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IN THE SUPREME COURT OF FLORIDA

WAYNE C. DOTY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-1257

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, WAYNE C. DOTY, raises four issues in his direct appeal from conviction and sentence of death. Doty plead guilty to first degree murder of Xavier Rodriguez.

This brief will refer to Appellant as such, or by proper name "Doty." Appellee, the State of Florida, was the prosecution below; this brief will refer to Appellee as such, or "the state."

The record on appeal is in thirty-five (35) volumes that are numbered consecutively and conform to the requirements of Fla. R. App. P. 9.200.

The complete transcript of the penalty phase proceedings are contained in volumes twenty through twenty-seven (20 – 27). The *Spencer* hearing is contained in volume fourteen (14), and the sentencing hearing is contained in volume fifteen (15). All citations to the record will be referenced by the letter "R" followed by the appropriate volume and page number "(R##: ##)".

The initial brief filed by Appellant's counsel, W.C. McClain, will be referenced by the abbreviation "IB" followed by the appropriate page number "(IB at ##)." Wayne C. Doty, filed a *pro se* brief titled "APPELLANT'S PRO SE SUPPLEMENTAL BRIEF" which is neither referenced nor addressed within this answer.

STATEMENT OF THE CASE AND FACTS

This is a direct appeal in a capital case. The grand jury of Bradford County, Florida, indicted Wayne C. Doty and William Wells for the first degree murder of Xavier Rodriguez.[1] (R1: 1 – 2; 88 – 89). Following a hearing pursuant to *Farretta v. California*, 422 U.S. 806 (1975), Doty was permitted to proceed *pro se*. (R1: 49). Stephen Bernstein and Michael Ruppert were appointed to assist as standby counsel to Doty. (R1: 49). Doty's and Well's case were severed on the State's motion and proceeded accordingly. (R1: 24 – 25). On August 7, 2012, Doty plead guilty to the first degree murder of Xavier Rodriguez. (R9: 52 – 99).

A penalty phase was held from January 7 – 11, 2013, where the state and Doty presented evidence of both aggravation and mitigation. (R20: 1). The penalty phase jury returned an advisory verdict of ten to two (10 – 2), recommending the court sentence Doty to death. (R4: 617; R27: 1026). (R15: 1). The *Spencer* hearing was held on March 13, 2013, and Doty again presented evidence of mitigation. On June 5, 2013, the trial court sentenced Doty to death for the murder of Xavier Rodriguez. (R5: 923 – 944).

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[1] As of July 2, 2014, William Wells has not been tried for the first degree murder of Xavier Rodriguez. The State Attorney is seeking the death penalty; however, no trial date has been set and the discovery process is still being completed.

Facts – Guilt/Penalty Phase

Wayne Doty, William Wells, and Xavier Rodriguez were all inmates housed in the K wing of Florida State Prison. (R22: 498 – 99). Each was a "runner", also known as an "inmate orderly," for K wing where they would receive additional privileges such as TV and phone calls in return for assistance in cleaning and distributing daily meals. (R22: 498 – 99; R23: 580).

When Rodriguez arrived on K wing, Doty felt Rodriguez had disrespected him. First, Rodriguez called Doty a "snitch." (R23: 590). This disrespect continued when Rodriguez called Doty names such as "pussy-ass cracker" and "fuck boy," and eventually culminated with Rodriguez stealing a pack of cigarettes from Doty. (R23: 590). Doty felt the only appropriate recourse was to kill Rodriguez and enlisted the help of Wells.

For weeks, if not months, Doty and Wells planned the murder of Rodriguez with no specific date in mind to carry out their plan; however, a small incident on May 17, 2011, was the last straw for Doty. (R23: 590 – 92). That day Rodriguez was mistakenly selected to work as a runner even though he was not scheduled. (R23: 590 – 91). When Rodriguez insisted he be allowed to work and refused to go back into his cell, Wells took the action as a personal insult; he and Doty decided to murder Rodriguez that day. (R23: 590 – 91).

The initial plan was to lure Rodriguez to the third floor interview room on K-

Wing, stab him, and then hang him off of the balcony. (R24: 612). Doty obtained a homemade knife to ensure that Rodriguez would die. (R24: 594 – 95; R24: 607) Doty then hid the knife in the third floor interview room in advance. (R24: 607).

Under the guise of a private phone call, Doty was given access to the interview room. (R24: 611). The torn pieces of bed sheet had been left in the room, and at that point Doty and Wells decided to change their initial plan and use the sheets. (R24: 608). Wells would bind Rodriguez's hands using a special knot he knew how to tie. (R24: 612 – 13).

Wells coaxed Rodriguez into the interview room by telling him they wanted to talk about another of the "runners." (R24: 610). When Rodriguez entered the room, Wells wagered a pack of cigarettes that Rodriguez could not escape from the "Coast Guard Handcuffs." (R24: 613). Rodriguez took the bait, and his hands were bound using the torn pieces of sheet; Wells tied the Coast Guard Handcuffs so Rodriguez could not escape. (R24: 613). Doty then came up behind Rodriguez and put him in a rear choke / sleeper hold. (R24: 613). Doty had to tighten his grip before it had a real effect on Rodriguez. (R24: 621). According to Doty, Rodriguez went limp in about 10 to 15 seconds after he locked in his grip, and then urinated on himself. (R23: 564; R24: 613).

Doty directed Wells to check the hall to make sure no one was coming. (R24: 620 – 21). After Wells left, Doty picked up the knife and stabbed Wells twenty-

five times in the abdomen to make sure Rodriguez was dead. (R23: 533; R24: 620 – 21, 624). The medical examiner testified that Rodriguez was unconscious, but alive, while he was being stabbed. He arrived at this conclusion because the stab wounds were so tightly grouped together and there was blood in the abdomen indicating Rodriguez had blood pressure when he was stabbed. (R23: 559, 565, 569).

Doty wanted to make sure Rodriguez would not come back to life, so Wells took one of the sheets and tied it around Rodriguez' neck. (R24: 622). Doty held the knot with his finger to make sure it was tight while Wells finished the ligature, which cut off air to Rodriguez. (R24: 622).

Doty and Wells waited approximately 15 minutes before reporting the murder. (R24: 625). Doty walked down stairs to Sgt. Homer Scott and said "Sarge, you need to cuff me up. There's a dead body upstairs." (R22: 499). Sgt. Scott detained Doty and Wells, went upstairs, and found Rodriguez's body. (R22: 500). Four days later, Doty gave a full confession to Rodriguez's murder and stated it had been planned for weeks. (R23: 588).

Aggravation

The state presented Mr. Greg Laughlin, an agent with the United States Secret Service, who in 1996, was a detective with the Plant City Police Department. (R24: 662). In 1996, Mr. Laughlin was investigating the murder of Harvey Horne,

and his investigation led him to Doty. (R24: 667). Doty ultimately confessed to the murder of Harvey Horne admitting he shot Mr. Horne in the face during a drug robbery. (R24: 669 – 70). Doty was convicted of first degree murder and sentenced to life in prison. (R24: 669 – 70).

The state also presented the facts concerning Rodriguez's murder through Doty's confession and the testimony of the state medical examiner. The state used the medical examiner to establish HAC. The medical examiner gave a cause of death as strangulation and stabbing. (R23: 554). Rodriguez was stabbed 25 times in the abdomen, and was alive when he was being stabbed because of the amount of blood in his stomach. (R23: 553). In his opinion, it could have taken Rodriguez anywhere from 10 to 45 second to lose consciousness depending on whether or not Doty's choke hold was expertly applied. (R23: 556 – 57).

Doty's multiple confessions also went toward establishing CCP. The confessions showed Doty's prolonged commitment and careful planning to murder Rodriguez and ensure his efforts would not be disturbed by the Florida State Prison guards.

Victim Impact

The state then presented Marisel Serrano for purposes of victim impact. (R24: 676). Ms. Serrano was Rodriguez's mother. (R24: 677). Ms. Serrano told the jury that Rodriguez was a good boy before going to prison and was scheduled to be

released in 2015. (R24: 678). Rodriguez planned to move back to Pennsylvania once he was released. (R24: 678).

Mitigation

The defense called eleven witnesses for the purpose of mitigation. Doty's first witness was another inmate at Florida State Prison, who testified that life inside prison is different than normal society and grievances are dealt with in a different manner. (R24: 686 – 89).

Dr. Clifford Levin was then called to present mental health mitigation. (R24: 696). Dr. Levin diagnosed Doty with Major Depressive Disorder, Post-Traumatic Stress Disorder, and Anti-Social Personality Disorder. (R24: 710, 721 – 22). Dr. Levin testified that Doty suffers from major mental health issues; however, he does not have a thought disorder, knows the criminality of his conduct, and is very manipulative. (R24: 722, 730). Dr. Levin believed it is difficult for Doty to make emotional connections. (R24: 710).

Doty then presented Dennis Cauwenberghs, an employee at Florida State Prison. (R24: 752). Doty's intention was to ask questions about his future dangerousness to Cauwenberghs. Before any testimony was heard by the jury the proceedings were stopped and the jury was excused. (R25: 756 – 57). The state and the trial court cautioned Doty about this line of questioning, and Doty was given a 10 minute recess to confer with standby counsel. (R25: 757 – 62).

Following the recess and after consulting with his standby counsel, Doty informed the court he was going to proceed with his desired line of questioning. (R25: 763 – 64). When Cauwenberghs was asked if Doty posed a future threat to any inmates at Florida State Prison, Cauwenberghs responded by saying "I think you've already proven that you could be a threat to other inmates." (R25: 767).

Leo Boatman, an inmate at Florida State Prison, was also called to testify. (R25: 774). Boatman first met Doty in prison in 2010, and felt he was always a respectful person. (R25: 775). Boatmen told the jury that prison is about being as tough as possible and is quite different from regular society. (R25: 777 – 78). Boatman also said that Doty was bitter about his relationship with his family because they were not involved in his life. (R25: 782).

Doty's next witness was Ann Hertle, his former step-mother. (R25: 787, 789, 791). Hertle testified that Doty's father was physically and mentally abusive to her. (R25: 789). Hertle also told the jury that Doty had a history of setting fires as a child. (R25: 794 – 95). One time, Doty tried to light the carpet on fire in the trailer they were living in; Hertle's reaction was to spank Doty and then burn his fingers on the stove to teach him the dangers of playing with fire. (R25: 794 – 95).

Shelley Ann Conner was the next defense witness. (R25: 805). Conner was Doty's step-mother from the age of four until he was sixteen. (R25: 807). Conner was seventeen when she began taking care of Doty. (R25: 807). Conner said Doty

suffered a lot of emotional abuse as a child. (R25: 811). Doty was exposed to frequent instances of domestic violence as a child. (R25: 813). Conner also said she felt Doty was social as a child and was never physically abused by his father. (R25: 813, 816).

Appellant then called his father, Randy, to testify. (R25: 819). Randy admitted to being an alcoholic and abusive towards women. (R25: 824). Before Appellant was two years old, Randy separated from Appellant's mother and took Appellant with him. (R25: 826 – 27). According to Randy this was a mutual separation. (R25: 826 – 27). Randy felt he provided Appellant with love and affection. (R25: 833). Randy did not like how Appellant was disciplined by some of his step-mothers and did not approve of the alternative school Appellant was sent to as a child. (R25: 825, 832 – 24, 836). In Randy's opinion the alternative school was for "throwaways" and he did not think it was a good environment for Appellant. (R25: 836 – 37).

Doty then presented additional witnesses to testify to Randy's drinking and womanizing. (R26: 854, 863, 869). In addition, Appellant's biological mother, Mary Cole, testified that Randy took Appellant from her when he was about two years old. (R26: 878). According to Ms. Cole, her separation from Appellant was not the product of a mutual separation. (R26: 878). Ms. Cole did not have a way to contact Randy or Appellant, and did not see Appellant again until he was 17

years old. (R26: 878 – 79). By that time, Appellant already had a problem with alcohol. (R26: 880 – 82).

The final defense witness was Doty himself who made a statement to the jury. (R26: 901). Doty told to the jury, "I reached a point in my life to where you can see things just don't affect me no more - - - I don't have no emotions." (R26: 901). "I don't want to have to put an individual, innocent people, in the line of fire." (R26: 901). Doty concluded by saying "I don't want to be put in a position where somebody might not make it home to their family. They know what I'm talking about, because they work in that environment. I'm not gonna stop. I'll do it again if I've got to." (R26: 902).

During cross-examination, Doty admitted that he did not blame his childhood, or the prison system for what happened to Rodriguez. (R26: 902 – 03). Doty admitted he planned the murder for a long time, and that Rodriguez was the victim of Doty's own grievance procedure. (R26: 910). Following deliberations, the jury recommended a sentence of death by a vote of ten to two (10 – 2). (R27: 1026).

Spencer Hearing

The *Spencer* hearing began with testimony from defense witness Dr. Harry Krop. (R14: 8). Dr. Krop was asked to perform a competency evaluation on Doty. (R14: 11). Dr. Krop found Doty to be competent, specifically stating: "[m]y evaluation has always shown Mr. Doty to be psychologically stable and there is no

psychiatric disorder with the exception of some depression, which has been intermittent during his stay, but none that would interfere with his ability to either prepare a defense or represent himself." (R14: 12).

Doty also called John Anthony Silva, an inmate with the Department of Corrections. (R14: 28). Silva was convicted of first-degree murder when he was 15 years old, and was previously involved in a homosexual relationship with Doty. (R14: 28 – 30). When their relationship ended, Doty attacked Silva with a knife and tried to slit his throat. (R14: 34).

Doty then called Sgt. Edward Duncan to testify. (R14: 37). Duncan testified, in his experience the quiet inmates are more dangerous than those who talk frequently. (R14: 38). Duncan said he has never witnessed Doty being violent to an officer, but he felt Doty would have attacked anyone who would have tried to stop him from killing Rodriguez. (R14: 42).

Once again, the final witness was Doty, who gave a statement. Doty's concluding words to the trial court were:

> Their system don't work, but mine does and will. One thing about my world as opposed to the outside world is there resides a lot of ignorance and disrespect in young punks with slick mouths just waiting to be a victim. . . I sit back and slowly absorb slick talk and disrespect, just waiting for my chance to fill another body bag.
>
> . . .
>
> [T]here's evidence, overwhelming evidence, all throughout the record to prove in the next case that I told the Honorable Judge James P.

> Nilon and the state attorney that I'd kill again with no remorse
>
> . . .
>
> [J]ust sit back and wait and prepare the heading on the indictment papers.

(R14: 72 – 73).

Sentencing and Trial Court Findings

The trial court held a hearing on June 5, 2013, to announce findings and Doty's sentence. (R5: 923; R15: 1). The trial court found the following aggravating circumstances and supported each with findings of fact:

1. Doty was previously convicted of another capital felony (Very Great Weight). (R5: 925).
    a. The state produced evidence of a Judgment and Sentence from the Thirteenth Judicial Circuit in and for Hillsborough County. (R5: 925). Doty "received a life sentence in the Department of Corrections without parole for his conviction of the capital offense of Murder in the First Degree and eighty (80) months concurrent to his life sentence for Robbery with a firearm." (R5: 925)
2. The capital felony was committed by a person under sentence of imprisonment. (Great Weight).
    a. The murder of Xavier Rodriguez occurred while Doty was serving a life sentence at Florida State Prison. (R5: 925 – 26).

3. The capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justifications. (Great Weight). (R5: 926).

    a. "Several weeks to months before the murder occurred, the Defendant felt the victim had 'disrespected' him by calling him a 'pussy-ass cracker," and had also stolen cigarettes from the Defendant. The Defendant felt his only recourse for such disrespect by Rodriguez was to kill him." (R5: 927).

    b. Doty "made arrangements to obtain a homemade knife from another inmate at least several weeks before the murder." (R5: 927).

    c. "The exact location was selected and the details as to how the murder was to be committed were made, including the ruse which would get the victim to place his hands in a ligature." (R5: 927).

    d. Doty and Wells "brought accessories they would use to further their plan to commit murder. . . ." (R5: 927).

(R5: 923 – 31).

Mitigation

The trial court did not find any statutory mitigators. (R5: 931 – 42). The following non-statutory mitigators were found and given corresponding weight:

1. The defendant was cooperative with authorities and reported the incident

himself. (Some Weight). (R5: 934 – 35)

2. The emotional neglect/abandonment of the defendant and his exposure to physical abuse during childhood. (Moderate Weight). (R5: 935 – 36).
3. Prison life/milieu/environment and the perception of the victim as a threat in that environment. (Very Little Weight). (R5: 936 – 37).
4. The defendant's diagnostic and mental health history for emotional disorder. (Some Weight). (R5: 937 – 38).
5. The defendant's perception of violent behavior as acceptable. (Little Weight). (R5: 939 – 40).
6. Failure of the Juvenile Justice System. (Moderate Weight). (R5: 940 – 41).
7. Doty's appropriate courtroom conduct throughout the proceedings. (Some Weight). (R5: 941 – 42).

The trial court concluded the aggravating circumstances outweighed the mitigating circumstances, and sentenced Doty to death. (R5: 943 – 44). In addition, the trial court noted Doty's "lengthy and detailed planning of the murder of Xavier Rodriguez in a cold calculated and premeditated manner" outweighed the non-statutory mitigation. (R5: 943).

This appeal follows.

SUMMARY OF ARGUMENT

Issue I – The state presented credible and competent evidence the strangulation murder of Xavier Rodriguez was heinous, atrocious and cruel. A trial court is required to give all instructions to the jury regarding aggravating or mitigating circumstances when credible and competent evidence has been presented. Whether the trial court determines an aggravating circumstance has been proven is irrelevant to the analysis of whether an instruction should be given. The medical examiner testified Rodriguez's cause of death was strangulation and stabbing, and the un-rebutted evidence showed Rodriguez was conscious before Doty placed him in the choke hold. Because death by strangulation creates a prima facie case for HAC, the trial court was correct in given the HAC instruction.

Issue II – Doty, while representing himself, introduced evidence of his future dangerousness after repeated warnings from the trial court. Doty did so with a knowing, intelligent, and voluntary waiver and therefore cannot assert a claim to error regarding the evidence of his future dangerousness. Furthermore, Doty invited the error by introducing evidence of future dangerousness during the direct examination of his own witness. Therefore, any claim Doty was denied a fair trial because the jury heard evidence of his future dangerousness is meritless.

Issue III – The medical did not invite or encourage the jury to imagine what Rodriguez felt while being stabbed and therefore did not violate the golden rule.

No objection was made during this comment, and as such it remains unpreserved and subject to an analysis of fundamental. In addition to the testimony of the medical examiner the jury heard: (1) Doty was serving a life sentence for first degree murder; (2) Doty carefully planned Rodriguez's murder for weeks; (3) Doty obtained a knife in order to ensure Rodriguez's death; and (4) Doty's own words which threatened to kill again if he was provoked through disrespect. As a result, it is unlikely any error in the medical examiner's testimony affected the validity of the jury's recommendation.

Issue IV – This Court has consistently rejected claims that Florida's sentencing procedures are facially unconstitutional under *Ring v. Arizona*. Moreover, Doty patently ignores the fact that he was previously convicted of a violent capital felony before being sentenced to death for the murder of Xavier Rodriguez. This Court has consistently rejected *Ring* claims in cases such as this where the defendant has been previously convicted of a felony.

Issue V – Doty's case is among the most aggravated and least mitigated of first degree murders and is therefore proportionate. The serious aggravators of CCP, prior capital felony, and under sentence of imprisonment are proven and unchallenged. No statutory mitigation and minimal non-statutory mitigation was found by the trial court. The evidence showed the murder of Xavier Rodriguez was senseless and unprovoked. This case bears a striking resemblance to *Gill v.*

State, 14 So. 3d 946 (Fla. 2009). In *Gill*, this Court upheld a death sentence with identical aggravators and significantly more mitigation than Doty presented to the trial court. Therefore, Doty's sentence is proportionate and should be affirmed.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GIVING THE HEINOUS, ATTROCIOUS AND CRUEL INSTRUCTION TO THE JURY BECAUSE THE STATE PRESENTED CREDIBLE AND COMPETENT EVIDENCE THE STRAGULATION MURDER OF XAVIER RODRIGUEZ WAS HEINOUS, ATROCIOUS AND CRUEL.

Doty contends the jury recommendation was tainted because the trial court instructed the jury on the heinous, atrocious, and cruel aggravator when the evidence was insufficient to support the instruction. (IB: 35). A trial court is required to give all instructions to the jury regarding aggravating or mitigating circumstances when credible and competent evidence has been presented. This Court has also previously stated that murder by strangulation creates a prima facie case for HAC. In the present case, the medical examiner testified the cause of death was strangulation and stabbing, and the un-rebutted evidence showed Rodriguez was conscious before Doty placed him in the choke hold. Therefore, the trial court had credible and competent evidence to support and instruction on HAC.

a. Standard of Review

A challenge to a specific jury instruction should be reviewed based on an abuse of discretion standard. *Carpenter v. State*, 785 So. 2d 1182, 1200 (Fla. 2001). "[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court." *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006)

(quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)). "A trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal." *Patrick v. State*, 104 So. 3d 1046, 1058 (Fla. 2012) (citing *Carpenter v. State*, 785 So. 2d 1182, 1199 – 1200 (Fla. 2001).

b. Competent and Credible Evidence Supported the HAC Instruction.

"This Court has held on numerous occasions that 'it is permissible to infer that strangulation when perpetrated upon a conscious victim, involves the foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable.'" *Overton v. State*, 801 So. 2d 877, 901 (Fla. 2001) (citing *DeAngelo v. State*, 616 So. 2d 440, 442 (Fla. 1993) (quoting *Tompkins v. State*, 502 So. 2d 415, 421 (Fla. 1986)). In fact, this court has previously held that death by strangulation creates a *prima facie* case for the HAC instruction. *Overton*, 801 So. 2d at 901 (citing *Orme v. State*, 677 So. 2d 258, 263 (Fla. 1996); *Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990) (stating "[S]trangulations are nearly per se heinous.")).

When evaluating the proposed jury instructions, a trial judge is required to instruct the jury on all aggravating and mitigating factors when credible and competent evidence of such has been presented to the jury. *Welch v. State*, 992 So. 2d 206, 215 (Fla. 2008) (citing *Stewart v. State*, 558 So. 2d 416, 420 (Fla. 1990)).

Although an aggravating factor must be proven beyond a reasonable doubt for purposes of sentencing, a jury instruction on an aggravator "need only be supported by credible and competent evidence." *Welch*, 992 So. 2d at 215 (citing *Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995)). "The fact that the State does not prove an aggravating factor to the court's satisfaction does not require a conclusion that there was insufficient evidence to allow the jury to consider that factor." *Welch*, 992 So. 2d at 215 (citing *Bowden v. State*, 558 So. 2d 225, 231 (Fla. 1991)).

In the present case, the undisputed testimony shows Rodriguez was conscious before Doty placed him in the choke hold and strangled him to death. (R23: 554; R24: 613). Rodriguez made a bet with Wells to see if he could escape the "Cost Guard Handcuffs" and allowed his hands to be bound. (R24: 613). Doty then approached Rodriguez from behind and placed him in the rear choke / sleeper hold. (R24: 613). Doty's own admission was that Rodriguez probably thought the choke was part of a game, but once Doty "really got that choke hold locked down, [Rodriguez] knew the game was over." (R24: 621). Rodriguez then went limp, urinated himself and Doty dropped his body on the floor. (R24: 613). The autopsy report listed Rodriguez's cause of death to be strangulation and stabbing from the 25 wounds to his abdomen. (R24: 554).

In *Overton v. State*, this Court considered whether the application of HAC was appropriate. *Overton*, 801 So. 2d at 901. After recognizing that death by

strangulation creates a presumption of HAC, this Court turned its inquiry to whether or not the victim in *Overton* was conscious at the he was being strangled. *Id*. at 901. Based on the testimony about the ongoing struggle and the defendant needing to "disable" the victim before strangling him, this Court affirmed the application of HAC. *Id.* at 901 (stating "After all, why would Overton find it necessary to 'disable' [the victim] by kicking him in the abdominal area if he was already unconscious?") (citing *Scott v. State*, 494 So. 2d 1134, 1137 (Fla. 1986) (upholding HAC, concluding that where victim was "beaten a second time," evidence "clearly supports the . . . conclusion that at some point the victim regained consciousness.").

Rodriguez was conscious when the attack began, and his ability to fight back was hampered by being tricked into having his hands bound. (R24: 613). Indeed by Doty's own admission, Rodriguez was trying to fight back. Otherwise why would Doty need to "lock down" the choke hold if Rodriguez was submissive to Doty? Furthermore, the medical examiner testified that based on the pressure and accurate application of the choke hold Doty used, it was likely Rodriguez lost consciousness within 10 to 45 seconds. (IB at 36; R23: 556 – 557).

The standard for determining the applicability of jury instructions is whether credible and competent evidence was presented to the jury which could establish the aggravator. The fact the trial court ultimately found the HAC aggravator was

unproven is not determinative of whether the instruction was applicable. In this case the trial court was presented with unquestionably credible testimony that showed Rodriguez was strangled, was conscious before being strangled, may have struggled while being strangled, and remained conscious for at least 10 seconds before passing out. Based on the evidence presented to the jury, the trial court did not abuse its discretion in giving the HAC jury instruction, and this claim should be denied.

c. Any Error in Giving the HAC Instruction Was Harmless.

Should this Court determine the trial court did err in giving the instruction on HAC, that error is likely to be deemed harmless. The harmless error test places the burden on the state to show there is no reasonable possibility the error contributed to the jury recommendation. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Application of the harmless error test requires a complete review of the record examining both the permissible and impermissible evidence to determine if the impermissible evidence affected the verdict. *Diguilio*, 491 So. 2d at 1135.

In the instant case, the jury heard evidence that at the time of the murder, Doty was serving a life sentence for first degree murder. The details of that murder involved Doty shooting his former employer in the face during a robbery. The jury also heard multiple witnesses testify regarding Doty's prolonged plan to murder

Rodriguez, which compelled him to obtain a knife in advance to ensure his plan would succeed. (R23: 590 – 91). Finally, Doty's closing remarks to the jury cannot be over looked. Doty affirmed his commitment to kill anyone he feels has disrespected him, and concluded by saying "I'll do it again if I've got to." (R26: 902).

The jury was instructed on four aggravators: (1) Doty was previous convicted of another capital felony; (2) Doty was under a sentence of imprisonment; (3) the murder was cold, calculated and premeditated; and (4) the murder was heinous, atrocious or cruel. The three aggravators which the trial court found – CCP, prior capital felony, and under sentence of imprisonment – are undisputed and undisputable. Most notably, Doty's prior violent felony was a first degree murder where he shot the victim in the face. When viewed against the proven aggravators and Doty's own statements, no reasonable possibility exists that an error in the HAC instruction effected the jury recommendation. Therefore, Doty's claim should be denied.

II. DOTY, WHILE REPRESENTING HIMSELF, INTRODUCED EVIDENCE OF HIS FUTURE DANGEROUSNESS AND MAY NOT BENEFIT FROM HIS AFFIRMATIVE WAIVER AND HIS SELF-INFLICTED ERROR.

Doty asserts he is entitled to a new penalty phase because the jury was allowed to hear testimony regarding his future dangerousness. (IB: 41 – 44). This claim on direct appeal is meritless because Doty affirmatively waived any issue before the trial court, and it was Doty who caused the error. On more than one occasion the trial court recommended Doty not introduce evidence of his future dangerousness. In spite of the trial court's recommendation and the recommendations from his standby counsel, Doty was unwavering in his desire to question his own witness regarding his future dangerousness. Doty then continued to assert his future dangerousness by telling the jury he would kill again if he was disrespected. Accordingly, this claim should be denied.

a. Standard of Review

This Court applies a *de novo* standard of review when evaluating the legal conclusions of a trial court. *See Davis v. State*, 26 So. 3d 519 (Fla. 2009). A *de novo* standard of review gives deference to the trial court's finding of fact, but reevaluates the application of the law to those facts. *See Pagan v. State*, 29 So. 3d 938, 953 (Fla. 2009).

b. Doty Affirmatively Waived This Claim

A defendant may waive a fundamental right if that right is waived knowingly,

intelligently, and voluntarily. *Tucker v. State*, 559 So. 2d 218, 220 (Fla. 1990); *State v. Upton*, 658 So. 2d 86, 87 (Fla. 1995); *Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993). What is important in the waiver of a right entitled to a defendant is the information about the right the defendant is waiving, the advice given to the defendant, and the express consent acquired from the defendant. *Tucker*, 559 So. 2d at 220; *Upton*, 658 So. 2d at 87; *Koon*, 619 So. 2d at 250. First, a trial court must inform the defendant of the process and right to which he is entitled. Second, the trial court and/or the attorney's must explain the ramifications of the defendant's decision – what are the potential pitfalls and what could happen as a result of the decision. And, third, the trial court must obtain any waiver from the defendant voluntarily and on the record. *See Tucker*, 559 So. 2d at 220; *Upton*, 658 So. 2d at 87; *Koon*, 619 So. 2d at 250; *Farr v. State*, 124 So. 3d 766, 781 (Fla. 2012).

In the present case, the trial court effectively conducted a colloquy for the waiver of a fundamental right when it counseled Doty against the presentation of evidence of his future dangerousness. During the presentation of mitigation, Doty called Dennis Cauwenberghs as a witness. (R25: 751 – 772). Cauwenberghs was a supervisor at Florida State Prison and worked on K-Wing. (R24: 752). Doty's intention was to ask Cauwenberghs questions about his knowledge of Doty as an inmate. When it became clear Doty wanted to ask Cauwenberghs if he thought

Doty would be a future threat, the proceeding was stopped and the jury was excused. Outside the presence of the jury and Cauwenberghs the following discussion took place:

> THE COURT: Thank you. My understanding is that - - from the sidebar conversation, that you're wanting - - you believe Lieutenant Cauwenberghs knows you well, knows things about you, some good things. But I asked you kind of what's the end of it, because you stated to me you'll kind of see the importance when we get to the end of the line, and I asked you what's the end of the line, and you told me that he's - - you're going to ask him whether you constitute a future threat.
>
> MR. DOTY: Absolutely, your Honor.
>
> THE COURT: Okay.
>
> MR. DOTY: Who's to say what he's gonna say.
>
> THE COURT: No, he's gonna tell the truth. Whatever that answer is I don't know.
>
> MR. DOTY: There you go. I don't know that answer, the state don't know the answer.
>
> THE COURT: It's the subject matter that's of some concern, not his answer, so that's what this is about, for me to consider the subject matter. And the state was getting ready to tell me what their thoughts on the matter were. I think I know what's coming, but I want to hear it clearly from the state, what their concern is, so that I can sort this out.
>
> MR. CERVONE: If this witness is asked, "Am I a future threat," that opens the door to potential rebuttal testimony, including many statements the defendant has made, some of which were redacted from materials yesterday, that he will kill again.
>
> THE COURT: Okay. So they're not objecting per se I don't think to

this, as I understand it. I think they're alerting, mostly you and the court, that if you go down that path and get to the point where you ask him what you want to ask him, then you are, quote, opening the door, something that may - - the state may not be able to get in otherwise. By you going down that road - - just a second. Listen carefully. That by asking the question about that topic, that - - what they normally may not be able to get into, you would now have raised the issue, so that's going to allow them to explore that much further and present other evidence possibly that might be different than what you're going to present. It's called opening the door, if you will.

MR. CERVONE: So that I'm clear, I have no problem with the man testifying Mr. Doty has generally been a good worker, cooperative, all those kinds of things. That would be totally proper.

THE COURT: But I think this goes to the question of am I a future threat to kill specifically.

MR CERVONE: Yes, that's the issue.

MR. DOTY: Your Honor, I understand what you're talking about (indicating). Let's think here for a minute. Okay. I know I'm a layman in this courtroom. Okay. I've hired an investigator, I've hired a mitigation specialist, I've hired a mental health mitigation specialist. This is a cut-and-dry situation right here where I called the man in for his testimony. I know where I'm going, I know what I'm going, your Honor. I'm doing it legally. I understand what I'm fixing to say is going to open up the door, but I'm taking that chance, Mr. Cervone.

THE COURT: Well, here's another - - you're representing yourself.

MR. DOTY: Absolutely, sir.

THE COURT: And we have had this discussion now maybe for the third time.

MR. DOTY: Absolutely, sir.

THE COURT: And I told you that I - - I mean, this is a very similar situation to what we had on paper yesterday with the exclusion of that

paragraph.

MR. DOTY: Yes, sir.

THE COURT: I'm going to do the same thing here again. I'm going to take a 10 or 15 minute recess, I'm going to allow you to consult with your mitigation specialist, with Mr. Fisher as well, the two lawyers, and then you come back in after hearing - - again, I don't think I need to repeat in as much detail because you know what the drill is now.

MR. DOTY: Yes, sir.

THE COURT: And then you talk it over, how you did in the past, then you come out and tell me what your personal decision is. No matter what these people have told you, it's your decision. I acknowledge that. And you tell me and I'm going to ask you what your decision is. So we're going to follow the same format.

MR. DOTY: Yes, sir.

THE COURT: And you understand what opening the door means, to some extant?

MR. DOTY: Absolutely, to the full extent.

THE COURT: And it could open the door to them, the State of Florida, brining in other evidence or statements, or whatever they think they have, in order to present a different answer to that question.

MR. DOTY: Or it could open up the door where it could help me out. nobody knows what that man's going to say.

THE COURT: It could. I don't know. Okay. We'll be in recess then.

(R25: 758 – 762). Following the recess, Doty informed the trial court that he intended to proceed with his line of questioning, and ask Cauwenberghs whether or

not he believed Doty posed a future threat. (R25: 762 – 65). Doty was adamant that his decision was made knowingly, willingly, and that he understood the ramifications. (R25: 762 – 65).

When Doty asked Cauwenberghs if he thought Doty was a future threat to other inmates and officers at Florida State Prison, Cauwenberghs' response was "I think you've already proven that you could be a threat to other inmates." (R25: 767). Cauwenberghs also testified that any of the 1200 inmates at Florida State Prison could be a threat to the corrections officers or civilian staff. (R25: 767 – 68). Cauwenberghs finished his testimony by telling the jury that other corrections officers at Florida State Prison believed Doty to be a good worker, and would put him back to work as a runner. (R25: 768).

Doty cannot assert he was denied the right of a fair and impartial trial when evidence of his future dangerousness was heard by the jury because he affirmatively waived that right. Doty was informed by the court, counseled as to the consequences of his decision, and ultimately decided to defy the advice of standby counsel and the court by presenting evidence of his future dangerousness. Therefore, Doty affirmatively waived any claim related to his future dangerousness.

c. Doty Invited the Error

A defendant "may not invite error and then be heard to complain of that error

on appeal." *Cox v. State*, 819 So. 2d 705, 715 (Fla. 2002) (quoting *Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983)). As noted above, it was Doty who produced the evidence of future dangerousness.

While the prosecution did not cross-examine Cauwenberghs on Doty's future dangerousness, the issue remained before the jury through Doty's own statements. In his closing statement to the jury, Doty stated:

> I reached a point in my life to where you can see things just don't affect me no more - - - I don't have no emotions. I don't have no emotions. I pretty much became a coldhearted individual towards others.
>
> . . .
>
> I don't want to have to put an individual, innocent people, in the line of fire.
>
> . . .
>
> I'm a lone wolf . . . When I play, I play to win.
>
> . . .
>
> I don't want to be put in a position where somebody might not make it home to their family. They know what I'm talking about, because they work in that environment. I'm not gonna stop. I'll do it again if I've got to.

(R12: 357 – 59).

In each of the cases Doty cited within his brief, the complained of error was the product of the prosecution's improper argument regarding future dangerousness. (IB at 43; *See Teffeteller v. State*, 439 So. 2d 840 (Fla. 1983)

(examining the **prosecution's** argument that the jury should vote for a death sentence to prevent the defendant from killing again); *Walker v. State*, 707 So. 2d 300 (Fla. 1997) (noting the **prosecutor** improperly aksed a mental health expert if he believed the defendant would kill again); *Allen v. State*, - So. 3d. -, 38 Fla. L. Weekly S592 (Fla. July 11, 2013) (noting the **prosecutor** asked a mental health expert if the defendant was "a risk to any prison guard who is watching her in the future"). In this case, the state as well as the trial court, took all necessary measures to ensure the validity of the trial and protect against an error such as Doty's future dangerousness. Moreover, while the state warned Doty that questions on future dangerousness would open the door, the state did not cross-examine either Cauwenberghs or Doty on the issue of future dangerousness.

The case law is clear and well established, a defendant may not invite an error during a trial and then complain of that error on appeal. *Cox*, 819 So. 2d at 715. The trial court and the state did everything possible to prevent Doty from presenting such testimony. In this case, the error was the product of Doty's strategy. Therefore, this claim should be denied as lacking any merit.

III. THE MEDICAL EXAMINER DID NOT COMMIT A "GOLDEN RULE" VIOLATION BY OPINING WHAT IT WOULD FEEL LIKE TO BE STRANGELED TO DEATH.

Doty claims he is entitled to a new penalty phase because the state medical examiner violated the Golden Rule during his testimony. (IB: 45). The state introduced the testimony of Dr. William Hamilton, the state medical examiner, for purposes of proving the HAC aggravator. In response to the state's question on what happens when a person is strangled, Dr. Hamilton in a brief statement stated "anyone in this room can fully imagine what sort of emotions might go through a person's mind . . . I mean you can only imagine what that would be like." This comment was not objected to by Doty and is therefore subject to analysis of fundamental error. Doty cannot show fundamental error in this comment.

a. Standard of Review

This Court should apply a *de novo* standard of review towards unpreserved claim of fundamental error. *See Croom v. State*, 36 So. 3d 707, 709 (Fla. 1st DCA 2010) (citing *Garzon v. State*, 980 So. 2d 1038, 1043 (Fla. 2008) (holding courts are required to exercise their discretion "very guardedly," finding fundamental error only in "rare cases" where the interest of justice compels them to do so)); *Smith v. State*, 76 So. 3d 379, 383 (Fla. 1st DCA 2011); *Elliot v. State*, 49 So. 3d 269, 270 (Fla. 1st DCA 2010); *Beckham v. State*, 884 So. 2d 969, 970 (Fla. 1st DCA 2004).

b. Doty's Claim is Unpreserved.

In the present case, the complained of error arose in the penalty phase of Doty's case. The questions posed to Dr. Hamilton by the state consisted of the following:

> Q. [c]ould you describe for the jury, Doctor, what a person goes through while they're being strangled, meaning physiologically speaking, what a person goes through?
>
> A. Physiologically and not cognitively you mean?
>
> Q. Both, please.

(R23: 554 – 55). Part of Dr. Hamilton's response included the following statement "anyone in this room can fully imagine what sort of emotions might go through a person's mind . . . I mean you can only imagine what that would be like." (R23: 555). No objection was raised when this statement was made. The remaining three paragraphs of Dr. Hamilton's response discuss the physical reactions a persons' body goes through when being strangled. (R23: 555 – 56). The state did not call any additional attention to Dr. Hamilton's questionable statement and moved on to a different subject of questioning. (R23: 556).

c. The State Did Not Violate the Golden Rule.

This Court has determined that an impermissible gold rule argument is an argument in which an attorney "asks the jurors to place themselves in the victim's position, ask the jurors to imagine the victim's pain and terror or imagine how they

would feel if the victim were a relative." *Williamson v. State*, 994 So. 2d 1000, 1006 (Fla. 2008) (quoting *Hutchinson v. State*, 882 So. 2d 943, 954 (Fla. 2000)). A golden rule argument "extends beyond the evidence and 'unduly create[s], arouse[s] and inflame[s] the sympathy, prejudice and passions of [the] jury to the detriment of the accused.'" *Lugo v. State*, 845 So. 2d 74, 106 (Fla. 2003) (quoting *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998)).

Golden rule violations must be viewed in light of the totality of the circumstances in order to determine whether or not Doty was prejudiced. In order to establish prejudice Doty must show the impermissible comments influenced the jury to reach a more severe verdict.

Dr. Hamilton's statement does not constitute a golden rule violation, because he did not invite or encourage the jury to imagine the pain Rodriguez felt. Dr. Hamilton simply stated that because he has not been strangled, one must imagine what it is like to be in that position. (R23: 555). In previous cases where this court has determined that arguments were impermissible violations of the golden rule, the statements directly invited the jury to imagine the pain felt by the victim in the victim's final moments. *See Bertolotti v. State*, 476 So. 2d 130, 133 n.2 (Fla. 1985); *Garron v. State*, 528 So. 2d 353, 358 – 59 (Fla. 1988). Admittedly, Dr. Hamilton's statement comes close to violating the golden rule, but because he did

not ask or invite the jury to imagine the emotions felt by Rodriguez while he was being strangled, it does not qualify as a golden rule violation.

d. Doty Cannot Show Fundamental Error.[2]

A Golden Rule violation is subject to the contemporaneous objection rule and, 'absent an objection at trial, can be raised on appeal only if fundamental error occurred.'" *Daniels v. State*, 38 Fla. L. Weekly S380 (Fla. 2013) (quoting *Garzon v. State*, 980 So. 2d 1038, 1042 (Fla. 2008)). Should this court determine Dr. Hamilton's testimony did constitute a golden rule violation, Doty is not entitled to relief because the error was not fundamental.

A fundamental error is one that reaches "down into the validity of the trial itself" to the extent that a sentencing recommendation could not have been achieved without the assistance of the error. *Daniels v. State*, 121 So. 3d 409, 417 (Fla. 2013) (quoting *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991). "In other words, 'fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.'" *Daniels v. State*, 121 So. 3d

[2] The United States Supreme Court has cautioned the appellate review of unpreserved errors and stated that any appellate court authority to remedy such error should be "strictly circumscribed." *Puckett v. United States*, 556 U.S. 129, 134 (2009). "[A]nyone familiar with the work of courts understands that errors are a constant in the trial process that most do not matter much, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett v. United States*, 556 U.S. 129, 134 (2009) (quoting *United States v. Padilla*, 415 F.3d 211, 224 (1st Cir. 2005) (Boudin, C.J. concurring).

409, 417 (Fla. 2013) (quoting *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991). "In defining the scope of the fundamental error doctrine, [this Court] … explained that a fundamental error is one that 'goes to the foundation of the case or goes to the merits of the cause of action.'" *Daniels v. State*, 121 So. 3d 409, 417 (Fla. 2013) (citing) *James v. State*, 51 So.3d 445, 448 (Fla.2010) (quoting *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla.1970)).

When viewed with the totality of the circumstances, it becomes clear Doty cannot meet this burden of proving fundamental error. The jury heard evidence that at the time of the murder, Doty was serving a life sentence for first degree murder. (R24: 667 – 70). The details of that murder involved Doty shooting his former employer in the face. (R24: 669 – 70). The jury also heard multiple witnesses testify regarding Doty's prolonged plan to murder Rodriguez, which required him to obtain a knife in advance. (R23: 590 – 91; R24: 594 – 95). Finally, in his concluding statement to the jury Doty affirmed his commitment to kill anyone who disrespected him. In light of the permissible evidence, it is unlikely Dr. Hamilton's brief statement had any effect on the jury recommendation. Moreover, Doty cannot complain that Dr. Hamilton's statement had an effect on the final sentence from the trial court because ultimately the trial court determined the state did not prove the HAC aggravator. Therefore, because

Dr. Hamilton's brief statement was unlikely to affect or influence the jury's recommendation, and this issue should be denied relief.

IV. THIS COURT HAS REPEATEDLY REJECTED CLAIMS THAT FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL PURSUANT TO *RING v. ARIZONA*.

Doty asserts the trial court imposed a death sentence in violation of the Sixth Amendment to the United States Constitution in light of the United States Supreme Court holding in *Ring v. Arizona*, 536 U.S. 584 (2002). (IB: 48). This is actually a facial challenge to the constitutionality of Florida Statute § 921.141, which governs Florida's capital sentencing procedures. Doty's argument lacks any merit as this court has repeatedly and recently rejected identical claims.

In *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert denied*, 123 S.Ct. 662 (2002), this Court considered whether the holding in *Ring* applied to the Florida capital sentencing scheme. *Bottoson*, 833 So. 2d 694 – 95. This Court declined to extend *Ring* to Florida's capital sentencing scheme and noted that for twenty-five years, the United States Supreme Court has reviewed Florida's sentencing procedures and specifically did not address any perceived conflict between *Ring* and Florida's sentencing procedures. *Id*. at 695.

In *King v. Moore*, 831 So. 2d 143 (Fla. 2002), *cert. denied*, 123 S.Ct. 657 (2002), this Court again rejected a claim that *Ring* should be extended to Florida's sentencing procedures. Most notably, this Court took into consideration the actions of the United States Supreme Court in deciding both *Ring* and *King*. *King*, 831 So. 2d at 144.

> The United States Supreme Court in February 2002 stayed King's execution and placed the present case in abeyance while it decided *Ring*. That Court then in June 2002, issued its decision in *Ring*, summarily denied King's petition for certiorari, and lifted the stay without mentioned *Ring* in the *King* order.

Id. at 144. This Court clearly inferred that the United States Supreme Court considered this specific issue and rejected it when it denied certiorari in *King*.

In *Peterson v. State*, 94 So. 3d 514 (Fla. 2012) the defendant made an identical claim to Doty's by inviting this Court to reconsider its decisions in *Bottoson* and *King*. *Peterson v. State*, 94 So. 3d 514, 538 (Fla. 2012), *cert. denied*, 133 S.Ct. 973 (2012). This Court rejected Peterson's argument finding no new arguments have been presented which would require this Court to reconsider its position. *Peterson*, 94 So. 3d at 538.

More recently, in *Hurst v. State*, - So. 3d – (Fla. 2014), 39 Fla. L. Weekly S293, *10 (May 1, 2014), this Court again rejected an invitation to reconsider its position in *Bottoson* and *King* and stated that Florida's capital sentencing scheme has repeatedly been upheld as constitutional. *Hurst v. State*, - So. 3d – (Fla. 2014), 39 Fla. L. Weekly S293, *10 (May 1, 2014) (citing *Baker v. State*, 71 So. 3d 802, 823 – 24 (Fla. 2011), *cert. denied*, - U.S. -, 132 S.Ct. 1639 (2012); *Darling v. State*, 966 So. 2d 366 (Fla. 2007); *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007).

Finally, while Doty invites this court to reconsider its longstanding judicial precedent of *Bottoson* and *King*, he patently ignores the fact that Doty was

previously convicted of a violent capital felony before being sentenced to death for the murder of Xavier Rodriguez. This Court has consistently rejected *Ring* claims in cases such as this where the defendant has been previously convicted of a felony. *See Chandler v. State*, 75 So. 3d 267, 269 (Fla. 2011); *Baker v. State*, 71 So. 3d 802, 824 (Fla. 2011); *Johnson v. State*, 969 So. 2d 938, 961 (Fla. 2007) *Darling v. State*, 966 So. 2d 366, 387 (Fla.2007). Therefore this claim should be denied as it lacks any merit.

V. THE MURDER OF XAVIER RODRIGUEZ IS AMONG THE MOST AGGRAVATED AND LEAST MITIGATED OF FIRST DEGREE MURDERS.

Although not raised on direct-appeal, this Court has an obligation to review the proportionality of every death sentence. In the instant case, the murder of Xavier Rodriguez is among the most aggravated and least mitigated, and Doty's death sentence is proportionate to cases with similar aggravators and mitigators.

a. Standard of Review

"A trial court's ruling on a pure question of law is subject to de novo review." *Demps v State*, 761 So. 2d 302, 306 (Fla. 2000).

b. Doty's Sentence is Proportional.

In determining whether death is a proportionate penalty in a given case this Court conducts "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Bright v. State*, 90 So. 3d 249, 262 (Fla. 2012) (quoting *Williams v. State*, 37 So. 3d 187, 205 (Fla. 2010)). A direct-appeal determination of death-penalty proportionality is not a matter of simply counting the aggravating and mitigating factors. As this Court explained in *Woodel v. State*, 985 So. 2d 524, 532 (Fla. 2008):

> In weighing the aggravating circumstances against the mitigating factors, the court understands that the weighing process is not simply an arithmetic exercise. The court's role is to consider the quality of the factors to be weighed, not the quantity of those factors.

> Accordingly, the court considers the nature and quality of the aggravators and mitigators that is has found to exist.

In reviewing the trial court's determination of the factual foundation for its death-penalty decision, the Court generally defers to the trial court, that is, whether a factual finding is supported by "competent, substantial evidence." *See, e.g.*, *Allred v. State*, 55 So. 3d 1267, 1277 – 1278, 1281 (Fla. 2010).

c. Proportional Review of Appellant's Case

A proper proportionality review of Doty's case considers the totality of the circumstances compared to similar cases. *See Woodel*, 985 So. 2d at 532. The evidence in this case shows that Doty, strangled and stabbed Rodriguez to death with no justification.

The trial court found three statutory aggravators and assigned weight accordingly:

- The defendant was previously convicted of a capital felony (Very Great Weight). (R5: 925).
- The capital felony was committed by a person under sentence of imprisonment (Great Weight). (R5: 925).
- The capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justifications. (Great Weight). (R5: 926).

The jury recommended a death sentence by a vote of ten to two (10 – 2). (R27: 1026). The trial court did not find any statutory mitigators, and assigned weight to seven (7) non-statutory mitigators.

Based on the underlying facts, aggravators, and mitigating circumstances, this case is comparable to *Gill v. State*, 14 So. 3d 946 (Fla. 2009). In *Gill*, the defendant, who was representing himself, pled guilty to the first degree murder of another inmate. *Gill*, 14 So. 3d at 951, 954. At the time of the murder, Gill was serving a life sentence for an unrelated first degree murder. *Gill*, 14 So. 3d at 951 – 52. While Gill sought to waive the presentation of mitigation, the state itself presented evidence of Gill's long standing mental illness during the penalty phase. *Id*. at 955. The court in *Gill* found three statutory aggravators: (1) prior capital felony conviction; (2) defendant was under a sentence of imprisonment; and (3) the murder was cold, calculated, and premeditated. *Id*. at 956. Two statutory mitigators were given substantial weight in *Gill*, with the addition of several non-statutory mitigating circumstances. *Id*. at 956 – 57.

> This Court affirmed the conviction and sentence in *Gill* as proportional and acknowledged that "despite the fact [that] RICARDO IGNACIA GILL is a deeply troubled individual with a long history of mental health problems, mental disturbances, suicidal impulses, and a life primarily spent in penal institutions . . . the magnitude of defendant's aggravating factors outweigh[s] the magnitude of Defendant's statutory mitigating factors and non-statutory mitigating factors.

Gill, 14 So. 3d at 964 – 65.

Doty's case presents the same aggravators accompanied by a shockingly similar factual scenario; however, while Ricardo Gill suffered from severe mental illness, Doty was not able to present any statutory mitigation to the court. Therefore the murder of Xavier Rodriguez is among the most aggravated and least mitigated and as such Doty's sentence should be affirmed as proportional.

CONCLUSION

For the aforementioned reasons the state respectfully requests this Honorable Court affirm Doty's conviction for first degree murder and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. E-MAIL on July 2nd, 2014 to W.C. McLain at bill.mclain@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
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