

IN THE SUPREME COURT OF FLORIDA

MIGUEL OYOLA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-2048

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

	PAGE#
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF ARGUMENT	17
ARGUMENT	17
ISSUE I: THE TRIAL COURT’S ANALYSIS AND SENTENCE OF DEATH DID NOT RELY ON IMPROPER AGGRAVATORS.	
ISSUE II: THE TRIAL COURT DID NOT VIOLATE <i>CAMPBELL V. STATE</i>, BECAUSE THE DEFENSE DID NOT PRODUCE ANY NON-STATUTORY MITIGATORS FOR THE TRIAL COURT TO CONSIDER.	
ISSUE III: THIS COURT HAS PREVIOUSLY RULED AND REJECTED OYOLA’S CLAIM OF A VIOLATION OF <i>RING v. ARIZONA</i>.	
CONCLUSION	32
CERTIFICATE OF SERVICE	32
CERTIFICATE OF COMPLIANCE	32

TABLE OF CITATIONS

Cases

<i>Austin v. State</i> , 784 So. 2d 186 (Miss. 2001).....	23
<i>Baker v. State</i> , 71 So. 3d 802 (Fla. 2011)	31
<i>Buzia v. State</i> , 926 So. 2d 1203 (Fla. 2006).....	19, 26, 28
<i>Campbell v. State</i> , 571 So. 2d 415 (Fla. 1990)	passim
<i>Chandler v. State</i> , 75 So. 3d 267 (Fla. 2011).....	31
<i>Darling v. State</i> , 966 So.2d 366 (Fla.2007)	31
<i>Ford v. State</i> , 802 So. 2d 1121 (Fla. 2001).....	19, 28
<i>Franqui v. State</i> , 59 So. 3d 82 (Fla. 2011).....	22
<i>Globe v. State</i> , 877 So. 2d 663 (Fla. 2004).....	25
<i>Hardy v. State</i> , 2014 WL 1716241 (Miss. 2014).....	23
<i>Huff v. State</i> , 569 So 2d 1247 (Fla. 1990).....	20, 26, 28
<i>Jurek v. Texas</i> , 428 U.S. 262 (1976).....	24
<i>Kansas v. Marsh</i> , 548 U.S. 163, 126 S.Ct. 2516 (2006).....	23
<i>Kilgore v. State</i> , 688 So. 2d 895 (Fla. 1996)	25
<i>Oyola v. State</i> , 99 So. 3d 431 (Fla. 2012).....	passim
<i>Parker v. Matthews</i> , 132 S.Ct. 2148 (2012)	21
<i>Polls v. State</i> , 2013 WL 6083411 (Fla. 4th DCA 2013).....	23
<i>Pulley v. Harris</i> , 465 U.S. 37 (1984).....	24

Ring v. Arizona, 536 U.S. 584 (2002).....31

Sexton v. State, 775 So. 2d 923 (Fla. 2000) 19, 26, 28

Yacob v. State, 2014 WL 1243782 (Fla. 2014).....24

PRELIMINARY STATEMENT

This brief will refer to Appellant as Defendant, or “Oyola.” Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such or the State.

The facts and legal rulings of this case were previously determined by this court on direct appeal and are reflected in *Oyola v. State*, 99 So. 3d 431 (Fla. 2012). The record of the remand proceedings is contained in the Supplemental Record – Volume I. The Supplemental Record consists of one volume which is consecutively paginated with handwritten page numbers at the bottom of each page. References to the Supplemental Record – Volume I will be as follows “(SSR at ##).” Oyola’s initial brief following this Court’s remand order will be “(IB at ##).”

Finally, it should be noted that Judge Ralph “Bubba” Smith, died shortly after issuing his Second Revised Sentencing Order in this case. As a result, should this Court decide for Oyola, the proper remedy would be a new penalty phase before a new judge.

ORAL ARGUMENT

This answer brief, and the defendant's initial brief, are in response to this Court's remand order regarding only the deficiencies with the trial court's sentencing order. As such, Oyola's case has been fully briefed and argued before this honorable Court on direct appeal. Therefore, it is the State's belief that oral argument is not necessary regarding the issues presented in Oyola's initial brief.

STATEMENT OF THE CASE AND FACTS

The appellant, Oyola, appeals his death sentence after this Court affirmed the convictions, but remanded the case and ordered the trial court to submit a new sentencing order in compliance with *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). *Oyola v. State*, 99 So. 3d 431, 446 – 447 (Fla. 2012). The facts and procedural history are reflected in this Court’s opinion on direct appeal opinion and are as follows:

Gerrard owned and operated C & G Outdoor Services, which was an outdoor landscaping business in and around Leon County, Florida. Gerrard employed Oyola in his landscaping business. Wakulla Bank had a long-standing business relationship with Gerrard and Gerrard’s company, and had issued Gerrard a debit card for its C & G Outdoor Services business account. On the day of the murder, a bank employee at Wakulla Bank, who had a long-term professional relationship with Gerrard and his business, received a telephone call from Gerrard. He inquired as to suspicious activities on his business debit card. She examined the account’s banking data and informed Gerrard of a series of suspicious transactions that had occurred the day before. Gerrard was both surprised and angered with regard to the transactions. He advised that he would travel to the bank to see her, but Gerrard never arrived.

The suspicious transactions recorded on the debit card included numerous purchases at two different Wal-Mart stores in Tallahassee, Florida, totaling approximately \$900. There was also an additional cash withdrawal of \$900 on the day of Gerrard’s murder. Wal-Mart’s video surveillance cameras recorded the transactions. The police obtained still shots of the Wal-Mart transactions in question. The still shots depicted the register during the purchase and the purchaser as he left the store. The pictures depict a man who appears to be Oyola. Also obtained with the still shots were receipts of the transactions. Oyola signed the receipts for two of the transactions.

During the late morning of the day of Gerrard's murder, a neighbor of Oyola saw Gerrard arrive at Oyola's home in a white truck. Gerrard stepped out of the truck and talked with Oyola for about twenty-five minutes. The two men entered the truck and drove away. At about 2:30 p.m., Gerrard was seen with one of his employees at a Sports Authority store in his white truck with an attached white trailer.

Later that afternoon, a truck driver for a logging company was driving equipment out of the woods on a logging road in a wooded area in Jefferson County, Florida. He proceeded around a curve in the road, at which point he noticed a white truck with an attached trailer parked in the road. The trailer started to rock and two men fell out. The men were engaged in a struggle.

The struggle became more physical and the truck driver described both of the men's shirts as having turned red. It appeared to the truck driver as though the men were fighting to the death. At this point, the driver backed his truck around the curve and used his Citizens' Band radio to call to a work crew for help. He informed them that two men were fighting in the middle of the road. The work crew joined the truck driver ten to fifteen minutes later. They proceeded around the curve and to the location of the tussle. The truck and its attached trailer, as well as one of the men, were gone. The other man was on the side of the road. He was on his hands and knees and was gasping for breath. He fell face down and remained still. The driver and work crew placed a call to the 911 emergency number.

The police dispatcher received the 911 call at 3:06 p.m. A Jefferson County deputy sheriff responded. When the deputy arrived, he found a man lying face down on the side of the road. The deputy found that the man was deceased and the later identified him as Gerrard. Gerrard was also later identified as the owner of the white truck and attached trailer that was previously in the logging road before the work crew found him.

In the early evening of that same day, Oyola's live-in girlfriend arrived home to find a white truck parked across the street. When she proceeded into her home, she found Oyola in a bathtub bathing in bleach. She found this especially peculiar because she knew that Oyola did not like the smell of bleach and it made him sick. She also

noticed a black plastic trash bag. Although she did not completely open the trash bag, she could see that the bag appeared to contain a pair of Oyola's beige colored pants. This seemed odd to her and she asked Oyola whether those were his pants in the bag. He informed her that she did not want to know what was inside the bag, because if she did know, it would make her ill.

A few minutes later, Oyola dressed and left the home, driving away in his girlfriend's automobile. Sometime after he left, Oyola called her and instructed her to proceed to the end of the road to pick up her car. He also told her that he was going to meet some friends and that he would call her later for a ride. She walked down to the road and found her car in the same place where the white truck had been previously parked. The white truck was no longer in the neighborhood.

Approximately one hour later, Oyola called his girlfriend and instructed her to pick him up at a K-Mart on Blairstone Road, across the street from an old Emarq office building. When she arrived at that location, he was wearing a jacket. He was not wearing a jacket when he left their home earlier. She had never seen that jacket before, and after that evening, she never saw the jacket again.

Later that evening, Oyola received a call from some of Gerrard's workers requesting a ride home because Gerrard had not responded to their calls for transportation. Oyola responded to the workers in his girlfriend's car. When one of the workers entered the car, he noticed a jacket that he had left in Gerrard's white truck earlier that day. Over the objections of Oyola, the worker recovered his jacket.

During that same evening, a witness spotted Gerrard's white trailer on the side of a road in Leon County. The trailer was not attached to anything and the ground around the trailer was on fire. The witness stopped and tried to extinguish the fire. There was an odor of gasoline around the trailer and an empty gasoline can at the scene. The witness noticed that the trailer door was wide open. He saw what appeared to be blood on the door and inside the trailer. The witness notified law enforcement, who responded and searched the trailer.

There was evidence of a fire on the ground near the trailer and on the

interior and exterior of the trailer door. The door of the trailer appeared to have been broken or busted open from the inside. There were multiple breaks on the inside paneling of the door indicating that someone, or something had struck blows against the door in an attempt to force the door open from the inside. There was a line of blood and dripping patterns of blood visible on the bottom side of the door. The bloodstain pattern indicated that blood had sprayed out and projected onto the interior surface of the trailer. There was also a stain pattern on the inside of a broken section of the door that was consistent with a bloody substance having been pushed or shoved into the door after the door had been broken. There were also bloodstains that appeared at the top of the inside wall of the trailer traveling away from the door and toward the rear of the trailer, consistent with cast off blood, i.e., blood that was thrown off something and onto the wall.

A large concentration of transfer blood was found on the interior of the door frame and something that was soaked with blood had come into contact with the surface. This stain was about shoulder height and consistent with someone wearing a blood-soaked garment leaning against the wall in an attempt to force the door open. In addition, law enforcement found aspirated blood at floor level near the door, which was indicative of a person lying injured near the doorway while breathing for a period of time. There were also mist-like blood patterns inside the trailer, which were indicative of blood having been forced from a human body.

In the late evening on the day of the murder, Deputy Sally Cole of the Jefferson County Sheriff's Office traveled to Oyola's residence to question him about Gerrard's death. Oyola voluntarily accompanied Cole to the Sheriff's Office. Law enforcement interviewed Oyola at the Sheriff's Office for informational purposes. He claimed he remained home all day until other workers called him for transportation because Gerrard had not responded to their calls and they needed a ride home. He claimed to have made several phone calls to Gerrard throughout the day and to have exchanged voicemail messages with him. He informed law enforcement that he suspected that two other men had committed the crime. He also said that Gerrard directed him to use the business debit card for up to \$1500 worth of purchases for Christmas gifts.

Upon searching the area around Oyola's residence, Cole located both the lower and upper halves of Gerrard's cellular phone (the phone had been broken in two) in the woods one-tenth of a mile from Oyola's residence. Officers later located a car floor mat near that area. The floor mat was consistent with the type of floor mat that was later found missing from the driver's side of Gerrard's truck. Law enforcement officers also searched the girlfriend's car and found approximately \$700 cash in the glove compartment. Oyola claimed that he told her that he placed the money in the glove compartment. He did not tell his girlfriend the source of the money, but informed her that it was money "owed to him."

The day after the murder, law enforcement located Gerrard's truck in Tallahassee, Florida. The interior of the truck was searched for fibers, fingerprints, and bloodstains. Reddish-brown stains were found inside the truck that tested positive for blood. There was a floor mat on the passenger's side, but no floor mat on the driver's side. A shovel and gas can filled with fuel were found in the bed of the truck along with a reddish-brown substance that tested positive for blood. The shovel was bent and curved on its right. A substance that tested positive for blood was found on the end of the shovel.

After Gerrard's death, Kevin Dunn, a friend of the Gerrard family, helped maintain Gerrard's business. Dunn spoke with Oyola because Oyola was a key person in the daily operations of the business. Dunn did not feel entirely comfortable conversing with Oyola because there was speculation about Oyola's involvement in the murder of Gerrard. While Dunn, Oyola, and another individual had a drink in Gerrard's honor, Dunn said that Oyola kept trying to proclaim his innocence. Oyola stated that it was odd for Gerrard to have been on the logging road because Gerrard always had his cellular phone with him and there is no cellular signal on that road. Oyola said that he had not seen Gerrard on the day of the murder but that Gerrard had driven to Oyola's house to deliver money to him. The dollar amount Gerrard delivered to Oyola changed as the conversation progressed: first, Oyola claimed that Gerrard placed \$800 in his mailbox; then he claimed that the amount was \$600; and later he changed the amount to \$500. Oyola claimed that other than Gerrard leaving money in his mailbox, he had not been in contact with Gerrard that day.

In November 2008, after his arrest for murder, Oyola spoke with his cellmate, James Hendrith, about the murder of Gerrard. Oyola bragged to him that he had robbed and killed Gerrard. Oyola allegedly stated that he stabbed Gerrard and hit Gerrard with a shovel multiple times. He said that he stole Gerrard's white truck and \$375. He claimed that he used a knife during the murder, cleaned it after the murder, and subsequently disposed of the knife. Oyola also told Hendrith that he planned to plead insanity, and perhaps self-defense, on the basis that a truck driver saw him and Gerrard fighting, but did not actually see Oyola kill Gerrard. To Hendrith, Oyola did not appear "crazy"; to the contrary, he seemed very alert.

Gerrard had been struck at least four times in the head, causing injuries and bleeding into his brain. There was also a laceration above his right eyebrow; scrape abrasions on his right cheek; and an injury that sliced through his right ear. The injury to Gerrard's right eyebrow appeared to have been caused by a blunt object that had a sharp edge, consistent with the edge of a shovel. The injury was also consistent with multiple strikes to that area.

Gerrard also sustained eight stab wounds. One of the right stab wounds was on the top of his right shoulder and two were to the right upper arm, proceeding through the soft tissue of the arm and into the soft tissue of the chest. The depth of some of his arm injuries was consistent with an attempt by Gerrard to interpose his arm between his body and blade. Gerrard's torso had sustained four separate stab wounds. One of these wounds penetrated his abdomen and incised his right kidney. The nature of the wounds indicated that the blade used was sharp on one side and blunt on the other.

Gerrard also suffered several injuries consistent with defensive wounds. More specifically, there were superficial linear scrap wounds on his upper abdomen; linear incised injuries on his left and right hands; and abrasions on top of his right hand. On the palm of Gerrard's right hand near the base of the thumb were slice-type injuries and there were abrasions on his right wrist.

It appeared as though the wounds occurred at approximately the same time. The relative proximity of the stab wounds indicated that the victim was moving very little when they were inflicted and that he

could have been lying on the ground. The impacts to Gerrard's head were sufficient to cause unconsciousness and, along with the stab wounds, were ultimately determined to be fatal. The authorities were unable to determine when in the sequence of events Gerrard lost consciousness. However, because of the defensive wounds on his hands and forearms, the medical examiner believed that he was conscious and resisting for part of the attack.

On a general verdict form, the jury found Oyola guilty of the first-degree murder of Gerrard, false imprisonment as a lesser included offense of kidnapping, armed robbery with a deadly weapon, and grand theft of a motor vehicle.

At the beginning of the penalty phase, Gerrard's mother, sister, and wife read victim impact statements. In those statements, they expressed sorrow for their loss, but requested that the trial court not sentence Oyola to death and instead give him a sentence of life imprisonment without parole.

The defense then submitted the testimony of Manuel Oyola, the brother of Oyola. Manuel is nine years older than Oyola, and he remembered Oyola at a young age while Oyola was living with their parents in Connecticut. Manuel claimed that their parents physically abused Oyola, hitting Oyola and his siblings with belts, broomsticks, and pointed shoes. According to Manuel, this type of physical abuse occurred often and was so rampant that it caused Manuel, Oyola, and their siblings to leave home around the age of fifteen.

Miguel believed that their abusive home life affected Oyola's intellectual development during childhood by hindering Oyola's study habits. According to Miguel, the abuse also affected the way Oyola handled stress and emotional situations, heightening his temper. Miguel also testified that Oyola began using drugs when he was approximately twelve years old.

The defense also submitted the testimony of Dr. Michael Thomas D'Errico, PhD, a forensic psychologist, who had performed two court-ordered psychological evaluations of Oyola. The first evaluation was after the murder, on March 4, 2008, and concerned Oyola's legal competency relative to his ability to stand for a violation of provocation

hearing. During the evaluation, D'Errico examined Oyola's prison mental health records. The psychiatrist at the prison assigned Oyola a working diagnosis of schizophrenia/paranoid type, which is a form of psychosis that involves hallucinations and delusions. The prison psychiatrist noted that he was treating Oyola for this psychosis with an antipsychotic medication. D'Errico found that Oyola exhibited several symptoms of the psychotic condition, i.e., he experienced auditory hallucinations, such as voices telling him negative things about himself and encouraging him to hurt himself, as well as visual and olfactory hallucinations.

D'Errico then noted Oyola's social history and measured Oyola's long-term memory. D'Errico found that Oyola had a family history of mental illness. In particular, Oyola's mother had been treated for schizophrenia and bipolar disorder, and one of his brothers suffered from schizophrenia. D'Errico also examined Oyola's school records from the Hartford Public School System Special Education Department in Connecticut. According to D'Errico, the records were not detailed but they confirmed that during primary grades, Oyola was enrolled in special education classes. In addition, according to Oyola's standardized achievement tests, his overall reading and math ability scores were no higher than the seventh percentile.

D'Errico found that Oyola had a substance abuse problem (cocaine abuse). After he examined Oyola's records from the Philadelphia Correctional Center (Oyola had previously lived in Philadelphia, Pennsylvania, during which time he was convicted of robbery and possession of cocaine), D'Errico learned that, in addition to cocaine, Oyola abused heroin and PCP. The psychiatric documentation in those records reflected treatment for a working diagnosis of schizoaffective disorder. Oyola had been placed on the psychotropic medication Zoloft, an antidepressant, and Risperdal, and antipsychotic medication. The records noted that the psychotropic medications alleviated the symptoms of the schizoaffective disorder, in that they suppressed his hallucinations, paranoid delusions, feelings of depression, difficulty modulating emotions, and unjustified anger and nervousness.

After the first evaluation, D'Errico concluded that Oyola was not legally competent to stand for his violation of probation hearing and

recommended inpatient mental health treatment. D'Errico was also concerned with Oyola's physical health. Oyola was an insulin-dependent diabetic and, due to his delusions, he refused his insulin shots because he believed that the shots were an attempt to inject him with poison. Due to his refusal to inject his insulin, his blood sugar level was three times higher than medically recommended.

In June 2010, D'Errico conducted his second psychological examination of Oyola. The purpose of the second evaluation was to determine Oyola's level of psychological stability, to make a determination of his competency to proceed to trial for the murder of Gerrard, to assess his sanity at the time of the offense, and to determine the presence or absence of certain mitigating circumstances in his case. D'Errico found that Oyola was alert and aware of place, time, and date, and displayed no expression of suicidal ideations. Oyola stated that he was involved in treatment for his hallucinations and was again receiving Risperdal and Zoloft (later changed to Wellbutrin) for his mental health issues.

D'Errico then conducted a psychometric analysis of Oyola's mental condition. This testing revealed a full-scale IQ score of seventy-four, which falls in the borderline range of intellectual functioning (100 demonstrates average intelligence). D'Errico concluded that Oyola had suffered a head injury in the past, but he found no evidence of brain damage. D'Errico noted that Oyola had a fair amount of memory capacity and demonstrated the ability to learn as stimuli were provided to him.

Based on this second evaluation, D'Errico found that Oyola was legally competent and was able to proceed to trial for the murder of Gerrard. He also determined that at the time of the offense Oyola was generally mentally aware of his actions and the ramifications of those actions. D'Errico found it very significant that when the crime occurred, Oyola was not undergoing treatment nor was he on any medication. D'Errico hypothesized that if someone with mental health problems like Oyola went without medication and treatment, his or her mental health symptoms would return.

During the evaluation, Oyola provided D'Errico with his account of Gerrard's murder. Oyola stated that he was aware of his behavior and

what was occurring as it happened. According to Oyola, Gerrard picked him up in the truck and accused Oyola of having an affair with his wife. Oyola denied this claim and subsequently told Gerrard that he needed to pay his workers because they had not received all of their money. At that point, Gerrard allegedly punched Oyola in the face, stopped the truck, stepped out, proceeded to the back of the truck, and pulled out a knife. Gerrard then attacked Oyola, who defended himself by punching Gerrard, throwing him to the ground and biting his ear. When Oyola bit Gerrard's ear, Gerrard released the knife. Oyola then claimed that he secured the knife and staged Gerrard multiple times. Afterwards, Oyola stated that he drove away in the truck, at which point Oyola stated that he could see Gerrard standing with the knife.

D'Errico believed it was likely that during the murder Oyola experience untreated symptoms of schizoaffective disorder, especially because he was not medicated at that time. In addition to auditory hallucinations and paranoia, D'Errico stated that Oyola's mental health condition caused him to experience poor impulse and behavioral control. He hypothesized that Oyola's condition worsened the situation with Gerrard. He believed that, due to this paranoia, Oyola might have overreacted and continued stabbing Gerrard after he bit Gerrard's ear, even though any threat to Oyola was neutralized when Gerrard dropped the knife. D'Errico also believed that the situation with Gerrard was potentially more dangerous than it was in reality. More specifically, Oyola may have misinterpreted an angry, verbally aggressive Gerrard as posing a physical and life-threatening danger when none actually existed. Regardless, D'Errico opined that Oyola understood the criminality of his conduct. However, he believed that because Oyola was not received treatment for his schizoaffective disorder at the time of the murder, his mental condition interfered with his capacity to conform his conduct to the requirements of law.

During cross-examination, D'Errico testified that, based on Oyola's IQ, Oyola was intelligent enough to plan the destruction of the evidence, which included attempting to burn the trailer and breaking Gerrard's cellular phone and throwing it into the woods. D'Errico also observed that Oyola was intelligent enough to know to bathe in bleach to remove Gerrard's blood and DNA from his body. D'Errico

admitted that Oyola's story had inconsistencies with the evidence presented because Oyola never admitted that he hit Gerrard with a shovel (or another object), he only stated that he stabbed Gerard; he never mentioned that Gerrard attempted to resist the stabbing (which would have been consistent with Gerrard's defensive injuries); he never admitted that he incapacitated Gerrard; he never admitted that he held Gerrard Captive in a trialier; and he never admitted to stealing cash from Gerrard. Nevertheless, D'Errico testified during redirect examination that it is not atypical for an individual with Oyola's condition to be incomplete and inaccurate in a description of an incident. He also testified that, notwithstanding that Oyola was not completely forthright, his opinion did not change with regard to Oyola's mental state at the time the offense occurred. He stated that it was entirely possible for Oyola, due to mental illness, to translate a verbal confrontation between an employer and employee over stolen money into a dangerous and life-threatening situation.

In a nine-to-three vote, the jury recommended a sentence of death. During the *Spencer* hearing, Oyola addressed the trial court, apologized for his actions, and expressed remorse for the murder.

In the sentencing order, the trial court found the following aggravating circumstances and gave each of them great weight: (1) the capital felony was committed by a person previously convicted of a felony and on community control or felony probation; (2) the capital felony was committed while the defendant was engaged in the commission of or an attempt to commit a robbery, and the capital felony was committed for financial gain (the trial court found that these two aggravators related to a single aspect of the case, and merged them and treated them as a single aggravator); and (3) the capital felony was especially heinous, atrocious, or cruel (HAC).

The trial court found that the defense failed to prove the existence of any statutory mitigating circumstances. More specifically, the trial court concluded that the defense failed to establish the mitigator provided in section 921.141(6)(f) Florida Statutes 2007, which is the defendant suffered from a mental illness that substantially impaired his ability to conform his conduct to the requirements of law. In its analysis section devoted to statutory mitigation, the trial court noted that Oyola's history of mental illness, although insufficient to

establish the statutory mitigator, was given slight weight in the trial court's consideration of aggravating and mitigating circumstances. Then, in the section of the sentencing order devoted to nonstatutory mitigating circumstances, the trial court gave slight weight to "non-statutory mitigation [that] included serious drug abuse, an abusive home life as a child [that] created a cycle of violence and mental disorder."

Oyola, 99 So. 3d at 435 – 442.

Oyola appealed his convictions and sentence to this Court. On direct appeal, this court affirmed the convictions, but remanded the case back to the trial court because the trial court failed to comply with this Court's precedent in *Campbell v. State*, 571 So. 2d 415, 419 – 20 (Fla. 1990). Specifically, this Court said:

[T]he sentencing order violated the requirements articulated in *Campbell* because the trial court did not expressly evaluate, in a well-reasoned fashion, how the evidence presented failed to support the mitigating evidence presented by Oyola. Rather, it merely gave a brief summary of its findings with regard to the mitigators, and did not expressly and specifically articulate why the evidence presented failed to support the proposed statutory mitigators, and why that same evidence warranted the allocation of slight weight to the nonstatutory mitigation evidence presented. In fact, the trial court's evaluation of the established nonstatutory mitigation evidence grouped three separate nonstatutory mitigators into a single sentence, and, in a single subsequent sentence, summarily gave them slight weight. In accordance with *Campbell*, the trial court should have separated and evaluated each nonstatutory mitigator, providing an evaluation and analysis as to why it gave each of them slight weight. In addition, the trial court's misplaced and confusing reference to what appears to be a finding with regard to nonstatutory mitigation inside the statutory mitigation section of the sentencing order further compounds its failure to render a sentencing order that reflects a well-reasoned evaluation and determination.

Oyola, 99 So. 3d at 447.

The trial court conducted a second *Spencer* hearing on April 15, 2013, which was followed by proposed sentencing memorandum from both the state and defense. (SSR 76 – 93; 94 – 114). In his re-sentencing memorandum, Oyola raised a previously addressed argument that Dr. D’Errico’s testimony provided evidence that the HAC aggravator was not applicable because there was no proof Oyola intended to torture or prolong the suffering of Gerrard. (SSR at 80). This Court previously rejected this argument on direct appeal. *Oyola*, 99 So. 3d at 443. Oyola also argued against the state’s recommendation for the treatment and evaluation of mitigation. (SSR 79). While the state suggested the trial court add more detail and analysis to the previous sentencing order, Oyola claimed the trial court should only revisit the mental health mitigation. (SSR 80, 112). Most notably, Oyola’s sentencing memorandum did not set out any proposed non-statutory mitigators for the trial court to evaluate.

The state’s sentencing memorandum suggested the trial court separately evaluate and assign weight to seven distinct items of non-statutory mitigation. (SSR 112). The state specifically outlined the following non-statutory mitigators which were present: (1) Oyola was abused as a child; (2) Oyola began using drugs at an early age and had a history of drug abuse; (3) Oyola suffers from diabetes; (4) Oyola suffers from Schizoaffective Disorder, Bipolar type; (5) Oyola has a low IQ of 74; (6) Oyola’s family has a history of mental illness; and (7) Oyola was not

under any active treatment for his schizoaffective disorder at the time of the murder which interfered with his capacity to conform his conduct to the requirements of the law.

On April 29, 2013, the trial court issued its Second Revised Sentencing Order, which sentenced the Oyola to death. Less than one month later, the trial judge, Judge Ralph Smith, died from complications following a stroke.

This appeal followed.

SUMMARY OF ARGUMENT

Issue I. A trial court's use of colorful language within a sentencing order does not itself vitiate the entire penalty phase when the court's ultimate conclusion shows a complete evaluation and individualized sentencing. The trial court's Second Revised Sentencing Order complied with this Court's order on remand and a full reading reveals the trial court's legal analysis. The trial court did not use an improper analysis in rendering its death sentence, but instead ineloquently placed a great emphasis on the aggravators of murder in the course of a robbery and pecuniary gain. By examining the aggravator of murder in the course of a robbery, the trial court inarticulately stated that the aggravator alone would have been enough to outweigh the minimal mitigation put forth by Oyola.

Issue II. The trial court violated neither the requirements of *Campbell* nor this Court's remand order, because the defense did not present an argument for the inclusion of non-statutory mitigation in its sentencing memorandum. Oyola's sentencing memorandum did not set out any proposed non-statutory mitigators for the trial court to evaluate, but instead raised a previously addressed argument that Dr. D'Errico's testimony provided evidence that the HAC aggravator was not applicable. Because the defense did not put forth any factors for non-statutory mitigation, the trial court cannot be deemed to have violated the requirements of *Campbell*.

Issue III. Oyola's claim of a violation of *Ring v. Arizona* is meritless because, this Court previously considered and rejected this claim in its initial opinion on direct appeal. In addition, this Court has consistently rejected *Ring* claims in cases such as this where the defendant has been previously convicted of a felony and commits the murder in the course of an enumerated felony.

ARGUMENT

ISSUE I: THE TRIAL COURT’S ANALYSIS AND SENTENCE OF DEATH DID NOT RELY ON IMPROPER AGGRAVATORS.

Oyola asserts his death sentence is invalid because the trial court used an improper analysis in rendering its sentence. (IB at 27). Oyola points to specific sentences which he claims denigrate the purpose of mitigation and alleges the trial court used an improper aggravation analysis when rendering its death sentence. However, the trial court’s analysis reflects consideration of all mitigation evidence and a comparison of aggravators and mitigation within the specific facts of this case. The trial court’s Second Revised Sentencing Order complied with this Court’s order on remand and a full reading reveals the trial court’s legal analysis.

a. Standard of Review

“A trial court’s ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record.” *Ford v. State*, 802 So. 2d 1121, 1133 (Fla. 2001). “The weight to be given aggravating factors is within the discretion of the trial court, and is subject to the abuse of discretion standard.” *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006) (citing *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000)). “[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court.” *Buzia*, 926 So. 2d at 1216 (quoting *Huff v. State*, 569 So 2d 1247, 1249

(Fla. 1990)).

b. The Trial Court Did Not Denigrate Oyola's Mitigation

Oyola first challenges one of the final sentences in Judge Smith's Second Revised Sentencing Order. In his closing remarks Judge Smith wrote: "[t]he imposition of only a life sentence for the first degree murder committed by Oyola would be a reward to him for his elaborate scheme to use a mental health expert to thwart justice." (RSO at 128 – 29).

While this comment may give one pause, a further reading of Judge's Smith's order reveals consideration of the aggravators and mitigation. In the next sentence, which was the final sentence of the trial court's analysis, Judge Smith wrote: "[a] life sentence for the first degree murder by Oyola would be contrary to the court's finding that the mitigating circumstances did not outweigh the aggravating circumstances." (SSR at 129). Indeed, on page 122 of Judge Smith's order, beings a discussion of the mitigation evidence presented by Oyola. (SSR at 122).

Judge Smith first re-evaluated Oyola's presentation and consideration of the statutory mitigation circumstance before rejecting statutory mitigation.

The only statutory mitigation circumstance which Oyola relied upon at trial, and on appeal is that contained in § 921.141(f), Fla. Stat. 2007. He maintained that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired, for a variety of reasons. The reasons for his impairment are not dispositive of the existence of this mitigator, if his capacity to appreciate and conform was not substantially impaired. No sufficient evidence was presented to prove substantial impairment,

and none is found to exist.

(SSR at 123). Moreover, the trial court acknowledged that Oyola suffered from schizoaffective disorder, bipolar type, had an abusive home life, and also suffered from chronic drug abuse. (SSR at 126). The trial court also outlined the testimony of Oyola's mental health expert in its analysis. (SSR at 126).

Regarding Oyola's mental condition, the trial court explained that the testimony of Oyola's mental health expert was uncorroborated by any physical evidence or additional testimony. (SSR at 127). In addition Judge Smith wrote that Oyola's mental condition "did not substantially impair Oyola's capacity to conform his conduct to the requirements of law." (SSR at 126). Because this was the crux of Oyola's presentation of mitigation, the trial court concluded that mitigation did not outweigh the aggravation and imposed a death sentence. (SSR at 127).

The trial court's colorful language can be compared to comments made by a prosecutor during closing arguments of a trial. While a prosecutor may make an improper comment during closing argument, such a comment does not by itself vitiate the entire trial. *See Parker v. Matthews*, 132 S.Ct. 2148, 2153 – 55 (2012) (refusing to grant federal habeas relief to defendant in a death penalty case when the prosecution used questionable language in closing argument which suggested mental health mitigation was the defendant's only option).

In *Franqui v. State*, 59 So. 3d 82, 95 – 99 (Fla. 2011), the Florida Supreme Court declined to hold defense Counsel ineffective for failing to object to inflammatory and improper comments made during both the guilt and penalty closing arguments. *Id.* at 98 – 99. In *Franqui*, the prosecutor: (1) diminished the jury’s obligation through sarcasm; (2) made inflammatory statements regarding murder for pecuniary gain; (3) made unnecessary and inflammatory statements during penalty phase closing with language such as “shocking” and “terrorized”; (4) attacked the integrity and credibility of defense Counsel; and (5) disparaged the defendant’s mental health mitigation by saying “that’s the world of Dr. Toomer [Franqui’s mental mitigation expert], folks. Through the looking glass at Disney World. Make Believe. Use your common sense.” *Id.* at 95 – 98. In affirming the trial court’s denial of Franqui’s claim of ineffectiveness the Florida Supreme Court stated “[w]hen viewed as a whole, the record shows that the above statements – either individually or cumulatively – are not so prejudicial as to affect the outcome of the guilt or penalty phases of the trial under the standard set forth in *Strickland*.” *Id.* at 98 – 99.

In the instant case, the trial court’s comments regarding Oyola’s mental mitigation do not equal the level of salaciousness or frequency as exhibited in *Franqui*. Although the trial court’s statement may have been improper, it did not affect the sentence rendered because the trial court conducted an analysis of the

mitigation presented and based its decision upon a weighing of the aggravators and the mitigation.

c. The Trial Court Properly Assessed and Analyzed the Aggravators and Mitigation and Determined a Life Sentence Was Not Appropriate.

Oyola asserts the trial court improperly imposed a sentence of death when it surmised that a life sentence for a charge of first degree murder would not be an adequate punishment when viewed in light of the contemporaneous life felony charge. (IB at 30). The trial court did not use an improper analysis in rendering its death sentence, but instead ineloquently placed great emphasis on the aggravators of murder in the course of a robbery and pecuniary gain.

An examination of the trial court's sentencing order should not focus solely on the language Oyola complains of, but should be a comprehensive reading of the entire sentencing order. *See cf. Kansas v. Marsh*, 548 U.S. 163, 179, 126 S.Ct. 2516, 2527 (2006) (noting the "well-established proposition that a single [sic] [jury instruction] may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *citing Hardy v. State*, - So. 3d ___, 2014 WL 1716241, 10 (Miss. 2014) (explaining that jury instructions "are to be read together and taken as a whole with no one instruction taken out of context" *quoting Austin v. State*, 784 So. 2d 186, 195 (Miss. 2001)). An order by the trial court should also not be nitpicked. *See Polls v. State*, 2013 WL 6083411, 1 (Fla. 4th DCA 2013) (explaining proper jury instruction analysis considers the instructions as a whole

and “does not nitpick” to “manufacture” error).

In the present case, the trial court’s 15 page sentencing order outlines the grounds for establishing the aggravators and the mitigation presented by Oyola. (SSR at 115 – 30). Most notably, the trial court assigned each aggravator “great weight” in its analysis, but also placed a great amount of significance on the merged aggravators of murder in the course of a robbery and pecuniary gain.

By examining the aggravator of murder in the course of a robbery trial court inarticulately concluded that the aggravator alone, which had been merged with the pecuniary gain aggravator, would have been enough to outweigh the minimal mitigation put forth by Oyola. Such an analysis complies with the United States Supreme Court’s view of a valid death penalty sentencing structure. *Cf. Yacob v. State*, 2014 WL 1243782 (Fla. 2014) (unreleased) (Canady, J. dissenting in part) (noting the United States Supreme Court does not conduct a comparative proportionality review of death penalty cases); *Pulley v. Harris*, 465 U.S. 37 (1984) (holding that a comparative proportionality analysis is not required by the Eight Amendment to the United States Constitution, and that a state death penalty sentencing scheme is constitutional so long as it looks to narrow the crimes which qualify for the death penalty and provided an opportunity to present mitigation (quoting *Jurek v. Texas*, 428 U.S. 262 (1976) “[b]y narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory

aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whether mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function”)).

In *Kilgore v. State*, 688 So. 2d 895, 899 – 900 (Fla. 1996), this Court upheld the trial court’s reasoning for imposing a death sentence under similar circumstances. Kilgore asserted the trial court had a policy of imposing the death penalty automatically, when it wrote the following in its sentencing order:

Under certain circumstances the state not only has the right, but the obligation, to take the life of convicted murderers in order to prevent them from murdering again. This is one of those cases. To sentence Mr. Kilgore to anything but death would be tantamount to giving him a license to kill.

Kilgore, 688 So 2d at 899. This Court reasoned that “the sentencing order [was] simply an attempt by the judge to evaluate the specific evidence in [the] case and independently apply it to Kilgore.” *Id.* at 900. Because the trial court evaluated all of the statutory aggravating and mitigating circumstances as well as evaluating all non-statutory mitigating factors, this Court found that Kilgore did in fact receive an individualized sentence. *Id.*; see *Globe v. State*, 877 So. 2d 663, 675 – 75 (Fla. 2004) (relying on the decision and reasoning in *Kilgore* in denying the defendant’s claim that the trial court’s use of “no deterrence” and “no punishment” language

amounted to an improper aggravating factor to apply a mandatory death sentence).

The present case resembles both *Kilgore* and *Globe*, in that a full reading of the trial court's sentencing order reveals a complete analysis of the aggravators and mitigators. The trial court in the instant case chose to place a great amount of emphasis on the aggravator of murder in the course of robbery, which is within its discretion.

d. The Trial Court's Analysis Did Not Taint the Weight Given to the Aggravating Factors

Oyola also avers the trial court's improper decision making process tainted the weight applied to the aggravators found by the trial court. (IB at 32 – 33). The trial court ultimately found and applied great weight to the aggravators of: (1) murder committed during the course of a robbery; (2) defendant on felony probation at the time of the murder; and (3) the murder was especially heinous, atrocious and cruel.

“The weight to be given aggravating factors is within the discretion of the trial court, and is subject to the abuse of discretion standard.” *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006) (citing *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000)). “[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court.” *Buzia*, 926 So. 2d at 1216 (quoting *Huff v. State*, 569 So 2d 1247, 1249 (Fla. 1990)).

In applying great weight to the HAC aggravator the trial court noted the

defendant left the victim “to die, in a helpless condition, when help was readily available on two separate occasions, and for an extended period of time between those occasions, is not only totally inconsistent with innocence, or self-defense, but it also shows a total indifference to Gerrard’s suffering. . . .” (SSR at 121 – 22). Moreover, this Court previously determined the trial court applied the correct rule of law in establishing the HAC aggravator. *Oyola*, 99 so 3d at 444. Therefore, given the nature of Gerrard’s injuries and the prolonged period of suffering, the trial court did not abuse its discretion in applying great weight to the HAC aggravator.

The trial court also applied great weight to the aggravator of defendant on felony probation. In doing so, the court noted that Oyola’s criminal history and status of being on felony probation should have acted as constant reminders to him of what was required to conform his conduct to the requirements of the law. (SSR at 119). No challenge was made regarding the trial court’s application of law to the felony probation aggravator, and this Court affirmed the aggravator on direct appeal. Therefore, there is no basis to disturb the trial court’s application of great weight to the aggravator of defendant on felony probation.

ISSUE II: THE TRIAL COURT DID NOT VIOLATE *CAMPBELL V. STATE*, BECAUSE THE DEFENSE DID NOT PRODUCE ANY NON-STATUTORY MITIGATORS FOR THE TRIAL COURT TO CONSIDER.

Oyola contends the trial court did not comply with this Court’s remand order and fails to comply with the requirements of *Campbell*. *Campbell* requires a trial court to expressly evaluate the mitigation evidence presented complete with a brief explanation of the trial court’s reasoning. (IB at 35). In the present case, the trial court violated neither the requirements of *Campbell* nor this Court’s remand order, because the defense did not present an argument for the inclusion of non-statutory mitigation in its sentencing argument or memorandum.

a. Standard of Review

“A trial court’s ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record.” *Ford v. State*, 802 So. 2d 1121, 1133 (Fla. 2001). “The weight to be given aggravating factors is within the discretion of the trial court, and is subject to the abuse of discretion standard.” *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006) (citing *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000)). “[D]iscretion is abused only where no reasonable [judge] would take the view adopted by the trial court.” *Buzia*, 926 So. 2d at 1216 (quoting *Huff v. State*, 569 So 2d 1247, 1249 (Fla. 1990)).

b. The Trial Court Did Not Violate *Campbell v. State*.

Oyola asserts the trial court's Second Revised Sentencing Order violated this court's remand order by not complying with the requirements of *Campbell v. State*. (IB at 35). In *Campbell*, this Court outlines what is required of the trial court's when preparing a sentencing order in a capital case. Specifically this court held that a trial court must expressly evaluate: (1) each mitigating circumstance proposed by the defendant; (2) determine if the proposed information is truly mitigating; (3) determine if a proposed mitigating factor was established by the greater weight of the evidence; (4) weigh the aggravating circumstances against the mitigating circumstances; and (5) "must expressly consider in its written order each established mitigating circumstance." *Campbell*, 571 So. 2d at 419 – 20.

This Court remanded Oyola's case and ordered the trial court to compose a new sentencing order which complied with the guidelines of *Campbell*. The trial court conducted a second *Spencer* hearing on April 15, 2013, which was followed by proposed sentencing memorandum from both the state and defense. (SSR 76 – 93; 94 – 114). Oyola's sentencing memorandum did not set out any proposed non-statutory mitigators for the trial court to evaluate, but instead raised a previously addressed argument that Dr. D'Errico's testimony provided evidence that the HAC aggravator was not applicable. (SSR at 82 – 84). Oyola also argued against the state's recommendation for the treatment and evaluation of mitigation. (SSR 79).

Oyola claimed the trial court should only revisit the mental health mitigation, and discounted any of the other evidence which was presented as non-statutory mitigation. (SSR 80).

In the present case, the trial court did not violate the requirements of *Campbell*, because the defense did not put forth any non-statutory factors for the trial court to consider in its evaluation of the mitigation evidence. *See Campbell*, 571 So. 2d at 419 – 20. Specifically, the defense argued the mental health mitigation should have been given greater weight and consideration and that said mitigation evidence diminished the HAC aggravator. (SSR at 80). The trial court did address the testimony of the defense mental health expert in detail and how said testimony affected the aggravator of HAC. (SSR at 121 – 22). The non-statutory mitigation which the trial court did consider was done so *sua sponte* by the trial court. Therefore, because the defense did not put forth any factors for non-statutory mitigation, the trial court cannot be deemed to have violated the requirements of *Campbell*.

ISSUE III: THIS COURT HAS PREVIOUSLY RULED AND REJECTED OYOLA'S CLAIM OF A VIOLATION OF *RING v. ARIZONA*.

Oyola asserts the trial court erroneously imposed a sentence of death in violation of *Ring v. Arizona*, 536 U.S. 584 (2002). This Court should reject this claim for three reasons. First, this claim is outside the directions of this Court's remand order to the trial court. Second, this Court previously considered and rejected this claim in its initial opinion on direct appeal. *Oyola*, 99 So. 3d at 449. And third, this Court has consistently rejected *Ring* claims in cases such as this where the defendant has been previously convicted of a felony and commits the murder in the course of an enumerated felony. *See Chandler v. State*, 75 So. 3d 267, 269 (Fla. 2011); *Baker v. State*, 71 So. 3d 802, 824 (Fla. 2011); *Johnson v. State*, 969 So. 2d 938, 961 (Fla. 2007) *Darling v. State*, 966 So.2d 366, 387 (Fla.2007).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions, sentence of death, and the sentencing order of the trial court.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. E-MAIL on May 13th, 2014: W.C McLain at bill.mclain@flpd2.com.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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