In the Supreme Court of Florida

LEO LOUIS KACZMAR III,

Appellant,

v. CASE NO. SC13-2247

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, LEO LOUIS KACZMAR III, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant’s initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the direct appeal from a resentencing in a capital case. In the original direct appeal, this Court remanded for resentencing. *Kaczmar v. State*, 104 So.3d 990 (Fla. 2012)(affirming convictions but remanding for new penalty phase due to erroneous finding of aggravators). Following the second penalty phase, the jury recommended death unanimously. The trial court again imposed a death sentence finding two aggravating circumstances: 1) the previously convicted of a violent felony aggravator and 2) the heinous, atrocious, or cruel (HAC) aggravator. This Court's original direct appeal opinion recounts the basic facts of the murder including the fact the defendant stabbed the victim 93 times. *Kaczmar*, 104 So.3d at 995-97.

Penalty Phase

Judge Wilkes, who presided at the original trial, also presided over the resentencing. Kaczmar was represented by defense counsel Francis Shea and Christopher Anderson.

The second penalty phase was conducted in August 19-20, 2013. Following jury selection, the trial court gave the jury preliminary jury instructions. (T. Vol. IV 617-792; 793). The prosecutor gave opening statement in which he sought two aggravating circumstances: 1) previously convicted of a violent felony, namely robbery, and 2) heinous, atrocious, or cruel. (T. Vol. IV 794-795, T. Vol. V 808). Defense counsel then gave opening statement pointing out that if sentenced to life Kaczmar would never get out and would die in prison. (T. Vol. V 808). Two stipulations were introduced - one

regarding the identity of the victim and another one that there was a prior violent felony of robbery on February 7, 2002. (T. Vol. V 814-816). The State presented the live testimony of the medical examiner, Dr. Jesse Giles. The State also presented the testimony of Priscilla Kaczmar; Christopher Ryan Modlin; William Fillancia; Richard Kurtiz; Maria Lam; Detective Charlie Sharman; and Deputy Russell Monson. The prosecutor presented the victim impact statement of the victim's brother. (T. Vol VI 1037-1039). The State rested their case. (T. Vol VI 1039).

The Defendant refused to present mitigation other than the statutory mitigator of age to the jury. (T. Vol VI 1039). There had been a prior hearing on the issue of the waiver of mitigation but the trial court conducted a waiver colloquy. (T. Vol VI 1039-1042). The trial court noted that the defendant was waiving most mitigation but intended to present the statutory age mitigator and intended to argue mitigation presented during the guilt phase. (T. Vol VI 1042). The trial court conducted a jury instruction conference. (T. Vol VI 1043-1049; 1080).

The defense presented a stipulation that the defendant was 24 years old on the date of the murder but presented no witnesses in mitigation. (T. Vol VI 1050). The defense rested. (T. Vol VI 1050).

Both the prosecutor and defense counsel presented closing arguments. (T. Vol VI 1051-1078).

The trial court instructed the jury. (T. Vol VI 1081-1095). The jury recommended a death sentence 12-0. (R. Vol. III 415).[1]

Spencer **Hearing**

On August 20,2013, the trial court conducted a *Spencer* hearing.[2] (T. Vol. II 298). The prosecutor did not present any additional evidence. The defendant again waived presentation of mitigation at the *Spencer* hearing but the defense presented numerous mitigation witnesses by presenting the testimony in mitigation from the first trial. (T. Vol. II 298 - Vol. III 414). Katherine Casleton, the defendant's aunt, testified regarding his childhood and the years he lived with her. (T. Vol. II 298-322; 332-333). Christopher Modlin, the defendant's friend, testified regarding the defendant's drug use including on the night of the murder. (T. Vol. II 322-323;382-391). Martha Moody, the defendant's grandmother, testified. (T. Vol. II 323-332; 381-382). On cross-examination, she testified that the defendant was spoiled by his parents "to a certain extent." (T. Vol. II 330). Dr. Miguel Mandoki, who is board-certified in psychiatry and child psychiatry, testified. (T. Vol. II 333-375). John Hough, a fishing friend, testified. (T. Vol. II 376-379). A stipulation regarding the defendant's prison history was introduced. (T. Vol. II 379-381). Tammy Evans, the defendant's mother, testified. (T. Vol. II 394- T. Vol. III). On

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[1] The first jury had recommended death 11 to 1. *Kaczmar*, 104 So.3d at 995.

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

cross-examination, his mother testified that they "definitely" spoiled the defendant. (T. Vol. II 413).

Sentencing

The State wrote a memorandum of law in support of the death penalty. (T. Vol. III 428-437). The State's memo argued for two aggravating circumstances: 1) previously convicted of a violent felony based on a prior robbery conviction, and 2) heinous, atrocious, or cruel. (T. Vol. III 429-430). The State's memo also discussed both statutory and non-statutory mitigation. (T. Vol. III 430-437). The prosecutor argued that, while the age mitigator was proven, it should be given little weight because there was no immaturity on the part of Kaczmar. (T. Vol. III 431-432). The prosecutor also addressed the non-statutory mitigation of being raised by a "physically and emotionally abusive father." (T. Vol. III 433). The prosecutor noted the testimony that the defendant was a spoiled child. (T. Vol. III 434).

The defense also wrote a sentencing memorandum. (T. Vol. III 438-439). The Court ordered a pre-sentencing investigation. (PSI). (T. Vol. III 537; 416-425).

The trial court wrote a sentencing order and an amended sentencing order. (T. Vol. III 451-474; 493-517; 528-551). The trial court found the following two aggravating circumstances: 1) previously convicted of a violent felony based on a prior robbery conviction, and 2) heinous, atrocious, or cruel. (T. Vol. III 533-537). The trial court discussed the statutory mitigating

circumstance of age but rejected it noting the defendant was five days shy of his twenty-fifth birthday on the date of the murder; was of “above average intelligence;” was not emotionally immature; and that the defendant’s interview with law enforcement about the murder showed “sophistication, intelligence, and understanding.” (T. Vol. III 541-542). The trial court found the age mitigator was not proven. (T. Vol. III 542). The trial court also discussed twenty non-statutory mitigating circumstances proposed by defense counsel. (T. Vol. III 541-548). The trial court found the following non-statutory mitigating circumstances: 1) the defendant was raised by an alcoholic father which it gave slight weight; 2) the defendant was raised by a physically and emotionally abusive father which it gave slight weight; 3) the defendant was emotionally traumatized when he witnessed his grandfather drown and his mother shoot his father which it gave slight weight; 4) the defendant was taught to lie in court which it gave slight weight; 5) the defendant lacked the normal mother-son relationship which it gave slight weight; 6) the defendant was kind to animals which it gave slight weight; 7) the defendant was a loyal friend which it gave slight weight; 8) the defendant was a good reliable business partner which it gave slight weight; 9) the defendant has a loving relationship with his aunt which it gave slight weight; 10) the defendant was protective of his family members which it gave slight weight; 11) the defendant suffers from the effects of long-term drug use which it gave slight weight; 12) the defendant was impaired by drug use on the night of the murder which it gave slight weight; 13) the defendant did not receive mental health

counseling which it gave slight weight; 14) the defendant was respectful in court which it gave slight weight; and 15) the defendant was a loving father which it gave slight weight. (T. Vol. III 542-548).

The trial court rejected the non-statutory mitigation of 1) the effect of the defendant's adult prison sentence while still a juvenile; 2) the defendant lacked male mentors; 3) the defendant was emotionally torn by the extreme of parental abuse and overindulgence; 4) the defendant was a good prison inmate; and 5) co-suspect Modlin received a disparate sentence because it involved a separate case, not this murder in which Modlin was not charged. (T. Vol. III 543, 544, 545, 546, 548).

The trial court noting that the weighing of aggravating and mitigating circumstances is "not an arithmetic comparison" but rather a qualitative analysis, concluded "on balance," the aggravating circumstances "far outweigh" the mitigating circumstances. (T. Vol. III 549). The trial court noted is was required to give great weight to the jury's unanimous recommendation of death but fully agreed with the "jury's assessment of the aggravating circumstances" (T. Vol. III 549).

SUMMARY OF ARGUMENT

ISSUE I

Kaczmar asserts the trial court violated *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), by giving the jury's recommendation of death great weight because the defendant waived most mitigation. *Muhammad* prohibits a trial court from giving any weight to a death recommendation from a jury when no mitigation was presented by a defendant to that jury because such a recommendation is skewed in favor of death. But *Muhammad* only applies when the defendant waives ***all*** mitigation. This Court has limited the reach of *Muhammad* to cases where there is a "complete" waiver of mitigation. Here, Kaczmar presented mitigation regarding his age. Therefore, *Muhammad* does not apply. And even if there was a *Muhammad* violation, the proper remedy is a remand for a new sentencing order, not a new penalty phase. There is no need for a third penalty phase. Thus, the trial court properly accorded the jury's recommendation of death great weight.

ISSUE II

Kaczmar asserts that the trial court committed fundamental error by informing the jury that their questions were not relevant. There was no violation of the comments statute. A comment on the evidence, as the statute explains, involves commenting to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. The trial court did not state his opinion regarding the guilt of the accused. Nor did he discuss the weight of the evidence or the credibility of any witness. Rather,

the judge merely informed the jury that their questions, two of which concerned the testimony at the first trial, were not relevant. The trial court properly refused to answer the questions and properly informed the jury that their questions regarding the first trial were not relevant. Alternatively, even if viewed as a comment and even if the issue had been preserved, any error would be harmless because there is no prejudice. There was no error, much less fundamental error.

ISSUE III

Kaczmar asserts the trial court committed fundamental error by not *sua sponte* granting a mistrial when the prosecutor referred to the mitigation as excuses during closing argument. The prosecutor's one reference to the mitigation was not fundamental error. Thus, the trial court properly did not sua sponte declare a mistrial.

ISSUE IV

Kaczmar asserts the trial court abused its discretion in finding the defendant's overindulgent upbringing not to be mitigating. A trial court is welcome, in its role as co-sentencer, to reject a particular fact, such as having an overindulgent upbringing, as not being "truly mitigating." Thus, the trial court properly rejected the defendant's upbringing as mitigation.

ISSUE V

Kaczmar asserts his death sentence is disproportionate due to the defendant's drug use. IB at 42. First, proportionality review is not constitutionally mandated. But even if the death sentence is reviewed, the sentence is proportionate. The trial court found four aggravators, including HAC and not a single statutory mitigator. Moreover, this Court has repeatedly rejected the argument that drug use precludes the imposition of the death penalty. Kaczmar's death sentence is proportionate.

ISSUE VI

Kaczmar asserts that this Court should recede from its numerous cases holding that Florida's death penalty statutes does not violate *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court should not recede from its solid wall of precedent rejecting *Ring* claims. Appellant provides no reason for this Court to do so. Furthermore, *Ring* does not apply to this particular case because the prior violent felony aggravator is present. Recidivist aggravators are exempt from the holding in *Ring*. Kaczmar had previously been convicted of robbery. The prior violent felony aggravator is not required to be found by the jury under any view of *Ring*. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* does not apply to cases where the jury convicts a defendant in the guilty phase of a separate felony. The jury convicted Kaczmar of attempted sexual battery. *Ring* was satisfied in the guilt phase in

this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. Kaczmar's jury recommended a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Thus, Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial, as this Court has repeatedly held.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT IMPROPERLY GAVE GREAT WEIGHT TO THE JURY'S RECOMMENDATION OF DEATH DESPITE THE DEFENDANT PRESENTING EVIDENCE REGARDING THE STATUTORY MITIGATING CIRCUMSTANCE OF AGE? (Restated)

Kaczmar asserts the trial court violated *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), by giving the jury's recommendation of death great weight because the defendant waived most mitigation. *Muhammad* prohibits a trial court from giving any weight to a death recommendation from a jury when no mitigation was presented by a defendant to that jury because such a recommendation is skewed in favor of death. But *Muhammad* only applies when the defendant waives ***all*** mitigation. This Court has limited the reach of *Muhammad* to cases where there is a "complete" waiver of mitigation. Here, Kaczmar presented mitigation regarding his age. Therefore, *Muhammad* does not apply. And, even if there was a *Muhammad* violation, the proper remedy is a remand for a new sentencing order, not a new penalty phase. There is no need for a third penalty phase. Thus, the trial court properly accorded the jury's recommendation of death great weight.

Penalty phase

During the penalty phase, Kaczmar waived the presentation of most mitigation. During the waiver colloquy, the trial court noted that the defendant was waiving most mitigation but intended to present the statutory age mitigator and intended to argue mitigation presented during the guilt phase. (T. Vol VI 1042). The

defendant presented mitigation of age. The State and the defendant entered a stipulation that the defendant was 24 years old at the time of the murder and was five days short of his 25th birthday. (T. Vol. VI 1050).

Furthermore, defense counsel argued in closing for seven mitigators to the jury. (T. Vol. VI 1074-1078). Defense counsel argued both statutory mental mitigators and the age mitigator. (T. Vol. VI 1075-1076). Defense counsel also argued for non-statutory mitigators including that Kaczmar was impaired by crack on the night of the murder; he was respectful in court; the disparate sentence of his co-suspect Modlin; and that Kaczmar was a loving father to his two little girls. (T. Vol. VI 1076-1078).

The trial court instructed the jury on seven proposed mitigators. (T. Vol VI 1089-1090). The proposed mitigators presented for the jury were: 1) extreme mental or emotional disturbance; 2) substantial impairment; 3) age of 24 years old; 4) illegal drug use on the night of the murder; 5) defendant's respectful behavior in court; 6) the disparate sentence of co-suspect Christopher Modlin; and 7) the defendant is a loving father to his two daughters. (T. Vol VI 1089-1090).

The trial court stated in its sentencing order that it was required to give the jury's recommendation of death great weight but also that it fully agreed with the "jury's assessment of the aggravating circumstances." (T. Vol. III 549).

The trial court's ruling

There is no ruling from the trial court regarding the alleged *Muhammad* error. Defense counsel did not file an objection in the trial court to the trial court's sentencing order pointing out the alleged *Muhammad* error.

Preservation

This issue is not preserved. Defense counsel did not file an objection in the trial court to the trial court's sentencing order pointing out the alleged *Muhammad* error. Indeed, opposing counsel objected to the State's motion to remand for clarification of the order. This issue was forfeited twice over, once by defense counsel in the trial court and yet again by appellate counsel in this Court. The issue is not preserved. *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)(explaining that to be preserved, the issue or legal argument must be raised and ruled on by the trial court).

Standard of review

The issue of whether *Muhammad* applies to a case where the defendant presents very limited mitigation is a pure issue of law reviewed *de novo*. *Puglisi v. State*, 112 So.3d 1196, 1204 (Fla. 2013)("Pure questions of law are subject to *de novo* review" quoting *Sanders v. State*, 35 So.3d 864, 868 (Fla. 2010)). The standard of review for a claim of fundamental error is necessarily *de novo* because there is no ruling from the trial court for the appellate court to defer to. *Morgan v. State*, 127 So.3d 708, 715 (Fla. 5th DCA 2013)(stating that claims of fundamental error are reviewed *de*

novo citing *Elliot v. State*, 49 So.3d 269, 270 (Fla. 1st DCA 2010)). Appellate counsel is raising *Muhammad* as a species of fundamental error and fundamental error by its nature is necessarily reviewed *de novo*.

Merits

Normally, a jury's recommendation regarding the sentence is entitled to great weight. *Snelgrove v. State*, 921 So.2d 560, 571 (Fla. 2005)(observing that the jury is a cosentencer whose recommendation of life is entitled to great weight). In *Muhammad v. State*, 782 So.2d 343, 361-63 (Fla. 2001), however, this Court concluded that "reversible error occurred when the trial court gave great weight to the jury's recommendation in imposing the death penalty despite the fact that no mitigating evidence was presented for the jury's consideration." *Id*. at 361. Muhammad had presented no mitigation. *Id*. at 350. The jury heard only the evidence of, and argument in support of, aggravation and then recommended a death sentence by a vote of ten to two. *Id*. The trial court gave the jury's recommendation of death great weight. *Id*. at 361. This Court explained that Muhammad's failure to present any evidence in mitigation "hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way." *Id*. at 362. This Court explained that the normal rule that a jury recommendation be given great weight contemplates a full adversarial hearing before the jury with the presentation of both aggravating and mitigating circumstances. *Muhammad*, 782 So.2d at 362. The Court concluded that reversible error occurred when the trial court afforded "great

weight" to the jury's recommendation when that jury did not hear any evidence in mitigation. *Id*. at 363. The *Muhammad* Court was concerned that the one-side presentation of aggravation would skew the jury's recommendation toward death and determined that the trial court should not give that skewed recommendation any weight.[3]

This Court later clarified that *Muhammad* only applies when the defendant waives ***all*** mitigation. *McCray v. State*, 71 So.3d 848, 879-80 (Fla. 2011)(citing *Eaglin v. State*, 19 So.3d 935, 945–46 (Fla. 2009) and *Boyd v. State*, 910 So.2d 167, 188–89 (Fla. 2005)). As this Court explained in *McCray*, a "trial court is required to implement the Muhammad safeguards only in cases where there is a ***complete*** waiver of all mitigation and not where a defendant decides to simply limit mitigation." *McCray*, 71 So.3d at 879-80 (emphasis in original).

In this case, the defendant did not completely waive all mitigation. He presented some mitigating evidence to the jury. Kaczmar presented evidence of the statutory mitigating circumstance of age. Kaczmar's attorney also argued for the non-statutory mitigating circumstances of being impaired by crack on the night of the murder and that he was a good father to his two young daughters. Because Kaczmar did not completely and totally waive the presentation of all mitigation, *Muhammad* does not apply. So,

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[3] Here only part of this Court's holding in *Muhammad* is at issue. This Court in *Muhammad* also required preparation of a PSI and that the trial court consider all mitigation from other sources in the record. Here, there is no dispute that the trial court ordered a PSI and considered the mitigation presented at the first penalty phase. So, only the part of *Muhammad* dealing with the weight to be given a jury recommendation when a defendant waives mitigation is at issue in this case.

the trial court properly gave great weight to the jury recommendation of death.

Additionally, the jury was instructed on seven mitigators including statutory and non-statutory mitigators. (T. Vol VI 1089-1090). The jury was instructed on mitigation such as age and that the defendant was using drugs at the time of the murder that was supported by the evidence. *Muhammad* does not apply to such cases.

Furthermore, it is clear from the language in the written sentencing order, that the trial court independently determined the aggravating circumstances. The trial court stated the "jury was fully justified in its twelve to zero recommendation." (T. Vol. III 549). The trial court also wrote that it "fully agreed with the "jury's assessment of the aggravating circumstances." (T. Vol. III 549). These statements show the trial court's determined that death was the appropriate sentence independently of the jury's determination.

Remedy

Even if this Court were to determine that *Muhammad* applies because the presentation of the mitigation was limited, the proper remedy for a *Muhammad* violation is a remand for entry of a new sentencing order, not a new penalty phase. *Oyola v. State*, 99 So.3d 431, 447 (Fla. 2012)(finding a violation of *Campbell v. State*, 571 So.2d 415, 419-20 (Fla. 1990), and remanding to the trial court "for the limited purpose of properly evaluating all mitigation and aggravation and providing this Court with a revised sentencing order that contains an evaluation that complies with the

requirements of *Campbell*"); *Coday v. State*, 946 So.2d 988, 1009 (Fla. 2006)(same); *Spencer v. State*, 645 So.2d 377, 385 (Fla. 1994)(remanding for reconsideration of the sentencing order where the trial court failed to consider the two statutory mental mitigating circumstances); *Cf. Dillbeck v. State*, 882 So.2d 969 (Fla. 2004)(remanding for the trial court to elaborate its order denying postconviction relief). As this Court has explained, a sentencing order in a capital case must be of "unmistakable clarity" and must reflect "reasoned judgment." *Lucas v. State*, 568 So.2d 18, 20, 23 (Fla. 1990). And while any sentencing order that is not clear will be vacated and remanded to the trial court for "reconsideration and rewriting," there "is no need to empanel a new jury" to do so. *Lucas v. State*, 568 So.2d 18, 23-24 (Fla. 1990)(remanding for reconsideration and rewriting of findings of fact in a new sentencing order).

This Court only remanded for a new penalty phase in *Muhammad* itself because of the additional steps this Court mandated be taken in the situation of a defendant who waives mitigation, such as ordering a PSI, which had not been taken in that case. But those additional steps were taken in this case. The trial court in this case ordered a PSI and considered the mitigation from the first penalty phase in its sentencing order. Because the only possible problem is the sentencing order itself, not any flaw in the penalty phase in front of the jury, remanding for a new sentencing order is the proper remedy. There is no need for a third penalty phase.

Opposing counsel's reliance on *Reese v. State*, 728 So. 2d 727 (Fla. 1999), and *Jackson v. State*, 767 So. 2d 1156 (Fla. 2000), is

misplaced. Unlike *Reese* and *Jackson*, this case is not the same as the typical case involving a *Campbell* error where the judge failed to weigh the mitigation, where counsel is entitled to write a full sentencing memorandum identifying each mitigator and to argue what weight should be given to and then how that mitigation should be balanced against the aggravation. *Campbell v. State*, 571 So.2d 415, 419–20 (Fla. 1990). Even applying *Reese* and *Jackson*, all that these cases require is a hearing on the matter at which the defendant is present. "No new evidence shall be introduced." *Jackson*, 767 So.2d at 1160 (quoting *Reese*, 728 So.2d at 728). Because no new evidence is being presented, it is not technically correct to refer to any hearing as a *Spencer* hearing. Most importantly, the matter at hand is limited to the issue of what weight should be given to a jury's recommendation of death when limited mitigation is presented. So, any new sentencing memorandum would be limited to the issue of what weight should be given to a jury's recommendation of death when limited mitigation is presented and that issue only. And any new sentencing hearing would be limited to the issue of what weight should be given to a jury's recommendation of death as well. At any remand for a new sentencing order, the memorandums, hearing, and sentencing order would be limited to the *Muhammad* issue.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ANSWER THE JURY'S QUESTIONS? (Restated)

Kaczmar asserts that the trial court committed fundamental error by informing the jury that their questions were not relevant. There was no violation of the comments statute. A comment on the evidence, as the statute explains, involves commenting to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. The trial court did not state his opinion regarding the guilt of the accused. Nor did he discuss the weight of the evidence or the credibility of any witness. Rather, the judge merely informed the jury that their questions, two of which concerned the testimony at the first trial, were not relevant. The trial court properly refused to answer the questions and properly informed the jury that their questions regarding the first trial were not relevant. Alternatively, even if viewed as a comment and even if the issue had been preserved, any error would be harmless because there is no prejudice. There was no error, much less fundamental error.

The trial court's ruling

During the jury's deliberations, the jury sent out four questions to the judge: "Was the knife that was used in the murder ever retrieved?; 2) Was Christopher Modlin a suspect in the victim's murder and if so, was he charged with any crime related to this case?; 3) Was there any witnesses in the initial trial that testified to seeing or hearing the defendant speak or treat the

victim derogatorily at any time while the victim was living in the house; and 4) Was there any testimony in the initial trial that the defendant ever spoke of wanting to have sex with the victim before the 12th of December, 2008? (R. Vol. II 297; T. Vol VI 1096).

Neither defense counsel nor the prosecutor thought the Court could answer the questions. (T. Vol VI 1096-1097). Both the state and the defense thought the Court should instruct the jury to rely on their memory and the evidence. (T. Vol VI 1097). The trial court refused to answer any of the questions. The trial court stated to the jury: "It's not relevant to what you're here to decide right now, so I cannot answer these questions, okay." (T. Vol VI 1097). There was no objection to the trial court's use of the phrase "not relevant."

Preservation

The specific issue of the trial court's use of the phrase "not relevant" was not objected by defense counsel and therefore, the issue is not preserved. *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)(explaining that to be preserved, the issue or legal argument must be raised and ruled on by the trial court). Thus, the issue is being raised as one of fundamental error. As the United States Supreme Court has observed, "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett v. United States*, 556 U.S. 129, 134, 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266 (2009).

Standard of review

The standard of review for any issue of fundamental error is *de novo*. *Williams v. State*, 145 So.3d 997, 1002 (Fla. 1st DCA 2014)(explaining that whether an error is fundamental is a question of law); *Elliot v. State*, 49 So.3d 269, 270 (Fla. 1st DCA 2010)("This Court reviews the issue of unpreserved fundamental error under the *de novo* standard.").

Merits

The summing up and comment by judge statute, § 90.106, Florida Statutes, (2014), provides:

> A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.[4]

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[4] While the law revision council notes in the statutes annotated that this statute is a codification of the holding in *Seward v. State*, 59 So.2d 529 (Fla. 1952), and *Hamilton v. State*, 261 So.2d 184 (Fla. 3d DCA 1972), is this not accurate. A version of this statute existed prior to 1952. Indeed, Florida has had statutes prohibiting judges from commenting on the facts of a case since March 2, 1877. Chapter 2096, § 1, Acts 1877, providing: "[u]pon the trial of all common law and criminal cases . . ., it shall be the duty of the Judge presiding on such trial to charge the jury only upon the law of the case); Revised Statutes of 1892 § 1088, charge to the jury in civil case section, the duty of judge to charge jury statute, providing: "the judge presiding on such trial shall charge the jury only upon the law of the case"; Revised Statutes of 1892 § 2920 charge of the court statute, providing: "the rules of law relative to instruction and the charge of the court in civil cases shall obtain in all criminal case. . ."; Compiled General Laws of Florida of 1927 § 4363 (2696) Charge to jury in civil and criminal cases section, the judge to charge jury on law of case statute, providing "the judge presiding on such trial shall charge the jury only upon the law of the case . . ." *See also Keigans v. State*, 41 So. 886, 890 (Fla. 1906)(Shackleford, C.J., dissenting)(giving legislative history of statute prohibiting judges from commenting on the evidence and limiting comments to the law.). The basis of this statute is a prior statute, not caselaw.

Garner v. State, 9 So. 835, 843 (Fla. 1891)(noting the statutory basis for the rule in Florida prohibiting comments by the judge); *Brown v. State*, 11 So.3d 428, 434 (Fla. 2d DCA 2009)(same). Other state and federal courts permit the trial judge to comment on the evidence. *Keigans v. State*, 41 So. 886 (Fla. 1906)(noting that while other states permit such comments they do not have a statute limiting the presiding judge to charges "only upon the law of the case" as Florida does); Cal. Const. art. VI, § 10 (providing that the court may make such comment on the evidence and the testimony and credibility of any witness as, in its opinion, is necessary for the proper determination of the cause); *People v. Rodriguez*, 726 P.2d 113, 134-139 (1986)(holding judge's comment on a witness' testimony to a deadlocked jury was within court's constitutional power and while a trial court's comment should be accurate, temperate, and fair, they need not be neutral, bland, or colorless summaries);*see also* CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 106.1 at 38 (2000 ed.)(noting that the federal rules of evidence do not prohibit such comments and that, at common law, a judge was permitted to comment on the evidence). At common law, and to this day in federal courts, judges were permitted to sum up evidence and comment on weight of the evidence and the credibility of the witnesses. Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV 195 (2000)(giving as an example of a true comment on the evidence a comment; explaining that the practice of judicial comments on the evidence has deep roots in our legal traditions and was widely employed in early America where a jury often would discuss with the judge their

doubts about the facts and the weight of different pieces of evidence; and noting that many commentators have expressed great concern over the curtailment of the judge's power to give such advice).

While Florida has a statute forbidding judicial comments, it is not a constitutional issue. *Quercia v. United States*, 289 U.S. 466, 77 L.Ed. 1321, 53 S.Ct. 698 (1933)(noting that, in a jury trial, a federal judge, as trial judges did at common law, may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are for their determination). Comments by the judge do not violate the right to a jury trial or due process. Indeed, in a criminal case, while "ill advised," it is not even *per se* reversible error for a trial judge to express his personal opinion of the defendant's guilt. *United States v. Fuller*, 162 F.3d 256 (4th Cir. 1998)(holding that the trial judge's statement that: "from my own personal view I do not credit and accept the defendant's testimony . . . that he had no intent to violate the federal drug laws"; rather, "I believe he was acting illegally as a drug dealer" but emphasizing that jury was not required to accept the judge's view; rather, it was "entirely up to you and you alone to make your determination of what the evidence establishes" was not *per se* error because the undisputed facts amounted to the commission of the crime but disapproving the practice *citing United States v. Murdock*, 290 U.S. 389, 394, 54 S.Ct. 223, 78 L.Ed. 381 (1933)). Even a judge commenting on a defendant's guilt is not a constitutional issue. *Davis v. Craven*, 485 F.2d 1138, 1140 (9th Cir.1973)(en banc)(declining to constitutionalize *Murdock*).

Here, however, the judge did not comment on the evidence. A comment on the evidence, as the statute explains, involves summing up the evidence like a prosecutor does or commenting to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. The trial court did not state his opinion regarding the guilt of the accused. Nor did he discuss the weight of the evidence or the credibility of any witness. To be a comment on the evidence would require, at a bare minimum, that the judge answer the questions and express a view on the issue of guilt, the evidence, or credibility of a witness. Rather, the judge merely informed the jury that their questions, two of which concerned the testimony at the first trial, were not relevant. The trial court was correct to inform the jury that the evidence and testimony at the first trial was not relevant to this trial. *Cf. Jackson v. State*, 545 So.2d 260, 263 (Fla. 1989)(determining that testimony regarding the prior trial conviction is "not admissible evidence" and was reversible error). There simply was no violation of the comments statute.

Opposing counsel's reliance on *Walden v. State*, 123 So.3d 1164 (Fla. 4th DCA 2013), and *Jacques v. State*, 883 So.2d 902, 905–06 (Fla. 4th DCA 2004), is misplaced. IB at 32. In *Walden*, the Fourth District held that the trial court's answer to the jury's question was a comment on the evidence that was fundamental error. During jury deliberations in open court, a juror asked the judge: "Is it fair to say that Ashley Walden [the defendant] was armed within a structure with a dangerous weapon?" The trial court responded, "He was armed or armed himself, yes." *Walden*, 123 So.3d at 1166. The

Fourth District noted that "a judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused." *Walden*, 123 So.3d at 1166 citing § 90.106, Fla. Stat. (2011). The Fourth district concluded that "[b]ecause the juror appeared to be asking about the facts of the case, the court's response could have been construed by the jury as a comment on the evidence or appellant's guilt, thus warranting a new trial." *Id*. at 1167.

In *Jacques*, the Fourth District found fundamental error occurred where, during defense counsel's closing argument, the judge commented, "That's not what she said and that's not what the record shows." 883 So.2d at 905. The Fourth District held that because the trial court's comments "went to the very heart of the defense," fundamental error occurred and reversed. *Jacques*, 883 So.2d at 903. The Fourth District noted the existence of the statute prohibiting trial judge's comments. *Id*. at 905. The Fourth District concluded that the trial judge's comment was a comment on the weight of the evidence and credibility of the witness. *Id*. at 906. The Fourth District also observed, the "defense was not mischaracterizing the evidence at all." *Id*. at 905. The Fourth District concluded that because "the sole issue" in the case was the credibility of the witnesses, the trial court's improper commenting on the credibility of a witness constituted fundamental error. *Id*. at 906.

Nothing resembling what occurred in either *Walden* and *Jacques*, occurred in this case. In both *Walden* and *Jacques,* the trial court answered the jury's question. Here, the trial court refused to

answer the questions. Neither *Walden* nor *Jacques* are applicable.

Harmless Error

While technically fundamental error is not subject to harmless error analysis, even if the issue had been preserved, it would be harmless error. *Quintana v. State*, 452 So.2d 98, 101 n.2 (Fla. 1st DCA 1984)(stating that judicial comments, which either directly or indirectly, convey to the jury the judge's view of the case or the evidence, may simply be harmless). Regardless of the use of the judge's use of the phrase "not relevant," the jury would have convicted the defendant. While opposing counsel asserts that any comment that results in prejudice warrants a new trial, she points to none. IB at 32. The jury was free to disagree with the judge's view of the relevance of their questions but without being provided any answers to the questions of the knife being found or Christopher Modlin being a suspect or charged, it is impossible to see how any prejudice could have resulted from the judge's comment. Any error was harmless.

ISSUE III

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY NOT *SUA SPONTE* GRANTING A MISTRIAL WHEN THE PROSECUTOR REFERRED TO THE MITIGATION AS EXCUSES DURING CLOSING ARGUMENT? (Restated)

Kaczmar asserts the trial court committed fundamental error by not *sua sponte* granting a mistrial when the prosecutor referred to the mitigation as excuses during closing argument. The prosecutor's one reference to the mitigation was not fundamental error. Thus, the trial court properly did not sua sponte declare a mistrial.

The trial court's ruling

The prosecutor in closing argument of the penalty phase stated: "now they may make arguments or ask you to speculate about some other things, you know, create some excuses or mitigation as I would call them for his actions, but at the end of the day that's your call. You determine whether those mitigators are present in the evidence I presented and you determine if they are present and what weight to give them and at the end of the day you determine how they weigh out with the aggravators that have been presented in this case." (T. Vol VI 1062). Defense counsel did not object. There was no ruling from the trial court because there was no objection.

Preservation

The issue of the prosecutor's comment is not preserved. *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)(explaining that to be

preserved, the issue or legal argument must be raised and ruled on by the trial court). Thus, the issue is being raised as one of fundamental error. As the United States Supreme Court has observed, "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett v. United States*, 556 U.S. 129, 134, 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266 (2009).

Standard of review

The standard of review for any issue of fundamental error is *de novo*. *Williams v. State*, 145 So.3d 997, 1002 (Fla. 1st DCA 2014)(explaining that whether an error is fundamental is a question of law); *Elliot v. State*, 49 So.3d 269, 270 (Fla. 1st DCA 2010)("This Court reviews the issue of unpreserved fundamental error under the *de novo* standard.").

Merits

This Court has stated that a prosecutor cannot improperly denigrate mitigation during a closing argument. *Carr v. State*, -So.3d -, 2015 WL 463524 (Fla. Feb. 5, 2015)(citing *Williamson v. State*, 994 So.2d 1000, 1014 (Fla. 2008) and explaining that improper denigration includes comments characterizing mitigation as "flimsy," "phantom," and "excuses"); *Delhall v. State*, 95 So.3d 134, 167-170 (Fla. 2012)(finding fundamental error and reversing where prosecutor refer to the mitigation as "excuses" and made

improper future dangerousness arguments); *Brooks v. State*, 762 So.2d 879, 904 (Fla. 2000)(holding that characterizing mitigating circumstances as "excuses" was an improper denigration of mitigation); *Urbin v. State*, 714 So.2d 411, 422, n.14 (Fla. 1998)(condemning a prosecutor referring to the mitigation as "excuses" eleven times). This Court, however, has not found fundamental error in a prosecutor doing so. *Poole v. State*, 151 So.3d 402, 415 (Fla. 2014)(rejecting a claim that the prosecutor's comment characterizing family mitigation as "all that crap" was fundamental error).

Factors to be weighed in determining whether an improper comment rises to the level of fundamental error include whether the statement was repeated and whether the jury was provided with an accurate statement of the law after the improper comment was made. *Poole v. State*, 151 So.3d 402, 415 (Fla. 2014). Opposing counsel only points to this one comment made one time as error. Furthermore, the trial court properly instructed the jury on mitigation including a statement that regardless of their findings concerning aggravating and mitigating circumstances, they were "neither compelled not required to recommend a sentence of death." (T. Vol. VI 1091).

Furthermore, unlike the comments in *Delhall*, the prosecutor did not make any improper future dangerousness arguments. *Delhall*, 95 So.3d at 167-170 (finding fundamental error and reversing where prosecutor refer to the mitigation as "excuses" and made improper future dangerousness arguments). And, unlike *Urbin*, there were not repeated references to mitigation as excuses or other types of

improper prosecutor’s comments in this case. Thus, the trial court properly did not *sua sponte* declare a mistrial.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE DEFENDANT'S OVERINDULGENT UPBRINGING NOT TO BE MITIGATING? (Restated)

Kaczmar asserts the trial court abused its discretion in finding the defendant's overindulgent upbringing not to be mitigating. IB at 37. A trial court is welcome, in its role as co-sentencer, to reject a particular fact, such as having an overindulgent upbringing, as not being "truly mitigating." Thus, the trial court properly rejected the defendant's upbringing as mitigation.

The trial court's ruling

The trial court rejected the defendant's overindulgent upbringing as mitigation in its written sentencing order. (T. Vol. III 544). The trial court noted that Tammy Evans, Martha Moody, and Katherine Casleton testified that the defendant's father would alternate between beating him and overindulging him but also noted that there was no evidence of how this impacted his ability to know right from wrong or inhibited his ability to be law-abiding. (T. Vol. III 544). The trial court found this mitigating circumstance "was not proven" and gave it no weight in determining the appropriate sentence. (T. Vol. III 544).

Preservation

This issue is not preserved. Defense counsel did not file an objection to the trial court not finding and weighing Kaczmar's overindulgent upbringing as mitigation. *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)(explaining that to be preserved, the issue or

legal argument must be raised and ruled on by the trial court). This argument is being made for the first time on appeal. As the United States Supreme Court has observed, "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett v. United States*, 556 U.S. 129, 134, 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266 (2009).

Standard of review

Whether a particular circumstance is truly mitigating in nature is a question of law, subject to *de novo* review. *Snelgrove v. State*, 107 So.3d 242, 258 (Fla. 2012)(quoting *Blanco v. State*, 706 So.2d 7, 10 (Fla. 1997)).

Merits

First, the trial court considered and weighed part of the proposed mitigator. The proposed mitigator was that the defendant was torn between the extreme of parental abuse and parental overindulgence. (T. Vol. 544). The trial court found and weighed that the defendant was raised by a physically and emotionally abusive father. (T. Vol. 542). So, only the overindulgent part of the proposed mitigation is at issue here.

This is really an argument that anything and everything is necessarily mitigating. And no it is not. Mitigation is limited to facts involving the defendant's character, record, or a circumstance of the offense. *Lockett v. Ohio*, 438 U.S. 586, 604, 98

S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978)(holding the sentencer in a capital case must be given a full opportunity to consider, as a mitigating factor, “any aspect of a defendant's character or record,” and “any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”). The United States Supreme Court has rejected the idea that everything is necessarily mitigating. They have rejected lingering doubt as mitigation because it does not involve the defendant’s character or background. *Franklin v. Lynaugh*, 487 U.S. 164, 173, n.6, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). As the Eleventh Circuit has observed, although the mitigating circumstances standard “is a broad one, it is not without boundaries.” *Hitchcock v. Sec’y, Fla. Dep’t. of Corr.*, 745 F.3d 476, (11th Cir. 2014)(holding a plea offer from the prosecutor is not mitigating because it is not evidence about “any aspect of petitioner's character, record, or a circumstance of the offense.”); *United States v. Gabrion*, 719 F.3d 511 (6th Cir. 2013)(en banc)(rejecting the contention that the location of the murder was mitigating); *United States v. Hager*, 721 F.3d 167, 194–97 (4th Cir. 2013)(finding execution impact testimony not to be mitigating and therefore, properly excluded); *United States v. Snarr*, 704 F.3d 368, 401–02 (5th Cir. 2013)(same). This Court has also observed that a particular circumstance may not be “truly mitigating” in nature. *Taylor v. State*, 120 So.3d 540, 553 (Fla. 2013); *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990). And a particular fact, even if it involves the defendant’s character or a circumstance of the offense, is not necessarily mitigating. That the murder

occurred on Monday is a "circumstance of the offense" but it is not mitigating. Bad character, for another example, is not mitigating. And, while a trial court may not improperly denigrate mitigation, a trial court, in its role as co-sentencer, is welcome to reject a particular fact as mitigation. *Oyola v. State*, - So.3d -, 2015 WL 686047 (Fla. Feb. 19, 2015).

The trial court did not exclude evidence of the defendant's overindulgent upbringing from the jury, it merely found that such evidence was not actually mitigating. Here, the defendant did not present his background, including his overindulgent upbringing , as mitigation to the jury. Instead, he refused to present mitigation evidence to the jury except evidence of his age. And, while a trial court could not exclude from the jury's consideration evidence that involved the defendant's character, record, or a circumstance of the offense, a trial court acting as a sentencer is welcome to reject it as mitigation.

Opposing counsel argues that mitigating evidence need not have a nexus to the offense to be mitigating. *Tennard v. Dretke*, 542 U.S. 274, 285–87, 124 S.Ct. 2562, 2570–72, 159 L.Ed.2d 384 (2004)(explaining that defendant need not establish nexus between mental capacity and crime for evidence to be relevant to mitigation). While the State agrees with this observation, it is not relevant to the issue. Opposing counsel's reliance on Justice Sotomayor's dissent to the denial of certiorari in *Hodge v. Kentucky*, – U.S. –, 133 S.Ct. 506, 184 L.Ed.2d 514 (2012) is misplaced. *Hodge v. Kentucky*, – U.S. –, 133 S.Ct. 506, 506, 184 L.Ed.2d 514 (2012)(Sotomayor, J., dissenting from denial of

certiorari)(expressing the view that mitigation evidence need not, and rarely could, explain a heinous crime; rather, mitigation evidence allows a jury to make a reasoned moral decision whether the individual defendant deserves to be executed, or to be shown mercy instead.). Her dissent merely establishes that while the weight of a mitigator may be lessened based on the lack of connection between the mitigation and the crime, a mitigating circumstance with no connection to the crime is still a mitigating circumstance.

Harmless error

Any error in the consideration of this mitigation was harmless. An overindulgent upbringing, even if considered as mitigation, would not be given substantial weight and would not be sufficient to change the sentencing calculus from death to life. It is relatively trivial mitigation. Any error was harmless.

ISSUE V

WHETHER THE DEATH SENTENCE IS PROPORTIONATE? (Restated)

Kaczmar asserts his death sentence is disproportionate due to the defendant's drug use. IB at 42. First, proportionality review is not constitutionally mandated. But even if the death sentence is reviewed, the sentence is proportionate. The trial court found four aggravators, including HAC and not a single statutory mitigator. Moreover, this Court has repeatedly rejected the argument that drug use precludes the imposition of the death penalty. Kaczmar's death sentence is proportionate.

Standard of review

The standard of review of whether the death penalty is proportionate is *de novo*. Proportionality review is a task of this Court. However, this Court does not reweigh the mitigating factors against the aggravating factors in a proportionality review, that is the function of the trial court. For purposes of proportionality review, this Court accepts the trial court's weighing of the aggravating and mitigating evidence. *Bates v. State*, 750 So.2d 6, 12 (Fla. 1999).

Merits

First, this Court should not engage in proportionality review. *Yacob v. State*, 136 So.3d 539, 557 (Fla. 2014)(Canady, J., dissenting)(noting that neither the federal constitution nor the state constitution require proportionality review citing *Pulley v.*

Harris, 465 U.S. 37, 43–44, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) and the conformity clause of article I, section 17, Florida Constitution). Both opponents and supporters of proportionality review agree that complete consistency is not possible. Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons From New Jersey)*, 64 ALB. L. REV. 1161 (2001)(concluding that proportionality review is "constitutionally unwarranted, methodologically unsound, and theoretically incoherent, and, therefore, should be abolished" and noting that the New Jersey Supreme Court has established the most quantitative proportionality review in the United States with an "elaborate, time-consuming, and costly methodology" which suffers from the "illusion that a mathematical formula will ensure equal treatment" and that is "hopelessly unrealistic" and concluding that "[c]omparison of capital cases drains judicial resources, diverts the focus of the courts, distends the post-conviction process, and denies the imposition of justice upon the guilty--all in pursuit of a chimera without basis in the Constitution."); Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 Alb. L. Rev. 883, 912 (2002)(admitting that if a state undertakes comparative proportionality review, "failure is inevitable" and explaining "it is not possible to make meaningful empirical comparisons of defendants' degrees of wrongdoing."); *In re Proportionality Review Project (II)*, 757 A.2d 168, 170 (N.J. 2000)(noting that "the development of a sound methodology for the purpose of systemic proportionality review has proved an elusive goal."); Judge David S. Baime, *Comparative Proportionality Review: The New Jersey*

Experience, Criminal Law Bulletin April 2005 (acknowledging that "[c]omplete consistency in capital sentencing can never be fully achieved.").[5]

Under current law, however, this Court reviews the proportionality of the death sentence in every capital case. *Yacob*, 136 So.3d at 546 (holding proportionality review is required under state law); *Yacob*, 136 So.3d at 552 (Labarga, J., concurring). This Court considers the totality of the circumstances to determine if death is warranted in comparison to other cases where the death sentence has been upheld. *McMillian v. State*, 94 So.3d 572, 581 (Fla. 2012)(citing *Crook v. State*, 908 So.2d 350, 356 (Fla. 2005)). In determining whether death is a proportionate penalty in a given case, this Court makes "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Williams v. State*, 37 So.3d 187, 205 (Fla. 2010). The Court considers the totality of the circumstances of the case and compares the case to other capital cases which entails a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Williams*, 37 So.3d at 205. In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." *Id*.

[5] Judge Baime was the Special Master appointed by the New Jersey Supreme Court to examine the proportionality review methodology used by that Court.

The death sentence in this case is proportional. The trial court found four aggravators, including HAC and not a single statutory mitigator. This court has found the death sentence proportionate in similar factual cases with similar aggravators and mitigators. *See Williams v. State*, 967 So.2d 735, 765-767 (Fla. 2007)(rejecting a claim of disproportionality where there were three aggravators including HAC and two statutory mitigators given little weight and five non-statutory mitigators given then slight weight in a case where the victim was stabbed six or seven times). Here, the victim was stabbed 93 times and there were no statutory mitigators found.

Furthermore, this Court has repeatedly rejected the argument that drug use precludes the imposition of the death penalty. *Brant v. State*, 21 So.3d 1276, 1285, 1287 (Fla. 2009)(concluding that the defendant's abnormal brain functioning and drug use, while mitigating, was not so mitigating as to make his death sentence disproportionate," where two aggravating circumstances – HAC and the murder was committed during a sexual battery – were weighed against three statutory mitigating circumstances and ten nonstatutory mitigating circumstances); *Brown v. State*, 143 So.3d 392 (Fla. 2014)(concluding that the use of crack cocaine did not preclude trial court's application of aggravating factor that the murder was committed in a cold, calculated, and premeditated manner and finding the death sentence proportionate); *Walker v. State*, 957 So.2d 560 (Fla. 2007)(concluding that the death sentence proportionate in drug-related murder where trial court found and gave great weight to HAC, CCP, and in the course of a felony

aggravators with several mitigating circumstances, including that the defendant suffered from bipolar disorder and was on drugs the day of the murder). The death sentence in this case is proportional.

ISSUE VI

WHETHER THIS COURT SHOULD RECEDE FROM ITS EXTENSIVE PRIOR PRECEDENT THAT FLORIDA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL? (Restated)

Kaczmar asserts that this Court should recede from its numerous cases holding that Florida's death penalty statute does not violate *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court should not recede from its solid wall of precedent rejecting *Ring* claims. Appellant provides no reason for this Court to do so. Furthermore, *Ring* does not apply to this particular case because the prior violent felony aggravator is present. Recidivist aggravators are exempt from the holding in *Ring*. Kaczmar had previously been convicted of robbery. The prior violent felony aggravator is not required to be found by the jury under any view of *Ring*. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* does not apply to cases where the jury convicts a defendant in the guilty phase of a separate felony. The first jury convicted Kaczmar of arson. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. Kaczmar's jury recommended a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Thus, Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial, as this Court has repeatedly held.

Standard of review

The standard of review is *de novo*. Constitutional challenges to statutes are reviewed *de novo*. *Miller v. State*, 42 So.3d 204, 215 (Fla. 2010)(stating "[w]e review a trial court's ruling on the constitutionality of a Florida statute *de novo*" regarding a Sixth Amendment challenge to Florida's death penalty scheme pursuant to *Apprendi* and *Ring*).

Merits

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) held that the Sixth Amendment requires that aggravating factors, necessary under Arizona law for imposition of the death penalty, be found by a jury.

Ring was the application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to capital cases. Arizona's death penalty statute, which was at issue in *Ring*, was

judge-only capital sentencing. Florida's death penalty statute, in contrast, as the *Ring* Court itself noted, is a hybrid system involving both a judge and a jury. *Ring*, 536 U.S. at 608, n.6, 122 S.Ct. at 2442, n.6 (noting that Arizona, like Colorado, Idaho, Montana and Nebraska, "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges" and noting that four States, Alabama, Delaware, Florida and Indiana, "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations."). Florida's scheme is jury plus judge sentencing, not judge only sentencing.

This Court has repeatedly, over the years, rejected *Ring* challenges to Florida's death penalty scheme. As this Court has recently noted: "we have repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." *Ault v. State*, 53 So.3d 175, 205-206 (Fla. 2010)(rejecting a *Ring* challenge to Florida's death penalty scheme citing *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002)). Kaczmar provides no reason for this Court to recede from this solid wall of precedent.

Furthermore, the Eleventh Circuit held that Florida's death penalty statute did not violate the Sixth Amendment right to a jury trial. *Evans v. Sec'y, Fla. Dep't. of Corr.*, 699 F.3d 1249 (11th Cir. 2012). In *Evans*, the Eleventh Circuit, in a case that involved neither the prior violent felony nor a contemporaneous conviction during the guilt phase, concluded that Florida death penalty statute does not violate *Ring*.

Ring does not apply to this particular case. One of the aggravating circumstances was the prior violent felony aggravator. Kaczmar had previously been convicted of robbery. This aggravator is not required to be found by the jury under any view of *Ring*. There is an exception to *Ring* for recidivist aggravators. The United States Supreme Court exempted prior convictions from the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), explaining that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), survived *Apprendi* and *Ring*. *Pham v. State*, 70 So.3d 485, 496 (Fla. 2011)(explaining that the express exceptions to *Apprendi* that were unaltered by *Ring*). This Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator is present. *Hall v. State*, 107 So.3d 262, 280 (Fla. 2012)("This Court has held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable" citing *Victorino v. State*, 23 So.3d 87, 107–08 (Fla. 2009)); *Evans v. State*, 975 So.2d 1035, 1052-1053 (Fla. 2007)(rejecting a *Ring* claim where the prior violent felony aggravator was present citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003)).

Moreover, if *Ring* applied and required that the jury find one aggravator, then *Ring* was satisfied in the guilt phase in the first trial of this particular case. One of the aggravators found by the

trial court was the "during the course of a felony" aggravator. The jury found Kaczmar guilty of arson in the guilt phase of the first trial. Basically, the jury unanimously found this aggravator in the guilty phase by convicting him of arson. *Ring* was satisfied before the penalty phase even began. And this Court affirmed that conviction in the first appeal. *Kaczmar v. State*, 104 So.3d 990, 1005 (Fla. 2012). As this Court has explained, "*Ring* is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony." *Baker v. State*, 71 So.3d 802, 824 (Fla. 2011)(*McGirth v. State*, 48 So.3d 777, 795 (Fla. 2010)(citing *Robinson v. State*, 865 So.2d 1259 (Fla. 2004)). Accordingly, *Ring* is not violated in a case where the jury unanimously finds an aggravator in the guilty phase.

The United States Supreme Court, in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), a case that was a precursor to *Apprendi* and *Ring,* explained that Florida's death penalty does not violate the Sixth Amendment. It was a footnote in *Jones* stating "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," that essentially become the holding in *Apprendi*. *Jones*, 526 U.S. at 243 n.6.[6] The

[6] Minus the language in *Jones* regarding the indictment clause because the federal indictment clause does not apply to the states. *Hurtado v. California*, 110 U.S. 516, 538, 4 S.Ct. 111, 28 L.Ed. 232 (1884)(holding that the Indictment Clause of the Fifth Amendment is

Jones Court explained that if there is a jury recommendation of death, the Sixth Amendment right to a jury trial is not violated. The *Jones* Court explained that in *Hildwin*, a Florida case, a jury made a sentencing recommendation of death, thus "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 251, 119 S.Ct. at 1228; *see also State v. Steele*, 921 So.2d 538, 546 (Fla. 2005)(explaining that a finding of an aggravator "is implicit in a jury's recommendation of a sentence of death" citing *Jones*). A jury in Florida is instructed that they may not recommend death unless they find an aggravator. So, a jury that recommends death has necessarily found at least one aggravator. According to both the United States Supreme Court in *Jones* and the Florida Supreme Court in *Steele*, a jury's recommendation of death means the jury found an aggravator which is all *Ring* requires.

Kaczmar's resentencing jury recommended death by a vote of 12 to 0. His jury necessarily found at least one aggravator in order to

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not incorporated against the states via the Due Process Clause); *Branzburg v. Hayes*, 408 U.S. 665, 688 n. 25, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)). Neither *Ring* nor *Apprendi* affected this. *Williams v. Haviland*, 467 F.3d 527, 532 (6th Cir. 2006)(noting that *Apprendi*'s holding does not mention any requirements related to the indictment and explaining the difference between the footnote in *Jones* and the holding in *Apprendi*). This Court has repeatedly rejected claims that the aggravator must be listed in the indictment. *Pham v. State*, 70 So.3d 485, 496 (Fla. 2011)(stating that "this Court has repeatedly rejected the argument that aggravating circumstances must be alleged in the indictment" citing *Coday v. State*, 946 So.2d 988, 1006 (Fla. 2006); *Ibar v. State*, 938 So.2d 451, 473 (Fla. 2006); *Blackwelder v. State*, 851 So.2d 650, 654 (Fla. 2003); *Kormondy v. State*, 845 So.2d 41, 54 (Fla. 2003); and *Rogers v. State*, 957 So.2d 538, 554 (Fla. 2007)).

recommend death. There can be no violation of the Sixth Amendment right to a jury trial where the defendant had a jury and that jury necessarily found an aggravator.

Harmless error

Furthermore, if even there had been a violation of the Sixth Amendment right to a jury trial, violations of the Sixth Amendment right to a jury trial, including *Ring* claims, are subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(finding that error in the judge determining the issue of materiality rather than properly submitting the materiality issue to the was harmless). A rational jury would have found an aggravator. Specifically, a rational jury would have found the HAC aggravator in a case where the victim was stabbed 93 times and who had numerous defensive wounds and whose throat was slit. Any error was harmless.

Sufficiency of the evidence

This Court found that there was sufficient evidence of premeditated first-degree murder in the original direct appeal. *Kaczmar v. State*, 104 So.3d 990, 1003-04 (Fla. 2012).

CONCLUSION

The State respectfully requests that this Honorable Court affirm the death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to Assistant Public Defender Nada M. Carey, 301 South Monroe Street Suite 401, Tallahassee, FL 32301 this 3rd day of March, 2015.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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