IN THE SUPREME COURT OF FLORIDA

RICHARD P. FRANKLIN,

Appellant,

v.

CASE NO. SC13-1632

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **THIRD** JUDICIAL CIRCUIT,
IN AND FOR **COLUMBIA** COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

RICHARD P. FRANKLIN,

Appellant,

v. **CASE NO. SC13-1632**
L.T. CASE NO. 12-312-CF

STATE OF FLORIDA,

Appellee,
_____/

STATEMENT OF THE CASE[1]

On May 3, 2012, the Columbia County Grand Jury returned an indictment charging Richard Franklin with premeditated murder in the death of Ruben Thomas, a correctional officer; battery on a law enforcement officer with great bodily harm (William Brewer, a correctional officer); and possession of contraband, a knife, by an inmate in a state correctional institution. R1:10-11.

On June 6-19, 2013, Franklin was tried by jury. The trial judge denied Franklin's motions for judgment of acquittal on the element of premeditation. R36: 2678-82, 2813-14, R37:2841-42. The jury found Franklin guilty as charged on counts 1 and 3 and guilty of the lesser included offense of felony battery on count 2. R3:511, T38:3002-03.

[1]References to the record on appeal are as follows: The forty-two volume record on appeal will be designated as "R," followed by the volume number as designated on the outside cover page of each volume, followed by the page number. All proceedings were before Columbia County Circuit Judge Paul S. Bryan.

The penalty phase was held June 25, 2013. The jury recommended death by a vote of 9 to 3. R8:1498, R40:3238.

A Spencer[2] hearing was held July 25, 2013. R:41. The defense introduced the telephonic deposition of inmate Randy Thomas. R8:1506-33.

On August 2, 2013, the trial court sentenced Franklin to death, finding five aggravating factors: 1) under sentence of imprisonment; 2) prior violent felony; 3) committed to disrupt or hinder the lawful exercise of any governmental function; 4) especially heinous, atrocious, or cruel; 5) cold, calculated, and premeditated manner. In mitigation, the court found: (1) Franklin's childhood and adolescence were troubled, unstable, and violent; (2) Franklin was a great brother and uncle; (3) Franklin suffered a head injury from a gunshot wound as a teenager; (4) Franklin's family effectively abandoned him; (5) Franklin intervened when a fellow inmate was being attacked; (6) Franklin exhibited good behavior during trial; (7) Franklin exhibited remorse. R9:1723-42; R42; Appendix A.

Notice of appeal was timely filed August 23, 2013. R9:1746.

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

STATEMENT OF FACTS

Guilt Phase

State's Case

On March 18, 2013, Franklin was an inmate at Columbia Correctional Institution (CCI). Franklin was housed in Tango Dorm (T-Dorm), which consists of four quads, 1-4, each with cells upstairs and downstairs. Franklin was in cell 3206 ("3" for Quad 3, "2" for second floor, and "06" for sixth cell). R31:1929-35. The officer's control station was on a raised platform in the middle of the four quads, with a 7-foot wall around it and a "sallyport" (hallway) encircling it. There was glass all around the entrance to each quad. A stairwell of 3-4 steps led down from the control station. At the bottom of the steps was a door, which led into a vestibule area. A second door led from vestibule area into the sallyport. The doors were 5 feet apart and opened outward. R31:1929-56, 2035, State's Exhibit 13.

Officer Myer testified that he and Sergeant Thomas worked the 4-12 shift that night. They sat in the officers' station, where they controlled the doors, lights, toilets, showers electronically. From the control room, they could see everything in each quad except inside some of the cells and right up against the wall. The main entrance to each quad was a steel grill gate, which took 30 seconds to open or close

completely and could be stopped or pushed back with a hand. The switch had to be in the locked position for the door to lock. R31:1967-76.

Officer Myer conducted the evening count around 9:30 that night by going to each cell to verify all the inmates were in their cells. Thomas remained in the control room. R31:1981-85. When Myer returned to the control room, he began "rolling doors" for the elderly inmates in Quad 1, i.e., he electronically unlocked the cell doors so the inmates could then close their doors, which would then automatically lock. R31:1987-89. Thomas spoke to an inmate on the intercom and then said he was going to see what was wrong with a cell in Quad 3. Myer let Thomas out the inner control room door, which Thomas shut, and then opened the outer door for Thomas to enter Quad 3. Thomas closed the door behind him. It was not unusual for an officer to walk into a quad alone to check on a cell. R31:1989-92.

Myer got distracted, and when he looked in Quad 3, he saw Thomas running from the top tier in the area of 3206 toward the front stairs. Myer glanced in the dayroom to see if there was a disturbance there, and when he looked back, Thomas was coming down the stairs. When Thomas turned to go out the exit door, Myer opened the door. As Thomas ran towards the door, Myer saw an inmate, whom he later recognized as Franklin, come out of the crowd in the dayroom, 3-4 feet behind Thomas, running. Myer

rolled the door closed, but the inmate got out, so he and Thomas were both running around in the sallyport area. Thomas came around Quads 1 and 2, hollering, "back door, back door." The back door, C-108, led into the vestibule area just outside the officer's station. Myer ran to the control panel to open the back door, and at the same time, called for back-up. Thomas opened the door, but the panel light stayed red, indicating the door didn't close. Myer ran down the 3-4 steps, looked into the vestibule, and saw Thomas inside the vestibule trying to pull the door closed, as Franklin was outside trying to pull the door open. Each time Franklin got the door open, his hand came through the door making a hitting motion at Thomas. Myer did not see a knife. The "struggle at the door, the striking, everything" lasted about 30 seconds and then stopped. Myer yelled at Thomas that help was coming and returned upstairs to look for Franklin, as he didn't know whether he was still in the sallyport or had gone into the vestibule area. R31:1992-2000.

Back-up arrived, and Sergeants Puttere and White assisted Thomas, while Officers Brewer and Peterson began securing the inmates in their cells, starting with Quad 1. Brewer was in Quad 2, heading towards the upper tier stairs, when Franklin came out of a cell, ran up to Brewer, and punched him in the face, knocking him down. Brewer dropped his gas, and Franklin leaned over him. Peterson sprayed Franklin with gas, and

Franklin grabbed Brewer's gas from the floor and retreated. Peterson picked Brewer up, Myer opened the door, and they came out. R31:2001-09.

At that point, Franklin ran to the Quad 2 door and began shaking it. R31:2009, 2011. Myer did not know how Franklin got into Quad 2. Franklin went into a bottom-tier cell, came back out, and threw a lock at the glass in the door. Captain Nipper was then talking to him at the door, telling him to submit. Franklin took some clothing out of a laundry bag that was just inside the quad door, tied the clothing together, and then tied one end to a shower grill and the other to the fire exit door, preventing the door from being opened. Franklin went into cell 2108, and two inmates came out. The fire alarm went off, and water started coming out of the cell. Franklin came back up to the quad door. R31:2011-16. By that time, Assistant Warden Anderson, Captain Nipper, and the armed response team were at the door. Anderson and Nipper tried to get Franklin to give up the spray. At that point, Franklin reached in his pants, pulled out a shank, and held it up to the window. He was visibly upset, flailing the knife, hollering, and carrying on. Myer had not seen Franklin with a knife before that point. The emergency response team sprayed chemicals under the door. Franklin waved his spray can around but did not use it. Anderson and Nipper moved back, and the next thing Myer saw was Franklin lying face

down on the ground, the spray and knife sliding off in different directions. Franklin jumped up in a few seconds and moved to the back. Nipper told Myer to open the door, and the team went in and tackled and handcuffed Franklin. Water covered the dorm floor and was running out the door. R31:2017-24.

Inmates were screaming and hollering from the quads during the incident. R31:2037. Asked if he recalled the sworn statement he gave right after the incident, in which he said Thomas was standing up when the control station door closed, Myer said his statement was probably more factual because it was given the same night. R31:40-41.

The medical examiner, Dr. Valerie Rao, testified the cause of death was rapid loss of blood. R35:2647. Thomas had sharp force injuries, bruises, lacerations, and abrasions. The bruises and abrasions were to the nose, shoulders, wrists, right chest, arms, knees, shin, foot, and buttock. On the upper lip was a sharp force injury, consistent with a stab wound (deeper than longer), and an abrasion consistent with a punch. The lower lip had injury consistent with a punch. There were eight sharp force injuries to the hands and arms. There was a non-lethal, incised wound (longer than deep) to the left scalp, about 4 inches long, which fractured the temporal bone. R35:2631-42. There were two non-lethal incised wounds outside the right eye and in front of the right ear, 2 inches and 1 inch

deep, respectively. There was a sharp force injury to the left side of the neck, 2 inches long, ½ inch deep, which injured the muscles. R35:2643-44. The only lethal wound was a stab wound to the neck that cut the jugular vein and punctured the left lung. R35:2645. That wound was 2.7 inches deep. R35:2654. Considerable force was required to cause the skull and the fatal neck injury. R35:2650. The wounds to the arms and hands were below the elbow and consistent with Thomas pulling something with his hands while someone was stabbing at his hands to get him to turn it loose. One wound was to the right forearm, the rest were to the wrists and hands. R35:2656-58.

Robert Acree had been Franklin's roommate for 3-4 months. Acree had the lower bunk, Franklin the upper. Acree made money in prison by making shanks. He sold quite a few of them, including one to Franklin in January 2012, which looked like the one used in the homicide, other than the wrap around the handle. Franklin generally kept the shank under the door, using ticky-tack or a magnet. R31:2043-47. That day, Acree saw Franklin at the intercom and shortly after that, Sgt. Thomas came to the cell. Franklin called Thomas to the back of the cell to look up at the vent. Acree couldn't hear the conversation. When Thomas looked down, Franklin hit him in the nose. Acree jumped up and moved to the door. Thomas looked at Acree, shocked, and had his radio out. Franklin hit Thomas again and "bust his nose,"

causing it to bleed "real bad." Then he hit him in the stomach/chest area, and Thomas ran out of the cell, dropping his radio and personal alarm. R31:2048-53. Franklin looked at Acree like he didn't know what he had gotten himself into. R31:2053. Acree was standing against the rail in front of the cell when Franklin came out of the cell. Thomas was already down at the Quad 3 door when Franklin came out. R31:2074. As Franklin walked out of the cell, he reached behind him and pulled a knife out of his pants. R31:2054. Franklin went in the same direction as Thomas, and Acree went in the other direction. R31:2054. Acree returned to the cell 5-10 minutes later and cleaned up the blood. There was not a lot of blood but it was noticeable. R31:2057. When Thomas came to the cell, he didn't seem angry or ready for a fight. The punch appeared to catch him off guard. R31:2059-60. Franklin hit Thomas three times, with a few seconds between blows. It looked to Acree like Franklin had the drop on Thomas, meaning that if Franklin had lured Thomas up there with the intention of killing him with a knife, he had ample opportunity to do so. R31:2069-71. Acree had last seen the knife 3 weeks before. The knife could not be stored under the door with the handle on without being visible. R31:2054-55. Franklin had been sitting on Acree's bed a few hours earlier. R31:2061. If the knife was in the back of Franklin's pants at that time, Acree would have seen it poking

out. R31:2072. Acree didn't see Franklin retrieve the knife or leave the cell other than to go to the intercom. Inmates commonly had knives for protection. Franklin was a quiet fellow, for whom Acree had a lot of respect. R31:2077.

Samuel Selig lived on the bottom tier of Quad 2. Selig testified he was sitting on a bench by the entrance to Quad 2 when it started. Thomas came by doing his security check, carrying a bag of chips, and went to the other wings. Selig next saw Thomas run around the corner from Quad 3, with blood on his face. Franklin was a step behind, carrying a knife. Thomas ran to the officer's door, pulled it open, ran in, and turned to pull it shut. Franklin put his foot in the door and stabbed Thomas multiple times in the chest and neck. R32:2093-95. Selig said he saw the blade buried several times in Thomas's neck. R32:2098. Franklin then got into Selig's wing. An officer came in, and Franklin knocked him down. Another officer got him out. Franklin was coming down the stairs "like he wanted to stab the old man, too, but he got pulled out by that time." R32:2099. Before the officer got pulled out, Franklin took his gas and sprayed it under the door. R32:2100.

On cross-examination, Selig said Franklin was a couple of steps behind Thomas when he first saw Franklin. R32:2112. When Thomas got to the office door, there was a delay at the door. He finally got in after a few seconds. R32:2105. All the hits

Selig saw were to the chest and upper neck, all buried deeply. R32:2106-07. When the door closed, Thomas was standing. He then fell to his hands and knees and rolled over. By that time, Franklin was in Quad 2. R32:2117-19. After Franklin struck the officer, he went upstairs and talked to some inmates. Other inmates were telling him, "barricade the door, barricade the door." R32:2131-32. When he came back downstairs, he tied the back door shut. R32:2137-39. After the attack on Thomas, Franklin walked over to the wings, gesturing with his hand across his throat laterally. R32:2141.

Sergeant Puttere testified she gave Thomas first aid and helped load him on a stretcher for transport to the hospital. His lips were moving. R32:2151-59.

Brewer testified he and Peterson went to lock down the inmates. R33:2065. There were sixty residents per quad, and the glass was full of inmates, banging, kicking, and yelling. Someone sitting behind the crowd at the glass would have a hard time seeing through the glass. R33:2174-76. They began in Quad 1, ordering the inmates into their cells and going behind them to make sure the electronic locks were engaged. When they got to Quad 2, Peterson went upstairs while Brewer stayed downstairs. Brewer ordered an inmate, who was not Franklin, to his cell, and the inmate just stood there, looking past Brewer. Brewer turned, and that's the last thing he remembers. His

orbital socket was crushed, and he lost 15% of his vision in his right eye, which now sits lower than the left eye. R33:2065-72.

Peterson testified that when he and Brewer got to Quad 2, they told everybody to get in their cells, which they all did. Nobody was on the quad. When Peterson got to cell 8, Franklin was walking towards him. Peterson ordered Franklin to his cell and when Franklin walked past Peterson, Peterson assumed he was going to his cell. Peterson heard a thump, turned, and saw Brewer fall to the ground. He saw no one on the quad other than Brewer and Franklin. Franklin leaned over Brewer, and as Peterson approached, Franklin stood up with Brewer's gas canister in his hands. Peterson did not see a knife in Franklin's hands and at no point saw a knife in Franklin's hands. Peterson sprayed Franklin in the face, and Franklin went to the back of the quad, to the shower area. Peterson walked Brewer to the entrance door, pounded on the door, the door opened, they got out, and the door closed. Peterson then heard Franklin shaking the door. There was no water on the ground and no fire alarm going off at that time. R32:2184-94, 2197-99. The gas comes out in a stream, burns the eyes, disorients the person, and looks like red spray paint. It washes off with water but continues to burn. R32:2201-02, 2209.

When Captain Nipper arrived, Thomas was being carried out. Brewer and Peterson then came out of T-Dorm, Brewer with facial

injuries. Nipper went to Quads 4, 3, and 1, hollering lock down, but no inmates were out. When she got to Quad 2, about 10 inmates were at the benches and table area, including Selig, who was in a wheelchair. Nipper pounded on the door and told them to lock down, and they started returning to their cells. Nipper stepped away for a minute, and when she returned, Franklin was fumbling with a laundry bag of clothes sitting inside the quad door. Nipper did not see any weapons in his possession. She ordered him back to his cell, then left to see if additional staff had arrived. When she returned, Franklin was bent over the laundry bag. He pulled out the homemade knife and a gas can. She ordered him to relinquish the weapons and lie down, but he did not comply. Franklin took clothes out of the bag, tied them together, and tied one end to the shower and the other end to the fire exit door. He came back to the quad door, and she ordered him again to give up his items. He refused and said, "Bitch, you ain't taking me alive." Franklin then started shaking the quad door. Nipper went back to the primary entrance and learned the armed response team was en route. When she returned to Quad 2, Franklin was standing by the benches, randomly spraying gas in the air. Franklin entered cell 2108, and two inmates came out. The fire alarm and strobe lights from the alarm went off, water started pouring from the cell, and Franklin came out of the cell. By that time, the armed team had

arrived, and Nipper devised a plan to fire non-lethal rounds through the portholes located above the top tier cells. She chose this plan in part because there was no imminent danger from Franklin. Assistant Warden Anderson arrived and approved the plan. Nipper stepped away while Anderson, Stg. Minnich, and others stayed at the door talking to Franklin. The non-lethal round was fired, Franklin fell, and the team rushed in as Franklin was getting up with the shank in his hand. Franklin was gassed, tackled, and restrained. R32:2215-52.

Sgt. Minnich testified that at one point, Franklin shook the knife and made a cutthroat motion across his throat. After the order to shoot, Franklin went down, sprang back up, and Minnich went in and ordered him to drop the weapon. Franklin crouched down, and the officers tackled him, knocking the shank out of his hand. Franklin never tried to use the weapon against anyone. R33:2261-69.

Assistant Warden Anderson testified the only weapon Franklin had when he arrived was the gas. Anderson told Franklin he had to cuff him, and Franklin kept saying, "You don't understand." Anderson ordered Sgt. Lamoreaux to gas him, and Lamoreaux sprayed him under the door. Franklin stepped back to wipe off his face, then tried to spray them, but his gas ran out. He also pulled the knife out from the back of his waist. He kept saying, "I'm going to get another one of y'all, y'all

come on. I'm ready for you." R33:2302-16. In his November 2012 deposition, Anderson said he ordered the door opened only after Franklin threw the weapon down and it looked to Anderson like he wanted to give up. R33:2319-20.

Michael Joseph fired the rubber pellets from the port. The shot knocked Franklin down, and he dropped the weapons. The team came in, and Franklin picked up the weapon, moved through the tables, and stopped. He crouched down, and the officers tackled him. R33:2356-68.

Officer Priller saw Franklin pull a knife from his waist. Franklin thumped his chest, saying, "You're going to shoot me, shoot me, kill me." R33:2373-82.

Inmate Birchard resided in cell 3201. Birchard testified he heard a ruckus, went outside, and saw Thomas leaning over the rail, coughing blood. Birchard went back in his room, and Thomas came walking by, "kind of in a fast walk . . . kind of like stumbling." Birchard followed Thomas and saw him trying to get out the Quad 3 door. As Birchard walked down the stairs, Franklin came by Birchard and squeezed through the door about two minutes after Thomas went through it. Franklin had a knife. Birchard saw a struggle and an arm going up and down but did not see a knife. Birchard returned to his room, and, from his doorway, saw Franklin in front of the glass make a gesture like his neck was cut. R33:2290-97.

Tilghman was Birchard's roommate. Tilghman said Thomas ran by his cell and down the stairs with Franklin running behind him. Tilghman went downstairs behind them and saw Thomas and Franklin go out the Quad 3 door. Tilghman couldn't see after that because the whole quad was on the glass. When Franklin came back, he moved his thumb across his throat. Tilghman did not see a knife in Franklin's hand at any time. R33:2274-88.

Charles Dodson resided in cell 2108. Dodson saw Thomas and Franklin struggling at the door. He did not see a weapon or the stabbing and returned to his bunk. Multiple inmates were on the glass, screaming and beating on the glass. After that, Franklin came into Dodson's cell briefly and left. Dodson didn't see any weapons. Franklin came back in a second time, asked for help with the pepper spray, and Franklin and Dodson's cellmate figured out how to use it. Franklin didn't threaten them in any way and was peaceful and calm. Franklin said he had to bust the sprinklers, and Dodson and his cellmate left. Dodson thought he saw a knife as they went out the door. R33:2334-42.

Robert Lynch resided in 3108. That night, Thomas came into Quad 3 and asked who had water coming out of their vent. Someone responded, "Up here, 6 top." Lynch looked up into the cell and saw Thomas walk into the cell and look up at the vent. Lynch did not see Acree in the cell. Franklin, who was standing at the back of the bed, struck Thomas, and a scuffle ensued.

Thomas came out of the cell, stumbled down the steps, and went out the door, which was wide open. Blood was coming from his face. Thomas was exiting the quad door when Franklin came out of his cell with a knife in his right hand. Thomas went around the vestibule, and Franklin grabbed the quad door as it was closing, and went out. Thomas got to the outer officer's station door but wasn't able to open it immediately. Franklin came around behind Thomas and made a stabbing motion with the knife. Lynch couldn't tell if Thomas made it out the door. Franklin came back around and dragged his right hand and thumb across his throat with the knife in his hand. Acree had offered Lynch a similar knife two days earlier. In most prisons, "you'd rather be caught with a knife than without one," but Lynch was going home in a few weeks, so declined the offer. The knife had string wrapped around it, but the handle looked different from the handle on the knife Franklin used. R34:2400-09, 2435.

Amy George, a crime scene technician, said the distance from cell 3206 to C-108, where the stabbing took place, was 150 to 170 feet. R34:2480. The knife blade was 6 inches long. The blade and handle together was 10-1/2 inches. R34:2502-03.

Captain Nipper agreed that Defense Exhibit 2 indicated that a person could see only the left side of Franklin's cell from where Lynch was standing. The vent and beds weren't visible. R35:2556.

Jo Ellen Brown, a DNA analyst, testified Thomas's DNA matched DNA from blood swabbed from the west stairwell of the south stairs, the floor, the south stairway, and the north and south walls of cell 3206 in Quad 3. Thomas could have contributed to a mixed DNA profile from the top rail between 3204 and 3205. R35:2577-79. Thomas's blood was in the sallyport outside door C-108 and around the door. R35:2582-83. Brewer's blood was on the Quad 2 floor. Blood from door 2102 matched Franklin and Thomas. R35:2585-88. Thomas's blood was on Franklin's fingernails, boots, and knife. R35:2592-96.

Defense Case

Testifying on his own behalf, Franklin first described the struggle at the officers' door. Thomas was trying to get in the door but it wouldn't open right away. Eventually the door opened and Thomas got inside, but Franklin was able to stick his foot in the door and stop it from closing. Franklin was pulling on the handle with his left hand and hitting Thomas's hand with his right hand to get Thomas to release the door. That didn't work, so he grabbed the knife out of his left hand, and with the knife in his right hand, started poking at Thomas's hand with the knife. They struggled over the door, pulling it back and forth. Franklin was not trying to hit Thomas anywhere other than the arms and hands. He was trying to get in the door because "I wanted to whup his ass." R36:2710-14. Franklin

thought it was back-up coming when he heard the noise caused by the inmates screaming and kicking on the glass, so he snatched his arm outside the door, and Thomas slammed it shut. When Thomas slammed the door shut, he was still standing. When Franklin realized back-up wasn't coming, he went to Wing 3 to see why the inmates were beating on the door. R36:2714-15. They were yelling at him to give them the knife so they could hide it. Franklin made the gesture across his throat because he wasn't going to give them the knife. He went in Wing 2 because the door was open. Peterson and Brewer came in and started clearing the dayroom. Franklin walked past them a few times because he had no cell to go to in that wing. He then swung and hit Brewer with his hand. Captain Nipper came to the sallyport area, hollered something, and left and came back several times. Franklin then tied the back door closed with the blues. People were screaming advice, and someone said tie off the back door. Franklin then saw the riot squad, people with guns, standing outside the window. R36:2720-22. Some officers told him, "get ready." Anderson arrived, and someone told him to talk to Anderson, so he walked up to the door and called out to him, but Anderson was talking to the riot team, the alarm was going off, people were hollering, and Anderson didn't respond. R36:2723. Anderson then came up and said something like, "Partner, you fixing to get the butt end of the stick," and another officer

gassed him through the crack in the door. Franklin backed off, Anderson called him back, he went back, and he was gassed again. They were acting like they were going to come in with guns, and he pulled the knife out. They came through the door and cuffed him. R36:2725.

Franklin said he got along with Thomas until 3-4 days before March 18. The problem was "childish" and "immature little kid shit, on both our behalf." R36:2726. Franklin was the last person in line one time, and he didn't close the gate after he came through. Thomas snapped, "Get your dumb ass back there and close the motherfucking gate." Franklin responded that inmates weren't supposed to touch any security measures. Thomas said a few words, and Franklin closed the gate. R36:2726. Later that day, Franklin went to Thomas and told him he didn't need to talk to him that way, that if he told him to close the gate, he would. But the conversation didn't go like Franklin thought it would, and the next time Thomas caught him at the gate, he had to open and close the gate for everybody. R36:2728. By March 18, it had gotten to the point where they were both cussing each other out. Franklin could see that Thomas wasn't going to take him to confinement for cussing, so Franklin told Thomas in the yard, "We can handle this head up." He told Thomas they could go to the barber shop or his room. Thomas said, "If you want me in there, you know how to get me

down there." After master count, Franklin called on the intercom and told Thomas, "I got a problem in the room. We need to handle this." R36:2729-30. When Thomas came in the room, Acree was on his bed. Thomas brushed past Franklin and looked up at the vent. Franklin asked, "What's up? What's up now?" When Thomas laughed and went to eating his chips, Franklin hit him in the mouth. Acree jumped out of bed and screamed something like Jesus Christ, and Franklin and Thomas both looked at Acree, "and that's when he tried to scoop me," meaning go up under him, like in wrestling, and they tussled on the ground. Thomas got the radio, and Franklin knocked it out of his hand. Thomas then grabbed the panic button, at which time Franklin stopped, and Thomas got up and left. Franklin left his cell because he didn't want to be in the cell when they came for him. He got the knife before he left to keep "the wolves" off him until they could come to terms. When he left the cell, he didn't see Thomas. He went down the front stairs, and when he got to the quad door, which was in the process of closing, he saw Thomas out in the hallway. He stopped the door from closing and went through. His intention at that point was to "chase him on off the block." At first, Thomas just stood in front of the officer's station door, as Franklin walked to him, like he was waiting to fight. Franklin didn't think Thomas saw the knife by the way he was acting. As Franklin got closer, Thomas ran.

Franklin never thought he would catch him because of the distance between them, but when he stuck his foot in the door, "it was like an excitement like, oh, I got you." It was never his intention to kill Thomas. In his mind, it was like, "I only hit you one time, period. . . I hit you in your mouth one time. I was fixing to get my ass whupped, ... If I get the opportunity, I got the opportunity to whup your ass, so that's what I'm going to do right now." He couldn't tell where the knife was striking Thomas and was not trying to hit him in any vital area. R36:2731-39. All he wanted to do was get the door open so he could whup his ass. R36:2769.

Asked on cross-examination how Thomas got stabbed in the skull, Franklin said he and Thomas both were putting their body weight on the door trying to get leverage and jerk it, so they weren't standing straight up. R36:2740. Franklin had bought the knife from his roommate, hid it under the cell door, and put the rope handle on it so it wouldn't fall off his wrist. You can take the handle off and hide the knife anywhere. The knife was under the door when he hit Thomas. He put the handle on after Thomas left. The wrap for the handle was in his locker. Franklin invited Thomas in to fight, and "he know what he come in there for." R36:2744-51. When Thomas laughed, it was like it was a joke to him, meaning it was going to continue. So Franklin hit him. R36:2753. After Thomas pushed the panic

button, Franklin stayed in the room. When he came out, Thomas wasn't even in the quad. Franklin wasn't thinking about catching him at that time because there's no way he could have. R36:2754. The shank was for Franklin's protection because Thomas had pushed the panic button and the "goon squad" would be coming. When Franklin left the officer's door, Thomas was standing upright. Franklin went to the primary entrance to meet the goon squad but the noise was inmates, not the good squad. So he went back around to Quad 2, and that's when he made the gesture of slashing his throat. R36:2760. When they shot at him, he ducked. He heard the shot go past his ear and hit the window. He never told Anderson he was going to take out another one. R36:2762-63. He admitted sucker-punching Brewer. He picked up the pepper spray but didn't try to use it on Brewer. Peterson sprayed Franklin in the face but Franklin never tried to use the mace on him. He didn't charge the door or chase after them with a knife in his hand. While he was running around and breaking the sprinklers, the knife was on his waist, "you can't run around with it." R36:2765. He never did a throat slash with the knife in his hand. He admitted beating his chest and saying, "Come on, let's get it." They had said, "Get ready." He thought the knife was keeping them from coming in and kicking his ass. "If I give them the knife, they going to kick my ass. If I don't give them the knife, they going to

eventually kick my ass, but the only thing that's stopping them from kicking my ass right now is this knife, so to give this knife up is not feasible." R36:2766. He hit Thomas once in the mouth in his cell, and then they wrestled in the cell. The floor and walls are cement, the bed frame and lockers are metal. When he left the cell, he fast walked. R36:2774, 2779.

Matthew Almand was Lynch's bunkmate. Almand testified he and Lynch were locked down after master count. As soon as count is cleared, they get their door rolled. Once the door is rolled, they can't get out without officer assistance. They lock the door by closing it because once the door is closed, it locks itself. That night, Almand never went out in the dayroom in Quad 3 after Thomas ran out. R36:2783-87.

Lionel Tate was housed next door to Franklin. That night, Tate saw Thomas "tussling" with Franklin in Franklin's cell. Tate didn't see any punches thrown and didn't see any weapons. Tate backed up and saw Thomas exit the cell, walk down the stairs, and leave the wing. Tate didn't see Franklin leave his room and didn't see anything else that night. During the ten days Tate was at CCI, he saw Thomas conduct three shakedowns of Franklin's room. A shakedown is when an officer goes through an inmate's personal property and searches for contraband. Tate also saw Thomas "talking to [Franklin] kind of aggressive, profanity." R36:2787-92.

Penalty Phase

The state introduced judgments and convictions for Franklin's prior convictions for first-degree murder, armed robbery, and aggravated battery with a firearm. Over defense objection, CCI officer Kim Kennedy testified that Franklin was serving life on the murder and armed robbery and a sentence of years on the aggravated battery. R39:3072-73.

Tony Anderson testified that dorm officers and sergeants have the same duties and go out into the dorm for various reasons, including checking on maintenance problems. It's not unusual for inmates to report problems. One person has to remain in the officer's station at all times. R39:3077-85.

The state presented the victim impact testimony of Paula Thomas, Ruben Thomas's mother, and Leeann Royster, his fiancée. R39:3089-3104.

The defense presented two family members.[3]

Lorenzo Frankline, 68, is appellant's[4] father. Richard's mother died a year ago. Mr. Frankline last saw his son in Okeechobee prison 20 years ago. Richard grew up in Daytona Beach, one of five children, four boys and one girl. Richard

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[3] Prior to the penalty phase, defense counsel informed the trial court that he would not be calling Dr. McMahon, retained by the defense, or Dr. Krop, who evaluated Franklin for his 1994 conviction and determined, inter alia, that he had an IQ of 73, brain damage, and a mental age of 13. R38:3012-13, R2:2226-28.

[4] At some point, appellant's name was spelled Franklin instead of Frankline and has remained so.

was the middle child, "the mildest of all, the nicest one." The family lived in a two-bedroom house. The five children shared a bedroom, sleeping in bunk beds. They were Jehovah Witnesses. The children were not allowed to participate in after-school activities or have friends over. They were allowed to go to other children's homes only with their parents. When Richard was 16, Mr. Frankline let the boys go for a ride with the sons of friends who were also Jehovah Witnesses. An hour later, they were called to the hospital. Someone shot the car up, and Richard had been shot. There were a thousand holes in the car. Richard wasn't the same after that. His "thinking and ability" was changed. He also talked about needing a gun so he wouldn't get shot again. R39:3107-11.

Loria Frankline is Richard's sister, the oldest of the Frankline children. Loria testified that their mother had a nervous breakdown when Richard was an infant and was away for six months. Loria, then 11, and her brother, who was 10, were responsible for taking care of Richard. Their parents were never affectionate with each other and were sometimes violent. Her dad knocked windows out of the house and once put a gun to their mother's face in front of the children. She was going to leave him because she got tired of him messing with other women. The children knew this was going on. The children all slept in

the same room. The house was a "raggedy shack." There were holes in the floors. While pregnant with one of Loria's brothers, her mother fell through the floor. The parents were violent towards the children as well. "We started out with switches, we upgraded to extension cords. And when I was 16, I got beat with an alternator belt." These incidents usually occurred because "my mom usually be upset because my dad done left the house." They had to be home from school or the bus stop within in 5 minutes and got beat if they didn't make it. The beatings left marks but no one at school saw them because they wore long sleeves or got the beatings on the weekend. Their dad shot her oldest brother inside the house one time. Richard was home at the time. They got a pair of shoes each August, and if the shoes came apart, her father glued them back together. They got picked on and made fun of everyday. They were on welfare and ate when her mother decided to cook. If her dad didn't like what she cooked, he threw it out. Her dad ate first, and then they ate. They were not allowed to participate in after-school activities, visit friends, or have friends over. To enforce the rules, their father raked the dirt in the yard on his way out and checked for footprints when he got back. They did not go to movies or celebrate holidays or birthdays. In public, they were not allowed to speak to people without their parents' okay. Loria moved out when she was 18 because "that's

[] the rules. When you turn 18, you had to leave." Loria now has children of her own. Richard was a great uncle to her kids. Of all the brothers, he was the favorite uncle. He did a lot for them. Loria worked two jobs and rode a bike because she didn't have a car. Richard took her son to daycare, picked him up, and bought him things she couldn't give him. When Richard was 16, he got shot in the head. He became distant, didn't come around as much, and didn't have a lot to say. He wasn't the uncle or brother he used to be. After he got sent to prison in 1995, she went to see him once but didn't go back. "I went to see him that one time and when I left, I couldn't handle it. It just did something knowing that I had to leave him there and I couldn't take him home. There was nothing I could do." Today was the first she had seen him since 1995. R39:3118-29.

Franklin also testified. Franklin said he shot a man in the leg with buckshot 20 years ago, and when the man died, he was charged with premeditated murder. Franklin wondered what is premeditated murder because he "never knowed anybody could die" from being shot in the leg. "I can't say it justifies anything because I'm still in the wrong, you know." Asked if he had taken steps to appeal the judgment, Franklin said he requested the transcripts many times and was told they cost $4,000, which he doesn't have. R39:3139-42. Asked if he had anything else he wanted to tell the jury, Franklin said:

> My actions have led to the death of a human being and it's—and there's nothing I can say to - I don't feel there's nothing I can say to the family to really make a difference. It's something that's been token from then that, you know, it's not like I done came in their house and broke an antique or something, it's something that can't be replaced. So I'm at a loss to even apologize because it seems like it even just make the situation even worse because it doesn't better anything, it doesn't change nothing. It's just like rubbing a stone, you know, adding fuel to the fire to make things worse, you know.
>
> And the only other thing really I can think of right now because my mind is cloudy is that I want to stress the fact that the last time that I saw him, he was standing up on his feet. He was not laying down, he was not falling down, he was upright on his feet the last time that I saw him.

R39:3142.

On cross-examination, the state was permitted, over defense objection, to ask Franklin about the facts underlying his prior armed robbery and aggravated battery conviction. Franklin said that incident happened a month after the prior murder. He shot a man, and the bullet "scraped" his leg. R39:3147-48.

On redirect, Franklin said he couldn't recall every movement he made as they struggled at the door but

> It's my fault. The evidence, regardless if I - regardless if I knowed I did it, if I didn't know that I did it, it's the result of my actions, so I'm not saying that it was no - I was intentionally doing it. I'm confessing to the fact that it occurred, man. That's what happened. It's evidence that that's what happened.
>
> I can't refute - what I'm refuting is the fact that they're saying it was intentional, man. That's

> the only challenge that I can never change. I never refuted the fact that, okay, I done fucked up and jooged this man in his neck and then he died. I'm not arguing that.

R39:3152-53.

Spencer Hearing

The trial judge noted he had read a stipulated redacted transcript of Spencer hearing witness Randy Thomas's deposition. R41:3255, as well as the PSI.

The defense and state agreed the PSI was incorrect in stating Franklin used a lock to hit Officer Brewer, as no facts were presented to support that statement. R41:3255=57.

In a deposition given July 17, 2013, Randy Thomas described a 2001 incident at Okeechobee Correctional in which Franklin intervened when Thomas was attacked by another inmate. Thomas did not know Franklin before the incident. Thomas, 5'1" and in a wheelchair at the time, was playing checkers when Johnny Thornton, 6'5", approached him about money he believed Thomas owed him and slapped the checkerboard on the ground. Thomas whacked Thornton with a cane, and Thornton picked Thomas up from behind, put his hands around his head, and tried to gouge his eyes out and twist his neck. Franklin physically pulled Thornton off Thomas. Thomas would have been critically injured or killed if Thomas had not intervened. Franklin put himself in danger while other inmates just watched. Franklin was always

quiet, minding his own business. He didn't mess with anybody. At chow, he was always at the back of the line. He respected everybody's space, and they respected his. R2:1510-30.

SUMMARY OF ARGUMENT

Issue 1. The evidence is insufficient to prove that Franklin had a "fully formed conscious purpose to kill." The state's own evidence refutes the state's theory that Franklin called Thomas to his cell with the purpose of killing him, as inmate Acree, who was standing feet away, testified that Franklin easily could have killed Thomas with the knife in the cell if he had wanted to do so and that Franklin pulled out the knife only after Thomas left the cell. The state's evidence is consistent with Franklin's testimony that he left his cell, not to kill Thomas (who was downstairs at the exit door by that time), but because he didn't want to be in his cell when the armed guards came for him; that, once downstairs, his decision to follow Thomas out the quad door was fortuitous; that he chased Thomas in the hallway, not expecting to catch him; that he decided to "whup" Thomas only after he managed to stick his foot in the door, knowing he already was in trouble; and that he stabbed at Thomas through the door opening to get him to release the door, not to kill him. The manner of killing also does not prove premeditation as it cannot be concluded that the single lethal wound, sustained as it was during the tug-of-war at the door, was deliberately placed or intended to kill. The Court should reduce Franklin's conviction to second-degree murder, which is committed when an unintended death results from an

an act reasonably certain to kill or cause serious bodily injury and is done with ill will or spite.

Issue 2. The trial court erred in finding as an aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner, as the state's own evidence was inconsistent with a prearranged design to kill. Assuming arguendo the presence of simple premeditation, the state's evidence does not establish the heightened premeditation and cold calculation required for the CCP aggravator to apply.

Issue 3. The trial court erred in finding as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. The attack lasted only 30 seconds, the majority of the wounds were to the hands, and Thomas died quickly after receiving the single lethal wound. This was not a torturous murder involving prolonged mental or physical suffering or pain. It therefore does not meet the Court's definition of especially heinous, atrocious, or cruel.

Issue 4. In an issue of first impression, this Court should hold that the law enforcement officer aggravating circumstance does not apply when the victim is a correctional officer. The legislature did not define the term "law enforcement officer" for purposes of section 921.141(5)(j). The legislature has defined separately the terms "law enforcement officer" and "correctional officer" in other statutes, however,

notably section 943.10. The 943.10 definition of law enforcement officer has been referenced in numerous other statutes, and this Court has referred to it as the "key definition." A strong argument can be made therefore that in enacting the law enforcement officer aggravator, the legislature had in mind the definition in section 943.10. At the very least, there are multiple reasonable interpretations of what the legislature intended by the term "law enforcement officer" in section 921.141(5)(j). Because the statute is ambiguous, the rule of lenity applies, and the statute must be narrowly construed in favor of the defendant. Accordingly, the law enforcement officer aggravator does not apply in the present case, and the trial court erred in instructing the jury on this aggravator.

Issue 5. The trial court erred in finding as an aggravating circumstance that the murder was committed to hinder or disrupt a government function. Though the murder resulted in disruption, there is no evidence the murder was committed for the purpose of causing disruption in the prison. This aggravating circumstance is not supported by the evidence.

Issue 6. Florida's death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

Issue 1

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT FRANKLIN'S CONVICTION FOR PREMEDITATED MURDER AS THE EVIDENCE SHOWED AT MOST THE STATE OF MIND REQUIRED FOR SECOND-DEGREE MURDER.

This issue was preserved by appellant's motions for judgment of acquittal at the close of the state's case and at the close of all the evidence. R36:2678-80, 2813, 37:2841.

The standard of review is de novo. See, e.g., Fisher v. State, 715 So. 2d 950 (1998).

Premeditation is "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). While the purpose to kill may be formed a moment before the act, it must exist "'for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.'" Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997)(quoting Wilson v. State, 493 So. 2d 1019 (Fla. 1986)). Second-degree murder, on the other hand, requires no specific intent to kill. Second-degree murder is committed when an unintended death results from an act "imminently dangerous to

another and evincing a depraved mind regardless of human life."[5] s. 782.04(2), Fla. Stat. (2012).

While premeditation may be proved by circumstantial evidence, premeditation sought to be proved by circumstantial evidence must be inconsistent with every other reasonable inference. Coolen v. State, 696 So. 2d 738 (Fla. 1997); see also Mungin v. State, 689 So. 2d 1026, 1029 (Fla. 1995), cert. denied, 522 U.S. 833 (1997); Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). If the state's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of premeditated murder cannot be sustained. Coolen.

This Court has recognized several types of evidence from which the presence or absence of premeditation may be inferred: the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, the nature of the wounds, and the manner in which the wounds were inflicted. Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied,

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[5] An act is imminently dangerous to another and evincing a depraved mind if it is an act (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, (2) is done from ill will, hatred, spite, or an evil intent, and (3) is of such nature that the act itself indicates an indifference to human life. Marasa v. State, 394 So. 2d 544, 545 (Fla. 5th DCA), review denied, 402 So. 2d 613 (Fla. 1981).

456 U.S. 984 (1982); Hill v. State, 133 So. 2d at 68, 72 (Fla. 1961).

Other courts and commentators have grouped the types of evidence from which premeditation may be inferred into three categories: (1) facts showing planning activity directed toward a killing purpose; (2) facts from which a motive to kill could be inferred; (3) facts about the nature of the killing from which it may be inferred "the manner of killing was so particular and exacting the defendant must have intentionally killed according to a preconceived design." See W. R. LaFave 2 Substantive Criminal Law, s. 14.7(a), at 480 (2003)[hereinafter LaFave].

> Illustrative of the first category are such acts by the defendant as prior possession of the murder weapon, surreptitious approach of the victim, or taking the prospective victim to a place where others are unlikely to intrude. In the second category are prior threats by the defendant to do violence to the victim, plans or desires of the defendant which would be facilitated by the death of the victim, and prior conduct of the victim known to have angered the defendant. As to the third category, the manner of killing, what is required is evidence (usually based upon examination of the victim's body) showing the wounds were deliberately placed at vital areas of the body. The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant in this regard, as such a killing is just as likely (or perhaps more likely) to have been on impulse.

Id. at 480-81 (citations omitted).

The present case lacks evidence in any of these categories. First, there was no evidence of planning activity directed towards a killing purpose. Franklin had obtained the knife 3-4 months earlier, so he clearly did not obtain the knife as part of a plan to kill Thomas. See, e.g., Kirkland v. State, 684 So. 2d 732 (Fla. 1996)(no evidence defendant obtained murder weapon in order to kill where victim's mother testified defendant owned knife entire time she was associated with him). Calling Thomas to his cell cannot be considered planning activity directed towards a killing purpose, as inmate Acree, who saw the confrontation from a few feet away, testified Franklin "had the drop" on Thomas, i.e., meaning he easily could have killed Thomas in the cell had he planned to do so. Acree also testified Franklin pulled out the knife only after Thomas had left the cell.

The state argued below that Franklin's pursuit of Thomas after Thomas left the cell established premeditation because "50 yards running or walking . . . is more than enough time to reflect." R36:2682. Time during which deliberation could have taken place does not prove there was in fact deliberation, however. There must be proof the defendant actually decided to and intended to kill prior to the actual killing. See LaFave, supra, at 479; see also Clay v. State, 424 So. 2d 139 (Fla. 3d DCA)(five-minute interval in and of itself does not give rise to

reflection and deliberation), review denied, 434 So. 2d 889 (Fla. 1983). Here, the state's evidence is consistent with Franklin's testimony that he left his cell, not to kill Thomas (who was already downstairs at the exit door by that time), but because he didn't want to be in his cell when the armed guards arrived; that, once downstairs, his decision to follow Thomas out the quad door was fortuitous, not planned; that he chased Thomas in the hallway, not expecting to catch him; that it was only after he stuck his foot in the door that he decided to "whup" Thomas, knowing he was already in trouble; and that he stabbed at Thomas through the opening to get him to release the door, not to kill him.

Franklin's version of events is entirely consistent with and even corroborated by numerous state witnesses. Officer Myer testified he saw Thomas run along the top tier walkway and down the stairs. It was only after Myer opened the quad door to let Thomas out that he saw Franklin come out of the crowd in the dayroom and follow Thomas out the door. Inmates Acree, Birchard, and Lynch also testified that by the time Franklin left his cell, Thomas was downstairs exiting the quad door.

Retrieving the knife before he left his cell does not prove a premeditated intent to kill under the circumstances here. As noted above, Thomas was already downstairs at the quad door when Franklin left his cell, so Franklin had no reason to think he

would encounter Thomas again. There also is another reasonable explanation for carrying the knife, for "protection" and as a tool for negotiating with the armed guards, who he knew would be coming for him.

As for motive, while Franklin had a motive to confront Thomas--the ongoing conflict over the gate--this hardly established a motive for murder or provided proof of intent to kill, especially intent to kill in front of numerous witnesses. Cf. Clark v. State, 609 So. 2d 513 (Fla. 1993)(defendant killed victim to get his job). Franklin described the events preceding the confrontation as "childish," and even the trial judge recognized such minor nonviolent conflicts were insufficient motive to kill. R9:1730.

The manner of killing also does not provide proof of premeditation. What is required is evidence the wounds were deliberately placed at vital areas of the body. Here, Franklin was stabbing through the door opening as both men tugged at the door. The majority of the wounds were to Thomas's wrists and hands, with a few wounds to the head and neck. It cannot be concluded that the sole lethal wound, inflicted as it was during the tug-of-war, was deliberately placed or intended to kill. This case is different from the situation where a defendant knowingly inflicts a potentially fatal injury and continues to inflict other obviously potentially fatal injuries. E.g.,

Hartman v. State, 728 So. 2d 782 (Fla. 4th DCA 1999). In other cases involving multiple stabbings, this Court has found insufficient evidence of premeditation. See Coolen (reversing 1st-degree murder conviction where victim stabbed 6 times, including 2 defensive wounds to the hand and forearm, and deep stab wounds to the chest and back, finding wounds consistent with an escalating fight over a beer); Kirkland v. State, 684 So. 2d 732 (Fla. 1996)(finding insufficient evidence of premeditation where victim died of neck wound caused by many slashes and also suffered blunt trauma).

Under the circumstances here, the evidence is insufficient to establish Franklin had a "fully formed conscious purpose to kill." Franklin's conviction must be reversed and remanded with instructions to enter a judgment for second-degree murder.

Issue 2

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED (CCP).

In reviewing a trial court's finding of an aggravating circumstance, the Court's task is to review the record and determine whether the trial court applied the correct rule of law, and, if so, whether competent, substantial evidence supports its finding. Aguirre-Jarquin v. State, 9 So. 3d 593, 608 (Fla. 2009). Competent, substantial evidence means legally sufficient evidence. Almeida v. State, 748 So. 2d 922 (Fla. 1999).

In order to establish the CCP aggravator, the evidence must show (1) "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage" (cold); (2) the defendant had a "prearranged design to kill before the crime began" (calculated), (3) the defendant exhibited "heightened premeditation" (premeditated); and (4) the defendant had "no pretense of moral or legal justification." Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007). "CCP involves a much higher degree of premeditation than is required to prove first-degree murder." Deparvine v. State, 995 So. 2d 351, 381-82 (Fla. 2008)(internal quotations omitted). Heightened premeditation is "a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than

that necessary to sustain conviction for first-degree murder." Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987). Furthermore, "the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began." Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990).

Each element must be proved beyond a reasonable doubt. Banda v. State, 536 So. 2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). Moreover, such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Geralds v. State, 601 So. 2d 1157, 1163, 64 (Fla. 1992); see also Harris v. State, 843 So. 2d 856, 866 (Fla. 2003).

In finding the CCP aggravating circumstance, the trial court stated, in pertinent part:

> First, the killing was "cold" in that the Defendant called the victim to his cell for the purpose of attacking him. In other words, the Defendant was not reacting to some immediately preceding conduct or action of the victim. . . .
>
> Second, the Defendant, with great premeditation, carefully planned the attack and lay in wait for the victim to arrive in his cell, which satisfies the second and third prongs. There was evidence proven beyond a reasonable doubt that established more than the mere premeditation element that the jury found during the guilt stage and exhibited that the Defendant had thoroughly planned the attack. For example, the Defendant acquired a knife and successfully hid it from prison officials. This supports the premise that the Defendant planned the attack. In addition, the Defendant manipulated his

cell so that the victim would be required to inspect it. He called the victim on the intercom and reported the vent issue to the victim. Prior to the victim's arrival, according to trial testimony, the Defendant either hid the knife on his person or purposefully placed it in a convenient location (not under the cell door where it was usually stored), establishing that the Defendant did not intend to merely report the air vent issue but, instead, intended on attacking the victim. After placing the intercom call, the Defendant waited for the victim to arrive. The victim entered the Defendant's cell carrying a bag of potato chips, which illustrates that the victim arrived without any indication that he would be physically attacked. The victim looked up at the air vent, and the Defendant struck the victim. The victim fled the Defendant's cell, and the Defendant pursued the victim with the knife that he retrieved either from his person or the convenient, prearranged location. The Defendant "fast-walked" after the injured victim, and ultimately, the two simultaneously tugged on the door separating them as the Defendant continuously stabbed the victim through the door opening. The door did not shut and lock due to the Defendant wedging his shoe into the door. Testimony from witnesses revealed that the Defendant was using overhand strikes through the opening in the door to stab the victim. During this attack, the Defendant had many opportunities to reflect and cease his attack on the victim; instead, the Defendant continued his deliberate pursuit of and physical attack on the victim. This series of acts prove beyond a reasonable doubt that the Defendant possessed a heightened intent to kill the victim—not just inflict harm upon him. These actions, according to settled case law, establish that the Defendant possessed heightened premeditation.

This Court is cognizant of the Defense's allegation that this aggravator has not been proven beyond a reasonable doubt. According to the Defense, three eyewitnesses from trial observed the initial altercation in the Defendant's cell and testified that the Defendant did not pull the knife immediately. Although, as the Defense argued, the Defendant could have retrieved the knife and murdered the victim relatively easily in his cell (as the victim was rather defenseless with a bag of potato chips), he did

> not. This, according to the Defense, establishes that the Defendant did not act in a cold, calculated, or premeditated manner. In other words, if the Defendant had orchestrated a premeditated plan to kill the victim, he would have done so as soon as the victim arrived in the Defendant's cell, a more secluded location, and a time when the victim was more vulnerable. The Defense argued that this "plan" to punch the victim and then chase him through the dorm and struggle over the door does not make sense. These arguments by the Defense do not diminish the cold, calculated, and premeditated aggravating factor. Instead, it illustrates a different plan that the Defendant may have attempted. It does not diminish or discredit the detailed planning that the Defendant engaged in regarding the preparation of the weapon or his cell, which was used to effectively lure the victim into the Defendant's cell.

R9:1731-32.

Here, there was not competent evidence to support the trial court's finding. As explained in Issue 1, supra, the evidence failed to establish simple premeditation, as intent to kill cannot be inferred from any of Franklin's conduct, the punch and scuffle in Franklin's cell, following Thomas out the quad door, or stabbing at Thomas through the control station door opening.

However, assuming arguendo the presence of simple premeditation, the evidence does not establish the heightened premeditation and cold calculation required for the CCP aggravator to apply.

First, the trial court's order cogently sets forth the evidence that is inconsistent with a prearranged design to kill before the crime began. As the trial court noted, "three

eyewitnesses observed the initial altercation in Franklin's cell and testified that Franklin did not pull the knife" at that time. And although Franklin "could have retrieved the knife and murdered the victim relatively easily in his cell," he did not. "In other words, if the Defendant had orchestrated a premeditated plan to kill the victim, he would have done so as soon as the victim arrived in the Defendant's cell, a more secluded location, and a time when the victim was more vulnerable." The trial court also noted the argument that a "plan" to punch the victim, chase him through the dorm, and struggle over the door does not make sense. In response to this evidence and argument, the trial court concluded that "[i]t illustrates a different plan that the Defendant may have attempted" and "does not diminish or discredit the detailed planning that the Defendant engaged in regarding the preparation of the weapon or his cell, which was used to effectively lure the victim into the Defendant's cell."

Franklin does not dispute that he had a plan to confront Thomas and that he implemented that plan by calling Thomas to his cell to check the vent. The CCP aggravator requires a calculated plan to kill, however, and nothing in the evidence--or the trial court's order--establishes a prearranged design to kill. While it is not entirely clear what the trial court meant by "a different plan," it appears the trial court was referring

to the state's theory that Franklin's plan was to sucker-punch Thomas and then stab him with the knife. The evidence the trial court relies on as proof of a plan to attack Thomas with the knife in his cell is that Franklin "either hid the knife on his person or purposefully placed it in a convenient location (not under the cell door where it was usually stored)." R9:1731. There is no evidence, however, that Franklin hid the knife before Thomas arrived with a plan to kill him with it. Acree did not see Franklin in possession of a knife until Franklin was leaving the cell, although he testified that both Franklin and Thomas stood there staring at him after the initial punch, and that Franklin easily could have killed Thomas if he had planned to do so. Furthermore, there is no evidence to refute Franklin's testimony that he retrieved the knife and placed the handle on it before he left the cell. The state's theory is pure speculation.

The trial court's finding of the "cold" element also is not supported by competent, substantial evidence. The trial court relied on the "ruse" and the knife as establishing that the murder was the product of calm reflection. As discussed in Issue 1, supra, however, the evidence establishes that the provocation for the stabbing did not arise until Thomas wedged his foot in the officer's station door, preventing it from closing. The actual killing was the result of a spontaneous

escalation of violence, not careful planning or cold calculation before the crime began. The events that culminated in the stabbing were fortuitous, not planned. This murder was not cold, calculated, and premeditated, and the trial court erred in instructing the jury on and in finding this aggravating circumstance.

The CCP aggravating circumstance is one of the weightiest aggravators, Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Given that three jurors voted for life despite the erroneous instruction, the error in instructing the jury on this aggravator cannot be deemed harmless. A new penalty phase is required.

Issue 3

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL (EHAC).

This aggravating circumstance applies to torturous murders, murders where the victim experienced prolonged physical pain or mental anguish. Here, the tug-of-war at the door, during which Franklin stabbed at Thomas through the door opening, lasted only 30 seconds. While Thomas sustained multiple stab wounds to his hands and arm and several to his head as he and Franklin tugged at the door, he collapsed quickly after sustaining the sole lethal wound to his neck. This was not an EHAC murder.

The standard of review is the same as that stated in Issue 2, supra, at page 42.

This Court recently explained the requirements of EHAC as follows:

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

Hernandez v. State, 4 So. 3d 642, 668-69 (Fla.)(quoting State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)), cert. denied, 558 U.S. 860 (2009).

Accordingly, the EHAC aggravating circumstance applies "only in torturous murders," those that inflict "a high degree of pain," either physical or mental. See Chere v. State, 579 So. 2d 86, 95 (Fla. 1991); Rose v. State, 787 So. 2d 786, 801 (Fla. 2001). To support a finding of this aggravator based on mental pain, "the evidence must show that the victim was conscious and aware of impending death." See Douglas v. State, 878 So. 2d 1246, 1261 (Fla. 2004).

In the present case, the trial court based its finding of EHAC on the following: (1) Thomas received eight defensive wounds, a wound to his skull, two wounds to his cheek, and a lethal wound to his neck; (2) the testimony of the medical examiner and the presence of defensive wounds establish that Thomas was conscious during most of the attack; (3) the thickness of the knife would require more force than would a standard knife; (4) because of the Defendant's chase and continued attack, Thomas experienced fear and emotional strain before he died and was aware of the danger the Defendant posed and was aware of his impending death during his final moments; (5) defendant's pursuit of Thomas after Thomas exited the defendant's cell indicates Franklin had time to reflect and negates the hypothesis that the homicide was the result of a frenzied attack or emotional rage. R9:1728-30, Appendix A.

These reasons do not establish EHAC under the definition established by this Court.

As for reasons one and two, neither the presence of defensive wounds nor the fact that Thomas was conscious during the attack establishes EHAC under the circumstances here. Where there are no witnesses to a crime, defensive wounds--wounds to the arms and hands--may establish that the victim was warding off blows and was thus conscious and aware of impending death during the attack. Here, however, there were numerous witnesses to the attack. We know exactly what happened. Franklin and Thomas were simultaneously pulling on the door, as Franklin stabbed Thomas through the opening. The struggle was brief, lasting about 30 seconds, and given that most of the stab wounds were to Thomas's hands, it cannot be inferred that Thomas was agonizing over his impending death. Evidence of anxiety and fear of impending death must be more than speculation. See Ferrell v. State, 686 So. 2d 1324, 1330 (Fla. 1996)(that victim may have realized defendants intended more than robbery when they forced him to drive to field insufficient to support EHAC). While Thomas no doubt experienced fear during the episode, it was not the type of fear, pain, and prolonged suffering that this Court has found sufficient to support EHAC. Compare Rimmer v. State, 825 So. 2d 304 (Fla. 2002)(EHAC disapproved where robbery victims bound and told to lie on floor, and were shot

15-20 minutes later, as fear they experienced not the type of prolonged suffering required to support EHAC), Diaz v. State, 860 So. 2d 960 (Fla. 2003)(EHAC disapproved where defendant reloaded gun in victim's presence, as murder was quick and reloading did not establish intent to inflict high degree of pain or torture victim), Street v. State, 636 So. 2d 1297 (Fla. 1994)(EHAC disapproved where defendant shot Strzalkowski three times, killing him, then shot Boles three times, ran out of ammunition, went back to get Strzalkowski's gun, pursued the injured Boles around his car, and shot him again, fatally, in the chest), cert. denied, 513 U.S. 1086 (1995), and Elam v. State, 636 So. 2d 1312 (Fla. 1996)(EHAC disapproved where victim was repeatedly struck in head with brick but was rendered unconscious in a short period of time) with Chavez v. State, 832 So. 2d 730 (Fla. 2002)(EHAC found where defendant kept victim captive for 3-1/2 hours before he was killed and no doubt victim lived every minute of his last hours with the fear of death); Henyard v. State, 689 So. 2d 239 (Fla. 1996)(EHAC found where children saw their mother shot and raped before they were each killed with single gunshot wound to the head); Wilson v. State, 493 So. 2d 1019 (Fla. 1986)(EHAC found where victim brutally beaten while attempting to fend off blows to the head).

The trial court's third reason, the bluntness of the knife, does not establish EHAC as there was no testimony regarding the pain caused by any type of knife, blunt or sharp.

The court's fourth reason, that Thomas experienced fear, emotional strain, and awareness of impending death because of the chase and continued attack, is not supported by the evidence. There is no evidence Thomas knew Franklin had a knife until the tug-of-war ensued. As discussed above, the circumstances of the brief struggle at the door do not indicate Thomas was aware of his impending death prior to the fatal blow.

Last, whether a crime is the result of sudden fury is generally not relevant to EHAC, as EHAC focuses on the manner and means of death, not the defendant's motivation. See Barnhill v. State, 834 So. 2d 836 (Fla. 2002), cert. denied, 539 U.S. 917 (2003).

This Court has upheld EHAC in multiple stabbing cases only in those cases where it was clear the victim experienced either prolonged physical or emotional torment. E.g., Schoenwetter v. State, 931 So. 2d 857 (Fla.)(upholding EHAC where during struggle with defendant, victim sustained multiple stab wounds to his back, neck, chest, and hands, lost a lot of blood and had difficulty breathing, but had lived long enough to drag himself next door, where he told neighbor that his entire family was killed; EHAC established by evidence of physical pain he endured

as well as by emotional torture of witnessing attack on daughter and wife), cert. denied, 549 U.S. 1035 (2006).

The present case is comparable to Elam. There, the Court found EHAC inapplicable because, although the victim was bludgeoned and had defensive wounds, the attack took place in a very short period of time ("could have be less than a minute, maybe even half a minute"), the victim was unconscious at the end of this period, and "there was no prolonged suffering or anticipation of death." 636 So. 2d at 1314.

Here, too, the attack took place in a very short period of time, maybe half a minute, after which the victim was unconscious, and there was no prolonged physical suffering or anticipation of death.

The EHAC aggravating circumstance is one of the most serious of aggravators, see Larkins, 739 So. 2d at 95, and the trial judge gave this aggravator great weight. The prosecutor also argued this aggravator to the jury. Given that three jurors voted for life despite the erroneous instruction, the error in instructing the jury on this aggravator cannot be deemed harmless. A new penalty phase is required.

Issue 4

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE VICTIM WAS A LAW ENFORCEMENT OFFICER ENGAGED IN THE PERFORMANCE OF HIS OFFICIAL DUTIES.

Prior to trial, appellant filed a motion in limine to preclude the state from using as an aggravator that the victim is a law enforcement officer (LEO).[6] R1:84-86. The state filed a response, R1:94-99, and, after a hearing, the trial judge denied appellant's motion, R14:36-43, and instructed the jury on this aggravator. R40:3224-25.

The issue is whether a correctional officer (CO) is a law enforcement officer for purposes of section 921.141(5)(j). The interpretation of a statute is a pure question of law and therefore subject to de novo review. Kasischke v. State, 991 So. 2d 803 (Fla. 2008); Kephart v. Hadi, 932 So. 2d 1086, 1089 (Fla. 2006), cert. denied, 549 U.S. 1216 (2007).

Although this Court has reviewed three cases in which the trial judge found the LEO aggravator where the victim was a correctional officer,[7] the Court did not address the propriety of

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[6] Section 921.141(5)(j) provides:

> (5) AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following:
>
> . . .
>
> (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

[7] In Hall v. State, 107 So. 3d 262 (Fla. 2012), the trial court found and merged the LEO and hinder/disrupt aggravators. In the

the LEO aggravator in those cases. Accordingly, this is an issue of first impression.

Legislative intent is the polestar that guides statutory interpretation. Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003); see also Kasischke v. State, 991 So. 2d at 807; Greenfield v. Daniels, 51 So. 3d 421, 425 (Fla. 2010). In discerning legislative intent, the starting point is the actual language of the statute. See Raymond James Fin. Servs., Inc. v. Phillips, 126 So. 3d 186, 190 (Fla. 2013)("legislative intent is determined first and foremost from the statute's text").

The plain and ordinary meaning of a word or phrase may be discerned by reference to a dictionary. See Greenfield, 51 So. 3d at 426. If the language is ambiguous, however, the court must use the rules of statutory construction to resolve the ambiguity, including resort to case law or related statutory provisions which define the term. See, e.g., Williams v. State, 707 So. 2d 683 (Fla. 1998)(holding "sentence of imprisonment" aggravator does not include confinement to juvenile facility where legislature uses term "imprisonment" for adult criminal sanctions but uses term "commitment" for juvenile sanctions); see also Tarpon Springs Hosp. Found., Inc. v. Anderson, 34 So. 3d 742 (Fla. 2d DCA 2010); State v. Miro, 700 So. 2d 643, 645

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co-defendant cases of Eaglin v. State, 19 So. 3d 935 (Fla. 2009), and Smith v. State, 998 So. 2d 516 (Fla. 2008), the trial judge merged the LEO and avoid arrest aggravators.

(Fla. 1997). If the ambiguity cannot be resolved after consulting traditional canons of statutory construction, the rule of lenity applies, which requires ambiguous criminal statutes to be construed in favor of the person subjected to them. State v. Byars, 823 So. 2d 740, 742 (Fla. 2002).

Here, the phrase "law enforcement officer" is defined differently in common parlance as well as in other Florida statutes. Because the phrase "law enforcement officer" is capable of different meanings, most of which do not include correctional officers, the rule of lenity applies, and the term must be interpreted narrowly. A correctional officer therefore is not a "law enforcement officer" for purposes of the law enforcement aggravating factor.

First, there is no plain and ordinary meaning of the phrase "law enforcement officer." Some dictionary definitions of "law enforcement officer" do not include correctional officers.[8]

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[8] Black's Free Online Law Dictionary (2d ed.) defines a law enforcement officer as "term given to people who are responsible for keeping the peace such as sheriffs and the police." Black's Law Dictionary (6th ed.) defines a law enforcement officer as "those whose duty it is to preserve the peace." Colliers English Dictionary defines a LEO as "an official employee who prevents and detects crime and who maintains and upholds the police, such as a police officer, sheriff, customs officer, etc." A law enforcement officer also is defined as "a government employee whose job entails enforcement of the law. A policeman, sheriff, deputy sheriff, or other officer charged with enforcing the laws and to uphold the peace." www.lawdictionaryonline.com/home-serach.php.

Others do include correctional officers, while also noting that the classes of persons who may be considered law enforcement officers varies by jurisdiction.[9]

Nor has the term "law enforcement officer" been uniformly defined by the Florida Legislature. Rather, the term has been defined differently for various purposes such as the payment of such officers' defense costs in criminal and civil cases, s. 111.065,; death benefits, s. 112.19(1)(b); Bill of Rights, s. 112.531(1); Baker Act, s. 394.455(16); assault and battery on such officers, s. 784.07; carrying concealed weapons, s. 790.001(8); and certification, s. 943.10(1).

Moreover, the Legislature has separately defined "law enforcement officer" and "correctional officer" in several statutes, notably section 943.10, Florida Statutes (2012).[10] Section 943.10, which is part of the legislation creating the

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[9] Dictionary.com defines a peace officer or law enforcement officer as "any public sector employee or agent whose duties primarily involve the enforcement of laws. The term can include police officers, correctional officers, customs officers, state troopers, special agents, immigration officers, court bailiffs, probation officers, parole officers, arson investigators, etc." Dictionary.com also notes that modern legal codes use the term peace officer or law enforcement officer to include every person vested by the legislating state with law enforcement authority, traditionally anyone "sworn, badged, and armable" who can arrest, or refer such arrest for criminal prosecution, including city police officers, county sheriff's deputies, and state troopers.

[10] The terms are also separately defined in section 112.531, Fla. Stat. (2012).

Criminal Justice Professionalism Program, defines LEOs and COs, as follows:

> (1) "Law enforcement officer" means any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state.
>
> (2) "Correctional officer" means any person who is appointed or employed full time by the state or any political subdivision thereof, or by any private entity which has contracted with the state or county, and whose primary responsibility is the supervision, protection, care, custody, and control, or investigation, or inmates within a correctional institution . . .

The definition of "law enforcement officer" in section 943.10(1) has been referenced in a number of other statutes. For example, the Legislature added, by Laws 2008, c. 2008-74, s. 1, enhanced penalties for the murder of full, part-time, and auxiliary law enforcement officers engaged in the lawful performance of a legal duty, as those terms are defined in section 943.10. See 782.065, Fla. Stat. (2008)(emphasis added). The 943.10 definition of "law enforcement officer" is also referenced in sections 984.07 (battery on a law enforcement officer; 394.455(16)(Baker Act); 790.052 (concealed carry for off-duty officers); and 901.15(12)(arrest by officer without warrant). This Court also has referred to section 943.10 as "contain[ing] the key definition of 'law enforcement officer.'"

See McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998) (holding Federal Protection Service Officers are not LEOs for purposes of section 784.07).

Other statutes provide a broader definition of "law enforcement officer" than that set forth in 943.10(1). For example, in Chapter 790, which concerns weapons and firearms, the legislature defined "law enforcement officer," for purposes of that Chapter, to include any state or federal officer authorized to carry a concealed weapon, members of the U.S. Army and the Florida National Guard, correctional officers, and U.S. and state attorneys, their assistants, and investigators. See s. 790.001(8), Fla. Stat. (2012).[11] Thus, if the legislature had

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[11] Section 790.001(8) defines "law enforcement officer," as used in that section, as follows:

> (a) All officers or employees of the United States or the State of Florida, or any agency, commission, department, board, division, municipality, or subdivision thereof, who have authority to make arrests;
> (b) Officers or employees of the United States or the State of Florida, or any agency, commission, department, board, division, municipality, or subdivision thereof, duly authorized to carry a concealed weapon;
> (c) Members of the Armed Forces of the United States, the organized reserves, state militia, or Florida National Guard, when on duty, when preparing themselves for, or going to or from, military duty, or under orders;
> (d) An employee of the state prisons or correctional systems who has been so designated by the Department of Corrections or by a warden of an institution;
> (e) All peace officers;

intended to include correctional officers within the ambit of section 921.141(5)(j), it easily could have done so.

The state argued below that the Senate Staff Analysis for Senate Bill 283, which added the LEO aggravating circumstance to Florida's capital sentencing statute, suggests the LEO aggravator was intended to apply when the victim is a correctional officer. See R1:98-99. Assuming a staff analysis "can ever assist in determining legislative intent," see Kasischke, 991 So. 2d at 810,[12] the Staff Analysis for SB 283 provides no assistance at all. The Comments begin with a quotation from Roberts v. Louisiana, 431 U.S. 633 (1977), in which the Court struck down a mandatory death sentence imposed for the murder of a police officer, as follows:

> To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly risk their lives in order to guard the safety of other persons and property.

> (f) All state attorneys and United States attorneys and their respective assistants and investigators.

[12] In Kasischke, the Court questioned the use of legislative staff analyses to determine legislative intent and noted further that a defendant cannot be expected to research staff analyses to determine whether particular conduct is permitted. See also American Home Assur. Co. v. Plaza Materials Corp., 908 so. 2d 360, 376 (Fla. 2005)(Cantero, J., concurring in part and dissenting in part)(proposing that "legislative staff analyses add nothing to an investigation of legislative intent").

The Comments then note that 26 of 36 states with death penalties include the murder of a law enforcement officer as an aggravating circumstance.

The Comments therefore focus on the constitutional validity of the LEO aggravator and do not address in any fashion the definition of the term "law enforcement officer." Indeed, the state's argument below is based not on the Staff Analysis but on footnote 1 of the Roberts opinion, which sets forth Louisiana's aggravating circumstances and explicitly defines "peace officer" for the purpose of Louisiana's "peace officer aggravator" as "any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorney's investigator." 431 U.S. at 634 n.1. The state's argument suggests that by acknowledging the Supreme Court's approval of a "peace officer" aggravator, the Legislature intended Florida's "law enforcement officer" aggravator to include all those individuals explicitly included in Louisiana's statute. There is no indication, however, that the Legislature was cognizant of footnote 1. Moreover, the Florida Legislature enacted a "law enforcement officer" aggravating circumstance, not a "peace

officer" aggravating circumstance.[13] Even if a Staff Analysis were a valid measure of legislative intent, the Staff Analysis for SB 283 does not give a clue as to whether the LEO aggravator was intended to apply to correctional officers.

In sum, given the separate definitions for LEOs and COs in section 943.10 and the frequency with which the 943.10 definition is referenced by other statutes, a strong argument can be made that in enacting the LEO aggravating circumstance, the legislature had the 943.10 definition in mind, a definition that does not include correctional officers. At the very least, the statute is susceptible to multiple interpretations.

Left with an ambiguous statute, this Court must apply the rule of lenity and interpret section 921.141(5)(j) in favor of the defendants subjected to it. Lenity, though codified by our legislature in section 775.021(1),[14] is founded on the due process requirement that criminal statutes must apprise ordinary

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[13] In Huebner v. State, 731 So. 2d 40, 44 n.2 (Fla. 4th DCA 1999), the court noted that although the term "peace officer" is not currently defined in the Florida Statutes, there was a definition in repealed Chapter 396. A "peace officer" was defined there as "any state, county, or municipal public safety officer, including policemen, sheriffs, deputy sheriffs, members of any county public safety department, members of the highway patrol, or any other public safety officers having the power of arrest." S. 396.032(6), Fla. Stat. (1991).

[14] Florida has codified the rule of lenity as follows: "The provisions of this [criminal] code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (2012).

persons of common intelligence as to what is prohibited. See Perkins v. State, 576 So. 2d 1310, 1312-13 (Fla. 1991). The rule of lenity applies "not only to the substantive ambit of criminal prohibitions, but also to the penalties they impose." Carawan v. State, 515 So. 2d 161, 165 (Fla. 1987); see also Nettles v. State, 850 So. 2d 487, 494 (Fla. 2003). Accordingly, this Court should hold that the LEO aggravator does not apply when the victim is a correctional officer.

In sentencing Franklin, the trial judge did not consider the LEO aggravator, noting that consideration of both the LEO aggravator and the hinder/disrupt aggravator "would be improperly duplicative." R9:1733. The jury was instructed on the LEO aggravating circumstance, however, and the prosecutor argued it in closing. R40:3191-92. Because the jurors could not know the aggravator did not apply as a matter of law, it must be presumed they found it and weighed it. Three jurors voted for life in prison, even with the erroneous instruction. Accordingly, it cannot be said beyond a reasonable doubt that the erroneous jury instruction did not affect the jury's recommendation. A new penalty phase is required.

Issue 5

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF HINDERING OR DISRUPTING A LAWFUL GOVERNMENTAL FUNCTION.

The standard of review is as stated in Issue 2, supra, at page 42.

In finding the hinder/disrupt aggravating circumstance, the trial court stated, in pertinent part:

> . . . Defendant's conduct effectively disrupted the operation of the prison facility. . . .
>
> . . .
>
> This Court recognizes that the Defense disagrees with application of this aggravating factor because, they argue, this factor requires the jury to find that that the Defense committed this crime "*to*" disrupt the lawful exercise of any government function. In other words, the Defense conceded that this crime did in fact cause disruption to the lawful operation of the prison facility. However, that disruption occurred after the crime, and, according to the Defense, the Defendant did not engage in this conduct for the express purpose "*to*" disrupt the operation of the prison facility—that was merely an unintended consequence.
>
> However, the Florida Supreme Court has repeatedly held "that in order for the disrupt/hinder aggravator to be applicable, it is sufficient to show that the victim was killed while performing a legitimate government function." Phillips v. State, 705 So. 2d 1320, 1322 (Fla. 1997)(held that evidence establishing that victim was a parole officer directly involved with revoking the defendant's probation was sufficient to show that the murder was committed to disrupt or hinder the lawful exercise of a government function)(citing Jones v. State, 440 So. 2d 570, 577-78 (Fla. 1983)). The operation of a prison facility is a "legitimate governmental function," and the victim in this case was directly involved with the supervision of the Defendant. This Court recognizes

> that revenge or ill will towards the victim may have also been a motivating factor for the Defendant, as he testified during trial that he called the victim to his cell to inflict physical harm upon him. However, like the defendant in Phillips (who killed his parole officer for exercising his official duty), the Defendant murdered the victim because of his official duties. The victim in this case was a sergeant tasked with guarding the Defendant; the Defendant, like Phillips, did not agree or approve of the government agent's conduct. Id. Proof beyond a reasonable doubt of the mere fact that the Defendant killed the victim while the victim was performing a legitimate government function is sufficient to establish this aggravator. However, as explained above, the State offered further proof of this aggravating factor.

R9:1727-28.

In concluding the hinder/disrupt aggravator is established merely by killing someone while that person is performing a government function, the trial court applied the wrong rule of law. To construe the statute so broadly is contrary to its plain language and leads to absurd results. To the extent that language in several of this Court's prior cases suggests such a broad interpretation, the Court should recede from that language.

By its plain language, this aggravator applies only when the murder was "committed to" disrupt or hinder the lawful exercise of a government function. The word "to" in this context expresses aim, purpose, or intention. See, e.g., www.merriam-webster.com/dictionary/to; en.wiktionary.org/wiki/to; dictionary.reference.com/browse/to.

Here, there is no evidence that Franklin attacked Thomas in order to disrupt the functioning of the prison. The only evidence of Franklin's purpose is his own testimony. According to that testimony, Franklin called Thomas to his cell to resolve a "childish" dispute that had begun several days earlier when Thomas called Franklin a "dumbass" and led to cussing matches. When Thomas laughed at Franklin, Franklin punched him. The situation escalated from there, culminating in Thomas's death. The punching incident and the subsequent knife attack at the officer's station door arose from anger, hubris, and impulse. There is no evidence Franklin killed Thomas for the purpose of causing the disruption on the quad that ensued afterwards. The evidence shows, rather, that the fight in the cell and stabbing at the control room door were the result of ill will or spite. Franklin's beef with Thomas was personal, and the disruption that resulted--inmates yelling and screaming and beating on the glass--was incidental. Franklin did not kill Thomas to disrupt or hinder any government function, as is required for this aggravator to apply.

The trial court's reliance on Phillips v. State, 705 So. 2d 1320 (Fla. 1997), is misplaced. The victim in Phillips was Svenson, a parole supervisor, who supervised several probation officers in charge of Phillips' parole. For several years prior to the murder, Svenson had repeated encounters with Phillips

regarding Phillips' unauthorized encounters with a probation officer. After one incident, Phillips' parole was revoked and he was returned to prison. Upon his release, Phillips was arrested for shooting into the home of the probation officers who had testified against him. A week later, Phillips shot Svenson to death in the probation building parking lot. This Court upheld the hinder/disrupt aggravator based upon the trial court's findings, as follows:

> [T]he Court submits, that although revenge may have been one motive, it was part of the overall motive of killing a parole official, who was in the past, and who would have been at the time of the homicide, one of the persons responsible for trying to have the defendant's parole revoked, for continuing to violate the terms of his parole and for shooting a gun which occurred a few days before the homicide. This would clearly hinder a government function. Mr. Svenson's only connection with the defendant was as a parole officer and parolee. Mr. Svenson's homicide was beyond a reasonable doubt committed to disrupt or hinder governmental function.

703 So. 2d at 1322.

In Phillips, the evidence thus showed that Phillips killed Svenson for the purpose of disrupting the parole process of which Svenson was responsible. Franklin, on the other hand, initiated the confrontation with Thomas to resolve a personal dispute, and when that failed, he lost his temper. The fight in the cell and the stabbing at the door were not for the purpose of disrupting the functioning of the prison.

While the Court in Phillips did state, "This Court has held in order for the disrupt/hinder aggravator to be applicable, it is sufficient for the State to show that the victim was killed while performing a legitimate government function," citing Jones v. State, 440 So. 2d 570, 577-78 (Fla. 1983), this statement was in the response to a completely different argument, Phillips' argument that a narrowing instruction should have been given on the disrupt/hinder aggravator. The Court did not hold, as a matter of law, that all that's required for the disrupt/hinder aggravator is the killing of someone who is performing a government function. Such a broad interpretation would lead to absurd results, as it would make the aggravator applicable to the murder of any government employee so long as the murder was committed while the employee was on the job.

The line of misguided case law begins with Jones, and to the extent that Jones stands for such a broad interpretation of the hinder/disrupt aggravator, this Court should recede from it. In Jones, the defendant shot a random police officer who was sitting in his squad car at an intersection. A week earlier, Jones had been charged with resisting arrest during a traffic stop, and during his arrest, Jones told the arresting officer (a different officer from the one he later shot) he was tired of being hassled and he "intended to kill a pig." In upholding the disrupt/hinder aggravator, the Court said:

> Appellant shot and killed Szafranski while the officer was travelling from an unrelated investigation, in uniform, and on active duty. This Court has upheld the applicability of section 921.141(5)(g) where, as in the instant case, the victim was killed while performing a legitimate government function. See Tafero v. State, 403 So. 2d 355 (Fla. 1981), cert. denied, 455 U.S. 983, 103 S.Ct. 1492, 71 L.Ed.2d 694 (1982).

440 So. 2d at 577-78.

The Court's reliance on Tafero v. State, 403 So. 2d 355 (Fla. 1981), cert. denied, 455 U.S. 983, 103 S.Ct. 1492, 71 L.Ed.2d 694 (1982) was misplaced, however, because in Tafero, unlike in Jones, the defendants shot the officers to avoid arrest. There, a state trooper and Canadian constable friend were shot and killed after they approached a parked car at a rest stop, saw guns inside, and ordered the male occupants, Tafero and Rhodes, out of the car. The Court approved the hinder/disrupt and avoid arrest aggravators based on the trial court's finding that the trooper was attempting to enforce the laws after finding firearms and controlled substances in the car. Tafero therefore does not stand for the proposition that all that's required for the disrupt/hinder aggravator is the killing of someone who is performing a government function. To the extent that Jones relied on Tafero for such a broad interpretation of the hinder/disrupt aggravator, this Court should recede from it.

Issue 6

THE TRIAL COURT ERRED IN SENTENCING RICHARD FRANKLIN TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Franklin's Motion to Bar Imposition of Death Sentence on the Basis that Florida's Capital Sentencing Procedure is Unconstitutional under Ring v. Arizona. R1:64-75. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2009), does not provide for such jury determinations.

Franklin acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 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.),

cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

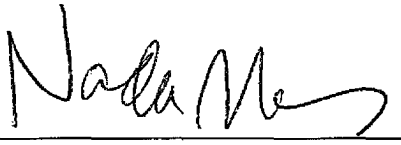
Additionally, Franklin is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So. 2d 1129, 1133-35 (Fla. 2005) (including footnotes 4 & 5, and cases cited therein); Steele. At this time, Franklin asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in 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 unconstitutional. Franklin's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully asks this Honorable Court to reverse and remand this case for the following relief: Issue 1, vacate Franklin's first-degree murder conviction and remand for imposition of a conviction of second-degree murder; Issues 2, 3, 4, and 5, vacate appellant's death sentence and remand for a new penalty phase proceeding; Issue 6, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,



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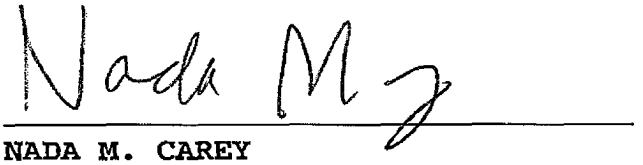
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was furnished by electronic transmission, per parties' agreement, to **RENE RANCOUR**, Assistant Attorney General, capapp@myfloridalegal.com, and by U.S. Mail to **RICHARD P. FRANKLIN**, #990054, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, May 7, 2014.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to FRAP 9.210(a)(2), this brief was typed in Courier New, 12 point.



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IN THE SUPREME COURT OF FLORIDA

RICHARD P. FRANKLIN,

Appellant,

v. **CASE NO. SC13-1632**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT

APPENDIX	DOCUMENT
A	Sentencing Order

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR COLUMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD P. FRANKLIN,

Defendant.
_____/

CASE NO.: 2012-313-CF

SENTENCING ORDER

On May 3, 2012, the Defendant was indicted by a grand jury for three offenses: First-Degree Murder, Aggravated Battery on a Law Enforcement Officer, and Possession of Contraband in Prison. The Defendant proceeded to a jury trial, whereby he was represented by M. Blair Payne and Jonathan Austin (with additional participation by John Hendrick and Robert Baker III). The State was represented by Jeffrey A. Siegmeister, David Phelps, and John Durrett. On June 19, 2013, the jury found the Defendant guilty of three offenses: Count 1, First-Degree Murder for the death of Ruben Howard Thomas, III, a capital felony, as charged in the indictment; Count 2, Felony Battery on William M. Brewer, a third-degree felony and lesser-included offense; and Count 3, Possession of Contraband in Prison, a second-degree felony, as charged in the indictment. Counts 2 and 3 are not capital offenses and will not be further addressed in the instant order except to announce their sentences.

In accordance with section 921.141, Florida Statutes, the same jury reconvened on June 25, 2013, and the parties presented matters in aggravation and mitigation during the penalty phase hearing. Under Florida law, a majority of the jury must recommend death—that is, by a vote of at least 7-5. On June 25, 2013, the jury recommended—not by a simple majority of 7-5, or even a two-thirds vote of 8-4—but 9 of the 12 jurors recommended that a sentence of death be imposed. In other words, the jury recommended by a vote of 9-3 that the Defendant be sentenced to death. Immediately thereafter, the jury was excused. Sentencing memoranda from the State and counsel for the Defendant and the presentence investigation report were received by this Court on or before July 22, 2013. On July 25, 2013, this Court conducted a separate hearing pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993), whereby the Defense submitted additional mitigation evidence.

This Court is mandated by section 921.141, Florida Statutes, to evaluate all statutory aggravating factors and all statutory and nonstatutory mitigating factors in making its decision. This Court presided over the guilt and penalty phases of the trial, considered the testimony and observed the demeanor of all witnesses, reviewed all exhibits introduced into evidence, listened to argument of counsel, reviewed the

presentence report, and reviewed all sentencing memoranda. This Court also reviewed a multitude of relevant decisions issued by the Supreme Court of Florida and the United States Supreme Court concerning a judge's responsibility whenever the imposition of the death penalty is considered. This Order sets forth in writing the results of this judicial effort.

Aggravating Factors (Section 921.141(5), Florida Statutes)[1]

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. The Defendant was previously convicted of three felonies and was currently serving an incarcerative sentence for at least one of these felonies.[2] Specifically, the Defendant's Classifications Officer, Kimberly Kennedy, testified that the Defendant had been previously convicted of armed robbery, aggravated battery, and first-degree murder. She further indicated that the Defendant was sentenced to a life sentence for his earlier first-degree murder conviction, a life sentence for his armed robbery with a firearm conviction, and a term of years in prison for his aggravated battery with a firearm. She also testified that, at the time of this crime, March 18, 2012, the Defendant was serving a prison sentence for at least one of these prior felonies. The Defense did not attempt to challenge this aggravating factor but, instead, argued that assigning any significant weight "would run afoul of the preclusion of arbitrary application of the death penalty."

This Court finds that this aggravating factor has been proven beyond a reasonable doubt by the testimony of Classifications Officer Kimberly Kennedy and Exhibits 101 and 102. This Court assigns this aggravating factor great weight.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. The Defendant was previously convicted of three felonies—a capital felony and two felonies involving the use

[1] The State presented the testimony of two of the victim's family members: Paula Thomas, the victim's mother; and Leeann Royster, the victim's fiancé and mother of his two children. These witnesses detailed how their lives and the lives of their family members have been affected by the victim's death. However, as the Defense noted, this testimony does not amount to an aggravating factor and was not considered by this Court in its decision to impose death.

[2] At the Spencer hearing, counsel for the State and the Defendant explained that the judgment and sentence documents for the Defendant's prior felonies were unclear concerning the consecutive or concurrent nature of the Defendant's previous three incarcerative sentences. However, it is clear and undisputed that the Defendant was serving at least one incarcerative sentence at the time of this offense (he may have been serving two sentences, or it is possible that one sentence had not yet begun because of the consecutive nature—however, such precise information is unnecessary to find this aggravating factor beyond a reasonable doubt).

of violence to a person. First, the State presented the Defendant's Judgment (Exhibit 101) for first-degree murder, a capitol felony. The Defendant attempted to minimize this murder by explaining that the killing resulted from his shooting a man in the leg with "buckshot," and the man subsequently died. The Defendant explained that he did not believe that a gunshot wound to the leg was necessarily a fatal wound, that people are often shot in the leg (especially in movies), and they do not die. Regardless of the Defendant's attempt to minimize his criminal conduct, this offense, standing alone and proven by Exhibit 101 and the details having been further explained by the Defendant, satisfies this aggravating factor.

Nonetheless, the State also presented the Defendant's Judgment (Exhibit 102) for armed robbery and aggravated battery. Both of these offenses were committed with a firearm. In fact, the Defendant admitted that these offenses also involved shooting a man in the legs—the Defendant explained that the bullet "grazed" or scraped one of the man's legs. This Court finds that both of these offenses, armed robbery with a firearm and aggravated battery with a firearm, involved the use of violence and that evidence was presented (Exhibit 102 and the Defendant's testimony) that establish this aggravating factor beyond a reasonable doubt.

The Defense attempted to diminish these aggravating factors by arguing that these offenses occurred when the Defendant was merely twenty years old, and they are remote in time to the present offense. However, part of the remoteness is attributed to the fact that the Defendant has been continuously incarcerated for the past approximately eighteen years as a result of the previous felonies committed when the Defendant was twenty years old. Additionally, the Defense argued that because the same offenses were used to satisfy the previous aggravating factor, this aggravating factor should either be "merged" with the previous aggravating factor or given little, if any, weight. This Court finds that this argument is also not compelling. Rose v. State, 787 So. 2d 786, 801 (Fla. 2001) (citing Hildwin v. State, 727 So. 2d 193, 196 n.3 (Fla. 1998)) (holding consideration of both aggravating factors, sections 921.141(5)(a) and (b), did not amount to "improper doubling").

Therefore, this Court finds that, under Florida law, these three prior offenses amount to a single aggravating factor under subsection (b). However, this Court can increase the weight of this factor because of the existence of the three separate offenses. Bright v. State, 90 So. 3d 249, 260-61 (Fla. 2012) (citing Tanzi v. State, 964 So. 2d 106, 117 (Fla. 2007)). Because of the existence of three prior felonies, one a capital felony and two felonies involving violence, this Court gives this aggravating factor great weight.[3]

[3] The Defendant was also contemporaneously convicted of a felony involving the use of violence, the felony battery of William M. Brewer. This contemporaneous felony involved a separate victim; therefore, it could have been considered under Florida law. See, e.g., King v. State, 390 So. 2d 315 (Fla. 1980); Pardo v. State, 563 So. 2d 77

(c) The defendant knowingly created a great risk of death to many persons.

There was no evidence presented to establish this aggravator.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

There was no evidence presented to establish this aggravator.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

There was no evidence presented to establish this aggravator.

(f) The capital felony was committed for pecuniary gain.

There was no evidence presented to establish this aggravator.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. Two of the most basic requirements of operating a prison facility are that people (both inmates and officers) are where they are supposed to be and order and control of the facility is maintained. However, the Defendant's conduct effectively disrupted the operation of the prison facility. The victim, as the dorm sergeant on staff on March 18, 2012, and the additional officer in the control room were responsible for the care, custody, and control of all inmates (more than 200) in the dorm at that time. As Warden Tony Anderson explained, a dorm sergeant has many duties both in and out of the control room. The dorm sergeant and his additional officer (if one is assigned) are in charge of count procedures, security checks, equipment inventory, ensure call-outs are conducted, and similar duties. Moreover, the dorm sergeant would regularly enter the common area in the dormitory, in particular, when inmates utilized the intercom system to report a maintenance problem in their cell. This is precisely what the Defendant did to get the victim to exit the control room and enter the dorm—he complained about the air vent in his cell.

(Fla. 1990); Stein v. State, 632 So. 2d 1361 (Fla. 1994); Francis v. State, 808 So. 2d 110 (Fla. 2002). However, the State did not request that either the jury or this Court consider this contemporaneous felony. Accordingly, it was not relied upon in this Court's decision to impose a death sentence.

Accordingly, the Defendant intentionally called one of two officers away from the control room and into Quad 3, leaving a single officer in the control room who could not, according to prison policy, leave the control room under any circumstances. After calling the victim away from his duties, the Defendant physically attacked the victim by, admittedly, punching him while he looked up to examine the air vent. Then the Defendant, again admittedly, pursued the victim, who, according to the testimony of many trial witnesses, was injured and bleeding, through the dorm. This conduct by the Defendant further hindered the operation of the prison facility by preventing the victim from exercising care, custody, and control over the inmates assigned to him. The Defendant's conduct also caused many of the other inmates to engage in disruptive conduct—some inmates were cheering, and many were up against the glass kicking and screaming.

The disruption was not contained to Quad 3. Testimony presented at trial showed that Quad 2 was equally disrupted and unsettled. In fact, testimony established that the entire dorm was affected. Even after the Defendant had inflicted fatal wounds on the victim, the Defendant's disruptive behavior continued—he returned to Quad 3 and informed his fellow inmates of what he had done by making the throat-slashing gesture(s). The Defendant tied the door shut and manipulated the sprinkler so that flooding occurred. Prison officials had to shut the water off, which affected many aspects of the operation of the prison including providing food to all of the prison's inmates. As further evidence of this disruption, when assistance arrived, the officers first had to regain control over the dorm and order inmates back into their cells. This unruly situation was the direct result of the Defendant's conduct. Therefore, each of the Defendant's actions resulted in disruption to the lawful operation of the prison facility.

This Court recognizes that the Defense disagrees with application of this aggravating factor because, they argue, this factor requires the jury to find that the Defendant committed this crime "*to*" disrupt the lawful exercise of any government function. In other words, the Defense conceded that this crime did in fact cause disruption to the lawful operation of the prison facility. However, that disruption occurred after the crime, and, according to the Defense, the Defendant did not engage in this conduct for the express purpose "*to*" disrupt the operation of the prison facility—that was merely an unintended consequence.

However, the Florida Supreme Court has repeatedly held "that in order for the disrupt/hinder aggravator to be applicable, it is sufficient for the State to show that the victim was killed while performing a legitimate governmental function." Phillips v. State, 705 So. 2d 1320, 1322 (Fla. 1997) (held that evidence establishing that victim was a parole officer directly involved with revoking the defendant's probation was sufficient to show that the murder was committed to disrupt or hinder the

lawful exercise of a governmental function) (citing Jones v. State, 440 So. 2d 570, 577-78 (Fla. 1983)). The operation of a prison facility is a "legitimate governmental function," and the victim in this case was directly involved with the supervision of the Defendant. This Court recognizes that revenge or ill will towards the victim may have also been a motivating factor for the Defendant, as he testified during trial that he called the victim to his cell to inflict physical harm upon him. However, like the defendant in Phillips (who killed his parole officer for exercising his official duty), the Defendant murdered the victim because of his official duties. The victim in this case was a sergeant tasked with guarding the Defendant; the Defendant, like Phillips, did not agree or approve of the government agent's conduct. Id. Proof beyond a reasonable doubt of the mere fact that the Defendant killed the victim while the victim was performing a legitimate governmental function is sufficient to establish this aggravator. However, as explained above, the State offered further proof of this aggravating circumstance.

Accordingly, this Court finds that this aggravating factor, that the capital felony was committed to hinder or disrupt the lawful exercise of a government function, has been proven beyond a reasonable doubt and assigns it substantial weight.

(h) The capital felony was especially heinous, atrocious, or cruel.

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. This Court has considered the Defense's argument that any death, even automobile accidents, have some measure of heinousness and atrociousness to them and that it must be proved beyond a reasonable doubt that this case was "*especially*" heinous, atrocious, or cruel. This argument has been recognized and endorsed by the Florida Supreme Court. See, e.g., Amoros v. State, 531 So. 2d 1256, 1260 (Fla.1988) ("First-degree murder is a heinous crime; however, this statutory aggravating circumstance requires the incident to be '*especially* heinous, atrocious, and cruel [sic].' "); Tedder v. State, 322 So. 2d 908, 910 (Fla.1975) ("It is apparent that all killings are atrocious.... Still, we believe that the Legislature intended something 'especially' heinous, atrocious, or cruel when it authorized the death penalty for first degree murder."). In fact, the Florida Supreme Court has explained that "only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another," are the elements of heinous, atrocious, or cruel met. Guzman v. State, 721 So. 2d 1155, 1159 (Fla.1998) (citing Kearse v. State, 662 So. 2d 677 (Fla.1995)). According to the Defense, this case does not rise to that level. However, this Court disagrees for numerous reasons.

First, the trial testimony, particularly the testimony of the medical examiner, established that the victim was stabbed at least twelve times. Specifically, the medical examiner testified that the victim

suffered eight defensive wounds, a wound to his skull, two wounds on the side of his face, and a mortal wound to his neck. Therefore, the capital felony was especially heinous, atrocious, or cruel. Francis v. State, 808 So. 2d 110, 134-35 (Fla. 2001) ("The [heinous, atrocious, cruel] aggravator has been consistently upheld where, as occurred in this case, the victims were repeatedly stabbed.") (citing Guzman v. State, 721 So. 2d 1155, 1159 (Fla.1998); Brown v. State, 721 So. 2d 274, 277 (Fla.1998); Atwater v. State, 626 So. 2d 1325, 1329 (Fla.1993)).

Second, the trial testimony of the medical examiner and the presence of eight defensive stab wounds establish that the victim was conscious during most, if not all, of the attack. A victim's consciousness while being repeatedly stabbed further establishes that the murder was especially heinous, atrocious, or cruel. See, e.g., Id.; Zommer v. State, 31 So. 3d 773, 747 (Fla. 2010) ("[The Florida Supreme Court] has previously upheld [heinous, atrocious, and cruel] aggravating factor in cases where a conscious victim was beaten or strangled prior to his or her death."); Randolph v. State, 562 So. 2d 331, 338 (Fla. 1990) (affirming heinous, atrocious, or cruel aggravating factor where defendant repeatedly hit, kicked, strangled, and knifed victim who was conscious during various stages of the attack); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (affirming heinous, atrocious, or cruel aggravating factor where victim was choked and repeatedly stabbed while she attempted to ward off a knife attack).

Third, the nature of the weapon further established the especially heinous, atrocious, or cruel nature of this crime. The weapon was crafted by the Defendant's cellmate, Robert Acree, who testified that he routinely made weapons while in prison. This particular weapon, a makeshift knife, was admitted into evidence and measured approximately ten inches long. The blade is about one inch wide. A witness labeled the makeshift knife a "Conan-knife." The medical examiner explained that the makeshift knife was very thick and blunt except for the end that was sharpened to a point. These characteristics—the thickness and lack of sharpness of the blade—according to the medical examiner, would require one to use more force than if it were a standard-made knife to effectuate the injuries that the victim suffered.

Fourth, the victim, because of his consciousness and the Defendant's chase and continued attack, experienced fear and emotional strain before he died. Francis v. State, 808 So. 2d 110, 134-35 (Fla. 2001); Walker v. State, 707 So. 2d 300, 318 (Fla. 1997). Despite the victim's attempt to flee to the control room, the Defendant admitted that he chased the victim. According to trial testimony, the Defendant chased the victim down a flight of stairs from the second floor to the first floor and across the quad—for a total of about 150 feet. The Defense argued that there was no evidence that established that the victim knew he was being chased. However, the victim's attempt to retreat to safety proves beyond a reasonable doubt that the victim was fearful and found it necessary to seek protection. Then, while the victim fought to pull the door shut, the Defendant wedged his foot in the door and continuously stabbed at

the victim. The victim was certainly aware of the danger the Defendant posed at this moment as he fought over the door and was repeatedly stabbed. The Defendant testified that the victim attempted to push his panic button at some point during the attack further establishing that the victim experienced fear. The victim was clearly conscious, fearful, and "aware of [his] impending death" during his final moments of life. Douglas v. State, 878 So. 2d 1246, 1261 (Fla. 2004) (citations omitted).

Fifth, the Defendant's argument, to disprove this aggravating factor, that this killing was "either the result of a frenzied attack or an emotional rage" is unconvincing. First, the Defendant testified that any controversy he had with the victim had occurred some time before this incident. For example, trial testimony revealed that the victim had required the Defendant to be responsible for opening and closing the gate on the way to and from meals. This resulted in the Defendant being the last inmate to obtain his meal. However, according to the Defendant's testimony, this incident had occurred at least a few days earlier. Moreover, the Defendant described these events as "childish" and immature, illustrating that the Defendant did not view these minor non-violent conflicts as sufficient motive to attack and kill the victim. Second, as the Defense argued, the Defendant did not brandish the knife "until the victim and Defendant were at the outer control room door." In other words, the Defendant pursued the victim after he had left the Defendant's cell. The Defendant opted, rather than end his physical attack when the victim exited the Defendant's cell, to pursue the bleeding victim. The Defendant's deliberate pursuit for approximately 150 feet during which the Defendant had time to reflect and could have abandoned his pursuit and brandishing of a knife further supports this aggravating factor.

Therefore, this Court finds that this aggravating factor, that the murder was especially heinous, atrocious, or cruel, has been proven beyond a reasonable doubt and assigns it very great weight.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. The Florida Supreme Court has articulated a four-part test for finding this aggravator: "(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." Victorino v. State, 23 So. 3d 87, 105-06 (Fla. 2009) (citing Lynch v. State, 841 So. 2d 362, 371 (Fla. 2003)).

First, the killing was "cold" in that the Defendant called the victim to his cell for the purposes of attacking him. In other words, the Defendant was not reacting to some immediately preceding conduct or action of the victim. Instead, the Defendant had to first manipulate the air vent in his cell for the purpose of luring the victim. He then purposefully used the intercom to call the victim to his cell, and the Defendant had already acquired the makeshift knife and ensured that it was ready and convenient. These incidents establish that the Defendant was not prompted by emotional frenzy, panic, or rage—instead, the Defendant had carefully constructed a situation to ensure that the victim would come to his cell.

Second, the Defendant, with great premeditation, carefully planned the attack and lay in wait for the victim to arrive in his cell, which satisfies the second and third prongs. Hall v. State, 107 So. 3d 262, 278 (Fla. 2012), reh'g denied (Feb. 1, 2013) (citations omitted). There was evidence proven beyond a reasonable doubt that established more than the mere premeditation element that the jury found during the guilt stage and exhibited that the Defendant had thoroughly planned the attack. For example, the Defendant acquired a knife and successfully hid it from prison officials. This supports the premise that the Defendant planned the attack. See, e.g., Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007) ("In a number of cases, [the Florida Supreme Court has] cited the defendant's procurement of a weapon in advance of the crime as indicative of preparation and heightened premeditated design."). In addition, the Defendant also manipulated his cell so that the victim would be required to inspect it. He called the victim on the intercom and reported the air vent issue to the victim. Prior to the victim's arrival, according to trial testimony, the Defendant either hid the knife on his person or purposefully placed it in a convenient location (not under the cell door where it was usually stored), establishing that the Defendant did not intend to merely report the air vent issue but, instead, intended on attacking the victim. After placing the intercom call, the Defendant waited for the victim to arrive. The victim entered the Defendant's cell carrying a bag of potato chips, which illustrates that the victim arrived without any indication that he would be physically attacked. The victim looked up at the air vent, and the Defendant struck the victim. The victim fled the Defendant's cell, and the Defendant pursued the victim with the knife that he retrieved from either his person or the convenient, prearranged location. The Defendant "fast-walked" after the injured victim, and, ultimately, the two simultaneously tugged on the door separating them as the Defendant continuously stabbed the victim through the door opening. The door did not shut and lock due to the Defendant wedging his shoe into the door. Testimony from witnesses revealed that the Defendant was using overhand strikes through the opening in the door to stab the victim. During this attack, the Defendant had many opportunities to reflect and cease his attack on the victim; instead, the Defendant continued his deliberate pursuit of and physical attack on the victim. This series of acts prove beyond a reasonable doubt that the Defendant possessed a heightened intent to kill the victim—not just inflict harm

upon him. See, e.g., Parker v. State, 873 So. 2d 270 (Fla. 2004) ("[The Florida Supreme Court has] previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead commits the murder."). These actions, according to settled case law, establish that the Defendant possessed heightened premeditation. McGirth v. State, 48 So. 3d 777, 793 (Fla. 2010) ("Sufficient evidence exists to support a trial court's finding on CCP where the defendant procures a weapon in advance, receives no provocation or resistance from the victim, and carries out the killing as a matter of course."); see also Williams v. State, 37 So. 3d 187, 195 (Fla. 2010); Franklin, 965 So. 2d at 98.

This Court is cognizant of the Defense's allegation that this aggravator has not been proven beyond a reasonable doubt. According to the Defense, three eyewitnesses from trial observed the initial altercation in the Defendant's cell and testified that the Defendant did not pull out the knife immediately. Although, as the Defense argued, the Defendant could have retrieved the knife and murdered the victim relatively easily in his cell (as the victim was rather defenseless with a bag of potato chips), he did not. This, according to the Defense, establishes that the Defendant did not act in a cold, calculated, or premeditated manner. In other words, if the Defendant had orchestrated a premeditated plan to kill the victim, he would have done so as soon as the victim arrived in the Defendant's cell, a more secluded location, and a time when the victim was more vulnerable. The Defense argued that this "plan" to punch the victim and then chase him through the dorm and struggle over the door does not make sense. These arguments by the Defense do not diminish the cold, calculated, and premeditated aggravating factor. Instead, it illustrates a different plan that the Defendant may have attempted. It does not diminish or discredit the detailed planning that the Defendant engaged in regarding the preparation of the weapon or his cell, which was used to effectively lure the victim into the Defendant's cell.

Finally, the Defendant acted without any moral or legal justification. As explained above, the attack was not the product of the victim's immediate provocation. Instead, the Defendant explained that the victim, in previous interactions, had treated the Defendant with disrespect—including the gate incident. Witness testimony was somewhat conflicted regarding the victim's treatment of the Defendant. Some witnesses, including Lionel Tate, testified that the victim "hasseled" the Defendant and conducted frequent "shakedowns" of his cell, a cell which he shared with Robert Acree, a known weapon maker. Tate also testified that the victim did not allow the Defendant to eat on one occasion. On the other hand, other witnesses testified that the Defendant was not treated differently by the victim. And the Defendant even testified that the prior issues between him and the victim were immature and "childish." Even if the

victim performed more frequent "shakedowns" of the Defendant's cell[4] or treated or talked to him in a disrespectful manner, such treatment clearly does not amount to legal or moral justification.

Therefore, this Court finds that this aggravating factor, that the murder was cold, calculated, and premeditated, and committed without moral or legal justification, has been proven beyond a reasonable doubt. This Court assigns this aggravating factor very great weight.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

The fact that the victim was a correctional officer was undisputed. The State argued that the victim, being a correctional officer, particularly a sergeant with the Department of Corrections, was a law enforcement officer. The Defense, on the other hand, relying upon their pretrial motions, argued that the victim was not "a law enforcement officer." However, this Court finds that, even if it were to conclude that a correctional officer is a law enforcement officer, consideration of this aggravating factor and subsection (g), the capital felony was committed for the purpose of hindering or disrupting a lawful governmental function, would be improperly duplicative. Kearse v. State, 662 So. 2d 677, 685-86 (Fla. 1995) (citing Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994) (finding that the aggravating factors of hindering or disrupting the enforcement of laws and the victim was a law enforcement officer were "duplicative because both factors are based on a single aspect of the offense, that the victim was a law enforcement officer"). Therefore, in an abundance of caution, this Court did not consider this aggravating factor in its decision in this case. Rather, it assigned substantial weight to the previous aggravating factor of hindering or disrupting the lawful exercise of a governmental function.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

There was no evidence presented to establish this aggravator.

(l) The victim of the capital felony was a person less than 12 years of age.

There was no evidence presented to establish this aggravator.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

There was no evidence presented to establish this aggravator.

[4] These additional "shakedowns," if actually conducted, were unsuccessful in that the makeshift weapon, which was in the Defendant's custody for at least three months, was not discovered.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

There was no evidence presented to establish this aggravator.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

There was no evidence presented to establish this aggravator.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

There was no evidence presented to establish this aggravator.

Statutory Mitigating Factors (Section 921.141(6), Florida Statutes)

(a) The defendant has no significant history of prior criminal activity.

There was no evidence presented to establish this mitigating circumstance. In fact, as already explained in this Order, the Defendant has a violent criminal history (including a prior first-degree murder) and was in prison serving a life sentence when he committed the criminal conduct that gave rise to the instant case. Therefore, this mitigating factor does not apply.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

There was no evidence presented to establish this mitigating circumstance. Instead, evidence was presented that established beyond a reasonable doubt that the Defendant acted with a premeditated plan. The Defendant's conduct shows planning and preparation, as explained throughout this Order. Therefore, this mitigating factor was not alleged or proven and does not apply.

(c) The victim was a participant in the defendant's conduct or consented to the act.

There was no evidence presented to establish this mitigating circumstance. In fact, evidence established that the Defendant initiated the interaction with the victim. As already explained in this Order, the undisputed evidence at trial established that the Defendant altered the air vent in his cell and then contacted the victim to come and examine the Defendant's cell. The victim arrived with a bag of

potato chips in his hand and began to examine the air vent. This evidence does not establish that the victim was a participant or consented to the act; instead, it demonstrates that the victim arrived in the Defendant's cell unaware that he would be physically attacked. Furthermore, the victim's unsuccessful attempt to flee to safety further disestablishes this factor. Had the victim consented to the attack by the Defendant or been a participant, he would not have sought refuge. Therefore, this mitigating factor was not alleged or proven and does not apply.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

There was no evidence presented to establish this mitigating circumstance. Neither the Defendant nor the State alleged that any other individuals were involved in the killing of the victim. At best, the Defendant's cellmate, Mr. Robert Acree, may have been implicated in the killing of the victim for his role in selling the knife used in the killing to the Defendant. However, the evidence adduced at trial revealed that Mr. Acree had sold the knife to the Defendant months before this incident, and he did not provide the knife to the Defendant for the specific purpose of killing the victim. Moreover, he did not assist or encourage the Defendant to kill the victim. Therefore, even though this mitigating factor was not raised by the State or the Defense, this Court, having considered all of the evidence, finds that this factor was not at issue and, therefore, does not apply.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

There was no evidence presented to establish this mitigating circumstance. Moreover, having considered all of the evidence presented, this Court finds no evidence that even hinted at potential duress or domination by another person. Therefore, this factor does not apply.

(f) 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.

There was no evidence presented to establish this mitigating circumstance. Again, neither the State nor the Defense specifically raised this factor. This Court, having considered the evidence presented at the guilt and sentencing phase, finds that this factor does not apply.

(g) The age of the defendant at the time of the crime.

There was no evidence presented to establish this mitigating circumstance. The Defendant was not a minor when he killed the victim, nor had he recently reached the age of majority. In fact, the

Defendant was thirty-six years old when he killed the victim in this case. As such, the Defendant's age was not at issue, and this factor does not apply.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

The evidence and arguments establish additional non-statutory mitigating evidence, which this Court has considered and will address below.[5]

(1) The Defendant's childhood and adolescence were troubled, unstable, and violent.

Early Childhood. According to the testimony of the Defendant's father and sister, the Defendant was a mild, nice, and beautiful baby and child. However, according to the Defendant's sister, the Defendant's mother was not present for about six to twelve months of the Defendant's early life because of a "nervous breakdown."

Conditions of Home and Personal Possessions. The childhood home of the Defendant was very small. The family, which would eventually include five children, shared a two-bedroom home. As described by his sister, it was a "raggedy shack" with holes in the floor. In fact, his mother fell through one of the holes in the floor during her second pregnancy. The Defendant's sister also explained that the home lacked most household luxuries, explaining that they did not acquire a television until she was about ten years old.

The family was on state-assistance and, according to the Defendant's sister, the children ate when their mother "decided to cook." However, if their father did not approve of the food, he threw it away before the children had the opportunity to eat.

The Defendant and his siblings wore mostly hand-me-down clothing, which caused the children ridicule from other school children. Additionally, the children received one pair of shoes a year. If the shoes were damaged or fell apart, the Defendant's father would repair them with glue rather than purchase a new pair.

According to the Defendant's sister, the children were not given any kind of "spending money."

Strict Rules. The Defendant's parents imposed very strict rules in the household. The children were allowed five minutes to get home after school. The children also were not permitted to have friends over after school. To ensure compliance with this rule, the Defendant's father would rake the grassless yard prior to leaving so that fresh footprints would indicate whether anyone had left or entered the home. The children were also not permitted to participate in after-school activities, and they were only allowed

[5] Both parties organize the nonstatutory mitigators differently. Accordingly, this Court has attempted to implement an organizational structure that allowed careful consideration and discussion of all mitigating evidence raised in a clear, concise, and chronological manner.

to visit friends' houses if accompanied by their parents. The family did not celebrate birthdays, Christmas, or Thanksgiving. Nor did they patronize movie theaters.

While in public, the children were not permitted to speak unless expressly granted permission from their parents.

Upon turning eighteen, the children were required to leave the home; according to the Defendant's sister, those were "the rules."

Violence. The Defendant and his siblings were witnesses to and victims of violence. The Defendant's father was violent towards the Defendant's mother—he held a gun to the mother's face. The Defendant's father would also exhibit violent outbursts—he would "knock the windows out of the house," according to the Defendant's sister's testimony. The Defendant's sister explained that the children were struck with switches and extension cords and that she was beaten with an alternator belt when she was sixteen years old. The "beatings" would leave physical marks, but, as the Defendant's sister explained, the children generally wore long-sleeved clothing, which hid the abuse. She also explained that these "beatings" would occur mostly on the weekends.

The Defendant was present in the home when his father shot the Defendant's older brother; however, this incident was not further explained by any witnesses.

Court's Finding. This Court finds that the evidence has reasonably established that the Defendant did not experience a stable and loving childhood, as the testimony of the Defendant's father and sister was credible and not refuted by any other testimony or evidence. In fact, the Defendant was raised in deplorable conditions and was deprived of a "normal" childhood. The Defendant did not obtain a high school diploma. He was born into poverty, and, according to testimony at the sentencing hearing, his childhood never improved. However, as the State explained, his sister was also exposed to the same disadvantages, and, yet, she lives a normal and productive life. Caylor v. State, 78 So. 3d 482, 497 (Fla. 2011) (approving of the trial court's finding that the defendant's abusive childhood and dysfunctional family life were assigned little weight "especially since the Defendant's brother raised in the same environment has been a law abiding citizen"); See also, Douglas v. State, 878 So. 2d 1246, 1260 (Fla. 2004). Moreover, there was no showing that these experiences diminished the Defendant's ability to know or understand right from wrong. Douglas, 878 So. 2d at 1260. Accordingly, the Defendant's upbringing and impressionable years, although likely affected the man he became, do not excuse or justify his behavior as an adult. Moreover, the evidence presented was not sufficient to establish that the Defendant's childhood and adolescence had an ill effect on the Defendant. As such, this Court assigns

little weight, individually and collectively, to each of the above mitigating circumstances surrounding the Defendant's childhood and adolescence.[6]

(2) The Defendant was a great brother and uncle.

The Defendant's sister testified that the Defendant was her favorite brother and that he was the "favorite uncle" to her children. In fact, she explained that he "did a lot for them." For example, he would take his sister's son to day care and pick him up, and he bought nice things for his nephew. His sister explained that the Defendant loved and cared for his nephews and that they loved him in return.

The Defendant's ability to transport his nephews and purchase things for them obviously ended when he was incarcerated approximately eighteen years ago. Further, as the Defendant's sister explained, and further addressed below in *(4)*, the Defendant's sister only visited him once since he has been incarcerated—sometime in 1995. Accordingly, this caring and loving behavior exhibited by the Defendant towards his sister and nephews occurred at least eighteen years ago. Nonetheless, this testimony regarding how the Defendant behaved as a brother and uncle was unrefuted and, accordingly, supported by reasonably established evidence. However, this Court assigns this mitigating evidence little weight.

(3) The Defendant suffered a head injury from a gunshot wound as a teenager.

The unrefuted testimony presented at the sentencing hearing established that the Defendant was the victim of a drive-by shooting when he was about sixteen years old. He was shot in the head. The Defendant's father testified that after that traumatic experience the Defendant "changed" and that "he wasn't the same no more." The Defendant's father further testified that the Defendant's attitude changed and that the Defendant felt that he needed a gun thereafter. The Defendant's sister also testified that this shooting changed the Defendant—he became "distant" and "cold," and "he didn't have a whole lot to say." She also explained that he was no longer the uncle or brother that he had been before.

The details concerning this incident were not fully discussed[7], although the Defendant testified at the sentencing hearing and was asked whether there was anything else he wanted this Court or the jury to know. The testimony of the Defendant's father and sister established that the Defendant's attitude or personality may have been altered by this incident; although, as the State notes, many other factors could have contributed to this change. Accordingly, this Court finds that the evidence presented has reasonably

[6] Many of these factors concerning the Defendant's childhood and adolescence would be difficult to evaluate individually given their overlapping nature and would result in multiple weight being afforded to the same circumstance. Therefore, this Court has reviewed them individually and collectively. See, e.g., Ault v. State, 53 So. 3d 175, 194 (Fla. 2010) (trial courts are permitted to group related mitigating factors into categories).

[7] At the Spencer hearing, the Defendant's counsel explained that the medical records concerning this shooting had been destroyed because of the passage of time.

established that the Defendant suffered a gunshot wound to his head while he was a teenager, and assigns it some weight.

(4) The Defendant's family effectively abandoned the Defendant.

The Defendant's sister testified that, prior to her seeing the Defendant during her testimony at the sentencing hearing, she had only seen her brother one time since he has been incarcerated—shortly after he was originally incarcerated in 1995. She explained that it was too painful for her to leave him at the prison—that she could not take her little brother with her when she left—so she has not visited him since. The Pre-Sentence Investigation reflects that the last time the Defendant had contact with his family was with "his mother and brothers Larue and Lorenza Frankline" in 2002.

This Court finds that the evidence has reasonably established that the Defendant has been effectively abandoned and cut off from his family for nearly all of his adult life and certainly for the last eleven years. The evidence establishing such was not refuted. However, the evidence establishes that this abandonment occurred after the Defendant was incarcerated for various felonies. This Court recognizes that the Defendant's life was not easy or comfortable before this time, but his family's abandonment could not be a cause for his early felonies as the abandonment occurred after the Defendant's criminal conduct. With regard to the current felonies, the Defendant's family's abandonment preceded these events. However, the evidence did not establish that the Defendant's family's abandonment had an ill effect on the Defendant. In other words, this Court is unconvinced that this abandonment led to or compelled the Defendant to engage in such reckless behavior. And it certainly does not justify or excuse the Defendant's behavior. Nonetheless, this Court assigns little weight to this mitigating circumstance.

(5) The Defendant intervened when a fellow inmate was being attacked.

Former inmate Randy Antonio Thomas provided testimony at a deposition, which was presented to this Court by way of a transcript stipulated into evidence at the Spencer hearing. According to his testimony, the Defendant physically intervened when Mr. Thomas—who was then confined to a wheelchair—was being attacked by another inmate. Specifically, Mr. Thomas testified that the attacking inmate was trying to twist Mr. Thomas's neck and gouge out his eyes. The Defendant shouted at the attacking inmate and forcibly pulled the attacking inmate off of Mr. Thomas. Mr. Thomas also testified that additional inmates reacted and intervened once the Defendant began to act. The testimony of Mr. Thomas concerning this incident was not refuted by any other testimony or evidence.

This Court finds that the evidence has reasonably established that the Defendant, along with a few other inmates, intervened in an altercation between Mr. Thomas and another inmate. The Defendant's conduct was undoubtedly commendable, and this mitigating factor is assigned some weight. See, e.g.,

Windom v. State, 886 So. 2d 915, 920 (Fla. 2004) (finding that affording "very little weight" to a defendant saving the life of two separate people was proper); Lugo, 845 So. 2d at 92 (finding that affording "little weight" to a defendant's exhibited "great acts of kindness in the past" was appropriate).

(6) The Defendant exhibited good behavior during the trial.

As the Defense alleged, the Defendant exhibited good behavior during both the guilt and sentencing phase of the trial. It was not necessary to ask the Defendant to be quiet or to cooperate with his attorneys or the assigned officials charged with courtroom security. This Court finds that the evidence has reasonably established that the Defendant's good behavior and cooperation during trial, although obvious to any observer, should only be afforded little weight. See, e.g., Douglas v. State, 878 So. 2d 1246, 1254 (Fla. 2004) (finding that assigning little weight to defendant's exhibition of "appropriate behavior during the trial" was appropriate).

(7) The Defendant exhibited remorse.

According to the Defense, the Defendant, during his testimony at the guilt phase, explained that the killing of the victim in this case should never have happened. Moreover, the Defense alleged that the Defendant's "demeanor and his testimony showed he was truly remorseful concerning the death of the victim." There was no evidence admitted contradicting these claims of remorse; however, the State argued that the Defendant did not show actual remorse and, instead, simply wished that the victim had not died as a result of the Defendant's attack.

This Court finds that the evidence has reasonably established that the Defendant testified about his regretful feelings concerning the murder of the victim. For example, he explained how nothing he could say to the victim's family would make a difference and that he took something away that cannot be replaced. This Court finds that these regretful feelings establish a minimal showing of remorse by the Defendant. This Court affords the Defendant's negligible remorse very little weight. See, e.g., Smith v. State, 28 So. 3d 838, 853 (Fla. 2009); Walker v. State, 957 So. 2d 560, 579 (Fla. 2007).

Conclusion

As explained above, this Court has found beyond a reasonable doubt the existence of five statutory aggravating factors, including both that the murder was committed in a cold, calculated, and premeditated manner and that it was especially heinous, atrocious, and cruel—"two of the most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). This Court assigned very great weight to those two "most serious aggravators," great weight to the aggravating factors related to the Defendant's prior felonies (which includes a prior first-degree murder), and substantial weight to the remaining aggravating factor, committed to disrupt or hinder a governmental

function. As required by law and articulated in the standard jury instructions, this Court has also afforded great weight and deference to the jury's advisory sentence of death. Fla. Std. Jury Instr. (Crim.) 7.11 (Penalty Proceedings—Capital Cases).

This Court carefully evaluated the statutory mitigating factors and found that none are applicable in this case. This Court found that seven non-statutory mitigating factors have been sufficiently proven. Four of these mitigating factors have been afforded little weight, one of these factors was afforded very little weight, and the additional two mitigating factors, the Defendant suffered a gunshot wound to the head as a teenager and the Defendant intervened during a physical altercation between two inmates, were assigned some weight.

This Court, having compared the mitigating factors against the aggravating factors, finds that the aggravating factors clearly, convincingly, and beyond a reasonable doubt outweigh the mitigating factors. In fact, the mitigating evidence "is minimal and does not come close to outweighing the aggravating factors." McWatters v. State, 36 So. 3d 613, 642 (Fla. 2010). In other words, although the number of mitigating factors is comparable to (in fact, in excess of) the number of aggravating factors, the relevant inquiry and determination is not the sheer number but, rather, the weight afforded each factor. Here, the nature and quality of the mitigating evidence pales in comparison to the enormity of the aggravating factors proven in this case.

IT IS THE JUDGMENT AND SENTENCE OF THIS COURT:

1. For the First-Degree Murder (Count 1) of Ruben Howard Thomas, III, the Defendant is sentenced to be put to death in the manner prescribed by law. It is ORDERED that the Defendant be taken by the proper authority to the Florida Department of Corrections to be housed there until the date execution is set. It is further ORDERED that on such scheduled date, the Defendant be put to death.
2. For the Felony Battery (Count 2) on William M. Brewer, the Defendant is sentenced to serve a term of imprisonment in the Department of Corrections for five years.
3. For the Possession of Contraband in Prison (Count 3), the Defendant is sentenced to serve a term of imprisonment in the Department of Corrections for fifteen years.
4. These sentences are to run consecutive to each other and to the sentences previously imposed by the Seventh Judicial Circuit Court in and for Volusia County.
5. Due to the sentences in the instant case being ordered consecutive to the Defendant's previous sentences and the fact that the Defendant was still serving the earlier-imposed sentences, the Defendant is not entitled to any presentence credit for the time he was

incarcerated in the Department of Corrections awaiting disposition of the instant case. See Cregg v. State, 43 So. 3d 818 (Fla. 1st DCA 2010).

6. The Defendant has thirty days from the date of this sentence to appeal the sentencing judgment and conviction of this Court. The Defendant has the right to counsel to assist in the preparation, filing, and argument of this appeal. If the Defendant cannot afford counsel, counsel will be appointed upon request.

7. Even if the Defendant elects not to appeal, "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida." § 921.141(4), Fla. Stat.

DONE AND ORDERED in Lake City, Columbia County, Florida, on August 2, 2013.

PAUL S. BRYAN, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Order was furnished by hand delivery, on August 2, 2013, to the following:

Office of Public Defender
Third Judicial Circuit
173 NE Hernando Avenue
Lake City, Florida 32055

Office of State Attorney
Third Judicial Circuit
173 NE Hernando Avenue
Lake City, Florida 32055

Person Sending Copies: Deputy Clerk