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IN THE SUPREME COURT OF FLORIDA

WAYNE C. DOTY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC13-1257
L.T. No. 2011-CF-498

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant Wayne Doty asked to represent himself and to waive this appeal. This Court denied that request, but Doty was allowed to file a pro se brief. Appellant Doty does not want this appeal to proceed. Appellate counsel remains in this case and files this brief in accord with this Court's directives in Klokoc v. State, 589 So. 2d 219 (Fla. 1991), to assist this Court's review by providing an adversarial testing of the judgement and sentence.

The record on appeal consists of thirty-four (34) volumes. References will be designated with the prefix "R" followed by the volume and page numbers. Volumes 20 through 27, contain the complete transcript of the penalty phase. Excerpts of the penalty phase transcript prepared for the lower court's use prior to

sentencing are contained in volumes 10 through 13. This brief will reference the complete penalty phase transcript in volumes 20 through 27. The Spencer hearing transcript is in volume 14. The sentencing is contained in volume 15. A copy of the trial court's sentencing order is attached as an appendix.

STATEMENT OF THE CASE AND FACTS

A Bradford County grand jury returned an indictment on August 24, 2011, charging Wayne Doty and William Wells with the first degree premeditated murder of Xavier H. Rodriguez. (R1:1-2) A second superceding indictment with the same charges was returned on December 13, 2011. (R1:88-89; R8:5-6) The State filed a notice of intent to seek the death penalty against Wayne Doty. (R1:3) Both the Public Defender and Regional Counsel withdrew from representing Doty. (R1:5-6, 8, 17-18, 29) The Court appointed private counsel. (R1:29) Doty filed his own motion to waive counsel. (R1:12-15) A hearing pursuant to Faretta v. California, 422 U.S. 806 (1975), was held on October 4, 2011. (R1:16; R7:1-48) After inquiry, Circuit Judge Ysleta McDonald granted Doty's request to represent himself. (R1:32, 49; R7:1-48) At Doty's request, the court appointed a psychologist to examine Doty for both competency to stand trial and competency to represent himself. (R1:53-57, 122-124) Dr. Harry Krop evaluated Doty and submitted his report finding Doty competent to stand trial and competent to represent himself. (R2:213-217) Appointed defense counsel remained as standby counsel. (R1:48-49)

On August 7, 2012, Doty requested to change his plea of not guilty to guilty as charged. (R9:3) Doty also asked to discharge one of the standby lawyers. (R266-268; 9:3) The case had been reassigned to Circuit Judge James Nilon. (R9:3) Judge Nilon

conducted another Faretta hearing before entertaining Doty's request to change his plea and inquired into Doty's desire to discharge one of the standby lawyers. (R9:4-31) After concluding Doty could continue to represent himself, Judge Nilon accepted the plea of guilty, and the case was set for a penalty phase trial. (R9:59-98) Doty continued with two appointed lawyers as standby counsel and a mitigation specialist. (R2:342-346; R9:98-104)

The case proceeded to a penalty phase trial on January 7, 2013. (R20:1 - R27:1031) After hearing evidence from the State and from Doty, his mitigation witnesses and his mental health expert, the jury recommended a death sentence by a vote of 10 to 2. (R27:1026-1029) The trial court ordered a presentence investigation report. (R4:620-652; R27:1036) A Spencer hearing was held on March 13, 2013, at which the court heard additional evidence. (R14:1-92) On June 5, 2013, Circuit Judge James Nilon adjudged Doty guilty and imposed a death sentence. (R5:923-944; R15:1-26) In the sentencing order, the court found three aggravating circumstances: (1) Doty was previously convicted of another capital felony based on a conviction for first degree murder and robbery in Hillsborough County; (2) Doty was under a sentence of imprisonment at the time of the homicide serving a life sentence for the previous murder conviction; (3) the capital felony was committed in a cold, calculated and premeditated manner. (R5:927-929)(App) The court specifically rejected the State's proposed aggravator that the

murder was especially heinous, atrocious or cruel. (R5:929-931) (App) In mitigation, the court found:

> 1. Doty cooperated with authorities and reported the killing himself. (some weight)
> 2. Doty suffered emotional neglect, abandonment, and he was exposed to physical abuse during his childhood. (moderate weight)
> 3. Doty perceived the victim as a threat given the prison milieu and environment in which they lived. (very little weight)
> 4. Doty's mental health history for emotional disorders -- major depression, post traumatic stress disorder, and anti-social personality disorder. (some weight)
> 5. Doty's perception of violent behavior as acceptable as a consequence of his abuse in childhood. (little weight)
> 6. The juvenile justice system failed Doty as a child. (moderate weight)
> 7. Doty's appropriate court conduct while representing himself. (some weight)

(R5:931-942)(App)

A notice of appeal to this Court was filed on August 1, 2013. (R5:987-988)

Penalty Phase

The State's Case

On May 17, 2011, Sergeant Homer Scott was in charge of the inmates on K wing at Florida State Prison. (R22:497-498) Wayne Doty, William Wells and Xavier Rodriguez were inmate runners on the wing. (R22:498-499) Scott had just completed a security check when Doty came down from the third floor and advised that there was a dead body in the conference room. (R22:499) Doty told Scott he needed to handcuff him and Wells, and he placed them in their cells. (R22:499-500) After securing Doty and Wells, Scott went to

the third floor conference room where he saw Xavier Rodriguez lying on the floor on a blanket with a noose around his neck. (R22:500) His face was blue and he appeared dead. (R22:500) Scott backed out of the room and called Captain Lindsey. (R22:500-501)

Kevin Snow, a senior inspector with the Department of Corrections Inspector General's office, investigated this case. (R23:574-576) Before he arrived at the prison, Snow called the captain on duty to insure procedures were followed for preserving evidence, and he determined the preservation procedures had already been employed. (R23:576) When Snow arrived, Rodriguez had been pronounced dead, and his body was secured in a medical clinic on another floor from the interview room where Rodriguez was first discovered. (R23:581) Snow photographed the body still on a backboard stretcher, and the ligatures that had been cut off were on the floor. (R23:583-585) Snow also photographed the third floor interview room where the homicide occurred. (R23:585-587) Strips of torn sheets matching the ligatures and a blanket were in the room. (R23:586) There was not a lot of blood at the scene. (R24:654) Four days later, Snow interviewed Wayne Doty. (R23:588-590)

Doty told Snow that he and Wells had a conflict with Rodriguez for being disrespectful and stealing tobacco from Doty, prompting them to plan to kill him. (R23:590-591) Around three weeks prior to the homicide, Doty and Wells made a plan, but they had placed the plan on hold. (R23:592-593) On the day of the murder, May 17th,

2011, the duty sergeant pulled Rodriguez for runner duty, but the day was supposed to be Well's. (R23:591-592) There are four assigned runners, and they rotate days out as a runner. (R23:592) Runners get a few extra privileges, such as watching some television, while working, and they get out of their cells for the day. (R23:592) When the mistake was recognized, Rodriguez balked at returning to his cell. (R23:592) Wells and Doty forced the issue, and Rodriguez was returned to his cell. (R23:592) Wells said to Doty that "he's got to go." (R23:592) Doty said he had paid Inmate Tillman some tobacco to make a knife. (R12:594) During meal time, Doty, as a runner, helped pass out meal trays and picked them back up along with trash. (R23:594, R24:606-607) While picking up Tillman's tray, Doty acquired the homemade knife. (R23:594-595) Tillman had the knife in his cell for several weeks. (R24:605) Doty hid the knife, and he was able to take it to the third floor interview room where he placed it in the duct work. (R24:607) The bed sheets were already in the room, and they tore them into strips. (R24:608) Their initial plan was to stab Rodriguez and hang him from the third floor balcony with the strips. (R24:608) They also had a back-up plan if circumstances changed. (R24:611-612) Later, Doty moved the knife to the desk in the room along with the strips of bed sheet. (R24:608-609)

After dinner time, Doty and Wells were placed in the day room to watch television, while Rodriguez and the new runner were left

in their cells. (R24:610) The runners could not be out while the staff supervised inmate showers. (R24:610) When showers were completed, Doty and Wells were removed from the day room to start cleaning the wing, and Rodriguez and the new runner were allowed in the day room. (R24:610) A some point, Doty and Wells told Rodriguez that the three of them needed to talk about the new runner. (R24:610) They told Rodriguez they would get an excuse to get him out of the day room to the interview room to talk. (R24:610) Rodriguez told the duty sergeant that he needed to make a telephone call, and the sergeant unlocked the telephone and allowed Rodriguez to use the interview room for the call. (R24:611) Doty was aware the staff made a master count of inmates between 9:00 and 10:00 p.m. (R24:614-615) He wanted to wait until the count was completed to insure they would have 20 to 30 minutes before the staff made the next security check. (R24:615) Rodriguez acted as if he was making a phone call until the corrections officer left for the master count. (R24:616) Doty and Wells then made a bet for cigarettes with Rodriguez that Wells could tie his hands in such a manner that Rodriguez could not get loose. (R24:616) Rodriguez accepted the bet, and Wells tied his hands with a strip of the bed sheet. (R24:612-6613, 616-619) Doty positioned himself behind Rodriguez and placed him in a choke hold. (R24:619) At first, Rodrieguez thought the choke hold was part of the game. (R24:621) Doty then tightened the choke hold. (R24:621) During the interview,

Doty showed Snow the bruise on his bicep he got from using the choke hold. (R24:613) Rodriguez went limp, urinated himself, and when Doty released him, Rodriguez collapsed to the floor. (R24:620-621) Doty and Wells moved Rodriguez behind the desk in the room, and Doty used the knife to stab him. (R24:620-621) The knife was not very good, and even using two hands, Doty could not accomplish what he wanted. (R24:621, 660) At that point, Doty and Wells used the bed sheet strips to tie a ligature around Rodriguez's neck and tied it. (R24:622) They wanted to make sure he was dead. (R24:624) Wells placed a blanket over the body, and they waited. (R24:625) Doty and Wells reported the death to Sergeant Scott. (R24:625-626)

Snow testified that Doty cooperated with the investigation. (R24:634-235, 658-659) Furthermore, Snow's information was that Doty did not present problems at the prison and was considered a good worker. (R24:650-653) Doty fully confessed during more than one interview. (R24:636) In court, Doty introduced as defense exhibits a transcript of the interview and additional sworn statements Doty made about the murder. (R24:635-639) The prosecutor advised the court that one of the statements contained a part that suggested future dangerousness and that was something the State could not introduce. (R24:639-640) The court cautioned Doty that this could be harmful to his case, but that he had the right to make decisions about what to introduce as evidence. (R24:641-643) Doty wanted the entire statement introduced. (R24:644-645) However,

after a consultation with standby counsel, Doty agreed to redact a part of the statement. (R24:645-647)

Dr. William Hamilton, medical examiner for the Eighth District, performed the autopsy on Xavier Rodriguez. (R23:546-550) He found a ligature furrow around the neck, and in this case, the ligature was likely fashioned from a bed sheet making a somewhat broad ligature marking. (R23:551-552) There was a shallow tear to the lip likely caused from hitting a tooth. (R23:552) A small, one-inch bruise was present on the scalp. (R23:553) Hamilton also found a small abrasion on the left leg. (R23:553) In the lower chest to mid-abdomen there were 25, tightly-grouped, mostly superficial stab wounds. (R23:553-554) The tight grouping of the wounds were an indication that the victim was not moving at the time and unconscious. (R23:559, 562-563) Hamilton stated that Rodriguez was still alive at the time of the stab wounds because there was some bleeding into the abdomen and the margins of the wounds, but the blood loss was minimal indicating a weak heartbeat, and Rodriguez could have been near death from the strangulation. (R23:573) Two stab wounds did penetrate into the stomach. (R23:558) Although Rodriquez might have survived the stab wounds, alone, Hamilton concluded that the cause of death was the strangulation and the multiple stab wounds. (R23:554)

At one point during Hamilton's testimony, the prosecutor asked Hamilton what a person goes through during a strangulation.

(R23:554-555) Hamilton responded,

> Having never been in that position myself, I can't speak with real authority, but if one is fully conscious at the time that ligature is applied, or that hands go around the neck to apply pressure, I think anyone in this room can fully imagine what sort of emotions might go through a person's mind if they are cognitive, if they're fully aware what's going on, if they know that a serious effort is being make[sic] to take their life, I mean you can only imagine what that would be like.

(R23:554-555)

Greg Laughlin worked as a detective in the Plant City police department in Hillsborough County in 1996. (R24:662) He investigated the murder of Harvey Horne that year. (R24:662) Horne was found inside a residential trailer parked on the grounds of a manufacturing plant, and he died from two gunshot wounds to the face. (R24:662-666) Wayne Doty became a suspect. (R24:667) Laughlin took a statement from Doty. (R24:667-669) Doty and a friend, Brian Lewandowski went to the grounds of Hardy Manufacturing where Doty had worked. (R24:668) They planned to see Doty's coworker, Harvey Horne to get methamphetamine, but they were not successful. (R24:668) Doty and Lewandoski bought some ammunition for a .22 caliber pistol Doty found in a vacant building about three weeks earlier. (R24:668) The two men also drank alcohol. (R24:668) After dark, the two men returned to the trailer at the manufacturing plant to try to get methamphetamine from Horne. (R24:668) Lewandowski stayed in the vehicle, and Doty went inside to "roll" Horne. (R24:669) Inside the trailer, a heated exchange occurred

between Doty and Horne. (R24:669) Detective Laughlin said it was possible both Doty and Horne may have been drinking at the time. (R24:671-672) Doty pulled the pistol and demanded that Horne give him drugs. (R24:669) Horne begged not to be shot, and he told Doty to take the drugs and leave. (R24:669) Doty shot Horne in the face and left. (R24:669) Doty was convicted of the murder. (R24:669-670)

Through an interpreter, Rodriguez' mother, Marisel Serrona, provided victim impact testimony. (R24:675-681) She described her son's life and the closeness of the entire family. (R24:678-680) Rodriguez had plans to improve his life after his expected release from prison in 2015. (R24:678)

The Defense Case

Lieutenant Dennis Cauwenberghs, a supervisor of security at Florida State Prison with 24 years experience at that institution, testified. (R25:751-753) He was aware of the murder of Rodriguez, and he knows Inmates Doty and Wells, who were involved in the murder. (R25:754-755) Doty confessed his involvement to Cauwenberghs a few days after the murder occurred. (R25:755-756) Based on his knowledge of Doty in the prison, Doty wanted to ask Cauwenberghs if he thought Doty posed a future threat inside the prison. (R25:757) The court then held a bench conference. (R25:758) Doty said he did not know how Cauwenberghs would answer, but he agreed with the court the witness would testify truthfully. (R25:758) The court advised Doty this could open the door to

potentially prejudicial rebuttal from the State, and future dangerousness evidence is not something the State would normally be allowed to present. (R25:759) Additionally, the court noted that Doty had previously agreed to redact similar statements from a document admitted earlier in the case. (R23:639-647; R25:759-761) The court took a recess for Doty to consult with standby counsel and the mitigation expert. (R25:761-762) After the recess, Doty asserted that he was representing himself, and he intended to ask the question of the witness. (R25:762-766) Doty then asked the question about future dangerousness, and Caurwenberghs testified as follows:

> Q. Lieutenant Cauwenberghs, knowing about the defendant, myself, and your relationship with your officers, being the administrative lieutenant, and being around them, has anyone in your office ever implicated that I could be a future threat to them or other inmates?
>
> A. I think you've already proven that you could be a threat to other inmates.
>
> Q. You think I could be a future threat to your officers?
>
> A. At Florida State Prison we have 1200 close-management inmates and death row inmates, and we handle all those the same way, and I believe they could all be a threat to security staff or civilian staff.
>
> Q. The reason I ask you that question, Lieutenant, is because, obviously, I was a runner when this happened, I have been around your officers, as a matter of fact, I've even cleaned up officers where mental health people are, you around them, they felt comfortable with me being around them; is that correct?
>
> A. That's correct.
>
> Q. That's the reason I'm asking you that question. For

> one, you're a professional, you've been around the institution for a while, you've been around inmates for a while. I wanted your professional opinion so the jury understands your point of view.

(R25:767-768) Cauwenberghs acknowledged that officers who knew Doty said he was a good worker, they would not hesitate to put him back to work. (R25:768)

Clinton Powers is an inmate who spent fifteen years in prison. (R24:686-687) He and Doty are friends, having served in two different prisons together. (R24:686-687) Powers testified about how prison life differs from life on the outside. (R24:687) If someone does something against you in prison, you cannot just report it to authorities as you could on the outside. (R24:687) In prison, a report to the authorities would earn you the label of " a snitch" that could mean a beating or being killed. (R24:687-688) However, if someone in prison steals from you, you have to stand up for yourself and take action. (R24:688) When at Columbia Correctional, Powers remembered Doty as the softball coach. (R24:690) He managed the team with strict rules and discipline. (R24:690-691) Power had never seen Doty argumentative with other inmates or correctional officers. (R24:691) Doty was respectful to others. (R24:691)

Leo Boatman had been an inmate for seven years, and he served all but seven months of that time confined in a single-man cell. (R25:774-775) His confinement was due to violent acts with other inmates. (R25:775) Boatman said prison is a violent environment.

(R25:775) He said the three most important things for an inmate are canteen, mail, and visits. (R25:775) Boatman was in solitary confinement on Q wing when he met Doty, who was the runner. (R25:775) Doty was not known to be confrontational and he was respectful of others. (R25:776) Boatman came to trust Doty. (R25:776) Boatman did comment that prison was like another world that you had to learn to fit in for survival. (R25:777-778) In prison, a violent action in response to being disrespected is expected. (R25:778) An inmate has to be tough, or he will be presumed weak, and others will prey on him. (R25:778) Filing a grievance against another inmate is not an option because the person filing it would then be known as a snitch, "the lowest of the low" in prison. (R25:779) An inmate who runs a business in prison is expected to protect the investment of others. (R25:780) If an inmate running a business is robbed of the property of others, he is held accountable. (R25:780) He is expected to take action or become a target. (R25:780-781)

Dr. Clifford Levin, the psychologist who evaluated Doty for possible mitigation, testified. (R24:696-700) In support of his evaluation, Levin had the benefit of a background investigation performed by a mitigation investigation specialist that included family interviews, school records, prison records, records from Doty's prior criminal case and some interviews Levin conducted on of other inmates. (R24:700-704, 719-720) Also, Levin interviewed

Doty several times totaling 21 hours. (R24: 700) Levin concluded that Wayne Doty's childhood experiences, including emotional neglect, abandonment and a father who modeled violence impacted Doty's development. (R24:706-711, 723-725) When Wayne was about 18-months-old, his father, Randy Doty, left his mother without notice and took Wayne with him. (R24:708) His mother had no knowledge where her son was or how to contact him. (R24:708) When Wayne was an older teenager, he contacted his mother for the first time since he was taken from her. (R24:708) Additionally, Wayne's father began a relationship with his friend and coworker's wife, Ann Hertle, who became the first of Wayne's two stepmothers. (R24:708-709) Shelley Conner was Wayne's stepmother from age four to sixteen. (R24:707-708) Doty's father was a Vietnam veteran and he was violently abusive to Ann and Shelley. (R24:707-708) Wayne witnessed this abuse. (R24:708)

Doty's problems, even when recognized by the school and Health and Rehabilitative Services, were not properly addressed and treated. (R24:711-718, 725-726) Dr. Levin reviewed school records where Doty was referred to HRS for psychological services at age twelve. (R24:712) Doty had refused to continue living with his father and stepmother – he was running away from home. (R24:712) After some psychological testing, the psychologist in 1985, recommended individual therapy, group counseling and recommendations for emotional handicap placement in school.

(R24:713-) Another recommendation, one with which Dr. Levin strongly disagreed, was for family counseling. (R24:713) Placing a victimized child in family counseling with the abuser, the father in this case, is re-victimizing the child. (R24:713) A school psychologist did not follow the recommendation for emotionally handicap school placement. (R24:716) Doty was already in an alternative school for being truant. (R24:716) The psychologist recommended tender loving care, support at home, and a behavior contract. (R24:716) These were recommendations that were not followed. (R24:716)

During Doty's time in prison, his mental condition has not been effectively treated, and the prison environment has made the problems more severe. (R24:718-724) Levin examined prison records documenting Dpty's mental health treatment. (R24:721) There was a documented suicide attempt when Doty was at Everglades Correctional Institute. (R24:721) He received intermittent psychiatric treatment with antidepressants and mood stabilizing drugs. (R24:721) Additionally, he had some individual counseling and anger management counseling. (R24:721) There were also periods of time when Doty rejected medication and group therapy. (R24:721) When Doty was first incarcerated, his primary diagnosis was adjustment disorder, typical for a new prisoner. (R24:722) However, Levin found his mental health problems had become worse with his current more severe diagnosis of major depression, post-traumatic-stress

disorder and antisocial personality disorder. (R24:721-722) The prison environment contributed to his decline. (R24:718-720) Prison is a controlled setting that tends to demean a person's worth and dignity and that would be difficult for someone like Doty who was already struggling with those issues. (R24:718) Additionally, the prison is a violent setting where a person is threatened for various reasons. (R24:718-719) The inmate population also operates on its own code of conduct that can carry severe consequences for violations of this code. (R24:719-720) This creates yet more insecurity for prison life. (R24:719-720)

Over time, Doty has developed some significant psychological disorders: major depression, post-traumatic stress, and antisocial personality. (R24:7109-711, 725) Levin noted that these problems have not been treated since his imprisonment, and the violent and threatening prison environment exacerbated the conditions. (R24:718- 725-726) Doty's experiences and mental conditions left him with feelings of worthlessness, poor sleep, low sex drive, black and white thinking leading to poor judgment and decisions, and irritability. (R24:710) Doty compensates by taking charge of things as a way of controlling his surroundings and proving himself to others. (R24:710) At times, Doty can be aggressive in efforts to prove himself and his exposure to violence made him prone to act violent himself. (R24:710-711, 723-724) Doty feels detached and isolated from others based on his unstable childhood and prison

experience. (R24:711, 718-720)

Ann Hertle was in a relationship with Doty's father for about two years, and she assumed a stepmother role during that time when Doty was very young. (R25:787-788, 791) Ann tried to parent Wayne just as she did her own children. (R25:793-794) When Wayne was four-years-old, he began playing with fire. (R25:794-795) Ann found him setting fire in his bedroom, and she burned his fingers on the stove trying to teach him not to play with fire. (R25:795) She also had a son, Randall, with Doty's father, but her son died in a traffic accident when he was 17 years old. (T25:788) Ann met Doty's father, Randy Doty, through her husband, Tom, who was a coworker, and they became friends with Randy and his then wife, Mary, who is Wayne Doty's mother. (R25:789-790) Ann and Mary got along well, and she remembers Mary's bond with Wayne who was about 18 months old when Randy and Mary ended their relationship. (R25:790-791) Randy took Wayne, and Mary left. (R25:791) Randy told Ann that Mary did not fight against Randy taking Wayne. (R25:791) Randy was abusive to Ann, including coming home drunk and punching her in the stomach when she was pregnant with their son, Randall. (R25:789) Ann later found out that Randy had abused Wayne's mother, Mary, as well as other women with whom Randy later had relationships. (R25:796) Randy, Ann and the children moved to Michigan for a time. (R25:792) However, Ann tired of Randy's abuse, and she took her children and returned to Florida. (R25:792-793) Wayne was about four-years-old,

and he remained with his father. (R25:796) Ann did not see Wayne again until he was about twelve-years-old. (R25:796) Randy Doty was never present for his son with Ann, Randall, after he left him at eight months old. (R25:799) When Randall was about seven-years-old, Ann met with Randy to show him Randall, but Randy never accepted him. (R25:799-800) Randy claimed Randall was not his child. (R25:799-800) After Randall died in the car accident at 17-years-old, Randy showed up trying to collect half of the money awarded in the resulting law suit. (R25:798-799)

Shelley Conner was a stepmother to Wayne Doty beginning when Wayne was four-years-old until he turned sixteen. (R25:805-807) Shelly was only seventeen, herself, at the time she began a relationship with Randy Doty. (R25:806-807) Randy Doty was not supportive of Shelley or Wayne. (R25:8070 She and Wayne were left alone most of the time without a car or telephone. (R25:807) They stayed at home most of the time. (R25:808) Shelley only saw Randy's brother, John, a few times, and she did not think Randy's family accepted them. (R25:809) When Shelley was about 21-years-old, Randy had left them alone at the house for few days. (R25:809) She threw some pots against the wall about 3:00 a.m., left Wayne in bed, and she walked to Randy's work. (R25:810) Randy called the police, claimed Shelley was crazy and tried to have her committed. (R25:810) On another occasion, Randy beat her up, and then, he told her not to go to work for a week because she had two black eyes.

(R25:810-811) Shelley acknowledged that Wayne suffered emotionally from the abuse in the household. (R25:810) Because of Randy's threats, Shelley was too scared to report the abuse. (R25:811) Wayne was in school and reported the behavior to counselors, but Shelley lied to them and said she got in a fight with a woman in a bar.(R25:812) Although Shelley was with Randy for ten or eleven years, he never told her Wayne's biological mother's name. (R25:812-813) Shelley remembered when Ann Hertle brought Randall, Randy's son and Wayne's half brother, to the house. (R25:814) Randy blamed Shelley and Wayne as the reason Randall was not around more. (R25:814) Randy never showed Randall any affection. (R25:813) When Randall died in the car accident as a teenager, Randy wanted half of the money from the lawsuit. (R25:815) Although she was no longer married to Randy, he asked Shelley to testify that she and Wayne were the reason Randall was not part of Randy's life. (R25:815)

Randy Doty, Wayne Doty's biological father testified. (R25:819) Randy Doty grew up as the oldest of six children in what he described as a normal family. (R25:821-823) His mother and father did not have physical fights. (R25:823-824) He served three years in the military including combat in Vietnam. (R25:821) Although his father did not abuse women, Randy admitted that he had abused Ann and Shelley while drinking. (R25:824) Randy said he and Wayne's mother lived in a motel in Plant City when they ended their relationship. (R25:825-826) When Randy left Mary, Wayne's mother,

he kept Wayne who was about 14 months old. (R25:826) Accoridng to Randy, there was no real fight about his keeping Wayne. (R25:826) Mary was on welfare, and she had four other children. (R25:826-827) She returned to Colorado. (R25:827) Randy denied ever being abusive to Mary or the children. (R25:828) He had a second son with Ann. (R25:831) He did not remember being abusive to Ann while she was pregnant, and he did not recall punching her in the stomach saying he wanted the child to die. (R25:831) The relationship with Ann did not last long, and Randy had no contact with her or the son they had together for a long time. (R25:832) When Randy married Shelley, he noted that they drank a lot and had fights. (R25:837-839) He admitted beating her so badly on one occasion that he kept her out of sight until she healed. (R25:837) While they lived up north, Randy acknowledged that he fathered a child with Cheryl, his brother's wife. (R25:834-835) Cheryl later died, and her family took the child, and Randy did not know what happened to the child. (R25:834-835) Randy thought he gave the love and attention to Wayne that most dads give. (R25:833) He noted family functions and fishing trips. (R25:833) However, when working in Florida, he admitted he spent little time with his family. (R25:835-836) He tried to spend time with his youngest son that he fathered with Ann. (R25:839) He admitted that he asked his then exwife, Shelley, to testify on his behalf regarding the civil suit over his son's death in a traffic accident. (R25:840)

Wayne Doty's uncle, John Doty, testified. (R26:854) He first talked about the family he and his brother, Randy Doty, had growing up. (R26:854-855) There was no physical abuse between the parents, and the children were disciplined if they did something wrong. (R26:854-855) Randy tended to be the bully among the children. (R26:856) John heard Randy talk about Wayne's troubles, and he said that if Wayne had not been stubborn and listened, he would not be in the situation. (R26:856) Randy's current wife was smart and quiet, but in his opinion, Randy did not deserve any woman. (R26:856-857) Randy cheated on his wives and did not treat women with respect. (R26:857) Although John did not know Wayne's mother long, he liked her, and she treated the children well. (R26:857-858) Randy worked with him for a time in Michigan. (R26:858-859) During that time, twenty years ago, John was married to woman named Cheryl. (R26:859-860) Although Randall was married, he started sleeping with Cheryl and fathered a child with her. (R26:860) John did not think Wayne got a fair chance at life growing up. (R26:860) He recalled, when Wayne was a child, that he was a positive influence with the other children when he was at John's house. R26:861)

Mary Cole is Wayne Doty's mother. (R26:869-871) Wayne is her youngest and only child with Randy Doty. (R26:870-871) She met Randy Doty in Colorado while he was in the military. (R26:874-875) Mary had four children when they met. (R26:870-875) When Wayne was

born, he had four siblings who liked their baby brother. (R26:873-875) Wayne was a healthy baby. (R26:872-873) They moved to Michigan for a couple of months where Randy had family. (R26:875-876) Mary got along well with Randy's parents and brothers and sisters. (R26:876) Next, they moved to Plant City, Florida, and they became friends with Randy's coworker and his wife, Ann Hertle. (R26:876-876) The two families socialized on a fairly regular basis. (R26:876-877) Mary presented a number of family photographs to the jury during her testimony. (R26:871-888) One photograph she presented of Wayne as toddler eating a marshmallow as the last photograph taken of him before he was gone. (R26:878)

When Wayne was around two-years-old, Mary and Randy had an argument. (R26:878) Mary left the house to take a walk and calm down. (R26:878) She returned to the motel where they lived at the time and found Randy and Wayne gone. (R26:878) All of Randy's clothes were missing. (R26:878) Randy left Mary with two bus tickets to Colorado and twenty dollars. (R26:878) She called the police about Wayne, but they told her Randy was his parent and had as much right to take him as she did. (R26:878) Since she had no one to help her in Plant City, she moved back to Colorado. (R26:878) She got a job and called an investigator to see about getting Wayne back. (R26:878) The advice she received was to move back to Florida for six months, something she was unable to do. (R26:878) Mary made numerous calls to Randy's relatives trying to

find Wayne without success. (R26:879) No one called her. (R26:879) When Wayne was seventeen-years-old, he and Mary were reunited. (R26:880-881) Wayne moved to Colorado, and his family out there helped him get a birth certificate, a driver's licence and a job. (R26:880-881) Wayne did not stay in Colorado long. (R26:881-882) Mary said he seemed emotionally damaged, he had difficulty trusting others and he had an alcohol addiction. (R26:881-882) Mary wanted him to stay, and he would have had a supportive family. (R26:883-888)

Wayne Doty's half-brother, Dario Valdez, testified. (R26:863) Valdez is an older son of Mary Cole. (R26:864-865) Dario was about seven-years-old when his mother began the relationship with Wayne's father, Randy Doty. (R26:866) Randy Doty was verbally, mentally and sometimes physically abusive – very intimidating. (R26:866) His discipline ranged from a hit to a whipping. (R26:866) Sometimes all the children received punishment even if only one committed the infraction, just to insure the others did not think about doing something wrong. (R26:866) Dario tried to avoid Randy Doty as much as possible, and he did not want to be in the same room with him. (R26:867) When Mary left Randy and moved back to Colorado, Dario was surprised that she left Wayne. (R26:867-868) His mother had always been devoted to the children, and she was not a person who would give up a child without a fight. (R26:868) If Wayne had returned to Colorado with his mother, Dario was sure that he would

have been part of their supportive family. (R26:868-869)

Wayne Doty presented his testimony as brief narrative. (R26:901)

> Ladies and gentlemen, I feel as a human being that my childhood wasn't the best. I can't say that I blame 110 percent of my family.
>
> I will say this, that I reached a point in my life to where you can see things just don't affect me no more. I don't have – I don't have no emotions.... I don't have no emotions. I pretty much became a cold-hearted individual towards others. It's got to do with the surroundings that I live in. In general, I'm a respectful individual towards society, people that's got a job to do or what have you.
>
> I will say this, that I'm going to live the way I've got to live, one day at a time, and I'm gonna live the best way that I can in the environment that I'm in.
>
> I can't fault you people for how you feel about me, and I'm not going to do that. You've got a right to feel that way, like I've got a right to feel the way I feel.
>
> With that said, I don't want to have to put an individual, innocent people, in the line of fire. I have nothing against these people. Of course, they've got a job to do.
>
> I feel that this comes from the inbred of an individual that's cold-hearted himself. Like father, like son. I do have love for individuals that's in my life, but I can't no longer be with them, so I'm in my own little world, and in that world I'm a lone wolf. I'm 40 years old. I don't use my hands. When I play, I play to win.
>
> You people come here to do a job. You heard everybody or whatever. You heard me. I'll tell you people and I'm going to tell the courts. What I said, what I told you, 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.

(R26:901-902)

Spencer Hearing

Dr. Harry Krop had been appointed earlier in the case to

assess Doty's competence to stand trial and competence to represent himself. (R1:53-57, 122-124) He submitted his report finding Doty competent to stand trial and competent to represent himself. (R2:213-217) At the Spencer hearing, Dr. Krop testified to this same assessment. (R14:10-16) During his evaluation, Krop did find one incident of suicidal behavior several years earlier, but he did not find any recent evidence of suicidal ideation, gestures or attempts. (R24:12) Krop diagnosed Doty with intermittent depression. (R14:12) Doty suffers from adjustment disorder, intermittent explosive disorder and antisocial disorder. (R14:16) Doty lacks the ability to express feelings, including remorse, that could be the result of his exposure to domestic violence in childhood. (R14:18) The prison records indicated that Doty generally rejected participation in anger management programs from his own informed choice. (R14:20) Doty has a distrust of various authority figures including mental health professionals and lawyers. (R14:20) Krop adhered to his assessment that Doty is competent. (R14:20-21)

Correctional Officer Kim Adams is in charge of grievances at Florida State Prison. (R14:25) The grievance procedures is designed to make an administrate settlement of inmate complaints and can be used for complaints against another inmate. (R14:25-26)

John Silva is a 28-year-old inmate who came to prison for murder when he was 15-years-old, and he had been incarcerated for

thirteen years. (R14:28-27) Silva and Doty were friends and also involved with each other in a homosexual relationship when they were both in Hamilton Correctional Institute. (R14:30-31) Silva tried not to deal with a lot of people in prison to avoid problems. (R14:31) He has seen a lot of violence between inmates over a variety of things, owing money, gambling debts, relationships, being robbed. (R14:32) When something happens to you in prison, the person has to react to it or become a victim. (R14:32) At some point during their relationship, Doty and Silva were separated and placed in different dorms. (R14:33) Silva said that Doty tried to be a softball coach at Hamilton C.I. and at Columbia C.I.(R14:33-34) While Silva and Doty were at Columbia C.I., Doty attacked Silva with a knife. (R14:34) If he had not used his arm to deflect the attack, Doty would have cut his jugular. (R14:34) Silva has a scar on the side of his face running into his hairline caused by the attack. (R14:34) The dispute arose because Silva got tired of dealing with Doty; he was greedy, manipulative and possessive. (R14:34-35)

Sergeant Edward Duncan, a correctional officer at Florida State Prison, has known Doty for over six years. (R14:36-37) During that time, Duncan had never seen Doty argue with a staff member or another inmate.(T14:37) In his experience, Duncan believed the quieter inmates posed the greater threat over the outspoken ones. (R14:38, 42-43) After the homicide in this case, Duncan was

assigned to escort Doty and watch him. (R14:39) Doty admitted to stabbing the inmate. (R14:40) At that time, Doty did not seem disturbed. (R14:40) In prison, an inmate cannot appear weak or he will become a victim. (R14:41) If an inmate disrespects another inmate, the other inmate will react to avoid being seen as weak. (R14:41) Doty appeared to Duncan to be an inmate who had a high expectation of respect. (R14:41) Duncan asked Doty what he would have done if an officer had seen his attack on the inmate and tried to intervene. (R14:41-42) Doty said, "That officer had to do his job." (R14:42) Duncan interpreted the response to mean that Doty would have stabbed the officer. (R14:42)

Louise Godfrey was the mitigation specialist who assisted Doty in preparing the case for penalty phase. (R14:45-48) Doty was cooperative with the investigation and assisted in locating some of the witnesses. (R14:49-50) Godfrey conducted interviews of eight different family members. (R14:49-50) Doty was involved and directed much of the investigation. (R14:51) Godfrey stated that all of the mitigation she found and delivered to Doty was presented to the court. (R14:52) Doty offered Godfrey's summary of her review of various documents to the court as an exhibit. (R14:53-56) In Doty's school records from when he was twelve, the psychological report stated Doty was referred for assessment for "telling big lies and refusing to live at home." The report noted that Doty did not like his father's drinking and chasing women. (R14:59) His

father told him to tell lies to his stepmother to cover for his father's behavior. (R14:59) The recommendation that there be family counseling was not accomplished. (R14:60) According to records, Doty's father and stepmother attended two sessions. (R14:60) Based on her prior experience in the juvenile system, Godfrey thought the psychological assessment was biased because the first paragraph started with the view that Doty was telling lies about his family situation. (R14:63) She thought that Doty's stepmother, Shelley Conner lied to the counselor to cover up Randy Doty's abuse. (R14:63-64) Consequently, when Doty reached out for help at twelve-years-old, the system allowed him to slip through without giving him the help he needed. (R14:62-64)

Wayne Doty testified in narrative form at the hearing. (R14:69) He condemned the juvenile system for failing him and noted that you do not grow out of being ignored, rejected, neglected, abandoned and exposed to the violence of watching your father beat a woman. (R14:71) Doty was critical of the adult system of mental health treatment. (R14:71-72) He expressed his view that his system works inside the prison. (R14:72) He may sit back while others disrespect him, but he will be "waiting for his chance to fill another body in a bag." (R14:72) He told the court that he had been declared sane and competent and that he would kill again without remorse. (R14:73) Finally, he referenced a report regarding the investigation where Doty was involved in the attempted murder

of John Silva. (R14:74) The report indicated the State Attorney in the Third Circuit refused to prosecute because Doty was already serving a life sentence. (R14:75)

SUMMARY OF ARGUMENT

1. The trial judge agreed to instruct the jury on the heinous, atrocious or cruel aggravating circumstance, relying on evidence that the victim may have been conscious and aware of impending death for as much as 45 seconds after first being choked. Later at sentencing, the trial court rejected the heinous, atrocious or cruel aggravating circumstance as not proven beyond a reasonable doubt. This brief period of consciousness and awareness of approaching death was also insufficient to justify the jury instruction. The jury's recommendation has been tainted because the court instructed the jury to consider an aggravating circumstance that was not supported by the evidence. Doty's death sentence has been unconstitutionally imposed relying on the tainted jury recommendation. Amend. V, VI, VIII, U.S. Const.; Art. 9, 16, 17, Fla. Const.

2. The possible future dangerousness of a capital defendant is not a valid aggravating circumstance and evidence or argument relevant to future dangerousness is inadmissible in the penalty phase. See, e.g., Allen v. State, __ So. 3d __, 38 Fla. L. Weekly S592 (Fla. July 11, 2013); Walker v. State, 707 So. 2d 300 (Fla. 1997); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983). A prison corrections official, familiar with Florida State prison and Doty personally, was permitted to testify to his opinion that Doty presented a future threat to other inmates and correctional

officers in the prison. This impermissible opinion evidence tainted the jury's consideration of the case and renders the death recommendation unreliable. Doty's death sentence has been unconstitutionally imposed. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const.

3. This Court has long held that it is improper to invite jurors to imagine themselves in the place of the murder victim and the pain and terror that they would feel in the same position. See, e.g., Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); Garron v. State, 528 So. 2d 353 (Fla. 1988). The medical examiner, in response to a question from the prosecutor, asked the jurors to imagine the pain and emotions they would feel if being strangled like the victim in this case. The medical examiner, in part, said, "[I]f one is fully conscious at the time that ligature is applied, or that hands go around the neck to apply pressure, I think anyone in this room can fully imagine what sort of emotions might go through a person's mind if they are cognitive ... I mean you can only imagine what that would be like." Such testimony influenced the jury's to consider improper factors in reaching a sentencing recommendation. The trial court's reliance on a tainted jury recommendation renders the death sentence unconstitutionally imposed. Amend. 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). 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.

ARGUMENT

ISSUE I
THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE INSTRUCTION.

The trial judge agreed to instruct the jury on the heinous, atrocious or cruel aggravating circumstance, relying on evidence that the victim may have been conscious and aware of impending death for as much as 45 seconds after first being choked. (R26: 937-940; R27:965-968, 1005-1006) Later at sentencing, the trial court rejected the heinous, atrocious or cruel aggravating circumstance as not proven beyond a reasonable doubt. (R5:929-931) This brief period of consciousness and awareness of approaching death was also insufficient to justify the jury instruction. The jury's recommendation has been tainted because the court instructed the jury to consider an aggravating circumstance that was not supported by the evidence. Doty's death sentence has been unconstitutionally imposed relying on the tainted jury recommendation. Amend. V, VI, VIII, U.S. Const.; Art. 9, 16, 17,Fla. Const.

There was no evidence that the victim perceived any danger until being choked. Doty confessed, giving a oral statement to Inspector Kevin Snow, and he also prepared affidavits with his confession to the crime. (R23:588 - R24:623, 655-657) A transcript of the confession and the affidavits were introduced as defense

exhibits during penalty phase. (R3:562-592; R24:655-655) Doty stated that he and inmate William Wells used a ruse to get Rodriguez out of his cell and into the interview room. (R3:565, 579; R24:616-619) Doty and Wells made a bet for cigarettes with Rodriguez that Wells could tie his hands with the strip of sheet and that Rodriguez could not get loose. (R3:565; R24:612-613,618-619) Rodriguez took the bet, and Wells tied his hands. (R3:565; R24:619) Doty came behind Rodriguez and placed his arm around his neck in sleeper choke hold position. (R3:565-566; R24:619) At first, Rodriguez thought Doty's actions were part of the game. (R24:621) However, Doty then locked down on the choke hold, and Wells also pinched Rodriquez's nose to hasten the restriction of the airway. (R3:579; R24:621) Rodriguez went limp and urinated himself in a very short time. (R3:579;R24:620) Based upon the evidence that the victim was first choked with a classic sleeper hold using the elbow and forearm to apply pressure to the neck, the medical examiner testified that it was reasonable to conclude that the victim lost consciousness with 10 to 45 seconds. (R23:556-557) An expertly applied sleeper hold could produce unconsciousness in 10 to 15 seconds, and a less expertly applied hold could take 45 seconds to render the victim unconscious. (R23:556-557) The victim was unconscious and near death at the time the stab wounds were administered. (R23:556-559, 562-563)

The trial court found and evaluated the case as a

strangulation killing, and correctly rejected HAC as an aggravating circumstance. (R5:929-931)(App) In the sentencing order, the court wrote its findings regarding the HAC circumstance:

> In Brezia v. State, 926 So. 2d 203, 1211-12 (Fla. 2006), the Florida Supreme Court stated that the HAC aggravator "focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." (citation omitted). Furthermore "[t]he focus should be upon the victim's perceptions of the circumstances." (citation omitted)
>
> The Florida Supreme Court has previously noted that "our case law establishes...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 th factor of heinousness is applicable." (citation omitted). Overton v. State, 801 So. d 877, 901 (Fla. 2001).
>
> In contrast to the actual planning of the murder which occurred over at least several weeks, the murder of Xavier Rodriguez itself occurred very quickly. According to their plan, the Defendant and codefendant lured an unsuspecting Rodriguez into the third (3rd) floor conference/interview/medical room. Once inside this room they tricked Rodriguez into placing his hands in the ligature it is absolutely clear he had no idea what Doty and Wells were planning. Otherwise he would have never placed his hands in the noose. Once Rodriguez's hands were in the ligature and incapacitated, the Defendant, who had used this diversion to get behind the victim, placed him in a sleeper hold. Dr. William F. Hamilton, the Medical Examiner, testified that when the sleeper hold was applied forty-five (45) seconds would be a reasonable time for the victim to lose consciousness. He further stated that if the sleeper hold was expertly applied one would expect the victim to lose consciousness within ten to twenty (10 to 20) seconds.
>
> In this case the court has the benefit of several oral and written statements made by the Defendant, as well as, his penalty phase testimony and statements.
>
> In Summer v. State, 31 So. 3d 733,747 (Fla. 2010), The Florida Supreme Court stated that "[a] trial judge is not prevented from relying on specific statements made by the defendant if they have indicia of reliability, even if the defendant has given several conflicting statements." (citation omitted).

> The Defendant's testimony as to how the murder occurred, and the reactions of the victim are consistent with the multiple statements he has given and the other corroborating evidence. In his penalty phase testimony the Defendant testified that when he placed the victim in the sleeper hold, the victim laughed like it was some kind of joke, which the Defendant found insulting, and he choked him harder. The strength the Defendant used to strangle the victim was supported by a photograph of a bruise on his arm shortly after the murder. Additionally, the Defendant maintained that the victim lost consciousness and urinated down his leg within ten (10) to (15) seconds of the sleeper hold being applied by him, a fact which the Medical Examiner testified supports a loss of consciousness.
>
> Additionally, after choking the victim with his sleeper hold, the Defendant stabbed the victim twenty-five (25) times. Although the victim still had a heart beat and a pulse, when these stab wounds were inflicted, the victim was not conscious when he received them. Dr. Hamilton testified that his conclusion that the victim was not conscious when the stab wounds were inflicted was based on the tight grouping of the wounds on the victim's body, and indication the he was not moving when he was stabbed by the Defendant, indicating a lack of consciousness.
>
> *This aggravating circumstance has not been proven beyond a reasonable doubt.*

(R5:929-931)

This Court has approved the heinous, atrocious or cruel aggravating circumstance in strangulation cases and stated that the strangulation killing of a conscious victim supports an inference for the existence of the HAC aggravating circumstance. See, e.g., Conde v. State, 860 So. 2d 930, 955 (Fla. 2003); Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000); Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1987). The theory of these cases is that strangulation requires some time to kill, and during that time, the conscious victim would suffer the anguish of awareness of impending

death. *Ibid.* Consequently, in cases where the victim was unconscious or semi-conscious at the time of the strangulation, the HAC aggravator is not supported. See, Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989); Herzog v. State, 439 So. 2d 1372 (Fla. 1983). In this case, the evidence showed that the victim was not conscious for more than 45 seconds. The victim was completely surprised. Believing that Doty's grabbing him around the neck was part of the game, the victim became aware of the seriousness of his situation only when the strangulation hold was increased. Unlike this case, the strangulation cases where HAC was approved typically had other evidence showing victim awareness other than the act of strangulation. See, e.g., Conde v. State, 860 So. 2d 930, 955 (Fla. 2003)(struggle with victim who was beaten and also had defensive wounds); Belcher v. State, 851 So. 2d 678, 683 (Fla. 2003)(victim had injuries consistent with a struggle with her attacker); Barnhill v. State, 834 So. 2d 836, 850 (Fla. 2002)(victim struck, knocked to the ground, manually strangled, and then strangled with the victim's own belt taken from his pants); Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000)(victim had injuries to her eye and neck indicating she struggled for her life with her attacker); Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1987)(victim had injuries consistent with a struggle and a fight to get away); Johnson v. State, 465 So. 2d 499, 507 (Fla. 1985)(Defendant initially choked the victim, but the victim escaped. Defendant

chased victim down, resumed strangulation three times to insure the victim's death); Lemon v. State, 456 So. 2d 885, 887-888 (Fla. 1984)(victim feared the defendant intended to kill her and pleaded for her life before the attack). This case is different. No additional evidence exists in this case suggesting that Rodriguez was aware of possible death at any time other than during the strangulation itself.

This case involves only a brief time of awareness of possible death before Rodriguez became unconscious. The trial court correctly concluded the aggravating circumstance was not proven beyond a reasonable doubt. However, the trial court incorrectly found that the evidence as sufficient for a jury instruction. Because the jury may have relied on an legally improper aggravating circumstance to reach a death recommendation, the death sentence imposed is improper. This case should be reversed and remanded for resentencing with a new jury.

ISSUE II
THE TRIAL COURT ERRED IN PERMITTING A PRISON CORRECTIONAL OFFICER TO GIVE HIS OPINION THAT DOTY WOULD BE A FUTURE DANGER TO OTHER INMATES AND CORRECTIONAL OFFICERS.

The possible future dangerousness of a capital defendant is not a valid aggravating circumstance and evidence or argument relevant to future dangerousness is inadmissible in the penalty phase. See, e.g., Allen v. State, __ So. 3d __, 38 Fla. L. Weekly S592 (Fla. July 11, 2013); Walker v. State, 707 So. 2d 300 (Fla. 1997); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983). A prison corrections official, familiar with Florida State prison and Doty personally, was permitted to testify to his opinion that Doty presented a future threat to other inmates and correctional officers in the prison. This impermissible opinion evidence tainted the jury's consideration of the case and renders the death recommendation unreliable. Doty's death sentence has been unconstitutionally imposed. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I Secs. 9, 16, 17, Fla. Const. The death sentence should be reversed.

Doty called Lieutenant Dennis Cauwenberghs, a veteran corrections supervisor at Florida State prison, to testify about the prison and his knowledge of Doty as an inmate. (R25:751-772) At one point, Doty advised the court he intended to ask Cauwenberghs if he thought Doty would be a future threat in prison. (R25:757) The court then held a bench conference. (R25:758) Although Doty did not know how Cauwenberghs would answer, he agreed with the court

the witness would testify truthfully. (R25:758) The court advised Doty this could open the door to potentially prejudicial rebuttal from the State, and future dangerousness evidence is not something the State would normally be allowed to present. (R25:759) Additionally, the court noted that Doty had previously agreed to redact similar statements from a document admitted earlier in the case. (R23:639-647; R25:759-761) The court took a recess for Doty to consult with standby counsel and the mitigation expert. (R25:761-762) After the recess, Doty asserted that he was representing himself, and he intended to ask the question of the witness. (R25:762-766) Doty asked the question about future dangerousness, and Caurwenberghs testified as follows:

> Q. Lieutenant Cauwenberghs, knowing about the defendant, myself, and your relationship with your officers, being the administrative lieutenant, and being around themm, has anyone in your office ever implicated that I could be a future threat to them or other inmates?
>
> A. I think you've already proven that you could be a threat to other inmates.
>
> Q. You think I could be a future threat to your officers?
>
> A. At Florida State Prison we have 1200 close-management inmates and death row inmates, and we handle all those the same way, and I believe they could all be a threat to security staff or civilian staff.
>
> Q. The reason I ask you that question, Lieutenant, is because, obviously, I was a runner when this happened, I have been around your officers, as a matter of fact, I've even cleaned up officers where mental health people are, you around them, they felt comfortable with me being around them; is that correct?
>
> A. That's correct.

> Q. That's the reason I'm asking you that question. For one, you're a professional, you've been around the institution for a while, you've been around inmates for a while. I wanted your professional opinion so the jury understands your point of view.

(R25:767-768)

This Court has consistently condemned attempts to introduce evidence of future dangerousness or arguments suggesting such an issue should be considered in the sentencing process. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983)(prosecutor argued the jury should vote for a death sentence to keep defendant from killing again); Walker v. State, 707 So. 2d 300 (Fla. 1997)(prosecutor improperly asked 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)(prosecutor asked mental health expert if defendant was "a risk to any prison guard who is watching her in the future"). The evidence elicited from Lt. Caurwenberghs directly concerns Doty's future dangerousness to inmates and guards. Such evidence can have a significant influence on a jury's consideration of the case and the jury's sentencing recommendation.

Given the prejudicial impact of such evidence, the trial court should have excluded it, even though Doty, acting as his own counsel, wanted to admit it. The jury's recommendation is for the trial judge's consideration in deciding the sentence, and the judge has the authority to protect the jury from improper influences to insure the integrity of the sentencing recommendation. Since this

improper evidence has tainted the jury's recommendation, the trial court's sentence is also tainted. A resentencing is now required in this case.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING THE MEDICAL EXAMINER TO TESTIFY ABOUT THE COGNITIVE EXPERIENCE SOMEONE WOULD HAVE WHILE BEING STRANGLED AND SUGGESTED TO THE JURORS THAT THEY COULD IMAGINE WHAT THAT EXPERIENCE WOULD FEEL LIKE TO THEM.

This Court has long held that it is improper to invite jurors to imagine themselves in the place of the murder victim and the pain and terror that they would feel in the same position. See, e.g., Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); Garron v. State, 528 So. 2d 353 (Fla. 1988). In this case, the medical examiner, in response to a question from the prosecutor, asked the jurors to imagine the pain and emotions they would feel if being strangled like the victim in this case. The medical examiner, in part, said, "[I]f one is fully conscious at the time that ligature is applied, or that hands go around the neck to apply pressure, I think anyone in this room can fully imagine what sort of emotions might go through a person's mind if they are cognitive ... I mean you can only imagine what that would be like." Such testimony influenced the jury to consider improper factors in reaching a sentencing recommendation. The trial court's reliance on a tainted jury recommendation renders the death sentence unconstitutionally imposed. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I Secs. 9, 16, 17, Fla. Const.

The medical examiner's testimony, in part, proceeded as follows:

Q. Could 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.

A. Having never been in that position myself, I can't speak with real authority, but if one is fully conscious at the time that ligature is applied, or that hands go around the neck to apply pressure, I think anyone in this room can fully imagine what sort of emotions might go through a person's mind if they are cognitive, if they're fully aware what's going on, if they know that a serious effort is being make[sic] to take their life, I mean you can only imagine what that would be like.

(R23:554-555)

In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), the prosecutor argued,

> ... can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life...

Bertolotti, at 133 fn.2. This Court held the argument was improper and wrote,

> ... the prosecutor made an argument which is a variation on the proscribed Golden Rule argument, inviting the jury to imagine the victim's final pain, terror and defenselessness. This violation has been addressed recently in Jennings v. State, 453 So.2d 1109 (Fla. 1984) vacated on other grounds, 470 U.S. 1002, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985), but the prohibition of such remarks has long been the law of Florida. Barnes v. State, 58 So.2d 157 (Fla. 1951).

Bertolotti, at 133. Relying on Bertolotti, this Court condemned a similar prosecutorial argument in Garron v. State, 528 So. 2d 353, 358-359 (Fla. 1988):

> [Y]ou can just imagine the pain this young girl was going

> through as she was laying there on the ground dying ....Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug[sic] herself from the bathroom into the bedroom where she expired...

Garron, at 358-359. Although the improper suggestion to the jury in this case came from the medical examiner's testimony, rather than the prosecutor's argument as in Bertolotti and Garron, the impact is perhaps even more prejudicial, since it came in the form of an expert's opinion evidence.

Although Doty, acting pro se, did not object to the testimony, the trial court should have acted. The trial court had the duty to protect the jury from prejudicial influences. This should have been accomplished by stopping the testimony, or at least, an admonishment and cautionary instruction could have been given. A remand for resentencing is now needed to remedy the error.

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). 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.

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). The decision from the United States Court of Appeals For The Eleventh Circuit has held it was without authority to overturn prior United States Supreme Court authority upholding Florida's statute on Sixth Amendment grounds, even though seemingly in conflict with Ring. Evans v. Department of Corrections, 699 F.3d 1249(11th Cir. 2012). Additionally, 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, this Court should 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.

Doty'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. Doty's death sentence must be reversed for imposition of a life sentence.

CONCLUSION

For the reasons presented in this initial brief, the death sentence imposed in this case should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Patrick Delaney, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapp@myfloridalegal.com as agreed by the parties, and to appellant, Wayne Doty, #375690, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026, on this 23rd day of April, 2014.

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,

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IN THE SUPREME COURT OF FLORIDA

WAYNE C. DOTY,

Appellant,

v.

CASE NO. SC13-1257
L.T. No. 2011-CF-498

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO

INITIAL BRIEF OF APPELLANT

Trial Court Sentencing Order

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

STATE OF FLORIDA,
(Plaintiff),
vs
WAYNE C. DOTY,
(Defendant Pro Se).
/

CASE NO.: 04-2011-CF-0498-A
FELONY DIVISION
Filed in Open Court on the 5 day of June, 2013.
Theresa Nadley
Deputy Clerk

SENTENCING ORDER

The Defendant, Wayne C. Doty, was indicted by the Bradford County Grand Jury for First Degree Murder, for the death of Xavier H. Rodriguez on August 24, 2011. On that same day the State filed its Notice of Intent to Seek Death Penalty. On September 13, 2011, the Court entered a Provisional Order Appointing Public Defender. After the Public Defender's office withdrew, and the Office of Regional Counsel was appointed, the Defendant filed his Motion to Waive Appointment of Counsel. Prior to a hearing on the Defendant's Motion to Waive Appointment of Counsel, the Office of Regional Counsel filed its Motion to Withdraw and on October 3, 2011, Stephen Bernstein, Esquire was appointed to represent the Defendant. On October 4, 2011, the Court conducted a Faretta Inquiry, pursuant to Faretta v. California, 422 U.S. 806 (1975), and found that the Defendant made a knowing, fully informed and voluntary decision to represent himself, and was competent to do so. The Court ordered that the Defendant was authorized to proceed *pro se* and also appointed Stephen Bernstein, Esquire and Michael Ruppert, Esquire, as standby counsel. In all stages of the case after the Faretta inquiry by the Court, and the subsequent order authorizing his right to do so, the Defendant has elected to proceed *pro se*. Over the course of the proceedings the Court has appointed a private investigator, Sean Fisher; a mitigation specialist, Louise Godfrey; a penalty phase mental health mitigation specialist, Dr. Clifford A. Levin; and a forensic psychologist Dr. Harry Krop to examine the Defendant for his competency to proceed pursuant to Rule

3,210 Fla. R. Crim. Pro., and his competency to represent himself pursuant to Indiana v Edwards, 554 U.S. 164 (2008) and Rule 3.111 Fla. R. Crim. Pro.

On August 7, 2012, the Defendant pled guilty to the charge of First Degree Murder as alleged in the Indictment.

A penalty phase proceeding was conducted on January 7 – 11, 2013. A majority of the jury, by a vote of 10 to 2, recommended that the court impose the death penalty on the Defendant.

On March 13, 2013, a Spencer hearing, pursuant to Spencer v. State, 691 So.2d 1062 (Fla. 1996), was conducted. The State presented no additional evidence to what they had presented at the penalty phase proceeding, and the Defendant presented several additional witnesses and pieces of evidence.

This Court has heard and considered the evidence presented at the penalty phase proceeding and the Spencer hearing, and considered the sentencing memoranda submitted by the State of Florida and the Defendant. The Court during the penalty phase proceeding has heard the Victim Impact Evidence from Marisel Serrano, the mother of the victim, regarding his uniqueness as an individual human being, but the Court has not considered Ms. Serrano's testimony in arriving at the sentence to be imposed. The Court has considered: The advisory sentence of the penalty phase jury, which by a majority vote of ten to two (10 to 2) advised and recommended to the Court that it impose the death penalty upon Wayne C. Doty. This Court, as required by law, and as told to the jury during their instructions that "the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose", has afforded the jury recommendation great weight and deference in arriving at its sentence. However, also as required by law, the Court has independently weighed the

aggravating and mitigating circumstances in arriving at its decision. The Court now FINDS as follows:

A. Aggravating Circumstances:

The State presented and the Court instructed the jury on four (4) aggravating circumstances:

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. See § 921.141 (5) (b), Fla. Stat. (2012).

The State, pursuant to a Stipulation with the Defendant, introduced a Judgment and Sentence from the Thirteenth (13th) Judicial Circuit in and for Hillsborough County, Florida, in case number 96-05875 for the Crimes of Murder in the First Degree, a capital felony and Robbery with a Firearm, a first degree felony punishable by up to life. The Defendant 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.

This aggravating circumstance has been proven beyond a reasonable doubt and the Court gives it very great weight.

2. The capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment. See § 921.141 (5) (a), Fla. Stat. (2012).

As discussed in the previous aggravating circumstance, the State introduced the Judgment and Sentence for Murder in the First Degree with its commensurate life without parole sentence. Additionally according to the uncontroverted testimony of many of the witnesses who testified at the penalty phase proceedings, including the

Defendant himself, the First Degree Murder that the Defendant pled to and is to be sentenced for in this case occurred in Florida State Prison, while the Defendant was serving his previously imposed life sentence.

This aggravating circumstance has been proven beyond a reasonable doubt and the Court gives it great weight.

3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated ("CCP") manner without any pretense of moral or legal justification. See § 921.141 (5) (I), Fla. Stat. (2012).

In Baker v State, 71 So.3d 802, 818-19 (Fla. 2011), the Florida Supreme referenced the four-part test established in Lynch v State, 841 So.2d 362, 371 (Fla. 2003), to determine whether the CCP aggravator applies in any given case: "(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."

After the Defendant and his codefendant, William Wells, committed the murder they made no secret of the fact that they had killed the victim in the third floor conference/medical/interview room of K-Wing at Florida State Prison ("FSP"). In fact within a short time after committing the murder, the Defendant told Sergeant Homer Scott, the correctional officer assigned to K-Wing that night, that there was a dead body upstairs in the interview room. Over the next week or so the Defendant made several incriminating statements, both oral and written, to several correctional staff members regarding his involvement in the murder of Xavier Rodriguez. The statement the

Defendant made to Investigator Snow, and presented to the jury during Snow's testimony, as well as, the Defendant's own testimony to the jury, support the fact that the Defendant had planned the murder for at least several weeks before he committed it. Several weeks to months before the murder occurred, the Defendant felt that the victim had "disrespected" him by calling him a "pussy-ass cracker", and had also stolen cigarettes from the Defendant. The Defendant felt that his only recourse for such disrespect by Rodriguez was to kill him. So along with his codefendant Wells the Defendant began making plans to kill Rodriguez. He made arrangements to obtain a homemade knife from another inmate at least several weeks before the murder. He and Wells gathered sheets to use as instruments to either hang the victim from the third (3rd) floor or to strangle him.

On the day of the murder, a final incident between Rodriguez and Wells and Doty occurred. The victim purportedly took advantage of a change in officers on K-Wing to take the place of Wells as a runner on the wing when it was not his turn. This act by the victim was considered by Doty and Wells as the straw which broke the camel's back. They spent the rest of the day planning the details of how to kill the victim. While generally they had been planning Rodriguez's murder for at least several weeks, this incident pushed their plans into high gear that morning. 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. The Defendant and Wells brought the accessories they would use to further their plan to commit murder to the third (3rd) floor conference/interview/medical room to hide for later use, including ripped up bed sheets for ligatures and a homemade knife to ensure that the victim would be killed.

Once the victim placed his hands in the ligatures in the conference room, it was the Defendant, who had previously maneuvered behind the victim as planned, who placed him in a choke/sleeper hold. It was the Defendant who assisted Wells in tightening the ligature around the victim's neck after the victim had gone limp, and it was the Defendant who stabbed the victim twenty-five (25) times in the abdomen to ensure his death. It was the Defendant who told Investigator Snow that he wanted to open up the victim, pull his heart out and hold his beating heart to ensure he had killed him.

The Defendant as part of his non-statutory mitigation has raised the realities of prison life, milieu or environment as mitigation. While the Court in a separate part of this order will address prison milieu as mitigation, the Court feels it necessary to address it here, as it relates to the last prong of CCP.

At the penalty phase proceeding the Defendant himself has testified, and offered the testimony of Clinton Powers, Leo Boatman, and several officers, as well as the testimony of John Silva at the Spencer hearing, that prison life and its environment is much different than that found in society outside of prison. The Defendant asserts that in prison you are either the perpetrator of violence or the victim of it. So for incidents involving a perceived disrespect, an inmate must take violent action toward the person perpetuating that disrespect or become prey to other inmates. These violent retaliatory acts are even perpetrated when the initial acts themselves involve no physical violence, or threat of one, which is the case here.

The Court finds that the Defendant's action in killing Rodriguez under these circumstances does not in any way constitute any pretense of moral or legal justification for the murder. As stated in Hill v State, 688 So.2d 901, 906 (Fla. 1996), "[a]s a practical

matter permitting a defendant to vindicate his or her criminal activity in such a manner would be an invitation for lawlessness."

Even in a prison environment the laws of the State of Florida must be followed and enforced. While the Defendant failed to avail himself of the grievance process that is provided by the Department of Corrections he is not entitled to enforce his own grievance process by killing inmate Rodriguez for the Defendant's perceived "disrespect".

This aggravating circumstance has been proven beyond a reasonable doubt and the Court gives it great weight.

4. The capital felony was especially heinous, atrocious, or cruel. ("HAC"). See § 921.141 (5) (h), Fla. Stat. (2012).

In Brezia v State, 926 So.2d 1203, 1211-12 (Fla. 2006), the Florida Supreme Court stated that the HAC aggravator "focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." (citation omitted). Furthermore "[t]he focus should be upon the victim's perceptions of the circumstances." (citation omitted).

The Florida Supreme Court has previously noted that "our case law establishes ... that strangulation creates a prima facie case for [HAC]" (citation omitted); and, "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." (citation omitted). Overton v State, 801 So.2d 877, 901 (Fla. 2001).

In contrast to the actual planning of the murder which occurred over at least several weeks, the murder of Xavier Rodriguez itself occurred very quickly. According to their plan the Defendant and codefendant lured an unsuspecting Rodriguez into the

third (3rd) floor conference/interview/medical room. Once inside this room they tricked Rodriguez into placing his hands in a ligature through the guise of a bet. Prior to Rodriguez placing his hands in the ligature it is absolutely clear he had no idea what Doty and Wells were planning. Otherwise he would have never placed his hands in the noose. Once Rodriguez's hands were in the ligature and incapacitated, the Defendant, who had used this diversion to get behind the victim, placed him in sleeper hold. Dr. William F. Hamilton, the Medical Examiner, testified that when the sleeper hold was applied forty-five (45) seconds would be a reasonable time for the victim to lose consciousness. He further stated that if the sleeper hold was expertly applied one would expect the victim to lose consciousness within ten to twenty (10 to 20) seconds.

In this case the court has the benefit of several oral and written statements made by the Defendant, as well as, his penalty phase testimony and statements.

In Summer v State, 31 So.3d 733, 747 (Fla. 2010), The Florida Supreme Court stated that "[a] trial judge is not prevented from relying on specific statements made by the defendant if they have indicia of reliability, even if the defendant has given several conflicting statements." (citation omitted).

The Defendant's testimony as to how the murder occurred, and the reactions of the victim are consistent with the multiple statements he has given and other corroborating evidence. In his penalty phase testimony the Defendant testified that when he placed the victim in the sleeper hold, the victim laughed like it was some kind of joke, which the Defendant found insulting, and he choked him harder. The strength the Defendant used to strangle the victim was supported by a photograph of a bruise on his arm shortly after the murder. Additionally the Defendant maintained that the victim lost consciousness and urinated down his leg within ten (10) to fifteen (15) seconds of the

sleeper hold being applied by him, a fact which the Medical Examiner testified supports a loss of consciousness.

Additionally after choking the victim with his sleeper hold, the Defendant stabbed the victim twenty-five (25) times. Although the victim still had a heart beat and a pulse, when these stab wounds were inflicted, the victim was not conscious when he received them. Dr. Hamilton testified that his conclusion that the victim was not conscious when the stab wounds were inflicted was based on the tight grouping of the wounds on the victim's body, an indication that he was not moving when he was stabbed by the Defendant, indicating a lack of consciousness.

This aggravating circumstance has not been proven beyond a reasonable doubt.

B. Mitigating Circumstances:

Because the Defendant has represented himself throughout all portions of the penalty phase the Court will address each and every statutory mitigating circumstance and all the non-statutory mitigating circumstances presented by the Defendant at the penalty phase trial and the Spencer hearing.

1. The Defendant has no significant history of prior criminal activity. See § 921.141 (6) (a) Fla. Stat. (2012).

The Defendant was serving a life sentence in the Florida Department of Corrections for First Degree Murder, committed in 1996, when he killed the victim in this case, Xavier Rodriguez.

The Court FINDS that there is no evidence to support this mitigating circumstance and it has not been proven.

2. The capital felony was committed while the Defendant was under the

influence of extreme mental or emotional disturbance. See § 921.141 (6) (b), Fla. Stat. (2012).

During Dr. Levin's testimony he confirmed the following diagnoses for the Defendant: (1) Major Depressive Disorder; (2) Post Traumatic Stress Disorder and (3) Anti-Social Personality Disorder. He also testified that the Defendant was not operating under the influence of extreme mental or emotional disorder as defined by statute, when he killed the victim.

The Court FINDS that there is no evidence to support this mitigating circumstance and it has not been proven.

3. The victim was a participant in the Defendant's conduct or consented to the act. See § 921.141 (6) (c), Fla. Stat.(2012).

While the victim may have initially consented to placing his hands into the noose provided by Wells, he in no way consented or participated in his own demise. His murder was clearly the work of the Defendant and William Wells and clearly against Xavier Rodriguez's will.

The Court FINDS that there is no evidence to support this mitigating circumstance and it has not been proven.

4. The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor. See § 921.141 (6) (d), Fla. Stat. (2012).

Both the Defendant and Wells participated in the planning and the preparations of the murder. Wells obtained the sheets used for the ligatures, the Defendant made arrangements to obtain the homemade knife that was used. The Defendant was the one who had the motive to kill Rodriguez. The Defendant was the one who felt disrespected

by the victim's words and actions, and was the person who took the primary role in actually killing the victim. He was the one who put the sleeper hold on the victim, which rendered him unconscious and was the major contributing factor causing his death. He also stabbed the victim to make sure he was dead. The Defendant also told Investigator Snow I could have done the murder by myself. The evidence establishes that the Defendant was the primary person responsible for the murder of Xavier Rodriguez.

The Court FINDS that there is no evidence to support this mitigating circumstance and it has not been proven.

5. The Defendant acted under extreme duress or under the substantial domination of another person. See § 921.141 (6) (e), Fla. Stat. (2012).

Dr. Levin testified on cross examination at the penalty phase proceeding that the Defendant was not under the substantial domination of another. The facts leading up to the murder and of the murder itself prove this out. While the testimony supported that the Defendant and Wells planned the murder together, it was the Defendant who the victim had slighted and it was Doty who actually killed the victim. Wells was a willing participant, but not the primary perpetrator.

Dr. Levin also testified that the Defendant may have had a perception of extreme duress, based on his perception of the prison environment, although it was not real based on society's standards. This was supported by Dr. Krop's testimony at the Spencer hearing.

The Court FINDS that there is no evidence to support this mitigating circumstance and it has not been proven.

6. The capacity of the Defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially

impaired. See § 921.141 (6) (f), Fla. Stat. (2012).

Dr. Levin testified that while the Defendant's emotional makeup may have impaired his ability to conform his conduct to the requirements of law, he had the intellectual ability to do so and he had the capacity to appreciate the criminality of his conduct.

Dr. Krop agreed that the Defendant's mental state would not have prevented the Defendant from being able to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The Defendant's plans and actions support this testimony. The Defendant and Wells made a concerted effort to isolate the victim and kill him away from anyone else's presence or eyesight. They did not want to be interfered with or interrupted.

The Court FINDS that there is no evidence to support this mitigating circumstance and it has not been proven.

7. The age of the defendant at the time of the crime. See § 921.141 (6) (g), Fla. Stat. (2012).

The Defendant was thirty-eight (38) years old at the time of his crime. Age is not a factor in this case and played no part in the commission of the crime nor is it a mitigating factor under the facts of this case.

The Court FINDS that there is no evidence to support this mitigating circumstance and it has not been proven.

8. The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty. See § 921.141 (6) (h), Fla. Stat. (2012).

a) Defendant, Wayne C. Doty, was cooperative with

authorities and reported the incident himself.

The Defendant and Co-defendant reported the murder to Sergeant Homer Scott, the officer in charge of K-Wing at the time of the murder, shortly after it occurred. After that the Defendant cooperated with prison officers and investigators throughout the investigation, and made numerous oral, tape recorded, and written statements regarding his participation in the murder including pleading guilty to First Degree Murder before the Court on August 7, 2012.

The Court FINDS that this mitigating circumstance has been proven by a preponderance of the evidence presented and the Court gives it some weight.

b) The emotional neglect/abandonment of the Defendant and his exposure to physical abuse during childhood.

The Defendant was taken abruptly from his biological mother by his biological father at an early age and did not have any contact with her for over twelve (12) years. During the time he was raised by his father he had two stepmothers, Ann Hertle and Shelley Connor, both of whom testified at the penalty phase proceeding. While the father minimized the domestic violence that he perpetrated on the two stepmothers, the stepmothers' testimony supported a significant level of domestic violence committed by him upon them, oftentimes in the presence or with the knowledge of the defendant. It is clear that during his childhood the defendant was exposed to significant levels of domestic violence perpetrated by his father against his stepmothers.

Except for one instance where Ms. Hertle burned the defendant's fingers on a stove as punishment for starting a fire in their mobile home, there was no other evidence presented that the Defendant himself was the victim of domestic violence from either his father or either stepmother.

Dr. Levin testified that the Defendant's exposure to violence lead to him becoming violent himself. He has feelings of detachment from others, isolation, and it is difficult for the defendant to make emotional connections. Some witnesses, including the defendant himself, describe him as being a "lone wolf."

The Court FINDS that this mitigating circumstance has been proven by a preponderance of the evidence presented and the Court gives it moderate weight.

c) Prison life/milieu/environment and the perception of the victim as a threat in that environment.

The Defendant has clearly proven that the prison milieu is decidedly different in many ways than that outside the prison walls. Both the correctional officers and inmates who testified agreed to that fact.

The Defendant asserts that the prison environment and his perceived rules of that society coupled with his particular background and childhood, involving his exposure to violence mitigate his crime. The Defendant asserts this type of mitigation even though the evidence shows his motive for killing Xavier Rodriguez, was his disrespect of the Defendant through name calling and pilfering of contraband. No evidence was presented that the victim had ever physically assaulted the defendant or co-defendant or even threatened to do so.

The Defendant would like the Court to apply his perceived law of the prison milieu as mitigation for his crime. However, the Court is loathe to apply different legal standards to the prison environment. The prison milieu is subject to the same laws as that of a free society, and the court, as a matter of public policy, cannot condone a course of conduct which would justify self help and murder in a prison setting. This is additionally true when the prison system has a grievance process to air complaints by

inmates against other inmates or staff.

The Court FINDS that the Defendant has proven the mitigating circumstance that the prison life/milieu/environment is in fact a different environment from life outside the prison walls and that the defendant's own perception of the victim as a threat in that environment was proven by a preponderance of the evidence and the Court gives it very little weight.

d) Defendant's diagnostic and mental health history for emotional disorder.

Dr. Levin testified that he examined hundreds of pages documenting the mental health treatment the Defendant has received in prison. The records establish an evolution of various mental health diagnoses that he has received over the years. When Dr. Levin combined these previous diagnoses with his own perceptions of the Defendant, through his lengthy personal interviews with the Defendant, and a review of family interviews, he diagnosed the Defendant with (1) a major depressive disorder, (2) post traumatic stress disorder, and (3) anti-social personality disorder, which he classified as major mental health issues.

Dr. Levin further testified that the prison system had offered the defendant a variety of anti-depressants, as well as, mood stabilizing medications. Additionally, the prison system offered the defendant psychiatric reviews, individual counseling, group counseling and anger management counseling. The records also reflected that the Defendant, intermittently engaged in these therapies and there were periods where he rejected them, including the period just before the murder occurred.

Dr. Krop testified at the Spencer hearing that based upon his review of the Defendant's prison records that three (3) diagnoses were highlighted: adjustment

disorder, intermittent explosive disorder and anti-social personality disorder.

However, both Dr. Levin and Dr. Krop agree that the Defendant's diagnoses did not prevent the Defendant from having the mental capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Both doctors agree that the choice the Defendant made to kill Xavier Rodriguez was made knowingly and deliberately outside the requirements of law.

The Court FINDS that this mitigating circumstance has been proven by a preponderance of the evidence and the Court gives it some weight.

e) Positive attributes of the Defendant reflecting the potential for him to be a contributing member to a prison setting.

Several Correctional officers, as well as inmates Clinton Powers and Leo Boatman testified that the defendant was known to them to be a quiet and generally respectful inmate. He was also described by the officers as a hard worker.

These attributes are offset by the Defendant's explosive and violent history in prison which will be discussed fully in section (f) below. According to the testimony of Dr. Levin when the Defendant is placed in a situation where he perceives that a person is either demeaning or belittling him, there is an urgency to reconcile his feelings by engaging that person, with violent behavior to elevate his self-worth.

Dr. Levin's testimony is supported by the Defendant's testimony at the Spencer hearing. He told the Court that the prison system has nothing to offer to rehabilitate him. He further testified "And I don't want rehabilitation." Mr. Doty further told the Court in the Spencer hearing: "[a]nd I will even go as far as saying, there's evidence, overwhelming evidence, all throughout the record to prove in the next case that I told the Honorable James P. Nilon and the state attorney that I'd kill again with no

remorse. I'm not psychotic. I'm not suicidal. Absolutely not."

The defendant's violent actions and his Spencer hearing testimony rebut any positive attributes of the Defendant reflecting the potential for him to be a contributing member to a prison setting.

The Court FINDS that this mitigating circumstance has not been proven by a greater weight of the evidence.

f) Defendant's perception of violent behavior as acceptable.

Dr. Levin testified that given the Defendant's upbringing involving domestic violence and his lack of proper role models a "legacy" of violence was created in the Defendant, whereby "the Defendant associated violence with his development of self-worth." Over the years if the defendant felt demeaned or belittled, he felt an urgency to reconcile his feelings against the individual who belittled or demeaned him, by resorting to violence against that individual to elevate his self-worth.

The State has proven that the Defendant has a violent history both inside and outside the prison milieu. His 1997 First Degree Murder and Robbery with a Firearm convictions; his violent attack on Inmate John Silva with a knife at Columbia Correctional Institution, which resulted in Mr. Silva being cut; to his cold, calculated and premeditated murder of Xavier Rodriguez, are proof of his violent history. The Defendant asserts that these violent incidents are part of his "legacy" of violence created by his father's emotional neglect of him and his exposure to domestic violence committed by his father on his two stepmothers, particularly Shelley Connor.

The evidence also establishes that except for one incident involving his stepmother Ann Hertle burning the defendant's fingers on a stove as punishment for starting a fire the defendant was not the victim of domestic violence himself.

So while Dr. Levin's testimony establishes that the Defendant was imprinted through his upbringing, that violence is an acceptable form of problem solving, it has no acceptable place in society whether it is outside or inside the prison walls.

The Court FINDS that this mitigating circumstance has been proven by a preponderance of the evidence and the Court gives it little weight.

g) Failure of the Juvenile Justice System.

The Defendant first encountered the Juvenile Justice System at approximately twelve (12) years of age. Through the testimony of Dr. Levin, his review of the Defendant's juvenile records and the testimony of the Defense witnesses it was proven that the Defendant was exposed to Domestic Violence on many occasions during his childhood. The defendant's father, Randy Doty, beat his wife Shelley Connor about the head and face on "too many to count" occasions. The Defendant was trying to run away from home to escape the violence and to his credit the Defendant reported at least one of these incidents to the juvenile authorities as the reason for his behavior. Unfortunately, when confronted by the Defendant's allegations of domestic violence perpetrated by his father, Ms. Connor lied to the authorities, and it was the Defendant who was made out to be a liar.

Additionally, Dr. Levin's testimony, regarding one of the treatment recommendations that was given for the Defendant's behavior, was to attend family counseling, which included his father. Dr. Levin opined that he strongly disagreed with this treatment recommendation because if the Defendant attended counseling with his father under these circumstances, it would re-victimize the Defendant. He further stated that, by including the father in the Defendant's counseling, it would be condoning the

father's behavior as acceptable.

The testimony established that a couple of the counseling sessions occurred but there was no follow-up to ensure that the recommendations for a young Wayne Doty were followed. The Defendant fell through the cracks of the Juvenile Justice System and his issues which brought him into this system were never adequately addressed.

The Court FINDS that this mitigating circumstance has been proven by a preponderance of the evidence and the Court gives it moderate weight.

h) Defendant's conduct throughout the court proceeding.

While the defendant has not raised his courtroom conduct and demeanor as a mitigating circumstance the Court feels that it deserves comment and some consideration.

From a very early point in the case the Defendant was legally permitted to represent himself in these proceedings. A case of this nature is the most serious type under the law. There is no other type of case where an individual can forfeit their own life for their conduct. The stress placed on all the participants of a case like this is of the highest level, particularly on the accused. That the Defendant was facing the possibility of the imposition of death penalty while representing himself placed him under extreme pressure and stress.

Even though the Defendant was under this strain, he conducted himself appropriately in all proceedings before the Court. While not an attorney, the Defendant presented his case in a meaningful way. While his pleadings were not always at the level that a highly experienced attorney would present, they were at least competent.

With one exception involving the cross examination of the victim's mother

the Defendant always conducted himself in a proper manner and was courteous to all the participants, including court personnel during the trial. The Defendant always followed the decorum of the courtroom and the rules of the Court.

The Court FINDS the Defendant's conduct throughout the totality of these proceedings is a mitigating circumstance which has been proven by a preponderance of the evidence and the Court gives it some weight.

C. Conclusion:

The Court FINDS that the State of Florida has proven, beyond and to the exclusion of every reasonable doubt three (3) Aggravating Factors.

The Court FINDS that no other statutory mitigating factors have been proven by a greater weight of the evidence other than Florida Statute §921.141 (6) (h) "which provides for any other factors in the defendant's background that would mitigate against imposition of the death penalty." Under this category the Court FINDS that the following mitigating circumstances have been proven by a greater weight of the evidence:

(1) The Defendant was cooperative with authorities and reported the incident himself.

(2) The emotional neglect/abandonment of the Defendant and his exposure to physical abuse during childhood.

(3) Prison life/milieu/environment and the perception of the victim as a threat in that environment.

(4) Defendant's diagnostic and mental health history for emotional disorder.

(5) Defendant's perception of violent behavior as acceptable.

(6) Failure of the Juvenile Justice System.

(7) Defendant's conduct throughout the court proceedings.

In weighing the aggravating factors against the mitigating factors the court understands that the process is not simply an arithmetic one. It is not enough to weigh the number of aggravators against the number of mitigatiors which it has found to exist. The process is more qualitative that quantitative.

This Court FINDS that the aggravating circumstances in this case far outweigh the mitigating circumstances.

The Defendant has been incarcerated in the Florida Department of Corrections since 1997 for First Degree Murder and Robbery with a Firearm. He has previously taken a life from a premeditated design. In that case, during the course of a robbery the Defendant shot an unarmed man in the face several times killing him.

He was housed in the Florida State Prison, a maximum security institution when this murder occurred.

In the current case his lengthy and detailed planning of the murder of Xavier Rodriguez in a cold calculated and premeditated manner, because Mr. Rodriguez disrespected or belittled the Defendant without any evidence of a physical assault or threat of one by Mr. Rodriguez far outweigh the non-statutory mitigation proven by the Defendant.

D. Judgment and Sentence:

As to the Charge of First Degree Murder of Xavier Rodriguez in the Indictment, this Court adjudicates you guilty of that offense and this Court sentences you, Wayne C. Doty, to death.

IT IS ORDERED that you, Wayne C. Doty, be taken by the proper authority to

the Florida Department of Corrections, to be housed there until the date your execution is set.

It is further **ORDERED** that on such scheduled date, you, Wayne C. Doty, be put to death.

You are hereby notified that this Sentence is subject to automatic review by the Florida Supreme Court.

DONE AND ORDERED this 5th day of June A.D., 2013, in Starke, Bradford County, Florida.

JAMES P. NILON
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished on this 5th day of June A.D., 2013, to the following:

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