979).

Second, the court noted that the gunshot wounds showed the victim moved around inside the vehicle and tried to get out in an attempted to avoid the gunshots. (R5:849-850) This fact does not establish the HAC aggravator. See, Stein v. State, 632 So.2d 1361, 1363, 1367 (Fla. 1994)(HAC not found where multiple gunshot wounds to the victim showed he moved around at the time of the shooting). A momentary attempt to escape the shooting or even begging the assailant not to shoot does not qualify a shooting death for HAC. See, Stein v. State, 632 So.2d at 1363 (HAC incorrectly found where victim sustained multiple gunshot wounds that showed he moved around in attempt to avoid the shots); Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1993)(HAC disapproved although store clerk begged

for his life before being shot); Brown v. State, 526 So.2d 903, 907 (Fla. 1988) (HAC not proper even though officer begged not to be shot after a struggle with defendant); Lewis v. State, 377 So.2d 640 (Fla. 1979)(HAC disapproved where victim shot once in the chest and then several times in the back as he attempted to flee).

Third, the court found that the victim's hands and arms had been shot, rendering them useless. (R5:849-850) These wounds were the product of the random gunfire of this assault. There is no indication these were inflicted as a means of tormenting the victim as seen in cases such as Troedel v. State, 462 So.2d 392, 397-398 (Fla. 1985)(gunshot wounds to both legs before fatal shots). The mere fact that these wounds to the arms and hands occurred during the assault is insufficient to prove the aggravating circumstance, even if the wounds were the result of the victim raising his hands in a defensive action. See, Rivera v. State, 545 So.2d 864, 866 (Fla. 1989)(HAC not approved where police officer victim who on his knees with his hands raised was shot in the arm during the five gunshots fired); Brown v. State, 526 So.2d at 906-907 (Fla. 1988)(HAC not approved where police officer was shot in the arm, rendering it useless, and pled for his life before being fatally shot).

Fourth, the court found that death was not instantaneous. (R5:850) This Court has never held that shooting deaths must be instantaneous to avoid qualifying for HAC. The accounts of the

witnesses in this case show that the shooting was a quick, sustained attack without notice to the victim. There was no prolonged physical or emotional suffering during the attack. A brief awareness of impending death does not establish the aggravator. See, e.g., Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1988). The wounds caused the victim in this case to die from internal blood loss rather than an instantaneous death from a head wound, but there was no indication of a prolonged, suffering death. (T10:476-478) Contrary to the trial court's finding that this process would have been a slow and painful death (R5:850), Dr. Rao testified the wounds that ruptured the aorta, heart and liver would have caused rapid blood loss rendering the victim unconscious and comatose before death occurred. (T10:477) Dr. Roa testified:

> Q. So would these wounds be, I guess I'll use the lay term instantly fatal? In other words, would a person who's shot in such a way as you described just die right on the spot or are these wounds that are going to have some other effect?
>
> A. No. He would bleed from these wounds. There would be a period of survival in which he would be attempting to shield himself from the bullets.
>
> Q. Now you mentioned rupturing the aorta and shooting the heart and hitting the liver which is a vascular organ. Tell me the practical effect of that, what that does to a body and the symptoms that a person who's injured in that way would experience?
>
> A. After you suffer a certain amount of rapid blood loss he would be rendered unconscious and then would go into a coma and then from which he would die.

(T10:477)

Shooting deaths are typically not classified as especially heinous, atrocious or cruel. Nothing in this case legally separates the crime from the typical shooting death where death occurs quickly. The trial court improperly found the HAC aggravator, and using this factor in sentencing Martin to death violates his constitutional rights to due process and to be free from cruel and unusual punishment. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I Secs. 9, 16, 17, Fla. Const. He now asks this Court to reverse his death sentence.

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). Martin's various motions to dismiss the death penalty as an option in his case should have been granted. (R3:434-460, 479-481; R4:616, 660; R7:1215-20) 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-decision-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.

Martin 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). Martin also acknowledges the recent decision in the United States Court of Appeals For The Eleventh Circuit holding it was without authority to overturn prior United States Supreme Court authority upholding Florida's statute on Sixth Amendment grounds even though seeming in conflict with Ring. Evans v. Department of Corrections, __ F.3d __ case no. 11-144498 (11th Cir. October 23, 2012). Additionally, Martin 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., 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. At this time, Martin 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. Martin's death sentence would then fail to be constitutionally imposed. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const. Martin's death sentence must be reversed for imposition of a life sentence.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Candace Sabella, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapptlh@myfloridalegal.com as agreed by the parties, and to appellant, Arthur Martin, #436687, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026, on this 25th day of March, 2013.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

NANCY A. DANIELS
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IN THE SUPREME COURT OF FLORIDA

ARTHUR JAMES MARTIN,

Appellant,

v. **CASE NO. SC12-1762**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO

INITIAL BRIEF BRIEF OF APPELLANT

Sentencing Order dated August 3, 2012

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

CASE NO.: 16-2009-CF-14374-AXXX-MA

DIVISION: CR-B

STATE OF FLORIDA,

vs.

ARTHUR JAMES MARTIN,
Defendant.
_____/

FILED
AUG 0 3 2012
CLERK CIRCUIT COURT

SENTENCING ORDER

The Defendant, Arthur James Martin, was tried for the murder of Javon Abdullah Daniels. The murder occurred on October 28, 2009. The guilt phase of the trial commenced on March 26, 2012, wherein the jury returned a verdict on March 28, 2012, finding the Defendant guilty of First Degree Murder. The jury further found the Defendant discharged a firearm causing death during commission of the offense.

The penalty phase commenced on April 2, 2012. The State presented the victim impact testimony of Shirley Gross and Marie Gross. The State also presented the testimony of Detective Chris Stroze. The Defense presented the testimony of Iomia Sikes, Dr. Stephen Bloomfield, and Jacqueline Martin. The jury returned a recommendation, by a vote of nine-to-three, that the Defendant be sentenced to death for the murder of Javon Daniels.

A separate Spencer[1] hearing was held on May 8, 2012. As ordered by the Court, the State and Defense filed their memoranda in support of and in opposition to the death penalty, and both parties presented argument to support their respective positions. Further, counsel for both parties

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

acknowledged receipt and review of the Presentence Investigation Report ("PSI").

This Court is mandated by section 921.141, Florida Statutes, to evaluate all aggravating and mitigating factors in making its decision. This Court presided over the guilt and penalty phases of the trial, including the Spencer hearing, considered the testimony and observed the demeanor of all witnesses, reviewed all exhibits introduced into evidence, listened to argument of counsel, reviewed the PSI,[2] and reviewed all sentencing memoranda. This Court also reviewed a multitude of relevant decisions issued by the Supreme Court of Florida and the United States Supreme Court concerning a judge's responsibility whenever the imposition of the death penalty is considered. This Order sets forth in writing the results of this judicial effort.

FACTS

On the afternoon of October 28, 2009, the victim, 19 year-old Javon Daniels, and his passenger, Willie McGowan, arrived at the Weber 5B apartments in Jacksonville, Florida. Mr. McGowan exited the vehicle, a Toyota Rav 4, and entered the apartment complex. The Defendant and Franklin Batie had arrived at the apartment complex approximately thirty minutes before, although neither of them lived there. The area is one known for drug related activity.

A few days prior to October 28, 2009, Mr. Batie had been at a different location where a shooting had occurred. During this incident, Mr. Batie was grazed across the back of his head by a bullet. Mr. Batie did not know the identity of the shooter, or whether he was the intended target, but had heard rumors that Mr. Daniels was the shooter. Mr. Batie noticed Mr. Daniels when he pulled up to the Weber 5B apartments on West 22nd Street. Mr. Batie told the Defendant that he

[2]This Court did not consider the Probation Officer's recommendation that the death penalty be imposed.

thought Mr. Daniels was the person who shot at him.

The Defendant proceeded to arm himself with a .45 ACP Masterpiece with a 30-round extended magazine, taken from the passenger area of Mr. Batie's car. The Defendant then walked to the driver's side of the vehicle Mr. Daniels was in and, while standing no further than ten feet away, began shooting. The Defendant fired seven shots at point-blank range. Mr. Daniels attempted to escape by crawling over the passenger seat and out the door. However, the Defendant walked around the front of the vehicle, firing one shot through the windshield, and several more through the passenger side of the vehicle and shot him back down in the car. Thirteen fired cartridge cases were recovered from the murder scene, all of which were fired from the .45 caliber pistol.

The Defendant returned to Mr. Batie's car and the two fled the murder scene. Mr. Batie dropped the Defendant off at his home. The Defendant kept the pistol. The Defendant has a distinguishable appearance[3] and was later positively identified, in court and out of court, by multiple witnesses. One witness, Tasheana Hart, saw the Defendant after the murder and he offered her money to keep silent about his involvement in the murder.

Mr. Daniels died in the vehicle. Mr. Daniels was found with his foot wedged against the gear shift lever and his body sprawled face down in the passenger seat, leaning against the passenger side interior. The passenger side window had been pushed out of the vehicle from the inside and was on the ground smeared with blood.

Mr. Daniels sustained twelve gunshot wounds, four of which were fatal. Six of the wounds entered Mr. Daniels' body from the rear and several of the wounds entered his arms as he held them

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[3]He was described by multiple witnesses as heavy-set (around 300 pounds), with a 48" waist and low cut hair. He had nicknames of "Shorty Fat" and "Beer Belly."

up to protect himself. Mr. Daniels' arms and left hand were broken from the bullets, and rendered unusable. Mr. Daniels also sustained multiple lacerated organs and lost a large amount of blood prior to dying.

AGGRAVATING CIRCUMSTANCES

The State proposed three aggravating circumstances: (1) The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person; (2) The capital felony was especially heinous, atrocious, or cruel; and (3) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

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

1. **The Defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person. § 921.141(5)(b), Fla. Stat.**

This aggravating circumstance is one of the most weighty in Florida's sentencing calculus. Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002). Further, the Florida Supreme Court has found that this aggravating circumstance, standing alone, carries sufficient weight to support the death penalty. Rodgers v. State, 948 So. 2d 655 (Fla. 2006); LaMarca v. State, 785 So. 2d 1209 (Fla. 2001); Ferrell v. State, 680 So. 2d 390 (Fla. 1996); Duncan v. State, 619 So. 2d 279 (Fla. 1993). On December 13, 2001, the Defendant, pursuant to a guilty plea, was convicted of Murder in the Second Degree with a Deadly Weapon, two counts of Armed Robbery, Burglary with Assault or Battery (Armed), and Possession of a Firearm by a Convicted Felon. The Defendant was sentenced to ten years of incarceration, and was released on June 1, 2009. The State introduced a certified copy of the

Judgement and Sentence and the Defendant stipulated to the existence of these convictions. Thus, the evidence established this aggravating circumstance beyond all reasonable doubt. Less than six months after the Defendant's release from incarceration on this previous murder conviction, the Defendant took another life. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed.

2. The capital felony was especially heinous, atrocious, or cruel. § 921.141(5)(h), Fla. Stat.

The heinous, atrocious, or cruel aggravator ("HAC") is another of Florida's weighty aggravators. King v. State, 89 So. 3d, 209, 232 (Fla. 2012); Offord v. State, 959 So. 2d 187, 191 (Fla. 2007); Sireci, 825 So. 2d at 887. To qualify for the HAC aggravator, "the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim." Hertz v. State, 803 So. 2d 629, 651 (Fla. 2001) (citation omitted). The HAC aggravator applies to murders which "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998). This aggravator "focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." Brown v. State, 721 So. 2d 274, 277 (Fla. 1998). Additionally, "the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony." Francis v. State, 808 So. 2d 110, 135 (Fla. 2001) (citing Walker v. State, 707 So. 2d 300, 315 (Fla. 1997)); see also Lynch v. State, 841 So. 2d 362, 369 (Fla. 2003) (in determining the existence of the HAC aggravator, the focus should be on the perceptions of the victim). "Fear, emotional strain, and terror of the victim . . . may make an otherwise quick death especially heinous, atrocious, or cruel." Heyne v. State, 88 So. 3d 113, 122 (Fla. 2012) (quoting Lynch, 841 So. 2d at 360).

The evidence showed that the Defendant approached the vehicle Javon Daniels was in and began shooting into the driver's side. Seven shots were fired at point-blank range. Mr. Daniels attempted to escape the vehicle and the onslaught of bullets by crawling over the passenger seat and out the door. However, the Defendant walked around vehicle, firing one shot into the windshield, and then several more into the passenger's side, tracking the victim as he tried to escape the hailstorm of bullets and shooting him "back down into the car". The victim had defensive wounds to his hand and both arms, as his left hand bones and both his humeri were broken by bullets. Mr. Daniels died in the vehicle, with his foot wedged against the gear shift lever, and his body face down across the passenger seat, leaning against the passenger door.

Dr. Valerie Rao testified regarding Mr. Daniels' cause of death, which she determined to be due to multiple gunshot wounds. Mr. Daniels sustained a total of twelve gunshot wounds. Four of the wounds were fatal: 1) one bullet penetrated his stomach, the left lobe of the liver, the left hemidiaphragm, and the right lung; 2) one bullet penetrated both his left and right lung; 3) one bullet penetrated his right side of the flank area, the right lobe of the liver, and the lower lobe of the right lung; and 4) one bullet penetrated his left lung, the left and right ventricles of the heart, the aorta, the esophagus, and the trachea. Six of the shots entered Mr. Daniels' body from the rear. Dr. Rao stated that because the Defendant was shot through glass, the glass actually became secondary missiles, thereby adding to the pain the victim would have suffered.

Additionally, one bullet went through Mr. Daniels' left hand and fractured two bones in the hand. Dr. Rao also testified that Mr. Daniels sustained gunshot wounds to both arms, and that both of his humeri were fractured. Dr. Rao stated that the gunshot wounds to Mr. Daniels' arms made his hands limp and rendered his arms unusable. Dr. Rao indicated that Mr. Daniels' left hand was

also inoperable due to the fractured bones. Dr. Rao testified that Mr. Daniels' would have been unable to manipulate a door lock or handle. Dr. Rao classified the wounds to Mr. Daniels' hand and humeri as defensive wounds. She also stated that Mr. Daniels would have been alert and awake when he sustained these wounds.

Dr. Rao opined that Mr. Daniels' would not have died instantly from his wounds, but would have survived for a period of time, bleeding profusely and attempting to shield himself from the bullets. She explained that Mr. Daniels would have suffered from a large amount of internal bleeding, as well as bleeding from the wounds to the arms. Dr. Rao also opined that the injuries Mr. Daniels sustained were painful.

This Court is cognizant that gunshot deaths are usually instantaneous and do not typically qualify as being heinous, atrocious, or cruel, unless accompanied by acts of mental or physical torture to the victim. Diaz v. State, 860 So. 2d 960, 966 (Fla. 2003). However, the evidence established that Mr. Daniels' death was not easy and instantaneous, but instead Mr. Daniels suffered through an agonizing, slow, and painful death. According to Dr. Rao, the death would have been a slow process of internal bleeding due to the fatal shots to the heart, lungs, and liver. Mr. Daniels endured the assailment of bullets to his back, and attempted to escape through the passenger side of the vehicle. However, Mr. Daniels' attempt to escape was to no avail, as the Defendant tracked him around the vehicle and continued his attack. Mr. Daniels tried to shield himself from the bullets and sustained defensive wounds, as evidenced by his fractured humeri and hand. Certainly, Mr. Daniels was acutely aware of his impending death, and the Defendant, never ceasing in his attack while Mr. Daniels attempted to escape, was utterly indifferent to his fear and suffering. See Buzia v. State, 926 So. 2d 1203, 1214 (Fla. 2006) (upholding the HAC aggravator and noting that whether the victim's

consciousness lasted for seconds or minutes, he was acutely aware of his impending death); see also Cox v. State, 819 So. 2d 705, 720 (Fla. 2002) (noting that "a victim's suffering and awareness of his or her impending death certainly supports the finding of the heinous, atrocious, or cruel aggravating circumstance"). Based on the totality of the evidence, this Court finds that this aggravating circumstance was proven beyond a reasonable doubt. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed

3. **The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. § 921.141(5)(i), Fla. Stat.**

The cold, calculated, and premeditated ("CCP") aggravator is also among the most serious aggravators set forth in Florida's statutory sentencing scheme. King, 89 So. 3d at 232; Silvia v. State, 60 So. 3d 959, 974 (Fla. 2011); Banks v. State, 46 So. 3d 989, 1000 (Fla. 2010). In order for the CCP aggravator to be applicable, four elements must be proven:

> (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); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (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, 818-19 (Fla. 2011). The heightened premeditation element is defined as "deliberate ruthlessness"[4] and exists in cases where a defendant has the ability to leave the scene with the victim alive, but instead chooses to murder the victim. Baker, 71 So. 3d at 820-21 (quoting Wright v. State, 19 So. 3d 277, 300 (Fla. 2009)). Further, to prove heightened premeditation, the evidence must show that the Defendant had a careful plan or prearranged design to murder, not to

[4]Ballard v. State, 66 So. 3d 912, 919 (Fla. 2011).

just commit another felony. Wright, 19 So. 3d at 300. "A plan to kill may be demonstrated by the defendant's actions and circumstances surrounding the murder even where there is evidence that the final decision to kill was not made until shortly before the murder itself." Baker, 71 So. 3d at 819 (citing Durocher v. State, 596 So. 2d 997 (Fla. 1992)).

Unlike the HAC analysis where the victim's perceptions are applicable, the CCP analysis focuses on the defendant's motivation, state of mind, and intent. Baker, 71 So. 3d at 819 (quoting Wright, 19 So. 3d at 298). The determination of whether the CCP aggravator is present is based upon the totality of the circumstances. Ballard, 66 So. 3d at 919. Circumstances which indicate the existence of the CCP aggravator include advance procurement of a weapon, lack of resistance or provocation on the part of the victim, and the appearance that the murder was carried out as a matter of course. Allred v. State, 55 So. 3d 1267, 1278 (Fla. 2010).

The evidence presented at trial proved beyond a reasonable doubt the existence of this aggravating circumstance. First, the Defendant's actions were a product of cool and calm reflection, in that no evidence was presented which indicated his actions were prompted by emotional frenzy, panic, or a fit of rage. Second, the Defendant planned to murder Mr. Daniels when he retrieved the .45 caliber pistol from Mr. Batic's car. Third, the Defendant exhibited heightened premeditation. The Defendant could have left Mr. Daniels after firing the first round of shots into the driver's side of the vehicle. Instead, the Defendant tracked Mr. Daniels around the car as he attempted to escape the vehicle, firing once into the windshield, and firing several times into the passenger's side. The Defendant ultimately fired at least thirteen shots, and did not stop firing until he was sure he completed his objective. Finally, the Defendant had no pretense of moral or legal justification for

the murder.[5]

Overall, the totality of the circumstances indicate that the Defendant carried out Mr. Daniels' murder in a cold, calculated, and premeditated manner. The Defendant was told a rumor that Mr. Daniels was the person who caused Mr. Batie to be grazed by a bullet. The Defendant then armed himself with a .45 caliber pistol with an extended magazine and approached Mr. Daniels. The Defendant's intent was not just to commit a felony, it was to kill. After the Defendant fired six shots into the driver's side of the vehicle, he continued to follow Mr. Daniels around the vehicle as Mr. Daniels tried to escape. The Defendant could have stopped shooting and left Mr. Daniels, but did not. See Lynch, 841 So. 2d at 372-73 (upholding the trial court's finding that the murder was calculated where the defendant had time to reflect between firing the first shot and the final fatal shot). The Defendant was not prompted by frenzy, panic, or rage, and Mr. Daniels did nothing to provoke the Defendant. By all appearances, this murder was carried out as a matter of course. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed.

MITIGATING CIRCUMSTANCES

The Defendant requested, and this Court instructed, the jury on two statutory mitigating circumstances: (1) The age of the defendant at the time of the crime; and (2) The existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty. While only these statutory mitigating circumstances were presented to the jury, in an

[5]Mr. Batie's statement that he heard Mr. Daniels was the one who shot him cannot be deemed to be a pretense of justification. See Cox v. State, 819 So. 2d 705, 721-22 (Fla. 2002) (finding that there was no pretense of justification because there were no threats to the defendant, real or perceived, from the victim).

abundance of caution, this Court has reviewed each remaining statutory mitigating circumstance and finds that no evidence was presented to support any of the other enumerated statutory mitigating circumstances.

1. The age of the Defendant at the time of the crime. § 921.141(6)(g), Fla. Stat.

In applying this mitigating factor to a non-minor defendant, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity, mental problems, or inability to take responsibility for or appreciate the consequences of his acts. Caballero v. State, 851 So. 2d 655 (Fla. 2003); Hurst v. State, 819 So. 2d 689 (Fla. 2002). The closer a "defendant is to the age where the death penalty is constitutionally barred, the weightier [the age] statutory mitigator becomes." Bell v. State, 841 So. 2d 329, 335 (Fla. 2002) (citing Urbin v. State, 714 So. 2d 411, 418 (Fla. 1998)). The Defendant was forty years old at the time he murdered Mr. Daniels, and twenty-two years older than the legal age of majority. The Defendant had been incarcerated throughout the majority of his thirties. The testimony was, however, that the Defendant liked to work, and although his ability to do so was limited by his physical ailments, he had worked in maintenance, construction, demolition, and plumbing. The Defendant also helped his mother with bills. Thus, the evidence established that the Defendant functioned as a mature adult. See Troy v. State, 948 So. 2d 635, 652 (Fla. 2006) (finding no error on the part of the trial court in denying the thirty-one year old Defendant's request for the age mitigator instruction, where there was ample evidence that he "functioned as a mature adult, including the fact that he was employed"); see also Nelson v. State, 850 So. 2d 514, 528-29 (Fla. 2003) (finding the trial court's rejection of the age mitigator was supported by evidence of the Defendant's functioning as a mature adult, which included the facts that the Defendant temporarily held a job and provided money for

necessities to the mother of his child). Further, there was no evidence of an inability of the Defendant to take responsibility for his actions. However, there was minimal evidence of significant emotional immaturity. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

2. **The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty. § 921.141(6)(h), Fla. Stat.**

A. The Defendant is functionally illiterate.

Dr. Stephen Bloomfield testified that the Defendant has a very low ability to read. Dr. Bloomfield noted that there was some indication that the Defendant could make out some words and had a second grade reading level. Dr. Bloomfield opined that the Defendant was functionally illiterate. Further, the Defendant's sister, Jacqueline Martin, testified that the Defendant cannot read.

In rebuttal, the State presented the testimony of Detective Chris Stroze. Detective Stroze testified that he reviewed a constitutional rights form with the Defendant and that the Defendant was able to read the first statement on the form. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

B. The Defendant has a learning disability.

Dr. Stephen Bloomfield testified that he knew the Defendant had a learning disability because he was illiterate. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

C. The Defendant has low cognitive functioning.

Dr. Stephen Bloomfield testified that the Defendant has low cognitive functioning. Dr. Bloomfield stated that the Defendant's IQ falls in the lower two percent, meaning that ninety-eight

to ninety-nine percent of the people his same age have higher IQs.[6] 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.

D. The Defendant suffered a lifetime of poor health, including asthma, diabetes, and sleep apnea.

The Defendant's mother, Iomia Sikes, testified that the Defendant had diabetes and a lung problem. Ms. Sikes stated that when the Defendant sleeps, he is loud, suffers from nose bleeding, and kicks. The Defendant's sister, Jacqueline Martin, testified that the Defendant had health issues, which included snoring and asthma. Ms. Martin testified that the Defendant cannot walk long distances. Ms. Sikes testified that the Defendant would fall asleep while talking and Ms. Martin testified that the Defendant would fall asleep suddenly. This Court finds this mitigating circumstances was proven and gives it slight weight in determining the appropriate sentence to be imposed.

E. The Defendant was a loving and caring son.

Iomia Sikes testified that the Defendant was a good son. Ms. Sikes stated that the Defendant would go with her to the doctor and that everywhere she goes, he is with her. Ms. Sikes stated that she and the Defendant have a loving mother/son relationship. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

[6]Dr. Bloomfield found that the Defendant was competent to stand trial, and could not diagnose the Defendant as mentally retarded. Dr. Bloomfield administered the WAIS-R to the Defendant, and he registered with an IQ of 71. However, Dr. Bloomfield's research revealed that one of the Defendant's prior IQ tests resulted in score of 94.

F. The Defendant was a hard worker.

Iomia Sikes testified that the Defendant would help her cook, clean, and wash clothes. Ms. Sikes stated that the Defendant would work, and had held a part-time job doing maintenance work at a hotel. Jacqueline Martin testified that the Defendant liked to work, and that he had done state work and pipe work. Ms. Martin also stated that the Defendant helped with housework. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

G. The Defendant was generous.

Iomia Sikes testified that the Defendant would share with her, helping her with bills and getting food. Jacqueline Martin testified that the Defendant was generous and sharing. Ms. Martin stated that the Defendant would give their mother, Ms. Sikes, all of his money to help pay bills. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

H. The Defendant was reverent.

Iomia Sikes testified that the Defendant was saved and baptized on November 19, 1995. Ms. Sikes also stated that the Defendant served as a deacon in the church. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

I. The Defendant was a loving and caring brother.

Iomia Sikes testified that the Defendant and his sister got along well. Jacqueline Martin testified she helped care for the Defendant while their mother was at work. Ms. Martin characterized her relationship with the Defendant as a loving brother/sister relationship. This Court finds this

mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

J. The Defendant's love of work was often thwarted by his poor physical health.

Jacqueline Martin testified that the Defendant could not walk much. This Court finds this mitigating circumstance was proven and gives it very slight weight in determining the appropriate sentence to be imposed.

K. The Defendant's childhood was plagued by the excessive alcohol consumption and fighting of his parents.

Jacqueline Martin testified that their parents used to drink alcohol and argue. Ms. Martin stated that their parents fought a lot and that they had bad childhood experiences. Ms. Martin explained that there was an incident in which she and the Defendant almost fell into a canal when they were little. This Court finds this mitigating circumstance was proven and gives it some weight.

L. The Defendant was respectful to the Judge and other officers of the Court.

This Court personally observed that the Defendant exhibited appropriate behavior throughout most of the proceedings. However, the Defendant, like every other person before this Court, is expected to exhibit appropriate behavior. Further, upon his conviction, the Defendant's behavior and demeanor changed for the worst. The Defendant's ability to conform his conduct to societal norms when it serves his interest does not constitute substantial mitigation. This Court finds this mitigating circumstance was proven and gives it very slight weight.

M. It is disproportionate and disparate to sentence the Defendant to death when the mastermind of the crime, Mr. Batie, will receive a life sentence.

The co-defendant, Mr. Batie, was charged with Second Degree Murder in case number 16-2009-CF-14496-AXXX-MA. The co-defendant entered into a negotiated plea agreement, and pled

guilty to the charged crime. The plea agreement exposes the co-defendant to a term of incarceration of up to life, but he has not yet been sentenced. When one co-defendant has greater culpability than the other, disparate treatment is acceptable. Jennings v. State, 718 So. 2d 144, 153 (Fla. 1998) (citations omitted). As the co-defendant was charged with and pled guilty to Second Degree Murder, rather than First Degree Murder, his culpability is less than that of the Defendant. See Shere v. Moore, 830 So. 2d 56, 61-62 (Fla. 2002) (stating that in order for co-defendants to have the same degree of culpability, they must at least be convicted of the same degree of crime).

Further, the co-defendant's actions in this case make him less culpable. The Defendant was in the co-defendant's car, was prompted by the rumor that Mr. Daniels shot the co-defendant, and used the co-defendant's gun. However, it was the Defendant who made the decision to approach Mr. Daniels and begin firing. It was also the Defendant's decision to continue shooting and track Mr. Daniels around the vehicle as he tried to escape. It was not the co-defendant who pulled the trigger at least thirteen times, it was the Defendant. This Court finds the evidence presented was insufficient to establish this mitigating circumstance.

N. The jury recommendation was not unanimous, in that three of the jurors voted for a life sentence.

Mitigating circumstances are defined as "factors that in fairness or in totality of defendant's life or character, may be considered as extenuating or reducing degree of moral culpability for crimes committed." Consalvo v. State, 697 So. 2d 805, 818-19 (Fla. 1996). Mitigating circumstances also include "any other aspect of the defendant's character or record, [and] any other circumstances of the offense." Jones v. State, 652 So. 2d 346, 351 (Fla. 1995). The fact that the jury made a non-unanimous recommendation for the death sentence is not pertinent to any aspect of the Defendant's

life, background, or character that may reasonably indicate that the death penalty is not an appropriate sentence. Nor is this fact pertinent to any circumstance of the offense that might indicate that the death penalty is not an appropriate sentence. This Court finds this circumstance was proven, but is not mitigating in nature, and has been given no weight in determining the appropriate sentence to be imposed.

ADDITIONAL MITIGATING CIRCUMSTANCES

The Supreme Court of Florida in Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993), requires this Court to consider all mitigating evidence anywhere in the record, whether or not advanced by the Defense. Neither the State, nor the Defense, argued that the Defendant has temper issues or that the Defendant was attacked when he was a child. However, this Court finds the evidence establishes these two mitigating circumstances.

A. The Defendant had temper issues.

Iomia Sikes testified that the Defendant had problems controlling his anger and temper. Jacqueline Martin also testified that the Defendant would sometimes loose his temper. This Court finds this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed.

B. When the Defendant was a child, he was attacked by other children.

Iomia Sikes testified to one incident in which the Defendant was going to school and was attacked by other children. Ms. Sikes stated the children jumped on the Defendant and glued his mouth shut. Ms. Sikes had to take the Defendant to the doctor. This Court finds this mitigating circumstance was proven and has been given slight weight in determining the appropriate sentence to be imposed.

PROPORTIONALITY REVIEW

This Court has considered how the crime in this case compares with other cases and sentences in reported decisions. This Court has also considered this Defendant's culpability with respect to his co-defendant. The vicious and deliberate cruelty and the indifference to the victim's suffering which this Defendant exhibited during the commission of this murder coupled with his previous murderous act, present facts sufficient in the opinion of this Court to warrant the death penalty. Further, although the weapon used was the co-defendant's, it was this Defendant who fired thirteen times at close range despite the squirming and struggling of the victim. In this Court's mind, this makes the Defendant more culpable than his co-defendant.

CONCLUSION

This Court has carefully considered all the evidence presented at the trial and at the sentencing proceedings, and weighed the aggravating and mitigating circumstances found to exist in this case. Understanding that this is not a quantitative comparison, but one which requires qualitative analysis, this Court has assigned an appropriate weight to each aggravating circumstance and each mitigating circumstance as set forth in this Order. This analysis results in a finding by this Court that the aggravating circumstances in this case outweigh the mitigating circumstances. Despite the existence of mitigating factors and the weight assigned to each by this Court, the nature and quality of those factors pales in comparison to the enormity of the aggravating circumstances in this case. The jury was justified in its nine-to-three recommendation that the death penalty be imposed upon the Defendant for the murder of Javon Daniels. This Court is required by law to give great

weight to the jury's recommendation[7] and fully agrees with the jury's assessment of the aggravating and mitigating circumstances. This Court is compelled to conclude that Arthur James Martin's actions in this case, and the manner, means, and circumstances by which those actions were taken, requires the imposition of the ultimate penalty.

Accordingly, it is;

ORDERED AND ADJUDGED that:

Having been found guilty by the jury, you, Arthur James Martin, are hereby adjudicated guilty and sentenced to death for the murder of Javon Daniels. It is further ordered that you be committed to the Department of Corrections of the State of Florida to be securely held until this sentence can be carried out as provided by law.

You are hereby notified that these sentences are subject to automatic review by the Florida Supreme Court. You are further advised that you have the right to counsel and counsel will be appointed to represent you by separate Order.

Arthur James Martin, upon execution of this sentence by the State of Florida, may God have mercy on your soul.

DONE AND ORDERED at Jacksonville, Duval County, Florida in open court, this 3rd day of August, 2012.

LINDA MCCALLUM
CIRCUIT COURT JUDGE

[7] Blackwood v. 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).

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