IN THE SUPREME COURT OF FLORIDA

SHAWN ROGERS,

Appellant,

v. Case No. **SC18-150**

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the First Judicial Circuit in and for Santa Rosa County, Florida

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONS

STATUTES

CASES

OTHER AUTHORITIES

INTRODUCTION

This case arose when an inmate with impulse-control issues and organic brain damage killed his cellmate. And this appeal is mainly about whether, in such a case, a death sentence can stand after the court (1) failed to instruct the jury that multiple elements of capital murder had to be proven beyond a reasonable doubt, and (2) summarily disposed of all sixty-eight mitigating circumstances when imposing death.

Shawn Rogers was charged with the first-degree murder and kidnapping of Ricky Martin. During the first-phase trial, the court admitted Rogers' letters to an earlier judge and to the elected state attorney in their entirety, including Rogers' reflections on race, politics, and his own character and predispositions. The second-phase trial essentially turned on whether the aggravating factors were sufficient and outweighed the mitigating circumstances.

After closing arguments, the court instructed the jury as to five aggravating factors, including the cold, calculated, and premeditated factor. The court also instructed the jury that, if it found an aggravating factor, it had to engage in a weighing process after making additional findings. Those additional findings included (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt.

In its verdict, the jury found the five aggravating factors, as well as various mitigating circumstances. The jury further found that the aggravating factors were sufficient to warrant a death sentence, as well as that they outweighed the mitigating circumstances. Finally, it determined that Rogers should be sentenced to death.

The court later sentenced Rogers to death. It found established and weighed the five aggravating factors, including the prior violent felony conviction and cold, calculated, and premeditated aggravating factors. And the court found some mitigating circumstances had not been proven. But it also found established and weighed multiple mitigating circumstances, including that (1) Rogers suffered from frontal lobe deficits and other organic brain damage; and (2) as a child, he was abandoned by his parents, moved to numerous foster and group homes, and admitted to a psychiatric hospital. This appeal follows.

* * * * * * * * * * *

Rogers' death sentence should be vacated. And this case should be remanded for a new second-phase trial. First, as to **Issue I**, the court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. Under Florida's capital sentencing scheme, those determinations are elements of capital murder. Further, in *Perry v. State*, 210 So.3d 630 (Fla. 2016), this Court indicated that those determinations must be made beyond

a reasonable doubt. Finally, the court's failure to instruct the jury to make those determinations beyond a reasonable doubt amounted to fundamental error.

Second, as to **Issue II**, the court admitted Rogers' letters to an earlier judge and to the elected state attorney in their entirety, including Rogers' reflections on race, politics, and his own character and predispositions. But those reflections "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." Further, the court's admission of Rogers' letters in their entirety amounted to fundamental error.

Third, as to **Issue III**, the court instructed the jury on, and the jury later found, the cold, calculated, and premeditated aggravating factor. But the evidence was insufficient to establish beyond a reasonable doubt that (1) Martin's killing was the product of cool and calm reflection, (2) Rogers had a careful, prearranged plan to murder Martin, and (3) Rogers exhibited heightened premeditation.

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At a minimum, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order. First, again as to **Issue III**, the court found (and assigned great weight to) the cold, calculated, and premeditated aggravating factor. But, for the reasons outlined immediately above, the evidence was insufficient to establish that factor beyond a reasonable doubt.

Second, as to **Issue IV**, in finding and assigning great weight to the prior

violent felony conviction aggravating factor, the court considered Rogers' indeterminate use of violence. But Rogers was not actually convicted of a violent crime as a result of his use of "illegal violence against other people."

Third, as to **Issue V**, the court failed to thoughtfully and comprehensively analyze any of the proposed mitigating circumstances. More specifically, the court failed to expressly and specifically articulate *why* (1) nineteen circumstances were not proven, and (2) the other forty-nine circumstances, though proven, were given relatively limited weight. Instead, the court summarily addressed and disposed of all sixty-eight mitigating circumstances.

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That said, Rogers is entitled to relief beyond simply remanding for a new trial or *Spencer* hearing. Instead, this case should be remanded for imposition of a life-without-parole sentence. As to **Issue VI**, Rogers' death sentence is a disproportionate punishment for first-degree murder. That is, even if Rogers' case is among the most aggravated of first-degree murder cases, it is not among the least mitigated of such cases.

STATEMENT OF THE CASE

I. Prior Proceedings Below.

Rogers was previously charged with the first-degree murder and kidnapping of Martin. [R93] The State sought the death penalty. [R93] Rogers pled guilty and

waived his right to a jury trial as to the second phase. [R93] A bench trial occurred. [R93, 3751] Rogers testified. [R93] The court later allowed Rogers to withdraw his plea. [R94, 3751] And the State filed a nolle prosequi. [R94]

II. Proceedings Below.

Months later, Rogers was again charged with the first-degree murder and kidnapping of Martin. [R21, 94] The indictment alleged the incident occurred on March 30, 2012.[1] [R21]

Rogers asserted his right to self-representation and waived his right to counsel. [R4086-96] Standby counsel was appointed. [R89-90, 3688-91, 4096] Rogers demanded a speedy trial. [R38, 4096-4100]

Approximately one month later, jury selection occurred. [R4096-4100, 4106-5324] The first-phase trial occurred. [R5324-6144] The court admitted (1) a letter from Rogers to the judge who presided in the earlier nolle prossed case; and (2) two letters from Rogers to the elected state attorney. [R2839-51, 5593-94, 5669-72, 5994-95] Rogers was found guilty as charged. [R1687-88, 6125]

The second-phase trial occurred. [R6145-7097] During its opening, the State referred to statements in the letters. [R6196-97] In the course of the defense case, Rogers asked to be represented by counsel, and standby counsel was ordered to "step in and take over." [R6492-6504] In rebuttal, an expert witness quoted a letter at

[1]All subsequent dates refer to 2012 unless otherwise noted.

length. [R6759-62] In the course of its closing, the State again emphasized certain statements made in the letters. [R6960-66]

More generally, in its closing, the State argued that multiple aggravating factors existed; they were entitled to great weight; and they outweighed any mitigating circumstances. [R6927-67] In response, Rogers argued that the mitigating circumstances were substantial and compelling, and they outweighed the aggravating factors. [R6975-99]

The court instructed the jury as to the following aggravating factors: (1) under sentence of imprisonment; (2) prior violent felony conviction; (3) committed while engaged in kidnapping; (4) especially heinous, atrocious, or cruel; and (5) cold, calculated, and premeditated. [R3073-75, 7000-02] The court informed the jury that, to find such a factor, it had to be convinced beyond a reasonable doubt that it existed. [R3073-75, 7000-03]

The court also instructed the jury that, if it found an aggravating factor, it had to engage in a weighing process after making additional findings. [R3076-81, 7004-12] Those additional findings included (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. [R13080, 7011] But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt. [R3076, 3080-81, 7004, 7010-12]

In its verdict, the jury found the five aggravating factors. [R3041-42, 7071-72] Jurors also found various mitigating circumstances, including (1) Rogers had a history of multiple head injuries starting as a child; (2) he was emotionally abused and abandoned by his mother; and (3) he was placed in multiple foster and group homes, as well as a children's psychiatric hospital. [R3045-46, 3048, 3055, 3057-58, 7074-75, 7079, 7081]

The jury further found that the aggravating factors were sufficient to warrant a death sentence, as well as that those factors outweighed the mitigating circumstances [R3043, 3071, 7072-73, 7088] Finally, it determined that Rogers should be sentenced to death. [R3071, 7088-89]

Rogers subsequently waived his right to present additional evidence regarding mitigating circumstances, and the court appointed special counsel for that purpose. [R3480-81, 4016-33] The court held a *Spencer* hearing. [R4039-75] A sentencing hearing was later held. [R4079-82]

As to the murder conviction, the court sentenced Rogers to death. [R3611] As to the kidnapping conviction, the court imposed a concurrent term of life in prison. [R3611] In imposing the death sentence, the court found established and weighed the following aggravating factors: (1) under sentence of imprisonment (great weight); (2) prior violent felony conviction (great weight); (3) committed while engaged in kidnapping (significant weight); (4) especially heinous, atrocious, or cruel (great

weight); and (5) cold, calculated, and premeditated (great weight). [R3590-95]

In addition, the court found some mitigating circumstances had not been proven. [R3595-02, 3605-09] But the court also found established and weighed, among other circumstances, the following:

(1) Rogers suffered from brain atrophy and had a history of multiple head injuries starting as a child (moderate weight);

(2) he was emotionally abused and abandoned by his mother (some weight);

(3) he grew up in poverty during his developmental years (some weight);

(4) Rogers witnessed multiple acts of violence in his neighborhood (some weight);

(5) he moved to multiple foster homes, which had a psychological impact on him (some weight);

(6) he was admitted to a children's psychiatric hospital at the age of 14 (moderate weight);

(7) Rogers lived on the streets when homeless (some weight);

(8) he was exposed to racial tension and discrimination (some weight);

(9) he was exposed to acts of violence, including being hit in the head with a metal pipe or chair, while in high-security juvenile detention facilities (some weight);

(10) Rogers suffered from brain damage, including frontal lobe damage; suffered from neurological deficits; and had signs of a presumptive diagnosis of chronic traumatic encephalopathy (CTE) (some weight). [R3596-98, 3601-05, 3607, 3609]

Rogers filed a notice of appeal. [R3615] This appeal follows.

STATEMENT OF THE FACTS

I. Underlying Facts Generally Relevant to the Appeal.

A. First-phase trial.

1. *Response to Rogers and Martin's cell and earlier events at prison.*

Just after 7 p.m. on March 30, at the Santa Rosa Correctional Institution, Officer Givens exited the staff restroom located in Wing 1 of "D" Dorm. [R5387, 5390, 5420, 5456] "D" Dorm was a close management housing unit. [R5377] Inmates there were essentially restricted to their cells, but most cells housed two inmates. [R5378, 5382-84]

Givens heard a lot of inmates "being loud and carrying on probably a little bit more than normal." [R5387] He begin walking around the wing to determine which inmates were being loud. [R5388-89] When he got to Rogers' cell, Rogers was standing at the cell door. [R5389] Rogers indicated to Givens that his cell mate, Martin, was "cutting" himself. [R5389, 5406]

Givens looked into the cell and saw Martin laying on the ground with a prayer rug covering most of his body. [R5390, 5392, 5407, 5430, 5436, 5443, 5457, 5466] There was blood on the floor and wall near Martin. [R5391, 5407, 5420, 5436-37, 5457, 5469, 5474] His elbow was in view and appeared to be behind his back. [R5390, 539, 54072] Martin seemed to be moving. [R5390]

Givens ordered Martin to stop cutting himself and show his hands, but got no response. [R5390-91] Givens pepper sprayed Martin's elbow through the handcuffing portal in the cell door. [R5391-93] Martin rolled over, and Givens saw that Martin's hands were tied behind his back. [R5393]

After other corrections officers arrived on scene, Rogers was restrained and removed from the cell. [R5393-94, 5420-21, 5443-44, 5457] He appeared to be uninjured and was cooperative. [R5396]

Once officers entered the cell, they saw that Martin's hands and feet were tied, his pants were pulled down, and his face was severely injured. [R5394-95, 5413-14, 5421, 5431-32, 5436-37, 5458, 5466] Bloody hand prints were on a cell wall. [R5430, 5474] Martin was not responsive, and his breathing was labored. [R5397-98, 5432, 5444, 5463, 5472]

After a nurse arrived on scene, Martin was transported to the prison emergency room. [R5397, 5401-03, 5421, 5432, 5478-79, 5932-33] He received treatment, but appeared to have brain damage and remained unresponsive. [R5479-92] Martin was transferred to a hospital. [R5481-82]

At the hospital, Martin's diagnosis included a closed head injury with internal bleeding and swelling. [R5502–03, 5514-15] His condition failed to improve, and Martin later died. [R5505-08, 5517-18]

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Earlier that evening, during the 7 p.m. security check, nothing had seemed out of the ordinary on the wing. [R5418, 5421-22, 5426, 5433] In particular, when Officer Beaudry looked into Rogers and Martin's cell, he observed Martin reading a book on his bunk. [R5427, 5433] No blood was visible, and Martin appeared to be in good health. [R5427-29, 5433-34]

Earlier that day, around 1:15 p.m., Officer Ritchie had moved Rogers into the cell with Martin. [R5445, 5596, 5905] At the time, Rogers and Martin indicated they had no problems with each other. [R5597]

2. ***Additional developments at first-phase trial.***

Rogers' testimony from earlier case. The State introduced transcripts of courtroom proceedings in the earlier nolle prossed case.[2] [R 2910-54, 5523-64, 5771-72, 5994] In those transcripts, Rogers testified that, when he was moved into the cell with Martin on March 30, he immediately noticed the cell was filthy. [R2910]

The filth bothered Rogers, and he expressed his displeasure to Martin. [R2911, 2928-29] More particularly, as Rogers cleaned the cell himself, he called Martin a "dirty-ass cracker" and a "filthy motherfucker." [R2911, 2928-29] Rogers later noticed that Martin was "cutting" himself with a metal object. [R2913, 2930-31]

Rogers jumped down from his bunk and advised Martin "to tighten his game

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[2]The proceedings at issue took place during the earlier second-phase bench trial. [R93-95, 176-345] But, during the trial below, those proceedings were simply referred to as "a hearing where Mr. Rogers testified." [R5521]

up" and "stop acting like a little bitch," but Martin continued to cut himself. [R2913, 2931-32] Martin repeatedly stated: "I got to get up out of here." [R2913, 2931] Rogers put a shirt up over the cell window because he "felt like this shit might turn into something." [R2915, 2933] As Rogers continued to tell Martin to stop cutting himself, Martin began yelling and screaming incoherently. [R2916]

Rogers struck Martin "three or four" times in the face. [R2917, 2932-33] Martin fell on the floor, and Rogers "went to kicking him in the face." [R2917, 2933] Martin continued to yell and scream. [R2917, 2933, 2935]

During this time, Rogers shouted that Martin had "racist tattoos" and yelled "this is for Trayvon Martin, Rodney King, and every other black man that you crackers done killed." [R2922-23, 2939-40] Though Martin remained conscious, he was "beat up pretty bad by then." [R2918-19, 2934]

Martin kept trying to get up, including by using "the wall to try to lift himself back up." [R2918, 2934] Once Rogers realized that Martin was going to continue to try to get up, he tore strips off his bed sheet and tied Martin up. [R2935-37] Rogers called out to the wing and asked "who wants me to kill him?" [R2925, 2939] A fellow inmate advised Rogers to "just leave [Martin] alone" and let officers remove him from the cell. [R2918-19] Rogers followed that inmate's advice. [R2919]

By that point, the wing had become very loud. [R2924-25] Other inmates called out. [R2925] Some were stating "what they [were] going to do" if Rogers killed

Martin. [R2925] In response, Rogers pulled Martin's pants down, spanked him, said "this is some sweet cracker ass," covered Martin with a prayer rug, and urinated on his Koran. [R2921, 2938, 2948-49] Rogers was trying "to send a message." [R2921, 2938] He explained: "[T]hat's just how prison is . . . . If people lose a fight, they get embarrassed, they get humiliated . . . ." [R2938]

Medical Examiner Minyard. Minyard conducted Martin's autopsy. [R5705-06] She opined that the cause of death was "blunt impact of head." [R5727, 5732-33, 5767] Martin had blunt-force injuries to his scalp and face. [R5707, 5710-13, 5722, 5737-38, 5742-43, 5747] Minyard claimed that the blunt-force injuries could have been caused by a weapon or by stomping against the ground. [R5721-22, 5751-57]

Martin had no broken bones, but his brain was severely injured. [R5713-17, 5721, 5743] More specifically, blunt-force trauma to Martin's head caused his brain to bleed, bruise, and swell. [R5722-27, 5738–39]

Martin also had sharp-force injuries on his chest, left hand, and left forearm. [R5707-08, 5710-12, 5720, 5732, 5739] Minyard testified that, while those cuts were possibly inflicted by someone other than Martin, certain factors indicated they were self-inflicted. [R5720-21, 5749-51]

Fellow inmates. Various inmates who were housed on the wing on March 30 testified. [R5809-5924] That evening, someone screamed on the wing. [R5811-12, 5815, 5819, 5842] There was "a lot of commotion." [R5827, 5842, 5885-86, 5905-06,

5912] One inmate testified he heard sounds of a struggle coming from Rogers and Martin's cell. [R5905-06] Another inmate claimed to have heard Rogers say "he was fixing to kill him." [R5815-16] A third inmate stated he heard someone refer to Trayvon Martin. [R5831-32] Something struck the door in Rogers and Martin's cell. [R5830-33, 5847]

***Rogers*.** At the trial below, Rogers testified that, when he was moved into the cell with Martin on March 30, he immediately noticed the cell was filthy. [R5987] And Rogers was "an old school-minded convict" who kept his cell and his person "meticulously clean." [R5987] As a result, Rogers stated, "to see a grown man living in such filthy conditions disgusted me to my core, and I was agitated and it pissed me off that I had to clean up after a grown man." [R5987]

So, as Rogers neatly arranged his property in his locker and prepared to clean the cell, he expressed his displeasure to Martin. [R5987] He called Martin a "dirty-ass cracker" and a "filthy motherfucker." [R5987] Rogers also stressed that Martin's cell and person needed to be clean "like a convict is supposed to be." [R5987]

After cleaning the cell, Rogers got on his bunk. [R5987] Moments later, Rogers noticed that Martin was "cutting himself" with "a razor or some sharp object." [R5988] Though Rogers advised Martin "to stop acting like a bitch and be a man," Martin continued to cut himself. [R5988] Martin repeatedly stated: "Man, I got to get out of here." [R5988]

Rogers continued to advise Martin to stop cutting himself. [R5988] When Martin refused, Rogers struck him "four or five" times in the face. [R5988] Martin fell on the floor, and Rogers "stomped his head into the concrete several times." [R5988, 5995] Martin screamed. [R5988]

There was blood "all over the cell." [R5988] Rogers kicked Martin in the face several times. [R5988, 5995-96] As he did, he referred to Trayvon Martin, Dr. Martin Luther King, Jr., Emmett Till, and "all the other black people you crackers done killed." [R5988-89, 5995-96, 5999] Martin "was messed up." [R5988-89] But he "tried to get up several times," including by attempting "to use the wall to push himself up." [R5989, 5996-97]

Rogers then tore strips off his bed sheet and tied Martin up. [R5988, 5996-97] And he "asked all the brothers on the wing, Who wants me to kill this . . . cracker?" [R5989] Some inmates responded affirmatively, but one discouraged Rogers. [R5989] Rogers followed the latter's advice. [R5989]

At that point, "Martin's gang brothers started cussing [Rogers] out and threatening" him. [R5989] In response, Rogers "pretended" to slap Martin "on his ass" by clapping his hands together; stated "[t]his is the sound of white ass"; pulled Martin's pants down; and covered Martin with a prayer rug. [R5989] Rogers was attempting to "send a message." [R5996]

Martin's gang brothers "were enraged" and made a lot of noise to get

corrections officers' attention. [R5989-90] Moments later, Rogers advised Givens that Martin had been "cutting himself," and Givens pepper sprayed Martin. [R5990]

Rogers went on to testify that, though he "beat Mr. Martin up about the murder of Trayvon Martin," "there were also other factors." [R5990] For instance, when Rogers "first met Mr. Martin and looked him in his eyes," Rogers realized that Martin was "a snitch" and "an undercover racist." [R5990] And "the more [Rogers] got to learn about" Martin, the more he realized that Martin was "everything [Rogers] despised in life," including a "snitch" and a "coward." [R5991] As result, Rogers was not remorseful. [R5991]

Rogers explained by contrasting his approach to serving time in prison with Martin's perceived approach . [R5991] Rogers again stressed: "I'm an old school-minded convict." [R5991] More specifically, Rogers "took care" of his own "business." [R5991] He kept his word. [R5991] Most importantly, he "never snitched." [R5991]

Rogers elaborated:

> Convicts know how to do time, inmates don't. Ricky Martin was an inmate, a cry baby, a cutter, not even man enough to stand up in his pants for what he claimed he believed in. He would rather tell the police if he got a problem and check-in with protective custody. I would never have no sympathy for no buster like that.
>
> Real talk, when I came through the system, you had to be a man, you had to fight. I had to cut people in the face. I had to stab people. I had to get into a lot of fights. I have a long disciplinary history for taking care of my business. Nobody ever babied me or held my hand as I did my time.

> In prison, if you don't stand up like a man, you will be made into a bitch, literally and figuratively. . . . I do believe a real person must stand up for what they believe in at all times.

[R5991-92]

With that in mind, Rogers acknowledged that he was "a Midnight Crip." [R5992] And he explained:

> When my mom was smoking crack and my pops was no where to be found, it was the Crip Gang that took me in. They been my family when I had no family. When I was doing time and didn't have nothing, Crip made sure I had a care package.

[R5993]

Rogers subsequently stressed: "I said all this because I firmly believe that if you stand for something, you stand firm in your convictions regardless of the consequences. The bottom line is that I'm responsible for the death of Ricky Martin." [R5993, 5998]

B. Second-phase trial.

1. *Rogers' background and character*.

At the time of Rogers' birth, his mother was only twenty years old . [R6618] She was also mentally ill–"probably schizophrenic." [R6413, 6450, 6454] And she was addicted to drugs. [6371, 6413, 6449] Rogers never knew his father. [R6413, 6449, 6618-19]

As an infant, Rogers lived with his mother in a housing project in Brooklyn, New York. [R6619] Rogers' mother went on to have three more children. [R6620]

When all the children were young, the Department of Children and Families (DCF) "intervened" because of Rogers' mother's "severe drug addiction and inability to care for her children." [R6620]

In Rogers' case, when he was two years old, his mother walked into a DCF office, said "she can't take care of him," and "just turn[ed] him over into foster care." [R6621, 6623-24] Rogers' younger siblings were later removed from their mother's care and placed for adoption. [R6621-22]

Around age four, Rogers was returned to his mother's custody. [R6622-24] But his mother continued using drugs. [R6622] And she remained psychologically unstable. [R6622] For instance, she "jump[ed] off a building in a suicide attempt [while] holding on to" Rogers. [R6623]

Shortly thereafter, "a series of quick placements in a variety of homes" began. [R6624] Over the next four years, Rogers was "in a variety of agencies, foster homes, and as he start[ed] to age . . . his schools rapidly change[d] with each placement." [R6624]

Around age eight, Rogers was placed with his grandmother. [R6625] The hope was he would "have access to seeing his mother." [R6625] If nothing else, "[w]hen she wasn't on the street, she may come home for a day or two." [R6625]

Instead, "even though he [was] very young," Rogers often ended up "venturing out looking for" his mother. [R6625]

> Sometimes when he would find her, her emotional state would be so impaired that she wouldn't want to go with him. Sometimes she wasn't even aware that he was her son. At times her drug use would impair her cognitive functioning and she would lash out at him, yell at him.

[R6626]

Rogers' placement with his grandmother did "not last very long." [R6626] During that placement, he ran away from home, injured himself, and acted aggressively. [R6626, 6628, 6632-33, 6690, 6745-46] He was also beaten up and robbed on the streets of New York. [R6636, 6791]

Around age ten, in March 1990, Rogers was placed at a residential treatment facility. [R6626-27, 6636, 6743-44] Rogers underwent various psychological assessments. [R6627] "[U]nder emotional pressure or in unstructured situations, [Rogers'] thinking bec[ame] peculiar and disorganized." [R6629] And his test scores were consistent with certain frontal lobe deficits. [R6627-28]

At school, Rogers was placed in special education classes. [R6634] School authorities also determined that Rogers needed "psychological treatment . . . for emotional and behavioral difficulties as well as learning disabilities." [R6635]

By his teenage years, Rogers had attended eight different schools. [R6452] He had also lived in multiple foster and group homes. [R6452]

At age fourteen, in 1994, Rogers was sent to Rockland Children's Psychiatric Center. [R6453, 6637-38, 6746-47] He had a psychiatric evaluation and underwent behavioral observations. [R6638] At times, Rogers became agitated and unable to

control his behavior. [R6638] He attempted to harm himself and had to be physically restrained. [R6638]

Around this time, Rogers was diagnosed with conduct disorder and attention-deficit/hyperactivity disorder (ADHD). [R6656-57, 6686] He was also treated for anxiety and depression. [R6657]

Further, Rogers was placed in the custody of the Department of Juvenile Justice (DJJ) after he stole food and mail. [R6641, 6691, 6746, 6746] Over time, he was held at several different juvenile detention facilities. [R6456-57, 6641-42, 6747] At one, Rogers was hit by either a metal pipe or metal chair, and as a result, received a metal implant in his head. [R6526-27, 6587] In between stints in DJJ custody, Rogers "liv[ed] on the streets." [R6642]

At age sixteen, in 1997, Rogers was convicted of attempted robbery. [R 3433-34, 6212] The charge arose from an incident in New York City in which a man on a train platform was robbed. [R6212-13, 6700-01] Rogers was ultimately sentenced to 27 to 54 months in prison. [R3433] As a result, he was sent to adult prison in the state of New York at age 17. [R6458, 6646, 6692, 6702, 6748]

At age twenty-two, in 2002, Rogers was convicted of armed robbery and aggravated battery in Volusia County, Florida. [R3419-31, 6702, 6748-51] The charges arose from an incident in which a cab driver was struck in the mouth and robbed. [R6209, 6748] Rogers was sentenced to life in prison. [R3421, 6702, 6748]

He was serving that sentence at the time of the incident that gave rise to the present case. [R6210-11]

During his incarceration in Florida, Rogers had some disciplinary issues, but he also assisted and mentored multiple fellow inmates. [R6241-345, 6693-94, 6751-54] For instance, Rogers shared food, hygiene supplies, and writing materials. [R6242, 6251-52, 6258, 6262, 6274, 6284, 6296, 6307-08, 6318, 6333-34] He provided frank, but positive, advice. [R6242, 6252-53, 6275-76, 6295-97, 6308-09, 6318-19, 6334] He engaged in discussions regarding race, politics, religion, and African-American history. [R 6243, 6251-56, 6274-77, 6295-99, 6309, 6319-21, 6335-37] Rogers also encouraged fellow inmates to educate themselves, work out, eat right, and keep in contact with their families. [R6243-44, 6254, 6275-77, 6298, 6310, 6320, 6336] Finally, he urged them to respect their elders, better themselves, and uplift their community rather than tear it down. [R6244, 6251, 6277-79, 6298, 6321, 6333, 6337-38]

2. *Additional developments at second-phase trial.*

Medical Examiner Minyard. Minyard was unsure how many times Martin was struck. [R6216, 6219] But his injuries were consistent with his head having been stomped repeatedly. [R6216] And Minyard asserted that Martin's injuries would have been painful if he was awake at the time. [R6217]

On that note, Minyard opined that, if "Martin was attempting to get away from

the beating," it was "fair to assume that he was awake and conscious." [R2 6217, 6219] And it was "safe to assume" that he would have suffered "pain up until the last moments of consciousness." [R6219] That said, the forceful blows struck against Martin "would appear to have caused, if not unconsciousness, at least a dazed state." [R6218] And, at some point during the beating, Martin "may have become semiconscious or unconscious." [R6218]

***Fellow inmates*.** Multiple inmates who had been incarcerated with Rogers testified. [R6241-345] Those inmates were generally not familiar with the incident between Rogers and Martin. [R6247, 6264, 6286-89, 6301-02, 6313-15, 6324-25, 6342-43] But, based on their interactions with Rogers, those inmates described him as follows.

One inmate described Rogers as a "humble soul" and a "straight-up dude." [R6241] Addressing Rogers, that inmate stated: "you was one of the person [sic] showed me that . . . a person could change." [R6244] A second inmate described Rogers as having a "positive vibe" and "[t]alking . . . good things about life." [R6251] Addressing Rogers, that inmate stated: "there was a couple times I seen maybe guys come at you the wrong way, and you . . . let it go but . . . that's kind of hard to do in this [prison] environment we live in . . . because a lot of guys might look at you [as] weak." [R6259]

Regarding Rogers, a third inmate stated: "to be an oversized dude, he was . .

. very humble. [A] lot of times, you know, people . . . considered [Rogers] a coward, stuff like that, because [he] turned the other cheek." [R6279] A fourth inmate described Rogers as: "Humble . . . peaceful, soul-searching, wise, giving and thoughtful. And mindful of the people around [him] when they in need." [R6310-11]

Chloe Johnson. Johnson was incarcerated in a Florida women's prison. [R6350] She was introduced to Rogers by letter through a mutual friend. [R6350-51, 6381] Johnson and Rogers began regularly corresponding by letter. [R6351-52, 6380-81] By the time of the trial below, they had corresponded for three years. [R6350-52] And they had fallen in love. [R6352-53, 6359, 6364]

Rogers was a positive influence on Johnson. [R6353] He encouraged her "to have morals" and "to control [her] emotions and never let anybody . . . make [her] react off of what they say or do." [R6354] Rogers also urged Johnson to "[a]lways learn something from everything you go through." [R6361]

Johnson subsequently stopped getting in trouble in prison. [R6354-58, 6380, 6384-85] She was "always reading . . . writing . . . trying to do stuff to better [her]self every day." [R6354] Her relationship with her mother improved. [R6354-55, 6361-63] Addressing Rogers, Johnson stated: "You're a man of honor. You've always stood by the same morals, the same principles. Everything you've always said has always been the same thing the last three years." [R6376-77]

Dr. Marvin Dunn. Dunn was a community psychologist. [R6387] As a

community psychologist, Dunn was "interested in social factors; what types of things outside of [a] person helped explain the person's behavior." [R6387, 6389-93]

Some examples of such factors could be a person's "upbringing; his or her exposure to trauma, [and] the environment in which they lived." [R6387] Another example could be a person's race and ethnicity, especially in combination with the role those factors play in the broader culture. [R6389-92]

Dunn was particularly interested in "the relationship between [a] person and his parents, because that's their definitive relationship in life." [R6387] With that in mind, Dunn noted that "parental abandonment" can have profound effects on a child's development. [6417-20] For instance, "children who grow up under those circumstances end up being highly sensitive, fearful, unpredictable, emotionally fragile." [R6419] And controlling impulses and exercising good judgment also "tend to be a problem with these kids." [R6447]

Dunn met with Rogers six times. [R6410, 6469] He also reviewed numerous records, reports, and other documents related to Rogers' background and life experiences. [R6409-10, 6467]

Dunn concluded that Rogers was a "damaged man." [R6411] In particular, Rogers had "very difficult impulse control" and was "hypersensitiv[e] to racial matters." [R6411, 6431, 6464-66] Dunn believed Rogers' racial hypersensitivity precipitated Martin's killing. [R6431-35, 6464-66] At the same time, Rogers

eventually adjusted well to prison, and he was honest. [R6411-12, 6472-75]

Dunn indicated that Rogers' "family situation was one of the worst [Dunn had] ever confronted." [R6412-13] As a child, Rogers was subject to excessive neglect. [R6413] His parents abandoned him, and Rogers "used the community to survive." [R6416, 6420, 6477] But Rogers' community "was a very dangerous one, a very violent community." [R6416-17]

Dunn concluded that Rogers had anger issues and "serious attachment issues." [R6415] But Dunn also testified that he had noticed positive changes in Rogers since they "first started working with each other a few years ago." [R6437] In particular, Dunn emphasized that Rogers' "hypersensitivity to racism ha[d] decreased" and his "capacity to relate with other people" had improved. [R6438]

Dr. Mark Rubino. Rubino was a neurologist. [R6507] He dealt regularly with head injuries. [R6507-08] He reviewed and interpreted Rogers' CAT scan. [R6512] It revealed a "right frontal hydroma" in Rogers' brain. [R6512-13] And portions of Rogers' brain, including the frontal lobe, had atrophied and shrunk. [R6513-16] Finally, fragments of metal were present in Rogers' skull. [R6515, 6531-32]

Those circumstances indicated that Rogers had suffered "a major head injury." [R6513-23, 6530-32] That injury was centered on Roger's frontal lobe. [R6524] Rubino later stressed: "We're talking traumatic brain injury." [R6522, 6535]

Rubino went on to explain the significance of such an injury:

> The typical problems of people with traumatic head injury is impulsiveness, attentiveness, altered judgment, . . . imp[aired] appreciation of consequences, decreased stress tolerance, much more likely to get agitated . . . their ability to make decisions isn't there, judgment is impaired.

[R6524, 6533] In particular, individuals with traumatic brain injury struggle with impulse control. [R6524-25, 6533-34] And in Rogers' case, impulse control was "a pervasive problem." [R6525-26, 6547]

Dr. Joseph Wu. Wu was the director of a neuro-cognitive imaging program and a psychiatrist. [R6556, 6562] He specialized in "neuropsychiatric imaging assessments of brain imaging." [R6556] Wu reviewed and interpreted Rogers' PET scan. [R6568-69] He also reviewed extensive prior medical records. [R6569-71]

The PET scan revealed abnormally low activity "throughout most of the brain . . . around the cerebellum." [R6577-83, 6591-94] In particular, the activity in Rogers' frontal lobe was abnormally low. [R6578-83, 6591-94] Those circumstances indicated that Rogers had endured multiple head injuries and sustained frontal lobe damage. [R6577-78]

Wu emphasized that individuals with frontal lobe damage "have a problem with the ability to calibrate their anger proportionally." [R6581] Regarding Rogers specifically, Wu explained:

> when you have this kind of damage, this is associated with significant behavioral dysfunction, including impaired ability to regulate anger or aggression and an impaired ability to calibrate a response so that one becomes neurologically impaired in terms of one's ability to calibrate

one's response.

[R6586, 6602]

Dr. Julie Harper. Harper was a psychologist. [R6610, 6680] She reviewed numerous records related to Rogers' background and life experiences, including foster care records, school records, prison records, medical records, and psychological records. [R6615] She also met with family members and others who knew Rogers in his youth. [R6616] Finally, Harper interviewed Rogers on ten different occasions. [R6616-17]

Harper emphasized that the "series of broken [foster care] placements" was "not good for [Rogers'] psychological stability." [R6624] She explained:

> What you see when you go from placement to placement is that the primary need of the child in the early age is to have a stable and secure relationship with someone, and [in Rogers' case] time after time, he's just getting comfortable, and then the attachment is disrupted over and over, and during this early []formative period, you absolutely need to be able to trust that the people who are taking care of you, are going to be consistent, are going to be kind to you, are going to care about you no matter what, no matter what your behaviors are, and when you see this breaking of the placements over and over, it forms an attachment disruption.

[R 6624-25, 6647-48, 6653-56]

Harper later elaborated on the effects of Roger's experience with "attachment disruption":

> When attachment is disrupted what ends up happening is that the infant doesn't understand that their needs are not going to be taken care of. They don't understand why this is, and they don't learn to . . . do it

> [themselves], and that has been a problem for Mr. Rogers.
>
> When he is very upset, when he is escalated, anxious, agitated and worried, he doesn't have those coping skills to say, it's all right. You know what? It's just today. It'll be better tomorrow. That's something you learn from a healthier person. You learn how to deal with your emotions, and when you don't know how to do that, it presents you . . . at a disadvantage when you're facing some really stressful situations later on.

[R6650-51]

Harper also stressed that Rogers' psychological struggles were compounded by the organic "deficit in [his] frontal lobe . . . which is like [the] decision-making center." [R6651, 6709] On that note, she highlighted that the frontal lobe is crucial to planning, following through, and regulating emotions. [R6651-52]

With all of that in mind, Harper indicated that anti-social personality disorder (ASPD) was not a "correct diagnosis" for Rogers. [R6689-90, 6710-11] She also opined that the homicide of Martin was committed while Rogers was under the influence of an extreme mental or emotional disturbance. [R6670, 6696-98]

Dr. Greg Prichard. Prichard was a psychologist. [R6727] The State hired him to evaluate Rogers. [R6731] He reviewed some documents and met with Rogers for a few hours. [R6731, 6735] In rebuttal, Prichard claimed that Rogers suffered from ASPD. [R6736-62] He also opined that the homicide of Martin was not committed while Rogers was under the influence of an extreme mental or emotional disturbance. [R6766, 6785-86, 6800-01]

C. *Spencer* hearing.

Dr. Jethro Toomer was the lone witness. [R4039-65] He was a psychologist. [R4041] He reviewed numerous records related to Rogers' background and life experiences, including foster care records, prison records, medical records, and psychological records. [R4044-45] Toomer also met with Rogers. [R4045] Finally, he reviewed Rogers' PET scans. [R4046]

Toomer emphasized that, in Rogers' case, factors critical to "healthy" behavioral and psychological development were missing. [R4046-48] And just as importantly, they "went missing" early–when Rogers was an infant. [R4048]

In addition, the degree of psychological "disruption" was extreme. [R4049] Toomer stated: "Mr. Rogers' records reflect what I would describe or call the perfect storm in terms of the myriad factors that can impact functioning." [R4049]

Toomer proceeded to explain that "persistent exposure to traumatic and debilitating situations and environment" can give rise to "toxic stress syndrome." [R4049-50] In that event, "the shape of the brain actually changes." [R4050] And Rogers suffered from toxic stress syndrome.[R4050]

But Rogers had also "been exposed to . . . brain trauma . . . blows to the head." [R4051] Regarding that combination of toxic stress and organic brain damage, Toomer emphasized: "that's why I say it's a perfect storm. It's like I have not seen a case like this in the years that I've been in practice, where you have both elevated almost to the same level." [R4051]

Toomer then described the impact that this "perfect storm" had on Rogers' behavior. [R4052-53] He indicated that Rogers struggled to "weigh alternatives, project consequences, manage conflicted data, have perceptive ability, you know, learning from our past experiences, controlling our impulses, all of those kinds of factors." [R4052] Toomer also characterized Rogers as "an individual who has a lifelong pattern of impairment, who is unable to manage stress, who is unable to respond to unanticipated stressors, whose human reflex for survival remains elevated or easily triggered." [R4052]

II. Underlying and Procedural Facts Particularly Relevant to Issues Raised.

A. Admission of Rogers' letters.

During the State's first-phase case-in-chief, and without objection, the trial court admitted (1) a letter from Rogers to the judge who presided in the earlier nolle prossed case; and (2) two letters from Rogers to the elected state attorney. [R2839-51, 5593-94, 5669-72, 5994-95]

In his letter to the previous judge, Rogers acknowledged: "[Martin's murder] was an unnecessary event that didn't have to take place. But it did [sic] so here we are. I don't make any excuses for what happened." [R2840]

Rogers then discussed the events of March 30.

> I don't deny that I smashed Mr. Martin. I beat him up, cut him up, tied him up, and stomped his head into the concrete floor. . . . My intentions were to kill him in the cell that night. It would've been simple as pie. But [a fellow inmate] begged me to stop. So I let him live on the

> strength of [the fellow inmate] which obviously didn't do him much good in the long run. Anyway after I fucced [sic] him up, I then covered him with his prayer rug and pissed on his Koran out of disrespect.

[R2840] Rogers further indicated that, to "emasculate" Martin, he pulled Martin's "pants down and smacked his buttcheeks so everyone on the wing could hear it." [R2840] Finally, Rogers explained: "when I heard about the brutal, unjustified, racist shooting of that young brother Trayvon Martin I decided that I was going to kill the next white man that came across my path. Unfortunately it happened to be Ricky Dean Martin." [R2841]

But, beyond that, Rogers fulminated more broadly.

> Yeah all that marching and demonstrating is cool. But I felt like somebody had to send a clear message to the white man. My message is any time you kill an innocent blacc [sic] kid for no reason other than your own sick psychotic racist hatred, that sword can cut in both directions. White people bleed just like us. If you can kill us and shoot us down in the streets like dogs we can kill you too. So unless you want a bloody race war let this serve as a deterrent to you. . . . It's 2013 and we have the 1st African-American president in this country[,] who is disrespected on a regular basis by his so-called colleagues in the political arena based on the color of his skin.

[R 2841]

And Rogers mused concerning his own character and predispositions.

> I am a Blacc [sic] Revolutionary. A member and leader of the Midnight Crips under that blacc flag. Fuccdaovaside! And I'll say it twice: Fuccdaovside! That's real. I'm a ruthless, cold-blooded, cut throat gangsta. Blood killer and killer of any and everything that go against the Crips Gang, or the people in general.

[R2840-41]

Rogers later continued to reflect on his character and predispositions, as well as the dangers those qualities might pose in the future.

> [T]he truth is life and living has made me cold and hard. There's certain things that a man know's [sic] about himself. I know that I'm a sociopath by definition. I have no remorse, regard or regret for nothing I've done in my life. It is what it is. I have the tendency to be very violent with little or no provocation. A problem I see that is only getting worse as the years go by. I don't have any mental health problems. My thing is this [sic] I have a life sentence and I know that I will never see day light again. All I think about everyday is who I can hurt and who I can kill. This time it was Ricky Dean Martin. Next time it may be corrections staff. I don't feel no sympathy toward Mr. Martin. Fucc [sic] him in my book.

[R2842]

Finally, Rogers mulled over how the trial judge should proceed in light of his character and predispositions.

> You have the power to end this by giving me the death penalty and in the process you can save innocent lives Your [H]onor. I want to wave [sic] my right to trial and plead guilty. I want to wave my right to present any evidence in the penalty phase. I want this issue resolved on April 15[,] 2013 and I move to represent myself in all further proceedings.

[R2842]

Second, in his letters to the elected state attorney, Rogers again admitted killing Martin. [R 2843, 2850] But, beyond that, Rogers derided the prosecutors: "I'm sitting back laughing at you crackers. . . . You crackers are dumb! . . . Just like I said from the very beginning you talk a good game. But you craccers [sic] are liars. [R2843, 2845]

Rogers later addressed the elected state attorney directly and elaborated.

> You a dumb azz (sic) craccer (sic) just like your president Donald J. Trump. I basically threw you & your flunkies a softball to hit a home run & get an easy prosecution & conviction. But you craccers are lazy & incompetent. Y[']all do all this grand standing for the public based on money & politics. But deep down you don't give a fucc (sic) about what's in the best interest of justice. . . . For you to just sit on your lazy azz & let me get away with killing that punk azz craccer is morally wrong and reprehensible in your part. Truthfully I don't give a fucc. I'm Gucci no matter how it goes. But I love to put the mirror in front of you craccer[']s eyes to force you to see your own hypocrisy. Mothafucc (sic) the white man!

[R2849-50]

B. Second-phase final jury instructions.

The court informed the jury that, to find an aggravating factor, it had to be convinced beyond a reasonable doubt that it existed. [R3073-75, 7000-03] The court also instructed the jury that, if it found such a factor, it had to engage in a weighing process after making additional findings. [R3076-81, 7004-12] Those additional findings included (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. [R13080, 7011] But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt. [R3076, 3080-81, 7004, 7010-12] That said, Rogers failed to request such an instruction. [R6812-6923]

C. Trial court's sentencing order.

In determining that the evidence established beyond a reasonable doubt that Rogers had prior violent felony convictions, the court noted Rogers' 1997 conviction for attempted robbery and his 2002 convictions for armed robbery and aggravated battery. [R3591] But the court proceeded to focus on Rogers' use of "illegal violence against other people." [R3591]

In that context, the court reasoned:

> In a letter to [the judge who presided in the earlier nolle prossed case], the Defendant stated "I have a tendency to be very violent with little or no provocation. A problem I see that is only getting worse as the years go by." These undisputed facts demonstrate that the Defendant used illegal violence against other people. The Defendant's pattern of criminal conduct has escalated to the point where the Defendant himself testified he murdered a cellmate because, in part, of the victim's "vibe."

[R3591-92] The court proceeded to assign "great weight" to the prior violent felony conviction aggravating factor. [R3592]

The court also found that the evidence established beyond a reasonable doubt that the homicide was committed in a cold, calculated, and premeditated manner. [R3594-95] The court reasoned:

> In a letter addressed to [the judge who presided in the earlier nolle prossed case], the Defendant stated that "My intentions were to kill him in the cell that night." The Defendant explained that after learning of the shooting death of Trayvon Martin, he decided that he "was going to kill the next white man who came across [his] path. Unfortunately, it happened to be Ricky Dean Martin." Moreover, the Defendant adamantly testified at trial that his merciless beating of the victim was because of the killing of Trayvon Martin. (Trayvon Martin was killed approximately one month prior to the Defendant's criminal conduct in this case.)

> The court finds that [this case] is analogous to cases where the killer lays in wait for his victim. Here, the Defendant waited for his opportunity to kill a white man in Santa Rosa Correctional Institution. . . .

[R3594] The court went on to note that "even if the CCP factor was not proven and was accorded *no weight*, the Court's sentencing decision would remain the sentence. [R3595] That said, the court assigned "great weight" to the cold, calculated, and premeditated factor. [R3595]

Finally, the court considered sixty-eight mitigating circumstances. [R3595-3610] As to twelve of those circumstances,[3] the court simply stated (1) the circumstance was not found by the jury; (2) the court finds the circumstance was not proven; and (3) the circumstance is given no weight. [R3595, 3599-3600, 3606-09]

A typical example in this context was the court's handling of mitigating circumstance "(1) The capital felony was committed while Defendant was under the influence of extreme mental or emotional disturbance." [R 3595, 3599-3600, 3606-09] There, the court merely noted: "This mitigating factor was not found to exist by the jury. In addition, the Court finds that it was not proven by a preponderance of the evidence. Thus, it is given no weight." [R3595]

And, when considering two of those twelve mitigating circumstances, the court referred to the wrong circumstance. [R3599, 3607] First, in considering circumstance

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[3]Identified by number only, the twelve circumstances are: (1), (2), (19), (20), (21), (48), (52), (56), (60), (61), (63), and (65). [R 3595, 3599-3600, 3606-09]

"(19) The death of Defendant's maternal grandmother was traumatic for him," the court stated: "The Court finds that Defendant has not proven by the greater weight of the evidence that he has never been show love or affection." [R3599] Second, in considering circumstance "(52) Defendant suffers from attachment issues," the court stated: "The Court finds that Defendant has not proven by the greater weight of the evidence that he cared for homeless boys on the street." [R3607]

As to another forty-nine of the sixty-eight mitigating circumstances considered,[4] the court simply stated (1) the circumstance was or was not found by the jury; (2) based on the testimony of a particular witness or witnesses, the court finds the circumstance was proven; and (3) the circumstance is given relatively limited weight. [R3596-3610]

A typical example in this context was the court's handling of mitigating circumstance "(4) Defendant suffers from major depression." [R3596-3610] There, the court merely noted: "This mitigating factor was not found to exist by the jury. Based on the testimony of Dr. Harper, however, the Court finds that Defendant has proven by the greater weight of the evidence that he has been diagnosed with major depressive disorder. This mitigating circumstance is given very little weight." [R3596]

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[4]Identified by number only, the forty-nine circumstances are: (4), (5), (7), (8), (9), (10), (11), (12), (14), (15), (16), (17), (18), (22), (23), (24), (25), (26), (28), (29), (30), (31), (32), (34), (35), (36), (37), (38), (39), (40), (41), (42), (43), (44), (46), (47), (49), (50), (51), (53), (54), (55), (57), (58), (59), (62), (66), (67), and (68). [R3596-3610]

Another typical example in this context was the court's handling of mitigating circumstance "(62) Defendant suffers from brain atrophy." [R3596-3610] There, the court merely noted: "This mitigating factor was found to exist by two members of the jury. Based on the testimony of Dr. Rubino, the Court finds that Defendant has proven by the greater weight of the evidence that he suffers from brain atrophy. This mitigating circumstance is given moderate weight." [R3609]

As to the remaining seven of the sixty-eight mitigating circumstances considered,[5] the court stated (1) the circumstance was not found by the jury; (2) the court finds the circumstance was not proven; and (3) the circumstance is given no weight. [R3596, 3598, 3601-02, 3605, 3609] But, in each such instance, the court also provided a one-sentence observation related to evidence presented at trial. [R3596, 3598, 3601-02, 3605, 3609]

A typical example in this context was the court's handling of mitigating circumstance "(3) The age of Defendant at the time of the crime." [R3596] There, the court noted: "This mitigating factor was not found to exist by the jury. In addition, the Court finds that it was not proven by a preponderance of the evidence. Indeed, the Defendant was 31 years of age at the time of the murder. Thus, it is given no weight." [R3596]

Another typical example in this context was the court's handling of mitigating

[5]Identified by number only, the seven circumstances are: (3), (6), (13), (27), (33), (45), and (64). [R3596, 3598, 3601-02, 3605, 3609]

circumstance "(33) Defendant experienced inadequate nutrition as a child." [R3602] There, the court noted: "This mitigating factor was not found to exist by the jury. The Court finds that Defendant has not proven by the greater weight of the evidence that he experienced inadequate nutrition as child. At best, the testimony of Dr. Dunn established that extreme poverty affects development because of poor nutrition. This mitigating circumstance is given no weight." [R3602]

SUMMARY OF THE ARGUMENT

Rogers' death sentence should be vacated. And this case should be remanded for a new second-phase trial. First, as to **Issue I**, the court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. Under Florida's capital sentencing scheme, those determinations are elements of capital murder. That is, those determinations increase the penalty for capital murder beyond the maximum sentence that may be imposed *solely* on the basis of conclusions that (1) the victim is dead, (2) the death was caused by the defendant, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists. In addition, even if those determinations do not increase the penalty, they are still necessary to impose the death penalty for capital murder.

Further, in *Perry v. State*, 210 So.3d 630 (Fla. 2016), this Court indicated that

those determinations must be made beyond a reasonable doubt. Finally, the court's failure to instruct the jury to make those determinations beyond a reasonable doubt amounted to fundamental error. More specifically, because the omission reduced the burden of proof as to multiple elements of capital murder, that omission was pertinent to what the jury had to consider. And the affected elements were disputed at trial.

Second, as to **Issue II**, the court admitted Rogers' letters to an earlier judge and to the elected state attorney in their entirety, including Rogers' reflections on race, politics, and his own character and predispositions. But those reflections "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." More particularly, they gave the State an unfair advantage and precluded the jury from fairly judging whether aggravating factors existed, whether those factors were sufficient to justify the death penalty, and whether they outweighed the mitigating circumstances.

In short, Rogers' reflections on race, politics, and his own character had, at best, minimal relevance to the aggravating factors. Further, and on the other hand, those reflections were unduly prejudicial and had a strong impact on the jury because they inflamed the jury's emotions. Finally, while there may have been evidence to support some aggravating factors, there was also ample evidence of mitigating circumstances.

The court's admission of Rogers' letters in their entirety also amounted to

fundamental error. More specifically, by inflaming the jury's emotions, Rogers' reflections precluded the jury from fairly judging the "foundation of the case"–whether aggravating factors existed, whether those factors were sufficient to justify the death penalty, and whether they outweighed the mitigating circumstances. By the same token, the court's admission of those reflections denied Rogers due process.

Third, as to **Issue III**, the court instructed the jury on, and the jury later found, the cold, calculated, and premeditated aggravating factor. But the evidence was insufficient to establish beyond a reasonable doubt that (1) Martin's killing was the product of cool and calm reflection, (2) Rogers had a careful, prearranged plan to murder Martin, and (3) Rogers exhibited heightened premeditation.

In short, rather than showing that Martin's killing was the product of cool and calm reflection, the evidence established that his killing was an act prompted by emotional frenzy and a fit of rage. Further, while the evidence may have indicated Rogers was motivated to murder Martin–in part–by his race, the evidence failed to establish that Rogers had a careful, prearranged plan to carry out that act. Finally, while the evidence may have indicated that Martin's killing was premeditated, the evidence failed to establish that Rogers exhibited heightened premeditation.

* * * * * * * * * * *

At a minimum, this case should be remanded for a new *Spencer* hearing

followed by the issuance of a revised sentencing order. First, again as to **Issue III**, the court found (and assigned great weight to) the cold, calculated, and premeditated aggravating factor. But, for the reasons outlined immediately above, the evidence was insufficient to establish that factor beyond a reasonable doubt.

Second, as to **Issue IV**, in finding and assigning great weight to the prior violent felony conviction aggravating factor, the court considered Rogers' indeterminate use of violence. But Rogers was not actually convicted of a violent crime as a result of his use of "illegal violence against other people." Thus, such use of violence did not relate to the prior violent felony conviction aggravating factor.

Third, as to **Issue V**, the court failed to thoughtfully and comprehensively analyze any of the proposed mitigating circumstances. More specifically, the court failed to expressly and specifically articulate *why* (1) nineteen circumstances were not proven, and (2) the other forty-nine circumstances, though proven, were given relatively limited weight. Instead, the court summarily addressed and disposed of all sixty-eight mitigating circumstances.

* * * * * * * * * * *

That said, this case should be remanded for imposition of a life-without-parole sentence. As to **Issue VI**, Rogers' death sentence is a disproportionate punishment for first-degree murder. That is, even if Rogers' case is among the most aggravated of first-degree murder cases, it is not among the least mitigated of such cases. In

short, Rogers' traumatic childhood was a "perfect storm." He experienced "toxic stress." Rogers also suffered from organic brain damage, including brain atrophy and neurological deficits. As a result, impulse control was "a pervasive problem." This Court has found death to be disproportionate where the extent of mitigation was essentially comparable.

ARGUMENT

I. Reversible Error Occurred When the Court Failed To Instruct the Jury To Determine Beyond a Reasonable Doubt Whether the Aggravating Factors Were Sufficient and Outweighed the Mitigating Circumstances Because Those Determinations Are Elements of Capital Murder, the Court Overlooked *Perry v. State*, and the Error Was Fundamental.

The United States Supreme Court has elaborated on the relationship between the Due Process Clause and the Sixth Amendment.

> It is self-evident [that the] requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). Thus, "[t]aken together," the Due Process Clause requirement of proof beyond a reasonable doubt and the Sixth Amendment right to jury trial "indisputably entitle a criminal defendant to 'a jury *determination* that [he] is guilty of every *element* of the crime with which he is charged beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-77

(2000) (quoting *United States v. Gauldin*, 515 U.S. 506, 510 (1995)) (emphasis added).

That general standard, including its focus on elementary determinations, is well-established. *See, e.g.*, *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016); *Alleyne v. United States*, 570 U.S. 99, 104 (2013). Further, in the present case, it is clear the court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. [R3076, 3080-81, 7004, 7010-12] Thus, the initial issue in dispute is whether, under Florida's capital sentencing scheme, those determinations are elements of capital murder.

But it is also clear that Rogers failed to request the necessary jury instruction. [R6812-6923] Thus, even if those determinations are elements, an additional issue in dispute is whether the court's failure to provide the necessary instruction amounted to fundamental error.

That said, under Florida's capital sentencing scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are elements of capital murder. Further, this Court indicated in *Perry v. State*, 210 So.3d 630 (Fla. 2016), that those determinations must be made beyond a reasonable doubt. Finally, the court's failure to instruct the jury to make those determinations beyond a reasonable doubt amounted to fundamental error.

A. Under Florida's capital sentencing scheme, determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances are elements of capital murder.

The United States Supreme Court has "emphasized the societal interests in the reliability of jury verdicts." *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). More specifically, the Court has explained that the beyond-a-reasonable-doubt standard protects the extraordinary interests at stake for a criminal defendant by requiring the factfinder to reach a subjective state of certitude as to the elementary determinations at issue.

> The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . . "Where one party has at stake an interest of transcending value–as a criminal defendant his liberty–th[e] margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. . . ." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

In re Winship, 397 U.S. 358, 363-64 (1970) (internal citations omitted).

In addition, the Court has made clear that the beyond-a-reasonable-doubt standard increases the wider community's confidence in the criminal law by requiring such a state of subjective certitude.

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law

> not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

And the United States Supreme Court has stressed that these societal interests are implicated where particular circumstances permit increased punishment.

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not–at the moment the State is put to proof of these circumstances–be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484; *see also id.* at 495. As a result, "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Id.* at 484; *see also Mullaney*, 421 U.S. at 697-98.

With all that in mind, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 102; *see also Apprendi*, 530 U.S. at 490. And "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

Further, the Court has repeatedly addressed the standard for ascertaining which determinations are, for purposes of the jury trial guarantee and due process, elements that "increase the penalty for a crime." As an initial matter, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative." *Id.* at 605. Instead, the appropriate analysis "looks to the operation and effect of the law as applied and enforced by the state.'" *Mullaney*, 421 U.S. at 699. Thus, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi* 530 U.S. at 494.

On that note, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence [that may be] impose[d] *solely on the basis of the facts reflected in the jury verdict*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). "In other words, the relevant 'statutory maximum' is not the maximum sentence [that may be] impose[d] after finding additional facts, but the maximum [that may be] impose[d] *without* any additional findings." *Id.* at 303-04.

Finally, in *Hurst v. Florida*, the United States Supreme Court declared Florida's capital sentencing scheme unconstitutional because it did "not require the jury to make the critical findings necessary to impose the death penalty." 136 S.Ct. at 622; *see also id.* at 619. And this Court has reinforced that general premise: "we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical

findings necessary before the trial court may consider imposing a sentence of death must be found . . . by the jury." *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016).

A majority of the Delaware Supreme Court has also acknowledged this premise: "I am reluctant to conclude that the Supreme Court was unaware of the implications of requiring 'a jury, not a judge, to find each fact necessary to impose a sentence of death.' If those words mean what they say, they extend the role of a death penalty jury beyond the question of eligibility." *Rauf v. State*, 145 A.3d 430, 464 (Del. 2016) (Strine, C.J., concurring) (footnote omitted); *see also id.* at 487 (Holland, J., concurring).

Further, a recognition of this general premise is emerging among distinguished legal commentators.

> [*Hurst v. Florida]* respects the long history of allowing [sentencers] to determine what ultimate sentence to impose, while at the same time ensuring that a jury makes decisions "which the law makes essential to the punishment" . . . by making the presence or absence of . . . sentencing discretion the central . . . inquiry, rather than relying on distinctions between findings that "authorize" sentences and findings merely required to select a sentence.

Carissa Byrne Hessick & William W. Berry, III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. Rev. (forthcoming 2019) (manuscript at 20) (footnote omitted).[6]

In the present case, an application of those general principles establishes the following regarding determinations as to whether the aggravating factors are

[6] A copy of the manuscript can be accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131906.

sufficient and outweigh the mitigating circumstances. First, those determinations increase the penalty for capital murder beyond the maximum sentence that may be imposed *solely* on the basis of conclusions that (1) the victim is dead, (2) the death was caused by the defendant, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists.

Second, even if those determinations do not increase the penalty, they are still necessary–as this Court recognized in *Hurst v. State*, 202 So.3d at 44–to impose the death penalty for capital murder. Third, instructing the jury to make those determinations beyond a reasonable doubt furthers "the societal interests in the reliability of jury verdicts," *Mullaney*, 421 U.S. at 699. Finally, with these general principles in mind, this Court indicated in *Hurst v. State*, 202 So.3d at 53-54, 57, that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are elements of capital murder under Florida's capital sentencing scheme.

1. ***Determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for capital murder beyond the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist.***

To establish first-degree murder, the following elements must be proven: (1) the victim is dead, (2) the death was caused by the defendant, and (3) the killing was premeditated or committed during a felony. *See* Fla. Std. Jury Instrs. (Crim) 7.2, 7.3

(2017). And first-degree murder is a "capital felony." § 782.04(1)(a), Fla. Stat. (2017). Further, a "person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in [section] 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by" life without parole. § 775.082(1)(a), Fla. Stat. (2017).

In relevant part, section 921.141 provides:

> "(2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.
> . .
> . . .
> (b) . . . If the jury:
> . . .
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all the following:
> a. Whether sufficient aggravating factors exist.
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without parole or to death."

Perry, 210 So.3d at 637 (quoting § 921.141(2)(b)2., Fla. Stat. (2016)).[7]

In *Perry*, this Court concluded that, under section 921.141, "*to increase the*

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[7]In relevant part, the sentencing scheme under which Rogers was sentenced to death below was identical to the scheme addressed by this Court in *Perry*. *Compare* § 775.082(1), Fla. Stat. (2016) *and* § 921.141, Fla. Stat. (2016) *with* § 775.082(1), Fla. Stat. (2017) *and* § 921.141, Fla. Stat. (2017).

penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, [and] that the aggravating factors outweigh the mitigating circumstances." 210 So.3d at 640 (emphasis added). This Court also noted that "the State still [had] to establish the same elements as were previously required under the prior statute." *Id.* at 638. And in the context of addressing that prior statute, this Court stressed: "[B]efore a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State*, 202 So.3d at 53.

With all that in mind, Florida's capital sentencing scheme conditions an increase in the maximum punishment for capital murder from life to death on *every* one of the following determinations: (1) whether the victim is dead; (2) whether the death was caused by the defendant; (3) whether the killing was premeditated or committed during a felony; (4) whether at least one aggravating factor exists; (5) whether the aggravating factors are sufficient to justify the death penalty; *and* (6) whether those factors outweigh the mitigating circumstances. Put another way, considering "the operation and effect of [Florida's scheme] as applied and enforced by the state,'" *Mullaney*, 421 U.S. at 699, a defendant is not eligible for the death

penalty until *all* of those determinations are made.

More specifically, in the absence of determinations that (1) the aggravating factors are sufficient to justify the death penalty, and (2) the aggravating factors outweigh the mitigating circumstances, "the 'statutory maximum' for *Apprendi* purposes," *Blakely*, 542 U.S. at 303, is life without parole. That is because life without parole is the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists. Conversely, a defendant is eligible for the death penalty *only if* additional determinations–as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances–are made.

2. *Even if determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not increase the penalty for capital murder, they are still necessary to impose the death penalty for that offense.*

In *Hurst v. State*, this Court addressed the determinations that, under Florida's capital sentencing scheme, are necessary to impose the death penalty for capital murder.

> [U]nder Florida's capital sentencing scheme, the jury . . . must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding . . . . "The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* the mitigating

> circumstances." Thus, before a death sentence may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

202 So.3d at 53 (internal citations omitted).

With that in mind, assume that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not increase the maximum punishment for capital murder from life to death. In other words, assume that a defendant is eligible for the death penalty solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists. Even then, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are *required* to select a sentence between life without parole and death. In that regard, the sentencer lacks discretion. Thus, those determinations are necessary to impose the death penalty for capital murder.

3. ***Instructing the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt.***

In general, society has "interests in the reliability of jury verdicts." *Mullaney*, 421 U.S. at 699. But the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). Thus, society's interests in

reliable verdicts is even stronger in capital cases.

More specifically, upon imposition of a death sentence, the defendant forfeits not only his liberty, but his life. In addition, such a sentence carries with it a tremendous stigma. Finally, it is critical that the wider community maintain a high level of confidence that any defendant condemned to death deserve that punishment.

For all of those reasons, whether particular determinations render a defendant eligible for death or are simply necessary to impose that punishment, those determinations should be conditioned on the jury reaching a subjective state of certitude. More specifically, under Florida's capital sentencing scheme, the jury should be instructed to determine beyond a reasonable doubt (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances.

4. *This Court indicated in* Hurst v. State *that, under Florida's capital sentencing scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are elements of capital murder.*

As previously mentioned, this Court stressed in *Hurst v. State* that, before the death penalty could be considered, the jury had to determine (1) whether at least one aggravating factor existed, (2) whether the aggravating factors are sufficient, and (3) whether those factors outweigh the mitigating circumstances. 202 So.3d at 53. Immediately thereafter, this Court stated: "all these findings necessary for the jury to essentially convict a defendant of capital murder–thus allowing imposition of the

death penalty–are also elements." *Id.* at 53-54. And this Court subsequently reiterated: "these findings occupy a position on par with elements of a greater offense." *Id.* at 57.

B. This Court indicated in *Perry v. State* that determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances must be made beyond a reasonable doubt.

In *Perry*, this Court stated: "in cases in which the penalty phase jury is not waived, the *findings* necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." 210 So.3d at 633 (citing *Hurst v. State*, 202 So.3d at 44-45) (emphasis added). Immediately thereafter, this Court noted: "Those findings specifically include . . . all aggravating factors to be considered, . . . that sufficient aggravating factors exist for the imposition of the death penalty, [and] that the aggravating factors outweigh the mitigating circumstances." *Id.* And this Court later affirmed: "we construe section 921.141(2)(b)2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances found to exist." *Id.* at 639 (original emphasis omitted).

That said, this Court recently amended Florida Standard Criminal Jury Instruction 7.11. *See In re Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d 172 (Fla. 2018). And, in doing so, this Court did not include instructions that

the jury should determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances. *See* Fla. Std. Jury Instr. (Crim) 7.11 (2018).

But omitting those instructions was inconsistent with the response and proposals offered by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases. *See* Standard Jury Instruction Committee's Response to the Court's Death Penalty Jury Instructions and To Comments at 7, 14-15, 18-19, 21-22, *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d at 172. It was also inconsistent with the comments offered by other interested parties. *See* Amended Comments of the Handling Capital Cases Faculty at 4, *id.*; Comments of the Florida Public Defender Association at 5-7, *id.*; Comments of the Florida Center for Capital Representation at FIU College of Law and Florida Association of Criminal Defense Lawyers at 1-2, *id.*

C. The court's failure to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances amounted to fundamental error.

"'In its narrowest functional definition, 'fundamental error' describes an error that can be remedied on direct appeal, even though the appellant made no contemporaneous objection in the trial court and, thus, the trial judge had no opportunity to correct the error.'" *Maddox v. State*, 760 So.2d 89, 95 (Fla. 2000).

"The reason that courts correct error as fundamental despite the failure of parties to adhere to procedural rules requiring preservation is not to protect the interests of a particular aggrieved party, but rather to protect the interests of justice itself." *Id.* at 98.

Generally speaking, "'in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003). "Thus, an error is deemed fundamental 'when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.'" *Id.*

Those general principles apply in particular fashion in the context of fundamental errors in jury instructions. As an initial matter, this Court "'has long held that defendants have a fundamental right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged.'" *Milton v. State*, 161 So.3d 1245, 1250-51 (Fla. 2014). But "'fundamental error occurs only when the omission [of a jury instruction] is pertinent or material to what the jury must consider in order to convict.'" *Daugherty v. State*, 211 So.3d 29, 39 (Fla. 2017).

With that in mind, when "evaluating fundamental error [related to jury

instructions], there is a difference 'between a disputed element of a crime and an element of a crime about which there is no dispute in the case.'" *Id.* But "whether evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruction a feature of the prosecution's argument are not germane to whether the error is fundamental." *Reed v. State*, 837 So.2d 366, 369 (Fla. 2002). Instead, fundamental error occurs if "the element is disputed." *Id.*

Finally, "'[f]undamental error is not subject to harmless error review.'" *Ramroop v. State*, 214 So.3d 657, 665 (Fla. 2017). "'By its very nature, fundamental error has to be considered harmful.'" *Id.*

Applying those standards here, the court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances "reach[ed] down into the validity of the trial itself to the extent that [the determination that Rogers should be sentenced to death] could not have been obtained without the assistance of" the court's failure, *F.B.*, 852 So.2d at 229. Put another way, the court's failure went "to the foundation of the case or the merits of the cause of action and [was] the equivalent to a denial of due process," *id.* *See* discussion *supra* pp. 42-53.

In more concrete terms, to conclude that Rogers should be sentenced to death, the jury had to determine (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating

circumstances. And the omission of an instruction that those determinations had to be made beyond a reasonable doubt reduced the burden of proof. As a result, the omission was "'pertinent or material to what the jury must consider in order to convict,'" *Daugherty*, 211 So.3d at 39.

Further, the elements concerning whether the aggravating factors were sufficient and outweighed the mitigating circumstances were disputed. At the conclusion of the trial below, the State argued that multiple aggravating factors existed; they were entitled to great weight; and they outweighed any mitigating circumstances. [R6927-67] In response, Rogers argued that the mitigating circumstances were substantial and compelling, and they outweighed the aggravating factors. [R6975-99] In short, this case turned on whether the aggravating factors were sufficient and outweighed the mitigating circumstances.

This Court's decision in *Reed*, 837 So.2d at 366, dictates a conclusion that the court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances amounted to fundamental error. There, the court failed to instruct the jury as to the proper definition of malice for purposes of aggravated child abuse. *Id.* at 368. As a result, the State only had to prove that Reed acted "'wrongfully, intentionally, without legal justification or excuse,'" rather than with "'ill will, hatred, spite, an evil intent.'" *Id.*

On appeal, this Court concluded that the trial court's failure to instruct the jury to determine whether Reed acted with ill will, hatred, spite, or evil intent amounted to fundamental error. *Id.* at 369. This Court reasoned:

> Because the inaccurate definition of malice reduced the State's burden of proof, the inaccurate definition is material to what the jury had to consider to convict the petitioner. Therefore, fundamental error occurred in the present case if the inaccurately defined term "maliciously' was a disputed element in the trial of this case.

Id. This Court subsequently observed: "The record in the present case demonstrates that the malice element was disputed at trial." *Id.* at 370.

Like the failure to properly define "malice" in *Reed*, the failure to instruct the jury here to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances reduced the State's burden of proof. In fact, the failure here reduced that burden far more than the failure there. Thus, if the failure there was material to what the jury had to consider, the failure here was as well.

Further, like the element in *Reed* concerning whether "malice" existed, the elements here concerning whether the aggravating factors were sufficient and outweighed the mitigating circumstances were disputed at trial. As a result, if fundamental error occurred in *Reed*, it did here as well.

The trial court failed to properly instruct the jury that it had to determine all the elements of capital murder beyond a reasonable doubt. Rogers' death sentence

violates his rights to trial by jury and due process. Amends. V, VI, XIV, U.S. Const.; Art. I, §§ 9, 16, 22, Fla. Const.

II. Reversible Error Occurred When the Court Admitted Rogers' Letters in Their Entirety Because Rogers' Written Reflections on Race, Politics, and His Own Character and Predispositions "So Infected the Sentencing Proceeding With Unfairness as To Render the Jury's Imposition of the Death Penalty a Denial of Due Process," and the Error Was Fundamental.

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941). And the Due Process "Clause applies to the sentencing phase of capital trials." *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994). In that context, "the test . . . for a constitutional violation attributable to evidence improperly admitted at a capital-sentencing proceeding is whether the evidence 'so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.'" *Kansas v. Carr*, 136 S.Ct. 633, 644-45 (2016); *see also Romano*, 512 U.S. at 12.

With those principles in mind, in the present case, it is clear that the trial court admitted (1) a letter from Rogers to the judge who presided in the earlier nolle prossed case; and (2) two letters from Rogers to the elected state attorney. [R2839-51, 5593-94, 5669-72, 5994-95] And it is clear that those letters included Rogers' reflections on race, politics, and his own character and predispositions. [R2840-42,

2843, 2845, 2849-50] Thus, the initial issue in dispute is whether those reflections "'so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process,'" *Carr*, 136 S.Ct. at 644-45.

But it is also clear that Rogers failed to object to the admission of those letters. [R5593-94, 5669-72] Thus, even if Rogers' reflections resulted in a denial of due process, an additional issue in dispute is whether the court's admission of Rogers' letters in their entirety amounted to fundamental error.

That said, Rogers' written reflections on race, politics, and his own character and predispositions "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." Further, the court's admission of Rogers' letters in their entirety amounted to fundamental error.

A. Rogers' written reflections on race, politics, and his own character and predispositions "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process."

"[A] fundamental-fairness analysis is heavily dependent upon the peculiar facts of an individual trial." *United States v. Rivera*, 900 F.2d 1462, 1477 (10th Cir. 1990). "As a result, the constitutional guarantee of a fundamentally fair trial cannot be defined with reference to particularized legal elements . . . ." *Id.*

That said, an "important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of [sentencing]." *Bruton v.*

United States, 391 U.S. 123, 131 n.6 (1968). Further, "the Due Process Clause . . . wards off the introduction of 'unduly prejudicial' evidence that would 'rende[r] the trial fundamentally unfair.'" *Carr*, 136 S.Ct. at 644; *see also McLean v. State*, 934 So.2d 1248, 1261 (Fla. 2006). On that note, "'[u]nfair prejudice' has been described as 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one." *McDuffie v. State*, 970 So.2d 312, 327 (Fla. 2007).

Consistent with those principles, in *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003), the Tenth Circuit employed the following analytical framework in the context of a capital proceeding.

> Although there are no clearly defined legal elements, the fundamental-fairness inquiry requires [the court] to look at the effect of the admission of the [evidence at issue] within the context of the entire second stage. [The court should] consider the relevance of [that evidence] and the strength of the aggravating evidence against [the defendant] as compared to the mitigating evidence in their favor and decide whether admission of the [evidence at issue] could have given the State an unfair advantage. Ultimately, [the court should] consider whether the jury could judge the evidence fairly in light of the admission of the [evidence at issue].

Id. at 1226; *see also Carr*, 136 S. Ct. at 645-46; *Romano*, 512 U.S. at 13-14. Further, in determining whether "the jury could judge the evidence fairly," the court should consider the instructions to the jury. *Carr*, 136 S. Ct. at 645; *Romano*, 512 U.S. at 13.

Applying that framework here, Rogers' written reflections on race, politics, and his own character and predispositions "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due

process." More particularly, that evidence gave the State an unfair advantage and precluded the jury from fairly judging whether aggravating factors existed, whether those factors were sufficient to justify the death penalty, and whether they outweighed the mitigating circumstances.

As an initial matter, portions of Rogers' letters addressed the events of March 30, Rogers' involvement in those events, and his motives for being involved. [R2840-41, 2843, 2850] And those portions were relevant because they had a logical tendency to prove that Rogers was guilty of first-degree murder and certain aggravating circumstances existed. Thus, those portions gave the State no unfair advantage.

But portions of the letters also contained Roger's reflections on race, politics, and his own character and predisposition. For instance, Rogers' fulminated broadly concerning race and politics.

> Yeah all that marching and demonstrating is cool. But I felt like somebody had to send a clear message to the white man. My message is any time you kill an innocent blacc [sic] kid for no reason other than your own sick psychotic racist hatred, that sword can cut in both directions. White people bleed just like us. If you can kill us and shoot us down in the streets like dogs we can kill you too. So unless you want a bloody race war let this serve as a deterrent to you. . . . It's 2013 and we have the 1st African-American president in this country[,] who is disrespected on a regular basis by his so-called colleagues in the political arena based on the color of his skin.

[R2841]

Rogers also mused concerning his own character and predispositions.

I am a Blacc [sic] Revolutionary. A member and leader of the Midnight

> Crips under that blacc flag. Fuccdaovaside! And I'll say it twice: Fuccdaovside! That's real. I'm a ruthless, cold-blooded, cut throat gangsta. Blood killer and killer of any and everything that go against the Crips Gang, or the people in general.

[R2840-41]

Rogers later continued to reflect on his character and predispositions, as well as the dangers those qualities might pose in the future.

> [T]he truth is life and living has made me cold and hard. There's certain things that a man know's [sic] about himself. I know that I'm a sociopath by definition. I have no remorse, regard or regret for nothing I've done in my life. It is what it is. I have the tendency to be very violent with little or no provocation. A problem I see that is only getting worse as the years go by. I don't have any mental health problems. My thing is this [sic] I have a life sentence and I know that I will never see day light again. All I think about everyday is who I can hurt and who I can kill. This time it was Ricky Dean Martin. Next time it may be corrections staff. I don't feel no sympathy toward Mr. Martin. Fucc [sic] him in my book.

[R2842]

Finally, after deriding the prosecutors as "dumb crackers," [R2843, 2845], Rogers addressed the elected state attorney directly:

> You a dumb azz (sic) craccer (sic) just like your president Donald J. Trump. I basically threw you & your flunkies a softball to hit a home run & get an easy prosecution & conviction. But you craccers are lazy & incompetent. Y[']all do all this grand standing for the public based on money & politics. But deep down you don't give a fucc (sic) about what's in the best interest of justice. . . . For you to just sit on your lazy azz & let me get away with killing that punk azz craccer is morally wrong and reprehensible in your part. Truthfully I don't give a fucc. I'm Gucci no matter how it goes. But I love to put the mirror in front of you craccer[']s eyes to force you to see your own hypocrisy. Mothafucc (sic) the white man!

[R2849-50]

Those portions of Rogers' letters were not relevant because they had no logical tendency to prove Rogers committed first-degree murder or certain aggravating factors existed. But assume those portions had some logical tendency to prove Rogers killed Martin while serving a prison sentence. Even then, the State had little need for such evidence because Rogers had admitted as much in his testimony below, in his earlier testimony introduced below, and in the portions of the letters addressing his involvement in the events of March 30.

Further, and most critically, Roger's reflections on race, politics, and his own character had no logical tendency to prove the following aggravating factors: (1) prior violent felony conviction; (2) committed while engaged in kidnapping; (3) especially heinous, atrocious, or cruel; and (4) cold, calculated, and premeditated.

On the other hand, Roger's reflections on race, politics, and his own character and predispositions provided the State with a significant unfair advantage. They inflamed the jury. They appealed improperly to the jury's emotions.

More particularly, any jury will look unfavorably on a defendant convicted of first-degree murder who threatens "a bloody race war"; claims to be a "ruthless, cold-blooded, cut throat gangsta" and "sociopath"; suggests he has "no remorse, regard, or regret" and may kill a corrections officer in the future; and refers to President Donald J. Trump, the elected state attorney, and the prosecutors as "dumb ass

crackers." Thus, the portions of Rogers' letters containing his reflections suggested the jury should sentence Rogers to death based upon inflamed emotions, rather than evidence establishing that aggravating factors existed, those factors were sufficient to justify the death penalty, and they outweighed the mitigating circumstances.

Further, there was insufficient evidence for the court to instruct the jury on, and for the jury to later find, the cold, calculated, and premeditated aggravating factor. *See* discussion *infra* pp. 70-77. And, while there may have been evidence to support other aggravating factors, there was also ample evidence of mitigating circumstances.

For instance, Rogers suffered from organic brain damage, including frontal lobe deficits. [R6512-24, 6526-27, 6530-35, 6577-83, 6587, 6591-94, 6627-28] Further, as a child, he was abandoned by his parents, moved to numerous foster and group homes, and admitted to a psychiatric hospital. [R6413, 6416, 6420, 6449, 6452-53, 6477, 6618-27, 6636-38, 6743-47] As a result, multiple experts explained at trial, Rogers struggled with controlling his impulses, regulating his emotions, and exercising good judgment. [R6411, 6524-26, 6533-34, 6547, 6581, 6586, 6602, 6650-52, 6709]

Finally, the jury was instructed: "No facts other than proven aggravating factors may be considered in support of a death sentence." [R3073, 7000] And juries are presumed to follow their instructions. *Carr*, 136 S. Ct. at 645. But Rogers' reflections–including his threats of "a bloody race war"; claims to be a "ruthless,

cold-blooded, cut throat gangsta" and "sociopath"; suggestions that he has "no remorse, regard, or regret" and may kill a corrections officer in the future; and references to President Donald J. Trump, the elected state attorney, and the prosecutors as "dumb ass crackers"–were "evidence of the most persuasive sort, ineradicable, as a practical matter, from the jury's mind," *id.* And the admission of that type of evidence should justify "a narrow departure from the presumption that jurors follow their instructions," *id.* *See Bruton*, 391 U.S. at 135.

It appears this Court has had few, if any, opportunities to specifically determine whether evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." But the Tenth Circuit's decision in *Spears*, 343 F.3d at 1215, should persuade this Court to conclude that Roger's reflections had that effect here.

In *Spears*, during the second phase of a capital trial, the trial court admitted crime-scene photos. *Id.* at 1225. The photos depicted the victim's "numerous post-mortem stab wounds, large gash wounds, exposed intestines, and swollen face and black eye." *Id.* at 1228.

On appeal, the Tenth Circuit concluded: "This highly inflammatory evidence fatally infected the trial and deprived Spears and [his co-defendant] of their constitutional rights to a fundamentally fair sentencing proceeding." *Id.* at 1229. The Tenth Circuit reasoned:

> Because the heinous, atrocious, or cruel aggravator focuses on [the victim]'s conscious suffering, and the evidence showed [the victim here] died or lost consciousness early on in the beating, the photographs of all of his injuries were unduly prejudicial at the second phase. Instead, the gruesome photographs potentially misled the jury, as they necessarily had a strong impact on the jurors' minds. . . .
>
> Even if the photographs were minimally relevant to the heinous, atrocious, or cruel aggravator, the photographs' prejudicial effect outweighed their probative value. Important to this conclusion is the fact that the State waited until the second stage to introduce the photographs. By contrast, the State introduced comparatively innocuous photographs at the first stage, seeming to deliberately await the second state to present the more gruesome photographs solely for their shock value. Because the photographs were the primary aggravating evidence specifically presented at the second stage, they constitute a major part of the State's second-stage case.
>
> [A] paucity of evidence supported the heinous, atrocious, or cruel aggravating factor. As to the "avoid arrest or prosecution aggravator" found by the jury, while there was some evidence to support the aggravator, [that] evidence was not particularly strong. When viewed together with the mitigation evidence . . . , we conclude that such evidence was not sufficiently strong standing alone such that the jury would have returned a sentence of death.

Id. at 1228.

Similar to the photos of the victim's injuries in *Spears*, Rogers' reflections on race, politics, and his own character had, at best, minimal relevance to the aggravating factors. On the other hand, like the photos there, Rogers' reflections here were unduly prejudicial and had a strong impact on the jury because they inflamed the jury's emotions.

Further, in both cases, while there may have been evidence to support multiple aggravating factors, there was also ample evidence of mitigating circumstances. On

that note, in the present case, "[o]nly one . . . vote was needed for a life [sentence]," *Harris v. State* 843 So.2d 856, 869 (Fla. 2003). Thus, if the evidence in *Spears* gave the State an unfair advantage and precluded the jury from fairly judging whether aggravating factors existed, whether those factors were sufficient to justify the death penalty, and whether they outweighed the mitigating circumstances, the same is true here as well.

B. The court's admission of Rogers' letters in their entirety amounted to fundamental error.

"[A]n error is deemed fundamental 'when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.'" *F.B.*, 852 So.2d at 229; *see also Wheeler v. State*, 4 So.3d 599, 607 (Fla. 2009). And, at least where the admission of victim impact evidence is concerned, "the analysis for fundamental error" parallels the analysis for determining a violation of "due process rights in the penalty phase of a capital trial." *Wheeler*, 4 So.3d at 607; *see also McGirth v. State*, 48 So.3d 777, 791 (Fla. 2010). Finally, "'[f]undamental error is not subject to harmless error review.'" *Ramroop*, 214 So.3d at 665.

Applying those standards here, the court's admission of Rogers' letters in their entirety went "to the foundation of the case or the merits of the cause of action and [was] the equivalent to a denial of due process," *F.B.*, 852 So.2d at 229. Put simply, in the context of the second phase of a capital trial, the "foundation of the case or the merits of the cause of action" revolves around whether aggravating factors exist,

whether those factors are sufficient to justify the death penalty, and whether they outweigh the mitigating circumstances. And, by inflaming the jury's emotions, Rogers' reflections on race, politics, and his own character precluded the jury from fairly judging that "foundation" or those "merits." By the same token, the court's admission of those reflections was more than "equivalent to a denial of due process." It actually denied Rogers due process. *See* discussion *supra* pp. 60-69.

The trial court admitted evidence that infected the second-phase trial with unfairness. Rogers' death sentence violates his right to due process. Amends. V, XIV, U.S. Const.; Art. I, § 9, Fla. Const.

III. Reversible Error Occurred When the Court Instructed the Jury on, and the Jury and Court Later Found, the Cold, Calculated, and Premeditated Aggravating Factor Because There Was Insufficient Evidence That the Killing Was the Product of Cool and Calm Reflection; Rogers Had a Careful, Prearranged Plan; and He Exhibited Heightened Premeditation.

"'A judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented.'" *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009); *see also McGirth*, 48 So.3d at 792 n.11. Further, "[w]hen reviewing claims alleging error in the application of aggravating factors . . . , this Court's role on appeal is to review the record to determine whether the trial court applied the correct rule of law for each aggravator and, if so, whether competent, substantial evidence exists to support its findings." *McGirth*, 48 So.3d at 792. Of note, "'competent substantial evidence' is tantamount to 'legally sufficient

evidence' and '[i]n criminal law, a finding that evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt.'" *Williams v. State*, 967 So.2d 735, 764 (Fla. 2007).

To establish the cold, calculated, and premeditated aggravating factor, the State must prove beyond a reasonable doubt that the homicide "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." § 921.141(2)(a), (6)(i), Fla. Stat. (2017). The "focus of the CCP aggravator is the manner of the killing, not the target.'" *Doorbal v. State*, 837 So.2d 940, 961 (Fla. 2003).

With that in mind, this Court has announced a four-pronged test:

> In order to establish the CCP aggravator, the evidence must show: (1) "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)"; (2) "the defendant had a careful plan or prearranged design to commit the murder before the fatal incident (calculated)"; (3) "the defendant exhibited heightened premeditation (premeditated)"; (4) "the defendant had no pretense of moral or legal justification."

Williams v. State, 37 So.3d 187, 195 (Fla. 2010).

As to the first prong, the "'cold' element 'generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts.'" *Baker v. State*, 71 So.3d 802, 819 (Fla. 2011). "'[E]xecution-style killing is by its very nature a 'cold' crime.'" *Id.*

As to the second prong, the "'calculated element applies in cases where the

defendant arms himself in advance, kills execution-style, plans his actions, and has time to coldly and calmly decide to kill.'" *Id.*

As to the third prong, "'CCP involves a much higher degree of premeditation than is required to prove first-degree murder.'" *Williams*, 37 So.3d at 195. "'Heightened premeditation necessary for CCP is established where . . . the defendant had ample opportunity to release the victim but instead, after substantial reflection, acted out the plan he had conceived during the extended period in which [the] events occurred.'" *Baker*, 71 So.3d at 819.

Applying those standards here, the decision by the court to instruct the jury on, and the decisions by the jury and court to later find, the cold, calculated, and premeditated aggravating factor were not supported by competent, substantial evidence. More specifically, the evidence was insufficient to establish beyond a reasonable doubt that (1) Martin's killing was the product of cool and calm reflection, (2) Rogers had a careful, prearranged plan to murder Martin, and (3) Rogers exhibited heightened premeditation.

A. Rather than showing that Martin's killing was the product of cool and calm reflection, the evidence established that his killing was an act prompted by emotional frenzy and a fit of rage.

As a general matter, Rogers was easily agitated and angered, struggled to control his impulses, and had difficulty regulating his aggression. [R6411, 6415, 6524-26, 6547, 6581, 6586, 6602, 6651-52] With that in mind, when Rogers was

moved into the cell with Martin on March 30, he immediately noticed the cell was filthy. [R2910, 5987] As a result, in Rogers' words, "to see a grown man living in such filthy conditions disgusted me to my core, and I was agitated and it pissed me off that I had to clean up after a grown man." [R5987]

Rogers immediately berated Martin. [R2911, 2928-29, 5987] Further, "the more [Rogers] got to learn about" Martin, the more he realized that Martin was "everything [Rogers] despised in life," including a "snitch" and a "coward." [R5991] Rogers later noticed Martin "cutting" himself. [R2913, 2930-31, 5988]

In response, Rogers jumped down from his bunk and yelled at Martin "to tighten his game up" and "stop acting like a bitch and be a man." [R2913, 2931-32, 5988] Rogers kept yelling at Martin. [R5988] When Martin refused to stop cutting, Rogers launched a frenzied attack in which he punched Martin, kicked him, and stomped his head into the ground. [R2917-19, 2922-23, 2932-35, 2939-40, 5988-89, 5995-96] Put simply, Rogers' "'loss of emotional control is evident from the facts,'" *Baker*, 71 So.3d at 819.

For its part, the court focused on Rogers' "merciless beating" of Martin. [R3594] And that beating was merciless in the sense that it was a cause of pain and suffering. But that beating was *not* merciless in the sense that it was an unemotional, execution-style killing.

With respect to the evidence being insufficient to establish that Martin's killing was the product of cool and calm reflection, the present case is analogous to

Middleton v. State, 220 So.3d 1152 (Fla. 2017). There, Middleton procured a knife and walked over to the victim's residence in order to rob her. *Id.* at 1171. When the victim refused to give Middleton money, a struggle ensued, and the victim was stabbed to death. *Id.*

On appeal, this Court concluded that "the evidence is inconsistent with the murder being a product of cool and calm reflection." *Id.* In support of that conclusion, this Court reasoned: "It was during the course of th[e] struggle when Middleton formulated his intent to kill [the victim]. Middleton's behavior at the time of the murder can be aptly described as murder committed in a frenzied rage or during a heated struggle following the victim's refusal to give him money." *Id.*

Similar to the effect on Middleton of the victim's refusal to give him money, Martin's failure to keep his cell clean and refusal to stop "cutting" himself triggered an emotional frenzy and a fit of rage on Rogers' part. And, as Middleton did there, Rogers formulated his intent to kill Martin during the ensuing struggle here. Further, like Middleton's behavior, Rogers' "behavior at the time of the murder can be aptly described as murder committed in a frenzied rage," *id.* As a result, if the evidence in *Middleton* was insufficient to establish that the murder was the product of cool and calm reflection, the evidence here was as well.

B. While the evidence may have indicated Rogers was motivated to murder Martin–in part–by his race, the evidence failed to establish that Rogers had a careful, prearranged plan to carry out that act.

As the court noted [R3594], Rogers had previously written: "when I heard

about the brutal, unjustified, racist shooting of that young brother Trayvon Martin I decided that I was going to kill the next white man that came across my path. Unfortunately it happened to be Ricky Dean Martin." [R2841] And, as the court also noted [R3594], Rogers testified that he "beat Mr. Martin up about the murder of Trayvon Martin." [R5990] Thus, Rogers may have been motivated to murder Martin by his race.

But that was not the only motive. The court ignored that, immediately after mentioning Trayvon Martin, Rogers testified: "there were also other factors." [R5990] For instance, after meeting Martin and looking him "in his eyes," Rogers felt strongly that Martin was "everything [Rogers] despised in life," including a "snitch" and a "coward." [R5990-91] And the presence of those additional motives indicated that Martin's killing was less the result of a careful, prearranged plan and more the result of an impulsive, reactive decision.

But assume Rogers' sole motivation for killing Martin was his race. Even then, the evidence failed to establish that Rogers had a careful, prearranged plan to carry out that act. For instance, there was no indication that Rogers attempted to get moved into Martin's cell. More generally, there was no indication that Rogers attempted to attack another white inmate or get moved into another white inmate's cell in the month between Trayvon Martin's death and Martin's death.

For its part, the court appeared to believe that Rogers' "plan" involved "wait[ing] for his opportunity to kill a white man in Santa Rosa Correctional

Institution." [R3594] But waiting for an opportunity to kill a random member of a large group is, almost by definition, different from having a careful, prearranged plan to murder an individual. That is because a careful, prearranged plan necessarily requires more than just waiting for an opportunity. Instead, such a plan requires taking actions in advance to create, or at least take advantage of, an opportunity. Here, there was no evidence that Rogers took actions in advance to create, or take advantage of, an opportunity to kill Martin or any other white man.

With respect to the evidence being insufficient to establish that Rogers had a careful, prearranged plan to murder Martin, the present case is analogous to *Patrick v. State*, 104 So.3d 1046 (Fla. 2012). There, Patrick and the victim were laying naked in bed together. *Id.* at 1053. According to Patrick, the victim attempted anal sex, and Patrick told him to stop. *Id.* When the victim refused to stop, Patrick severely beat the victim, tied him up, and placed him in the bathtub where he was later found dead. *Id.* Prior to trial, Patrick stated that "he had planned to kill the victim." *Id.* at 1068.

On appeal, this Court acknowledged the trial court's reliance on Patrick's statement that "he had planned to kill the victim." *Id.* at 1067. But this Court still concluded that "there was no evidence of a careful plan." *Id.* In support of that conclusion, this Court reasoned: "Patrick did not procure the weapon in advance, did not lie in wait to attack [the victim], and did not appear to carry out the murder as a matter of course." *Id.* at 1068. This Court also appeared to appreciate that there was evidence Patrick had been provoked. *Id.*

Similar to Patrick, Rogers did not act in advance to take advantage of an opportunity to kill Martin. In addition, like Patrick, Rogers did not lie in wait to attack Martin. And in both cases, as opposed to the murder being carried out as a matter of course, there was evidence that a provocation precipitated the murder. Thus, if the evidence in *Patrick* was insufficient to establish that the defendant had a careful, prearranged plan to murder the victim, the evidence here was as well.

C. While the evidence may have indicated that Martin's killing was premeditated, the evidence failed to establish that Rogers exhibited heightened premeditation.

As the court noted [R3594], Rogers had previously written: "My intentions were to kill [Martin] in the cell that night." [R2480] And, when Martin refused to stop cutting himself, Rogers launched a frenzied attack in which he punched Martin, kicked him, and stomped his head into the ground. [R2917-19, 2922-23, 2932-35, 2939-40, 5988-89, 5995-96] Further, assume the attack lasted long enough to allow Rogers to reflect on a decision to kill Martin.

Even then, the evidence failed to establish that Rogers "had ample opportunity to release [Martin] but instead, after substantial reflection, acted out [a preconceived] plan,'" *Baker*, 71 So.3d at 819. In fact, the evidence demonstrated that, once Rogers reflected on an inmate's advice to stop beating Martin, Rogers stopped beating Martin. [R2918-19, 5989]

IV. Reversible Error Occurred When, In Finding and Weighing the Prior Violent Felony Conviction Aggravating Factor, the Court Considered Rogers' Indeterminate Use of Violence Because Rogers Had Not Been

Convicted of a Crime as a Result of Such Use of Violence.

"Because [this] issue involves the interpretation of a statute, this Court's review is de novo." *Polite v. State*, 973 So. 2d 1107, 1111 (Fla. 2007).

"Section 921.141, Florida Statutes, intended as it was to meet the constitutional infirmity of capital sentencing procedures explored in *Furman v. Georgia*, 408 U.S. 238 (1972), is designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible." *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976). Further, section 921.141 states: "Aggravating factors shall be limited to the following. . . ." § 921.141(6), Fla. Stat. (2017). As a result, "aggravating considerations must be limited to those provided for by the statute, and information must relate to one of the statutory aggravating [factors] in order to be considered aggravation." *Odom v. State*, 403 So.2d 936, 942 (Fla. 1981).

With that in mind, one statutory aggravating factor is: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." § 921.141(6)(b). In light of that language, this Court has concluded that section 921.141(6)(b) "specifically limits the evidence to that of a violent crime for which the defendant is actually convicted." *Donaldson v. State*, 722 So.2d 177, 184 (Fla. 1998); *see also Dougan v. State*, 470 So.2d 697, 701 (Fla. 1985).

Applying those standards here, the court determined that the evidence established beyond a reasonable doubt that Rogers had prior violent felony

convictions. [R3591-92] And it assigned "great weight" to that aggravating factor. [R3592] In the process, the court focused on Rogers' use of "illegal violence against other people." [R3591] In that context, it reasoned:

> In a letter to [the judge who presided in the earlier nolle prossed case], the Defendant stated "I have a tendency to be very violent with little or no provocation. A problem I see that is only getting worse as the years go by." These undisputed facts demonstrate that the Defendant used illegal violence against other people. The Defendant's pattern of criminal conduct has escalated to the point where the Defendant himself testified he murdered a cellmate because, in part, of the victim's "vibe."

[R3591-92]

But Rogers was not actually convicted of a violent crime as a result of his indeterminate use of "illegal violence against other people." Thus, such use of violence did not relate to the prior violent felony conviction aggravating factor. As a result, it should not have been considered by the court in finding and weighing that factor.

Two prior decisions of this Court should control the outcome on this issue. First, in *Provence* 337 So.2d at 783, the trial court found and weighed the prior violent felony aggravating factor. *Id.* at 786. In doing so, the court considered two armed robbery charges pending against Provence at the time of sentencing. *Id.* It also considered information indicating that, at the time of his arrest, Provence was "'in the process of ripping off a heroin addict.'" *Id.* On appeal, this Court concluded that the trial court erred. *Id.* This Court reasoned: "Clearly the language of [section 921.141 that defines the prior violent felony conviction aggravating factor] excludes

the possibility of considering mere arrests or accusations as factors in aggravation." *Id.*

Second, in *Odom*, 403 So.2d at 936, the trial court's "written sentencing findings state[d] that [it] considered [Odom]'s prior record, including numerous arrests and charges which did not culminate in criminal convictions." *Id.* at 942. On appeal, this Court concluded that "consideration of mere arrests and accusations as aggravating circumstances is precluded." *Id.* This Court reasoned: "information must relate to one of the statutory aggravating [factors] in order to be considered aggravation." *Id.*

In *Provence* and *Odom*, the defendant was not actually convicted of a violent crime as a result of his arrests and accusations. Similarly, Rogers was not actually convicted of a violent crime as a result of his indeterminate use of "illegal violence against other people." Thus, in all three cases, the information considered by the trial court in aggravation did not relate to the prior violent felony conviction aggravating factor. As a result, if the information should not have been considered by the trial court in finding and weighing that aggravating factor in those cases, the same is true here as well.

V. Reversible Error Occurred When the Court Considered the Proposed Mitigating Circumstances Because, Rather Than Thoughtfully and Comprehensively Analyzing Those Circumstances, the Court Summarily Addressed and Disposed of Them.

A "trial court's discretion is limited . . . by the principles of stare decisis."

McDuffie, 970 So.2d at 326. Further, a trial court "abuses its discretion if its ruling it based on an 'erroneous view of the law.'" *Id.*

With that in mind, "the sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). Further, section 921.141 provides: "In each case in which the court imposes a sentence of death, the court shall . . . enter a written order addressing . . . the mitigating circumstances . . . reasonably established by the evidence." § 921.141(4), Fla. Stat. (2017). Finally, in *Campbell v. State*, this Court declared:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. . . The court next must weigh the aggravating [factors] against the mitigating circumstances. . . .

571 So.2d 415, 419-20 (Fla. 1990).

More fundamentally, the "sentencing order must reflect 'reasoned judgment' by the trial court as it weighed the aggravating and mitigating circumstances." *Oyola v. State*, 99 So.3d 431, 446 (Fla. 2012). And a "trial court's findings . . . must be of 'unmistakable clarity.'" *Lucas v. State*, 568 So.2d 18, 24 (Fla. 1990).

As this Court has more fully explained:

> While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, *death is different*. Since the ultimate penalty of death

> cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to "expressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence."
>
> This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of. . . . Clearly then, the [sentencing order] can only satisfy Campbell and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. . . . If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

Walker v. State, 707 So.2d 300, 319 (Fla. 1997) (internal citations omitted).

In the present case, the trial court failed to thoughtfully and comprehensively analyze any of the proposed mitigating circumstances. More specifically, the court failed to expressly and specifically articulate *why* (1) nineteen circumstances were not proven, and (2) the other forty-nine circumstances, though proven, were given relatively limited weight. Instead, the court summarily addressed and disposed of all sixty-eight mitigating circumstances.

First, as to twelve mitigating circumstances,[8] the court simply stated (1) the circumstance was not found by the jury; (2) the court finds the circumstance was not proven; and (3) the circumstance is given no weight. [R 3595, 3599-3600, 3606-09] And when considering two of those circumstances, the court referred to the wrong

[8]Identified by number only, the twelve circumstances are: (1), (2), (19), (20), (21), (48), (52), (56), (60), (61), (63), and (65). [R 3595, 3599-3600, 3606-09]

circumstance. [R3599, 3607] Thus, the court offered no reasoning or analysis in support of its findings that the circumstances were not proven. Further, at least some of the court's findings were made in haste and without care.

Second, as to another forty-nine mitigating circumstances,[9] the court simply stated (1) the circumstance was or was not found by the jury; (2) based on the testimony of a particular witness or witnesses, the court finds the circumstance was proven; and (3) the circumstance is given relatively limited weight. [R3596-3610] A typical reference to the testimony of a particular witness or witnesses was: "Based on the testimony of Dr. Rubino, the Court finds that Defendant has proven by the greater weight of the evidence that he suffers from brain atrophy." [R3609] Thus, other than a cursory allusion to generic testimony, the court offered no reasoning or analysis in support of its findings that the circumstances were to be given relatively limited weight.

Finally, as to the remaining seven mitigating circumstances,[10] the court stated (1) the circumstance was not found by the jury; (2) the court finds the circumstance was not proven; and (3) the circumstance is given no weight. [R3596, 3598, 3601-02,

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[9]Identified by number only, the forty-nine circumstances are: (4), (5), (7), (8), (9), (10), (11), (12), (14), (15), (16), (17), (18), (22), (23), (24), (25), (26), (28), (29), (30), (31), (32), (34), (35), (36), (37), (38), (39), (40), (41), (42), (43), (44), (46), (47), (49), (50), (51), (53), (54), (55), (57), (58), (59), (62), (66), (67), and (68). [R3596-3610]

[10]Identified by number only, the seven circumstances are: (3), (6), (13), (27), (33), (45), and (64). [R3596, 3598, 3601-02, 3605, 3609]

3605, 3609] But, in each such instance, the court also provided a one-sentence observation related to evidence presented at trial. [R3596, 3598, 3601-02, 3605, 3609] A typical such observation was: "At best, the testimony of Dr. Dunn established that extreme poverty affects development because of poor nutrition." [R3602] Thus, other than a passing comment on the evidence presented, the court offered no reasoning or analysis in support of its findings that the circumstances were not proven.

Two prior decisions of this Court dictate a conclusion that the court summarily addressed and disposed of all sixty-eight mitigating circumstances. First, in *Oyola*, 99 So.3d at 431, the trial court found that a proposed mitigating circumstance was not proven and other circumstances, though proven, were entitled to relatively limited weight. *Id.* at 446-47. In doing so, the court stated:

> The evidence did establish that the defendant suffered from Schizoaffective Disorder, Bipolar type, and that there was a history of mental illness in his family, but the evidence was insufficient to show that such mental condition impaired his ability to conform his conduct to the requirements of the law. These circumstances were only given slight weight . . . .

Id. at 447. The court also observed: "While the evidence did establish [serious drug abuse, an abusive home life as a child, and mental disorder], the Court only gives such circumstances slight weight . . . ." *Id.*

On appeal, this Court concluded that the court's "sentencing order violated the requirements articulated in *Campbell*." *Id.* This Court reasoned:

> [T]he 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.

Id.

Second, in *Jackson v. State*, 704 So.2d 500 (Fla. 1997), the trial court found that proposed mitigating circumstances were not proven. *Id.* at 506. It also essentially found that, even if proven, they were entitled to relatively limited weight. *Id.* In doing so, the court stated:

> 1. The crime for which the Defendant is to be sentenced was committed while the Defendant was under the influence of extreme mental or emotional disturbance. The defense suggested the defendant suffered a flashback of a childhood rape. The Court believes this testimony to be non-credible.
>
> 2. The capacity of the Defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was substantially impaired. The defense argues that this was due to self induced drugs and alcohol. The Court likewise believes this testimony to be of no significance.
>
> 3. Any other aspect of the Defendant's character or record and any other circumstance of the offense. The defendant had a difficult childhood that included sexual abuse and as an adult she suffered domestic violence and abused drugs and alcohol.
>
> Thus, this Court finds no statutory mitigating circumstances, furthermore no aspects of the Defendant's character is sufficient to be of a mitigating nature and no circumstance of the offense appears mitigating. Notwithstanding this, however, the Court concludes, in light of the aggravating circumstances found above, that even if one or all of the suggested mitigating circumstances existed that the Court's sentence would be no different than that announced below.

Id. (internal citations omitted).

On appeal, this Court concluded that the court's sentencing order violated "the dictates of *Campbell*." *Id.* This Court reasoned:

> With regard to the statutory mitigators, the sentencing order does not even refer to the testimony of the three experts who all opined that these mitigators existed. Nor does it refer to any evidence to the contrary. Instead, the order indicates without explanation that the trial court found all the testimony offered in support of the statutory mitigators noncredible . . . [A] more thorough explanation as to why the court rejected the expert testimony is necessary here . . . .
>
> The sentencing order also . . . merely lists the nonstatutory mitigators before rejecting them. The order should address the relevant testimony and explain why the experts' testimony, in conjunction with the testimony of Jackson's family and friends, does not support the nonstatutory mitigators the court rejects.

Id. at 506-07.

Like the court in *Oyola*, the court in the present case failed to "expressly evaluate, in a well-reasoned fashion, how the evidence presented failed to support" the proposed mitigating circumstances, *Oyola*, 99 So.3d at 447. Instead, again like the court there, the court here "merely gave a brief summary of its findings," *id.* More specifically, in both cases, the court failed to "expressly and specifically articulate why the evidence presented failed to support" certain mitigating circumstances, as well as "why th[e] evidence warranted the allocation of slight weight" to other circumstances, *id.*

By the same token, similar to the sentencing order in *Jackson*, the sentencing order in the present case failed to offer thorough explanations as to why certain

mitigating circumstances were not proven and why other circumstances, though proven, were given relatively limited weight. In particular, like the order there, the order here failed to "address the relevant testimony," *Jackson*, 704 So.2d at 507. As a result, if the trial court in those cases failed to thoughtfully and comprehensively analyze the proposed mitigating circumstances, the same is true here as well.

The trial court failed to properly consider the mitigating circumstances. Rogers' death sentence violates his right to be free from cruel or unusual punishments. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

VI. Rogers' Death Sentence Is a Disproportionate Punishment Because, Even if His Case Is Among the Most Aggravated of First-Degree Murder Cases, It Is Not Among the Least Mitigated of Such Cases.

"The purpose of this Court's proportionality review is to 'foster uniformity in death-penalty law.'" *Tai A. Pham v. State*, 70 So.3d 485, 499 (Fla. 2011). This Court has elaborated:

> "Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." This Court's proportionality review involves "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." "This entails a qualitative review . . . of the underlying basis for each aggravator and mitigator rather than a quantitative analysis."

Phillips v. State, 207 So.3d 212, 221 (Fla. 2016) (internal citations omitted).

"'In performing a proportionality review, a reviewing court must never lose

sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders.'" *Id.* at 220-21; *see also State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973). Thus, in conducting such a review, "this Court conducts a two-pronged inquiry to 'determine whether the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders.'" *Davis v. State*, 121 So.3d 462, 499 (Fla. 2013); *see also Heyne v. State*, 88 So.3d 113, 126 (Fla. 2012).

Applying those standards here, even if Rogers' case is among the most aggravated of first-degree murder cases, it is not among the least mitigated of such cases. As an initial matter, among other mitigating circumstances, the court found that Rogers was emotionally abused and abandoned by his mother. [R3597-98] In addition, it found that he moved to multiple foster homes, which had a psychological impact on him, and was admitted to a children's psychiatric hospital. [R3602-04] The court ultimately recognized that Rogers' "childhood was a 'perfect storm'" and he "experienced toxic stress." [R3610]

The court also found that Rogers suffered from brain atrophy and had a history of multiple head injuries starting as a child. [R3596, 3609] It further found that he suffered from brain damage, including frontal lobe damage; suffered from neurological deficits; and had signs of a presumptive diagnosis of CTE. [R3604, 3607-08]

With that in mind, at trial, Dunn indicated that Rogers' "family situation was

one of the worst [Dunn had] ever confronted." [R6412-13] And he concluded that Rogers had "serious attachment issues." [R6415] Dunn also emphasized that Rogers had "very difficult impulse control." [R6411]

For his part, Rubino stressed that Rogers suffered from "traumatic brain injury," which was centered on Rogers' frontal lobe. [R6522, 6524, 6535] He explained that, as a result, Rogers was impulsive, did not appreciate consequences, had a decreased tolerance for stress, and had an increased tendency to get agitated. [6524, 6533] Rubino particularly emphasized that impulse control was "a pervasive problem" for Rogers. [R6525-26, 6547]

Wu also emphasized that Rogers had sustained frontal lobe damage. [R6577-78] He explained:

> when you have this kind of damage, this is associated with significant behavioral dysfunction, including impaired ability to regulate anger or aggression and an impaired ability to calibrate a response so that one becomes neurologically impaired in terms of one's ability to calibrate one's response.

[R6586, 6602]

For her part, Harper stressed that Rogers' psychological struggles were compounded by the organic "deficit in [his] frontal lobe . . . which is like [the] decision-making center." [R6651, 6709] And, while Prichard testified that Rogers suffered from ASPD [R6736-62], the court did not refer to his testimony. [R3588-3611] On the other hand, the court repeatedly referred to the testimony of Dunn, Rubino, Wu, and Harper. [R3596-3610]

Further, at the *Spencer* hearing, Toomer made clear that Rogers suffered from both toxic stress syndrome and traumatic brain injury. [R4050-51] As a result, Toomer emphasized, Rogers was "an individual who has a lifelong pattern of impairment, who is unable to manage stress, who is unable to respond to unanticipated stressors, whose human reflex for survival remains elevated or easily triggered." [R4052] No expert rebutted Toomer's opinion at the *Spencer* hearing. [R4039-65]

Finally, this Court has found death to be disproportionate in cases where the extent of mitigation was essentially comparable to the extent of mitigation here. For instance, in *Larkins v. State*, this Court found death to be a disproportionate penalty for first-degree murder. 739 So.2d 90, 95 (Fla. 1999). There, the trial court found "statutory" mitigating circumstances, and Larkins' intelligence was below-average. *Id.* at 94. But on appeal, this Court focused at length on Larkins' "extensive history of mental and emotional problems." *Id.*

Most critically, Larkins suffered from organic brain damage. *Id.* As a result, it was "difficult for him to control his behavior." *Id.* He was "easily irritated by events that would not normally bother other people." *Id.* And he had "poor impulse control." *Id.*

This Court also found death to be a disproportionate penalty for first-degree murder in *Crook v. State*, 908 So.2d 350 (Fla. 2005). There, the trial court found "statutory" mitigating circumstances, including Crook's age, and Crook had a

substance abuse problem. *Id.* at 355, 358. But on appeal, this Court also focused at length on Crook's organic brain damage, including to his frontal lobe; his "abusive childhood" and "disadvantaged home life"; and his "diminished control over his inhibitions." *Id.* at 358.

Like Crook, Rogers endured an abusive and disadvantaged childhood. In fact, Rogers' childhood was a "perfect storm" in which he experienced "toxic stress." Further, like both Larkins and Crook, Rogers suffered from organic brain damage, including to his frontal lobe. In fact, Rogers' brain had atrophied.

Most critically, like both Larkins and Crook, Rogers struggled to regulate his emotions and control his behavior. Like them, he was easily irritated. And like them, he had poor impulse control.

Organic brain damage is immutable. And the "fact that an immutable aspect of the defendant's character or background has contributed to making him or her dangerous is precisely why the factor mitigates responsibility in the calculus of capital punishment." *Perez v. State*, 919 So.2d 347, 383 (Fla. 2005) (Pariente, J., concurring specially). With that in mind, even if some mitigating circumstances present in *Larkins* and *Crook* were not present here, the extent of mitigation there was essentially comparable to the extent of mitigation here. As a result, if those cases were not among the least mitigated of first-degree murder cases, then neither is the present case.

The trial court imposed a disproportionate punishment. Rogers' death sentence

violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

CONCLUSION

A few principles bear repeating. Though society has "interests in the reliability of jury verdicts," *Mullaney*, 421 U.S. at 699, the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett*, 438 U.S. at 604. And the "aim" of due process is "to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba*, 314 U.S. at 236. Finally, "fair and deliberate consideration by a trial judge . . . is particularly important in a capital case because . . . *death is different*." *Walker*, 707 So.2d at 319.

With that in mind, various errors demand reversal here. First, the court failed to instruct the jury to determine multiple elements of capital murder beyond a reasonable doubt. Second, the court's admission of Rogers' letters in their entirety "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." Third, the decision by the court to instruct the jury on, and the decisions by the jury and court to later find (and weigh), the cold, calculated, and premeditated aggravating factor were not supported by the evidence.

Fourth, in finding and assigning great weight to the prior violent felony conviction aggravating factor, the court improperly considered Rogers' indeterminate

use of violence. Fifth, rather than thoughtfully and comprehensively analyzing the mitigating circumstances, the court summarily addressed and disposed of them. Finally, Rogers' death sentence is a disproportionate punishment for first-degree murder.

Rogers' death sentence should be vacated. This case should be remanded for imposition of a life-without-parole sentence. Alternatively, this case should be remanded for a new second-phase trial. At a minimum, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Jennifer A. Donahue, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Appellant, Shawn Rogers, #166626, Florida State Prison, P.O. Box 800, Raiford, FL 32083, on this 11th day of September, 2018.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

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