IN THE SUPREME COURT OF FLORIDA

SHAWN ROGERS,

Appellant,

v.

CASE NO. SC18-150
Lower Tribunal No.
2017CF000804
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations in this brief will be designated as follows: the trial record shall be referred to as "R." followed by the page number and Appellant's brief shall be referred to as "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Background

Jury selection took place on July 31, 2017 and August 1-2, 2017. The guilt phase of the trial took place on August 3-4, 7-8, 2017. On August 8, 2017, the jury found Appellant guilty of Count 1, first degree premeditated murder or first-degree felony murder and, guilty of Count 2, kidnapping to terrorize or inflict bodily harm. (R. at 6125). The penalty phase took place on August 11, 14-17, 2017. On August 17, 2017, the jury unanimously recommended that Appellant be sentenced to death after unanimously finding that the five aggravating factors were proven beyond a reasonable doubt, unanimously finding that those aggravating factors were sufficient to warrant the death penalty, unanimously finding that those aggravating factors outweighed the mitigating circumstances. (R. at 7071, 7073, 7088-89). The Spencer[1] hearing took place on November 3, 2017. (R. at 4039-77). The judge followed the jury's recommendation and sentenced Appellant to

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

death, which was announced in court on December 18, 2017. (R. at 4078-83). The Sentencing Order was entered the same day. (R. at 3588-3612).

Appellant represented himself throughout the guilt phase and for a majority of the penalty phase. The judge conducted a Faretta[2] inquiry at the beginning of each day of the proceedings. (R. at 3682-87, 3773-83, 4086-97, 4106-14, 4478-83, 5021-27, 5323-30, 5580-85, 5729-30, 5791-96, 5961-66, 6143-50, 6230-38). On July 11, 2017, after both the office of the public defender, and the office of regional conflict counsel withdrew from representing Appellant due to conflicts of interest, the judge appointed Mr. Ken Brooks as standby counsel to assist the Appellant. (R. at 58-62, 89-90, 3688-91, 4094-96). Although Mr. Brooks was not qualified to represent defendants facing a capital sentence under Florida Rule of Criminal Procedure (Fla. R. Crim. P.) 3.112, the judge made specific findings regarding Mr. Brooks' 26 years of experience as a criminal defense attorney, which includes experience as lead counsel on three murder cases and several attempted murder cases. (R. at 89-90). After penalty phase testimony concluded on August 14, 2017, Appellant indicated that he no longer wished to represent himself. (R. at 6492). Standby counsel, Mr. Brooks, took over the case. (R. at 6496).

[2] Faretta v. California, 422 U.S. 806 (1975).

Guilt Phase

On March 30, 2012, Appellant, Shawn Rogers, and inmate Ricky Martin were put together in a cell at the Santa Rosa Correctional Institution at approximately 1:00-1:30 p.m. (R. at 5441, 5597). Rogers and Martin were both asked if they had a problem with the move, and they both indicated that they did not. (R. at 5597).

At 7:00 p.m., a routine security check was conducted. (R. at 5418, 5425). Both Appellant and Martin were secured in their cell and in good health. (R. at 5427). At approximately 7:10 p.m., a disturbance, including many inmates shouting, occurred in the wing where Appellant and Martin were housed. (R. at 5387). One of the correctional officers attempted to ascertain the cause of the disturbance. (R. at 5388). When the correctional officer arrived at Appellant's cell, Appellant indicated that Martin was "cutting" (self-harming) himself. (R. at 5389). The correctional officer observed Martin lying on the ground with a prayer rug covering most of his body. (R. at 5390). The prayer rug covered Martin's head down to his waist and Martin appeared to be lying on his back with his hands behind his back, his elbows slightly protruding from under the rug, and oriented with his feet closest to the door. (R. at 5392). The officer directed Martin to show his hands and stop cutting himself, but Martin did not respond. (R. at 5390-91). The officer could see blood on the floor around Martin and on the walls beside him. (R. at 5391). The officer deployed a

chemical agent, or pepper spray, to Martin's exposed elbow through the handcuff portal in the cell door in an attempt to stop Martin from cutting himself. (R. at 5391). In reaction to the spray, Martin rolled onto his side and the officer could see that Martin's hands were tied behind his back with white pieces of cloth. (R. at 5393). The officer then called for assistance and restrained Rogers with handcuffs while awaiting backup before opening the cell door. (R. at 5393-94). Once the cell door was opened, Appellant was removed to an adjacent shower area. (R. at 5394, 5444, 5457). One inmate observed Rogers drop a small object in the drain of the shower. (R. at 5846-47).

Once the officers entered the cell and removed the prayer rug from Martin, they observed Martin with a string tied around his neck, hands tied behind his back, feet tied together, pants pulled down, and a pair of boxers over his head. (R. at 5394-95, 5431, 5436, 5443, 5457-58, 5461). Once the boxers were removed, it became apparent that Martin had severe facial injuries. (R. at 5395). The nurse was called and determined that Martin needed immediate medical attention. (R. at 5397, 5432). Martin was unresponsive, and his breathing was becoming increasingly labored. (R. at 5397-98, 5432, 5444). Martin was placed on a stretcher and carried to the prison's on-site emergency room. (R. at 5402, 5461).

At the on-site emergency room, a registered nurse evaluated Martin. (R. at 5477, 5479). She noticed that Martin was having difficulty breathing, was unconscious, and appeared to have severe brain damage as he was having a seizure. (R. at 5479). Martin was gurgling blood in his mouth and was turned on his side to have the blood suctioned out of his mouth. (R. at 5489). When Martin was turned on his side, brain matter or bodily fluids came out of his ear and the nurse observed that part of one ear was missing. (R. at 5481). Because of the severity of his injuries, Martin was transported from the Santa Rosa Correctional Institution to Sacred Heart Hospital for further treatment. (R.at 5481).

Martin was admitted to Sacred Heart Hospital with extensive head injuries, which included swelling and bleeding in his brain. (R. at 5502). Martin was diagnosed with an intracranial hemorrhage, caused by head injuries, with a poor prognosis. (R. at 5514). He did not have any neurological response and was placed on a ventilator due to respiratory failure. (R. at 5505, 5514). Over the next few days, his neurological condition continued to deteriorate. (R. at 5506). In addition to the neurological and respiratory problems worsening, Martin developed pneumonia. (R. at 5506). Nine days after being severely beaten by Appellant, Martin was declared brain dead and taken off life support. (R. at 5507). At 11:36 a.m. on April 8, 2012, Martin was pronounced dead. (R. at 5507).

The autopsy of Martin revealed that externally, he had several injuries to his face and scalp caused by blunt force trauma, and wounds made by a sharp weapon on his chest and left upper extremity. (R. at 5707-08, 5722, State's Exhibits 1-14). Martin's brain was severely injured, with subdural hemorrhaging, or bleeding on the brain, apparent. (R. at 5713, 5716). The medical examiner testified that it was possible that Martin's injuries could have been sustained in less than five minutes. (R. at 5741). The medical examiner opined that the cause of Martin's death was "blunt impact of head" and the manner of death was "homicide." (R. at 5727).

Regarding the incident, Appellant claimed that when he was transferred into Martin's cell, it was filthy. (R. at 5535, 5988). Appellant started cleaning the cell and "talking shit" while doing so. (R. at 5536). Appellant called Martin "a dirty-ass cracker and filthy motherfucker." (R. at 5987). Then Martin started cutting himself and yelling. (R. at 5539). Martin felt he needed to get moved out of the cell away from Rogers and was likely using the cutting to try to get transferred to the medical wing. (R. at 5547). Appellant told Martin to "stop acting like a little bitch" and stop cutting or he "might put [his] foot in [Martin's] ass." (R. at 5548, 5988). Martin would not stop cutting, so Appellant punched him in the face and "it went on from there" as Rogers "started kicking his ass." (R. at 5539, 5988). Appellant punched

him four times and Martin fell. (R. at 5540). Appellant then kicked Martin in the face and "stomped his head into the concrete several times, probably six or seven times. He screamed a high-pitched scream like a girl." (R. at 5540, 5988). Martin attempted to get back on his feet by pushing up on the wall with his hands, leaving bloody handprints on the walls. (R. at 5540, 5988). Appellant felt that if Martin kept trying to get up, then he was "going to keep whooping his ass." (R. at 5541). Appellant described it as "kind of like when you step on a roach" that "they still be moving." (R. at 5553). Appellant admitted that Martin was "helpless" and "never got a single punch in or even really got the chance to try." (R.at 5551). Because Martin kept trying to get up, Appellant used torn bedsheets to tie his hands behind his back. (R. at 5553, 5988). Appellant kicked him in the face and said, "this is for Trayvon Martin, motherfucker," and for Martin Luther King, Emmet Till and "all the other black people you crackers done killed." (R. at 5988-89, 5995-96). Appellant also tied Martin's feet together and put a strip around his mouth to try to stop Martin from screaming, but it came off and ended up around Martin's neck. (R. at 5554). Appellant was not concerned about the guards hearing Martin, he just "didn't like the sound" of Martin screaming. (R. at 5554). Appellant admitted that he "beat the shit out of" Martin. (R. at 5549).

Appellant admitted pulling Martin's pants down as "a message to other people" that if "you try to step up like this, this is what's going to happen to you." (R. at 5542). Appellant then spanked Martin and yelled "this is some sweet cracker ass." (R. at 5555). Appellant wished to enrage Martin's "dumbass gang brothers." (R. at 5989). Explaining why he spanked Martin, Appellant relayed, "that is just how prison is" and that if "people lose a fight, they get embarrassed." (R. at 5555). While beating Martin, Appellant yelled "this is for Trayvon Martin, Rodney King, and every other black man that you crackers done killed." (R. 5543, 5556). Appellant felt Martin had "racist tattoos" and yelled to the other inmates that Martin had "Nazi tattoos and swastikas" even though Martin did not in fact have those tattoos. (R. at 5543, 5556). Rogers admitted he had no idea if Martin was a white supremacist or not and that really had nothing to do with why he killed Martin. (R. at 5564). During this incident, the other inmates were loud, some encouraging Rogers to "kill the dude," and Appellant asked, "who wants me to kill him?" (R. at 5543-44, 5989). Martin was "pretty beat up pretty bad by then" when another inmate told Appellant to "leave the dude alone." (R. at 5541). Appellant yelled to the inmate: "God bless you. You saved his life." (R. at 5564, 5989).

Appellant admitted writing a "false story" of self-defense in a letter to a former judge in this case. (R. at 5561-62, 5995).

However, he did admit that the portion of the letter claiming that he "covered [Martin] with the prayer rug and pissed on his Koran out of disrespect" was true. (R. at 5563).

Appellant also sent two letters to the State Attorney, Bill Eddins. (R. at 5670, 5995). Appellant wrote: "I'm sitting back laughing at you crackers because I killed that soft-ass white boy Ricky D. Martin and got away with it. LOL, smiley face, my gang gave me my black heart for killing that fuck boy, and you crackers are dumb." (R. at 5670). "You a dumbass cracker just like your president, Donald J. Trump. . . . Ricky D. Martin was a straight bitch, coward, snitch and racist fuckboy. In my eyes, he deserve to die. . . . Mother fuck the white man, straight up." (R. at 5671).

Appellant's clothes were later collected and turned over to the Florida Department of Law Enforcement (FDLE). (R. at 5462). In explaining why there was not much blood on his clothes, Appellant stated that he knows "how to fight without making a mess on myself." (R. at 5557). Appellant admitted that he had "no remorse, or no regret" about "Mr. Martin's untimely death" and that he did not "care about that dude." (R. at 5772). Rogers also admitted "if the situation ever happened again," he "would handle the situation the same way." (R. at 5772).

Addressing the jurors during his testimony, Appellant stated: "if you're asking yourself if I beat Mr. Martin up about the murder

of Trayvon Martin[3], my honest answer is, you're goddamn right I did. . . ." (R. at 5990, 5995). "I got no love for dude or no sympathy. I don't feel bad about it. I don't feel no remorse. I'm not losing any sleep over the death of Ricky Martin and neither is anybody else." (R. at 5991).

Penalty Phase

During the penalty phase, Martin's father-in-law gave a victim impact statement regarding the effect of Martin's death on his wife and two children. (R. at 6201-04). Next, the State presented records of Appellant's prior felony convictions as well as his own admission regarding these convictions from a prior proceeding. (R. at 6205-6213, State Exhibit 148). When Rogers was a minor, he was convicted as an adult for armed robbery with a firearm of an individual at a train platform. (R. at 6211). Appellant was also convicted of robbery with a firearm and aggravated battery with a firearm for robbing a cab driver, whom he struck with a firearm and knocked out a tooth. (R. at 6209, 6195, State Exhibit 148).

The State also presented additional testimony from the medical examiner regarding the injuries to Martin. (R. at 6215-6220). The medical examiner determined that the injuries to Martin were consistent with being stomped and hit repeatedly and

[3] Trayvon Martin was killed roughly one month prior to this incident, on February 26, 2012.

forcefully in the head, which would be very painful if the victim was awake. (R. at 6217-18). The evidence of bloody handprints on the walls and that Martin attempted to get away from Rogers demonstrate that Martin was likely awake for a portion of the beating. (R. at 6217).

Rogers presented evidence in the form of testimony from eight inmates regarding their interactions with Rogers. (R. at 6241, 6250, 6273, 6294, 6306, 6316, 6331, 6349). The inmates described Rogers as "a humble soul," peaceful, "a straight-up dude" with "a good heart," a good friend who gives advice, encourages them to become educated, to work out, to eat healthy, and lends items to individuals who need them. (R. at 6241-3, 6251-52, 6254, 6274-76, 6279, 6281, 6296, 6307-10, 6318-20, 6333, 6336, 6338-40, 6356-58). The inmates consider Rogers a good friend and mentor. (R. at 6243, 6252, 6256, 6282, 6310, 6321-22, 6336, 6354, 6377). None of them knew the facts about this case. (R. at 6247, 6265, 6286-87, 6301-02, 6313-14, 6324, 6342-44, 6383).

Rogers also presented the testimony of a community psychologist, Dr. Marvin Dunn. (R. at 6386-87). "Community psychologists are interested in social factors; what types of things outside of this person helped explain the person's behavior. . . ." (R. at 6387). Dr. Dunn focuses on race and ethnicity, including relations and conflict, in our society. (R. at 6389-91). Dr. Dunn described Rogers' family life as one of the worst

he had encountered. (R. at 6413). Rogers never knew his father and his mother was a drug addict who was possibly schizophrenic. (R. at 6413). Rogers grew up in extreme poverty and essentially raised himself. (R. at 6417, 28). Rogers "developed a hypersensitivity to racial matters" and his "racial attitudes" were the reason he killed Martin. (R. at 6431). Rogers had anger toward "all white people." (R. at 6465). Dr. Dunn has seen progress in the three or four years since he started working with Rogers. (R. at 6426). Rogers has become much less hostile, less hypersensitive to race, and has started trying to help other inmates and mentor them. (R. at 6426, 38). Rogers has impulse control problems, especially with aggression, that are explained by his upbringing and head injuries. (R. at 6447-49). Rogers has Attention Deficit Hyperactivity Disorder (ADHD) and suicidal tendencies. (R. at 6461). Dr. Dunn had no clinical diagnosis of Rogers. (R. at 6467).

Dr. Mark Rubino, a neurologist, also testified on Rogers behalf. (R. at 6506-07). Based on Rogers' computerized axial tomography (CAT) scan, Dr. Rubino opined that Rogers had evidence of at least one major head injury in his frontal temporal region. (R. at 6522, 6524).

Dr. Julie Harper, a licensed psychologist, testified on Rogers behalf. (R. at 6610). Dr. Harper discussed Rogers personal and familial history. (R. at 6618-68). Rogers never knew his

father and his mother had significant substance abuse and psychiatric issues. (R. at 6622). Appellant's mother lived in a housing project in a very poor and violent area of New York. (R. at 6619). At age two, Appellant's mother surrendered him to the Department of Children's and Families. (R. at 6620). From that point, Appellant was placed in various foster homes, group homes, lives off and on with his maternal grandmother, and, at times, is placed back with his own mother. (R. at 6623-27, 6635-37). Appellant experienced extreme neglect and poverty throughout his childhood. At fourteen, Appellant was admitted to a children's psychiatric center. (R. at 6637-40). Appellant was described as "impulsive and distractible with consequent poor judgement," which is consistent with ADHD and has also been diagnosed with major depressive disorder and anxiety disorder. (R. at 6640, 6711-12). Appellant then acquired a lengthy criminal record, serving time in juvenile detention facilities. (R. at 6641). However, Harper did admit that Appellant has previously been diagnosed with a conduct disorder and antisocial personality disorder. (R. at 6686-87). Harper was also aware that Appellant has over one hundred disciplinary citations since his current incarceration commenced in 2002, including incidents where he attacked cellmates in the past. (R. at 6694).

Related to the murder of Martin, Dr. Harper felt that Rogers was operating under the influence of an extreme mental or emotional

disturbance because he was in “a highly anxious and agitated state in a new environment for him with a person he didn’t know, his sense of safety was greatly affected, and furthermore, that inmate was armed with some king of cutting device that made him feel unsafe.” (R. at 6670). Dr. Harper believes that Rogers “lost control of himself.” (R. at 6671).

In rebuttal, Dr. Prichard, a forensic psychologist, testified for the State. (R. at 6727). After reviewing extensive records and evaluating Rogers, Dr. Prichard concluded that Rogers meets the criteria for a diagnosis of antisocial personality disorder. (R. at 6736). Dr. Prichard recounted the many noted instances of conduct disorder from Rogers’ childhood. (R. at 6743-6748). Rogers was in an adult prison in New York from age 17 to 21 for attempted robbery. (R. at 6748). Within a year of his release, Rogers hits a taxi cab driver in the mouth with a gun during another robbery and has received a life sentence in the state of Florida at age 22 in 2002. (R. at 6748). That same year, Rogers tied up his cellmate and beat him up. (R. at 6751). In 2005, Rogers again tied up a cellmate and beat him for disrespect. (R. at 6752). Rogers told Dr. Prichard that he beat that cellmate worse than Martin. (R. at 6752). In 2009, Rogers stabbed another inmate in the head with a knife and kneed an inmate in the face. (R. at 6752). Dr. Prichard also considered that Rogers had received over 100 disciplinary reports since 2002, for incidents

including lying, assault, inciting riots, lewd and lascivious exhibition, among other things. (R. at 6753). Dr. Prichard referenced Rogers letter admitting that he had decided to kill the next white man he came across as demonstrative of Rogers ability to plan and premeditate. (R. at 6765). Additionally, the fact that Rogers stopped beating Martin in order to tie him up demonstrates that there was a certain amount of restraint regarding the crime, not just wholly acting on impulsivity, as well as dialoging with other inmates regarding Martin. (R. at 6765-66, 6803).

During the charge conference, the defense made no objections to the aggravating circumstances and no objections were made by the defense regarding any of the jury instructions or the verdict form (R. at 6812-14, 6918). At the conclusion of jury instructions, the judge asked if the parties had any objections to the instructions, and both parties stated that they did not. (R. at 7024).

The jury was instructed that they must "unanimously determine whether the aggravating factors alleged by the State have been proven beyond a reasonable doubt." (R. at 7000). The aggravating factors were as follows: (1) that the Appellant was previously convicted of a felony and under sentence of imprisonment; (2) that the Appellant was previously convicted of felonies involving the use or threat of violence to another person, specifically robbery

with a firearm, aggravated battery with a firearm, and attempted robbery; (3) that the first degree murder was committed while the Appellant was engaged in the commission of a kidnapping; (4) that the first degree murder was especially heinous, atrocious, or cruel (HAC); and (5) that the first degree murder was committed in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal justification. (R. at 7000-01). Ultimately, the jury found unanimously that all five aggravating factors were proven beyond a reasonable doubt. (R. at 3041-42, 7071).

The jury was specifically instructed to consider whether the defendant had proved by a greater weight of the evidence that any of the following 68 mitigating circumstances existed: (1) The capital felony was committed while Shawn Rogers was under the influence of extreme mental or emotional disturbance (not found to exist by the jury, given no weight by the judge[4]); (2) The capacity of Shawn Rogers to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (not found, no weight); (3) The age of Shawn Rogers at the time of the crime (not found, no weight); (4) Shawn Rogers suffers from major depression (not found, very little weight); (5)

[4] Although mention of the judge's findings in this section is premature chronologically, they are mentioned here in order to consolidate the information regarding the plethora of mitigating circumstances. Thus, the jury's conclusions will be listed first, followed by the judge's conclusions second in the parenthesis.

Shawn Rogers has a history of multiple head injuries starting as a child (found to exist by a vote of 10 jurors and not to exist by 2, moderate weight); (6) Shawn Rogers was born to a crack-addicted mother (not found, no weight); (7) Shawn Rogers does not know the identity of his father (not found, no weight); (8) Shawn Rogers endured maternal abandonment (found 12-0, some weight); (9) Shawn Rogers endured paternal abandonment (not found, little weight); (10) Shawn Rogers' mother is mental ill (not found, very little weight); (11) Shawn Rogers' mother attempted suicide by jumping off a building with Shawn Rogers (not found, little weight); (12) Shawn Rogers was emotionally abused and rejected by his mother (found 12-0, some weight); (13) Shawn Rogers was rejected by his maternal grandmother (not found, no weight); (14) Shawn Rogers was born into a dysfunctional family (found 12-0, some weight); (15) Shawn Rogers was separated from his biological brother, Christopher, as a toddler (found 9-3, some weight); (16) Shawn Rogers was separated from his biological brother, Kevin, who was born cocaine positive and removed at birth (not found, very little weight); (17) Shawn Rogers was separated from his biological brother, Sherrod, who was born cocaine positive and removed at birth (not found, very little weight); (18) Shawn Rogers was exposed to drugs at an early age by his mother, who made him inject her with drugs (not found, some weight); (19) The death of Shawn Rogers' maternal grandmother was traumatic for him (not found, no

weight); (20) Shawn Rogers never received grief counseling after the loss of his grandmother (not found, no weight); (21) Shawn Rogers has never been shown love or affection (not found, no weight); (22) Shawn Rogers loves his mother in spite of the maltreatment and neglect by her (not found, very little weight); (23) Shawn Rogers loves his brother, Christopher (not found, very little weight); (24) Shawn Rogers has empathy for his mother (not found, little weight); (25) Shawn Rogers has encouraged his brother to do well (not found, very little weight); (26) Shawn Rogers has counseled his brother on the importance of his education (not found, very little weight); (27) Shawn Rogers will continue to be a source of emotional support to his brother (not found, no weight); (28) Shawn Rogers lived on the streets when he was homeless (found 12-0, some weight); (29) Shawn Rogers grew up in poverty during developmental years (found 10-2, some weight); (30) Shawn Rogers spent his early years in the Marcy Projects in Brooklyn (found 5-7, some weight); (31) Shawn Rogers moved to multiple foster homes (found 8-4, some weight); (32) The psychological impact of being placed in foster care(found 9-3, some weight); (33) Shawn Rogers experienced inadequate nutrition as a child (not found, no weight); (34) Shawn Rogers attended at least eight schools by the age of 13 (found 1-11, very little weight); (35) Shawn Rogers witnessed multiple violent acts in his neighborhood (found 10-2, some weight); (36) Shawn Rogers was sent

to a children's group home, The Children's Village (not found, very little weight); (37) Shawn Rogers was moved to another group home, Edwin Gould Academy (not found, very little weight); (38) Shawn Rogers was admitted to a children's psychiatric hospital at the age of 14 (found 12-0, moderate weight); (39) Shawn Rogers did not have a stable childhood (found 12-0, some weight); (40) Shawn Rogers was exposed to racial tension and discrimination in his life (found 11-1, some weight); (41) Shawn Rogers suffers from brain damage (found 1-11, some weight); (42) Shawn Rogers suffers from neurological deficits (found 1-11, some weight); (43) Shawn Rogers was exposed to acts of violence while in the high security juvenile detention facilities (found 12-0, some weight); (44) Shawn Rogers sustained head trauma at age 14, when he was hit in the head with a metal pipe and/or metal chair, which resulted in metal fragments being left in his skull while in juvenile detention facility (found 10-2, some weight); (45) Shawn Rogers sustained head trauma and loss of consciousness when he was hit by a car at the approximate age of eight or nine (not found, no weight); (46) Shawn Rogers seeks to improve his knowledge base by reading articles and news (not found, very little weight); (47) Shawn Rogers has spent years in solitary confinement (found 5-7, little weight); (48) Shawn Rogers cared for homeless boys on the streets (not found, no weight); (49) Shawn Rogers has mentored other inmates (not found, very little weight); (50) Shawn Rogers has

shared food and hygiene products as well as paper/envelopes/stamps with other inmates (not found, very little weight); (51) Shawn Rogers encouraged the relationship between his girlfriend, Chloe Johnson, and her mother (not found, very little weight); (52) Shawn Rogers suffers from attachment issues (not found, no weight); (53) Shawn Rogers suffers from post-traumatic stress disorder (not found, little weight); (54) Shawn Rogers has frontal lobe damage (not found, some weight); (55) Shawn Rogers has signs of a presumptive diagnosis of C.T.E. (chronic traumatic encephalopathy) (not found, some weight); (56) Shawn Rogers has suffered concussions (not found, no weight); (57) Shawn Rogers has neocortex damage (not found, some weight); (58) Shawn Rogers has suffered a subdural hematoma as evidenced by a right frontal hydroma (found 2-10, some weight); (59) There is a disparity in Shawn Rogers' neuropsychological test, which is found in brain injury and consistent with Shawn Rogers' imaging studies (found 10-2, some weight); (60) Shawn Rogers is unable to calibrate or modulate his responses as a result of frontal lobe damage (not found, no weight); (61) Shawn Rogers is unable to conform his behavior due to a significantly compromised neocortex (not found, no weight); (62) Shawn Rogers suffers brain atrophy (found 2-10, moderate weight); (63) Shawn Rogers' judgment and decision making is impaired (not found, no weight); (64) Shawn Rogers has a lack of impulse control (not found, no weight); (65) Shawn Rogers cannot

appreciate the consequences of his actions (not found, no weight); (66) Shawn Rogers suffers from racial hypersensitivity (not found, very little weight); (67) Shawn Rogers endured institutional failures (found 12-0, some weight); and (68) Shawn Rogers was diagnosed with ADHD (not found, little weight). (R. at 3043-70, 3588-3612, 7005-11; 7073-88).

The jury was instructed to weigh whether the aggravating factors found were sufficient to justify the death penalty, whether they outweighed any mitigating circumstance found to exist, and whether death is the appropriate sentence. (R. at 7012). Specifically, they were instructed as follows:

> if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, and your finding that the aggravating factors found to exist outweigh the established mitigating circumstances must be unanimous, and your decision if to impose a sentence of death must be unanimous.

(R. at 7012-13). The jury found unanimously that all five aggravating factors were proven beyond a reasonable doubt and found unanimously that the aggravating factors were sufficient to warrant a possible sentence of death. (R. at 3041-43, 7071, 73). After weighing, the jury unanimously found that the aggravation outweighed the established mitigating circumstances. (R. at 3071, 7088). The jury then unanimously determined that the Appellant should be sentenced to death. (R. at 3071, 7089).

Spencer Hearing

Appellant did not wish to present any additional mitigation at the Spencer hearing. (R. at 4016-29). The Court appointed Mr. William Wade as special counsel to present additional mitigation. (R. at 3480-81, 4039). The State did not present additional evidence at the Spencer hearing. (R. at 4039). The special counsel presented testimony from Dr. Jethro Toomer, a clinical and forensic psychologist. (R. at 4041). Dr. Toomer stated that he did not "find any evidence of sociopathy or any diagnostic entities suggestive of antisocial personality disorder" and described Appellant's condition as "toxic stress syndrome" which "basically is a result of persistent exposure to traumatic and debilitating situations and environment." (R. at 4050, 4054, 4062). Toxic Stress Syndrome is not a diagnosis. (R. at 4053-54). Instead, Dr. Toomer described this syndrome as causing "impairment across the board in terms of interpersonal relationships, in terms of being able to appropriately manage conflict." (R. at 4053). Dr. Toomer does not believe that Appellant is capable of "weighing alternatives and projecting consequences." (R. at 4057). However, Dr. Toomer did not review Appellant's representation of himself at trial or his testimony (R. at 4056-60). No further evidence was presented.

On December 18, 2017, the judge orally sentenced Appellant to death for the first-degree murder of Ricky Martin, and to life in

prison without the possibility of parole, to be served concurrently, for kidnapping. (R. at 4081-82). The judge entered a 25-page written sentencing order the same day. (R. at 3588-3612). The judge found that the jury's finding that the five aggravating factors had been proven beyond a reasonable doubt was supported by the evidence and gave significant weight to aggravating factor 3 and gave great weight the remaining 4 aggravating factors. (R. at 3590-95). The judge assigned weight to each of the mitigating circumstances which the jury found to have been demonstrated. (R. at 3595-3610). However, on multiple occasions, the judge also assigned weight to mitigating circumstances which he believed had been proven by the greater weight of the evidence and assigned weight to those factors as well. The judge summarized his findings as follows:

> The Court has considered and weighed the proven aggravating and mitigating circumstances. Mindful that a human life is at stake, the Court, nonetheless, finds that the aggravating circumstances far outweigh the mitigating circumstances.
>
> The Defendant, a physically imposing man who stands well over six feet tall, mercilessly beat his smaller, physically weaker cellmate to death. Due to a mixture of racial animus, a disdain for a man's apparent lack of cleanliness, and a dislike of his "vibe," the Defendant chose to viciously murder and humiliate him. The Defendant does not lack intelligence or an ability to understand the nature of his actions.
>
> Of particular significance, the Defendant was serving a life sentence at the time he committed the heinous, atrocious, and cruel murder of his cellmate.

(R. at 3611, 4081).

SUMMARY OF THE ARGUMENTS

The only finding a capital sentencing jury must make beyond a reasonable doubt is whether a given aggravator is proven. This claim of instructional error is waived because defense counsel affirmatively agreed to the jury instructions that were presented to the jury. Further, there is no requirement that capital juries make findings beyond a reasonable doubt as to the sufficiency of the aggravation and whether the aggravation outweighs the mitigation. Thus, the trial court did not err in instructing the jury during sentencing and this claim should be denied.

Admission of Rogers' letters, which demonstrate motive and premeditation, was proper. This claim was not preserved for appeal as Appellant did not object to the admission of his letters during the guilt phase portion of the trial. Appellant's letters demonstrated his thought process in premeditating the murder of Ricky Martin. Admission of this evidence of premeditation was not error and this claim should be denied.

There was sufficient evidence for the trial court to instruct the jury on the CCP aggravating factor and it was proven beyond a reasonable doubt. The claim of instructional error was waived because defense counsel affirmatively agreed to the jury instructions on the CCP aggravating factor that were presented to the jury. Additionally, Appellant's letters demonstrate that for

over a month, he had planned to murder someone. This, among other evidence, was sufficient proof beyond a reasonable doubt that the jury was correct in finding the existence of CCP in this case. Thus, this claim should be denied.

Consideration by the judge of the escalation of violence in analyzing appellant's prior violent felonies is relevant and proper. In determining whether the death penalty is an appropriate sentence in this case, the judge considered an apparent escalation in Appellant's use of violence. This included considering Appellant's own admissions that his violence was escalating. Consideration by the judge of this relevant character evidence in determining if the death penalty is an appropriate. Thus, this claim should be denied.

The court sufficiently considered rogers' mitigating circumstances. The jury made specific findings on whether the 68 listed mitigating circumstances were established by the greater weight of the evidence. In every circumstance where the jury found that the mitigation was proven, the judge agreed with the jury's findings. In some circumstances where the jury did not find that the mitigating circumstances were found, the judge found that they were proven by the greater weight of the evidence and assigned a weight. The judge's order adequately represents his careful consideration of all factors in this case. This claim should be denied.

Appellant's death sentence is a proportionate punishment. Upon review of capital cases which are factually similar, and contain similar aggravating factors and mitigating circumstances, it is clear that this case is among the most aggravated and least mitigated cases. The death penalty is a proportionate punishment and this Court should affirm the sentence in this case.

Statement regarding sufficiency of the evidence. Appellant admitted that he committed brutally beat and humiliated his cellmate. Appellant admitted that if he was given the same opportunity, he would commit the crime again. Appellant's own words demonstrated that he planned for over a month to kill the next white man he could in retaliation for the killing of Trayvon Martin. The evidence in this case was overwhelming. Appellant's convictions should be affirmed.

ARGUMENT

ISSUE I: THERE WAS NO JURY INSTRUCTION ERROR BECAUSE THE ONLY FINDING A CAPITAL SENTENCING JURY MUST MAKE BEYOND A REASONABLE DOUBT IS WHETHER A GIVEN AGGRAVATOR IS PROVEN

Appellant claims that Hurst and Perry required the trial court to instruct the jury that they must make findings beyond a reasonable doubt regarding whether the aggravators were sufficient to justify the death penalty and whether those aggravators outweighed the mitigators. (IB at 43); Hurst v. Florida, 136 S.Ct. 616 (2016); Perry v. State, 210 So. 3d 630 (Fla. 2016). Since

neither Hurst nor Perry require the jury to make findings beyond a reasonable doubt as to sufficiency and weighing, there was no error in the jury instructions and this claim should be denied. Further, this claim was waived at trial because the defense attorney affirmatively agreed to the jury instructions.

"Fundamental error is waived under the invited error doctrine because 'a party may not make or invite error at trial and then take advantage of the error on appeal.'" Universal Ins. Co. of North America v. Warfel, 82 So. 3d 47, 65 (Fla. 2012) (citing Sheffield v. Superior Ins. Co., 800 So. 2d 197, 202 (Fla. 2001)). In this case, after jury instructions were given, the judge asked if either party had any "objections to the instructions and verdict form." (R. at 7024). Both the State and Defense had no objections. (R. at 7024). Because counsel affirmatively agreed to the instruction, even if the instruction given was improper, fundamental error is waived. Id.

Under the Sixth[5] Amendment, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be

[5] There are also no Eighth Amendment concerns. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." Roper v. Simmons, 543 U.S. 551, 568 (2005). The State of Florida has a list of sixteen aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated

submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 103 (2013) (citing Apprendi v. New Jersey, 530 U.S. 466, 483, n.10, 490 (2000)). The standard of proof for proving aggravating factors in Florida has been beyond a reasonable doubt long before Hurst was decided. See Fla. Std. J. Inst. (Crim.) 7.11; Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986); Zeigler v. State, 580 So. 2d 127, 129 (Fla. 1991); Finney v. State, 660 So. 2d 674, 680 (Fla. 1995). Thus, because only the aggravating factors increase a defendant's penalty exposure, only the aggravating factors must be proven beyond a reasonable doubt. Here, since the jury was instructed that in order to find that the aggravating factors exist, it must first be proven beyond a reasonable doubt, there was no instructional error.

Neither Hurst nor Perry addressed the proof-beyond-a-reasonable-doubt standard. In Hurst v. Florida, the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional pursuant to Ring's determination that the Sixth Amendment requires a jury to find the existence of an aggravating circumstance which qualifies a defendant for a sentence of death. Hurst, 136 S. Ct. at 616. On remand, this Court held in Hurst v. State that in capital cases, the jury must unanimously and

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aggravating factors has been proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied.

expressly find that the aggravating factors were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, Florida v. Hurst, 137 S. Ct. 2161 (2017). Perry merely affirmed the requirements in Hurst v. State and held that the statute as applied to Perry was unconstitutional because it only required ten jurors to recommend death rather than a unanimous recommendation. Perry, 210 So. 3d at 633, 640.

Further, nothing in this Court's post-Hurst precedent, or in section 921.141, Fla. Stat, compels imposing a burden of proof on the jury findings regarding sufficiency of the aggravators and the weighing of the aggravation and mitigation. As Appellant admits, this Court recently amended Florida Standard Criminal Jury Instruction 7.11 and declined to include a standard of proof for the jury's findings of sufficiency of the aggravation and weighing of the aggravation and mitigation though the issue was specifically raised by the defense bar during oral argument regarding the amendments. In re Standard Criminal Jury Instructions in Capital Cases, 244 So. 3d 172 (Fla. 2018).

As related to the jury finding that aggravation is sufficient and the jury finding that the aggravation outweighs the mitigation,

neither Hurst v. Florida nor Hurst v. State ascribed a standard of proof. Hurst v. State, 202 So. 3d 40, 54 (Fla. 2016). The weight that a juror gives to the aggravating factors or mitigating circumstances based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard. The United States Supreme Court has specifically held that the beyond-a-reasonable-doubt standard for finding that the aggravation outweighs mitigation is not required under federal law. See Kansas v. Marsh, 548 U.S. 163, 164 (2006) ("Weighing is not an end, but a means to reaching a decision."); Tuilaepa v. California, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."); Kansas v. Carr, 136 S. Ct. 633, 642 (2016) ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt."). The weight that a juror gives to the aggravation as compared to the weight given to mitigation is also not something that can be defined by a beyond-a-reasonable-doubt standard. Thus, because a beyond-a-reasonable-doubt standard is only required for proving aggravating factors and not for determining sufficiency of the aggravating or weighing

of the aggravating and mitigation, there was no error in the jury instruction given in this case.

Because Appellant's jury was properly instructed that the aggravating factors must be proven beyond a reasonable about, no error occurred. Even if the instructions were in error, counsel affirmatively agreed to the instructions, thus waiving any error. This claim should be denied.

ISSUE II: ADMISSION OF ROGERS' LETTERS, WHICH DEMONSTRATE MOTIVE AND PREMEDITATION, WAS PROPER

Appellant claims he was denied due process because the admission of his own letters, without objection, which detail his premeditation, motive, and lack of remorse regarding the murder of Ricky Martin, "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." (IB at 60); Carr, 136 S.Ct. at 644-45. However, these letters were certainly relevant and admissible. Thus, this claim should be denied.

Because Appellant failed to make a contemporaneous objection, failing to preserve the issue for appeal, he must demonstrate that any error "is so prejudicial as to constitute fundamental error." Murray v. State, 3 So. 3d 1108, 1123 (Fla. 2009). "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." Williams v.

State, 209 So. 3d 543, 561 (Fla. 2017) (quoting State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)). To be fundamental, the error must "reach[] down into the validity of the trial itself to the extent that a verdict of guilt could not have been obtained without the assistance of the alleged error." Williams, 209 So. 3d at 562 (quoting Anderson v. State, 841 So. 2d 390, 403 (Fla. 2003)).

"The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003). There is no fundamental error in allowing the jury to hear Appellant's own words regarding the murder of Ricky Martin. The evidence specifically questioned by Appellant is State exhibit 66, a letter written by Appellant dated March 31, 2013 addressed to the Honorable Marcie Goodman, and State's Exhibits 67 and 68, two letters written by Appellant, addressed to the State Attorney, Bill Eddins. (IB at 63-64; R. at 2839-45, 2849-50, 5593-5594, 5669-5671). No objections were made to the entry of these exhibits. (R. at 5593, 5670). Appellant quotes large portions of these letters and claims they "were not relevant." (IB at 65). Certainly, however, statements such as "just sit on your lazy azz & let me get away with killing that punk azz cracker," and "[a]ll I think about everyday is who I can hurt and who I can kill" are relevant admissions of his commission on the murder and his

premeditation. (IB at 64; R. at 2842, 2849-50). Perhaps small portions of the letters have no relevance, but instead would be necessary to give context to the relevant statements. Even if there are portions that are not relevant and would not lend context, admission without objection does not constitute fundamental error.

As far as "inflaming the jury's emotions" by allowing them to see Appellant's "reflections on race, politics, and his own character," Appellant's motivation in murdering Ricky Martin directly relates to race and politics. (IB at 70). Appellant admitted that he wanted "to make a political statement." (R. at 2840).

> The hard truth is this, last year, 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. Blood for blood. Eye for an eye.

(R. at 2841).

Further, Appellant's contention is that this "evidence gave the State an unfair advantage and precluded the jury from fairly" determining a sentence in this case. (IB at 63). However, these letters were admitted during the guilt phase of the trial, not during sentencing. (R. at 5593-5594, 5669-5671). Appellant's admissions were relevant to his guilt and his premeditation in the guilty phase and were properly admitted. For example, Appellant

admitted that he planned to murder the next white person that he could in retaliation for the death of Trayvon Martin. (R. at 2841). Appellant's admissions were also relevant to the CCP aggravator as it demonstrated heightened premeditation and lack of remorse. Further, Appellant's admissions were relevant as rebuttal to character evidence presented by Appellant during sentencing. For example, multiple inmates testified that Appellant was humble and peaceful. (R. at 6305, 6310). Appellant was described as a mentor. (R. at 6426, 6439).

Appellant did not preserve this issue for appeal. Further, as there was no error in admitting Appellant's own admissions into evidence, this Court should deny this claim.

ISSUE III: THE COLD, CALCULATED, AND PREMEDIATED AGGRAVATOR WAS PROVEN BEYOND A REASONABLE DOUBT

Appellant alleges that the trial court erred by instructing the jury on the CCP aggravating factor because there was insufficient evidence to support it. (IB at 70). However, Appellant's own admissions that he planned for over a month to kill a white man are sufficient to prove CCP beyond a reasonable doubt. The trial court did not err in instructing CCP and the jury did not err in finding that CCP was proven beyond a reasonable doubt. Further, this claim was waived at trial because the defense attorney affirmatively agreed to the jury instructions.

In this case, after jury instructions were given, the judge asked if either party had any "objections to the instructions and verdict form." (R. at 7024). Both the State and Defense had no objections. (R. at 7024). Because counsel affirmatively agreed to the instruction, even if the instruction given was improper, fundamental error is waived. See Warfel, 80 So. 3d at 65.

> 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); the defendant had a careful plan or prearranged design to commit 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) (quotations removed). "The CCP aggravator can be indicated by circumstances showing such facts as advance procurement of a weapon, lack of resistance, or provocation, and the appearance of a killing carried out as a matter of course." Id. "The fact that the murder did not proceed as planned does not preclude a finding that it was accomplished in a calculated manner." Asay v. State, 580 So. 2d 610, 613 (Fla. 1991).

Here, Appellant admitted that after the killing of Trayvon Martin, he planned to kill the next white man he could in retaliation. (R. at 2841). Appellant paused during the brutal beating of Martin to tie him up. (R. at 5551-52). Although Appellant denied using a weapon to assist in killing Martin, the

medical examiner testified that Martin had wounds made by a sharp weapon on his chest and left upper extremity. (R. at 5707-08, 5720). One inmate testified that he saw Appellant drop a small object down the shower drain, which could have been a weapon. (R. at 5846-47). Although Appellant denied that he had previously torn the bedsheets in preparation for this event, the short time in which Appellant had to accomplish the events of the murder, approximately 10 minutes, indicates that the bedsheets were, in fact, pre-torn. (R. at 5387, 5418, 5425, 5552). Then Appellant again stopped beating Martin and asked the other inmates, "who wants me to kill him?" (R. at 5543-44, 5989). Further, though Appellant may have felt that this killing was justified as retaliation for the killing of Travon Martin, he "had no colorable claim of any moral or legal justification for this killing." Dougan v. State, 595 So. 2d 1, 5-6 (Fla. 1992) ("To hold that death is disproportionate here would lead to the conclusion that. . .any other terrorist killer should not be sentenced to death if the crime were motivated by deep-seated philosophical or religious justifications.").

Based on the above evidence, the CCP aggravating factor was proven beyond a reasonable doubt. The judge did not err in instructing the jury on the CCP aggravating factor. Additionally, because defense counsel affirmatively approved of the jury

instructions, any error would be waived. This Court should deny this claim.

ISSUE IV: CONSIDERATION BY THE JUDGE OF THE ESCALATION OF VIOLENCE IN ANALYZING APPELLANT'S PRIOR VIOLENT FELONIES IS RELEVANT AND PROPER

Appellant alleges that reversible error occurred when the judge considered that Appellant's pattern of criminal conduct has escalated. (IB at 79, R. at 3591-92). However, escalation of the Appellant in committing violent crimes is character evidence which is proper for the judge to evaluate in determining if the death penalty is an appropriate sentence. Thus, this claim should be denied.

> [T]he purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and judge.

Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1997). The State is not "restricted to the bare admission of a conviction" when presenting evidence in support of the prior violent felony aggravating factor. Gonzalez v. State, 136 So. 3d 1125, 1150 (Fla. 2014) (quoting Miller v. State, 42 So. 3d 204, 225 (Fla. 2010)). The State can present any evidence that is relevant to the "nature of the crime and the character of the defendant." Id. (quoting Fla. Stat. 921.141(1)).

Here, in his sentencing order, the judge listed the three prior violent felonies for which Appellant was previously convicted. (R. at 3591). The judge then quoted Appellant's own words: "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." (R. at 3591). The judge quoted Appellant's own words to demonstrate that Appellant does not dispute his own violence and even admits that it is escalating. The judge then tied the prior violent felonies and Appellant's own admission of escalation together stating that these "undisputed facts demonstrate that the Defendant has used illegal violence against other people." (R. at 3591). The "other people" that the judge is referring to are the three victims of Appellant's three prior violent felonies, as opposed to the victim in this case. The judge then states correctly that Appellant's "pattern of criminal conduct has escalated," a fact which the Appellant does not dispute. (R. at 3591). The judge rightly notes that the Appellant's imprisonment with a life sentence for robbery with a firearm meant that Appellant "was already serving the second harshest sentence available under the law at the time" of this murder. (R. at 3591). Nothing in this consideration by the judge is improper.

Appellant attempts to analogize the judge's consideration of "illegal violence against other people" here with cases in which

trial courts considered arrests, accusations, or pending charges as aggravation. (IB at 79-80); See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976) (prior violent felony aggravator "excludes the possibility of considering mere arrests or accusations"); Odom v. State, 403 So. 2d 936, 942 (Fla. 1981) ("consideration of mere arrests and accusations as aggravating circumstances is precluded"). However, the judge here did not consider any arrests, accusations, or pending charges. The judge considered the three convictions for prior violent felonies, as well as their underlying facts, and compared them with Appellant's first-degree murder conviction in this case. From this analysis, the judge determined that Appellant's violence has escalated and that, because of this information, the death penalty is an appropriate sentence in this case.

The judge's consideration of Appellant's prior violent felonies and escalation of violence was proper. Thus, this claim should be denied.

ISSUE V: THE COURT SUFFICIENTLY CONSIDERED ROGERS' MITIGATING CIRCUMSTANCES

Appellant alleges that the trial court's sentencing order does not demonstrate that the court "thoughtfully and comprehensively analyze any of the proposed mitigating circumstances." (IB at 82). However, the judge thoroughly analyzed the mitigation, even assigning weight in circumstances

where the jury found that the circumstances was not established by the greater weight of the evidence. The trial court did not err, and Appellant's sentence is not violative of his Eighth Amendment rights. This claim should be denied.

This Court reviews a trial court's assignment of weight to mitigation under an abuse of discretion standard and the finding of whether a mitigating circumstance has been established is a question of fact that will not be overturned where it is supported by competent, substantial evidence. Lowe v. State, no. SC12-263, 2018 WL 5095143, *24 (Fla. Oct. 19, 2018).

> In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.

Fla. Stat. § 921.141 (4) (2017).

Even if the sentencing order fails to meet the requisite requirements, the remedy is remand for a new sentencing order. Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995). In Ferrell, regarding the mitigation, the sentencing order merely stated that the "Court has further considered all statutory and non-statutory mitigating factors." Id. This Court held that the "judge must expressly evaluate" each mitigating circumstance, determine if

mitigating circumstances were established, and "determine the relative weight given to each established mitigator." Id.. Here, the judge did just as required and evaluated each mitigating circumstance individually. The judge then assigned weight to every mitigating circumstance which had been established. Because the judge followed the established protocol, there is no error.

Appellant compares the sentencing order in his case to that in Oyola and Jackson. Oyola v. State, 99 So. 3d 431, 447 (Fla. 2012); Jackson v. State, 704 So. 2d 500 (Fla. 1997). In Oyola, the judge failed to expressly evaluate each mitigating circumstance by only stating as follows: "The alleged non-statutory mitigation included serious drug abuse, an abusive home life as a child, created a cycle of violence, and mental disorder. While the evidence did establish such circumstances, the Court only gives such circumstances slight weight in weighing the aggravating circumstances against the mitigating circumstances." Oyola, 99 So. 3d at 447. In contrast, here, the judge wrote fifteen pages addressing the mitigating circumstances, denoting whether they were found to exist and what weight was assigned to each.

In Jackson, the trial court "summarily disposes" the mitigating circumstances in approximately one page. Jackson, 704 So. 2d at 506. This Court stated that the sentencing "order should address the relevant testimony and explain why" the testimony "does

not support the nonstatutory mitigators the court rejects." Id. at 507. However, Jackson did not have the benefit of findings from the jury on the mitigating circumstances. Here, the only mitigating circumstances that were rejected by the judge as having been not proven were also rejected by the jury as having been not found to exist. Additionally, the judge did find that some mitigating factors which were rejected by the jury, were in fact proven by the greater weight of the evidence and assigned weight to those circumstances. Though the judge did not give explanation as to why he felt the weight he assigned was warranted, neither Jackson nor Oyola expressed such a requirement.

Even if "the trial judge should have gone into greater detail, any error was harmless beyond a reasonable doubt" given the five proven aggravating factors, one which was assigned significant weight, and the other four, which were assigned great weight, as compared with the little weight the mitigating circumstances were given. Lowe, 2018 WL 5095143 at *26. In Lowe, the trial court found four aggravating factors, under sentence of imprisonment (great weight), prior violent felony (great weight), pecuniary gain (great weight), and avoid arrest (great weight). Id. at *3 n.7. The Court rejected the statutory mitigating circumstance of minor participant and gave little to moderate weight to 8 of 10 nonstatutory mitigating circumstances such as good behavior in confinement. Id. Like in Lowe, "it is apparent that the trial

court considered each of the mitigating circumstances." Id. at *26. Here, even if the trial court had given greater weight to any of the mitigating circumstances, "there is no reasonable doubt that the trial court would have imposed the death penalty" based on the significance of the aggravating factors. Deparvine v. State, 995 So. 2d 351, 381 (Fla. 2008).

Here, the judge weighed each mitigating circumstance and even found that some mitigating circumstances, which were not found to exist by the jury, were established by the greater weight of the evidence. The judge assigned weight to each mitigating circumstance which was established. The judge then weighed the aggravation and mitigation and provided insight in the conclusion as to why the death penalty was the appropriate sentence in this case. As such, there was no error. This Court should deny this claim.

ISSUE VI: ROGERS' DEATH SENTENCE IS A PROPORTIONATE PUNISHMENT

Appellant alleges that the death penalty is not a proportionate sentence because his case is not among the least mitigated of cases. (IB at 88). However, Appellant's case is proportionate to other cases in which the death penalty has been upheld. Thus, this claim should be denied.

"Proportionality review is not a quantitative analysis involving comparing the number of aggravators and mitigators, but a qualitative review of the underlying basis for each aggravating

and mitigating factor and the totality of circumstances as compared to other capital cases." Lowe, 2018 WL 5095143 at *28. This case is comparable to other cases in which this Court has upheld the death penalty as being proportional.

Appellant's case is similar in nature to White, where this Court upheld the death penalty as a proportional sentence. White v. State, 817 So. 2d 799 (Fla. 2002). White and two other members of his motorcycle gang severely beat a woman because she "liked blacks," then White "stabbed her fourteen times and slit her throat." Id. at 802. In White, this Court found the death sentence proportional where the trial court found that the four aggravating factors (prior violent felony, contemporaneous kidnapping, disrupt or hinder enforcement of laws, and HAC) outweighed one statutory and nine non-statutory mitigating factors, including that the murder was committed while under the influence of an extreme mental or emotional disturbance, a poor family background including poverty and parental neglect, organic brain damage and neurological deficiencies, low IQ, and lacked future dangerousness. Id. at 803, n.2, n.3, 811. Here, there were five aggravating factors, prior violent felony, contemporaneous kidnapping, and HAC like in White, plus, serving a life sentence at the time of the murder and CCP, all of which were given significant or great weight. Additionally, many of the mitigating circumstances here are similar to those in White, such as parental

neglect, poverty, brain damage, and neurological deficiencies. However, in White, the statutory mitigating factor that the crime was committed while the defendant was under the influence of an extreme mental or emotional disturbance was found and given weight, where here, none of the three statutory mitigating circumstances were found and none were given any weight. Additionally, in White, the marginal intelligence or low IQ mitigating factors was given little weight, whereas here, the Appellant is intelligent. As this Court held the death sentence proportional in White, and as there is an additional aggravator in this case and no statutory mitigating factors, the death penalty in Appellant's case is also a proportional sentence.

Appellant's case is similar in nature to Globe, where this Court upheld the death penalty as a proportional sentence. Globe v. State, 877 So. 2d 663 (Fla. 2004) In Globe, the defendant was convicted of first-degree murder of another inmate. Id. at 666. This Court found the death sentence proportional where the trial court found four aggravating factors (under sentence of imprisonment, prior violent felony, HAC, and CCP), and weighed the aggravating factors against no statutory and eleven nonstatutory mitigating circumstances, including having antisocial personality disorder and having an abusive relationship with his parents, none of which were given more than slight/little weight. Id. at 677. Here, there were five aggravating factors, under sentence of

imprisonment, prior violent felony, HAC and CCP like in Globe, plus the contemporaneous kidnapping, all of which were given significant or great weight. Additionally, no statutory mitigating circumstances were found in Globe or here and like Globe, Appellant has antisocial personality disorder and had a poor relationship with his parent. Since this Court held the death sentence proportional in Globe, which was also an inmate murder, and as there is an additional aggravator in this case and no statutory mitigating factors, the death penalty in Appellant's case is also a proportional sentence.

Appellant cites to Larkins and Crook in support of his argument that his case is not among the least mitigated of first-degree murder cases. (IB at 91); Larkins v. State, 739 So. 2d 90 (Fla. 1999); Crook v. State, 908 So. 2d 350 (Fla. 2005). However, Appellant's case is significantly distinguishable from Larkins and Crook.

Larkins shot and killed the clerk in a convenience store that he was in the process of robbing. Larkins, 739 So. 2d at 91. This Court found the death penalty to not be proportionate in Larkins because "the mitigating factors outweigh the circumstances presented in aggravation." Id. at 95. In Larkins, there were two aggravating factors, prior violent felony that was committed almost twenty years prior, and pecuniary gain. Id. at 92, 95. Here, Appellant was still under his sentence of incarceration for

one of his three prior violent felonies, and there were five aggravating factors, including HAC and CCP, "two of the most serious aggravators set out in the statutory sentencing scheme." Id. at 95. Additionally, in Larkins, the trial court found two statutory mitigating circumstances, that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance and the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired. Id. at 92. The trial court also found eleven non-statutory mitigating factors including low intelligence, memory impairment, severe organic brain damage in both hemispheres such that "a baby crying or laughing, could call forth great rage," which actually occurred during the robbery, and the evidence of mental health issues was uncontroverted at trial. Id. at 92, 94. Here, no statutory mitigating circumstances were found to exist. Additionally, Appellant's claims of impulse control issues relating from brain damage were controverted by the testimony of Dr. Prichard that Appellant has antisocial personality disorder. The facts in Larkins vastly differ from Appellant's case, and unlike in Larkins, the death penalty is an appropriate penalty here.

Crook "brutally killed the victim, the co-owner of the bar where the robbery and murder occurred. . . ." Crook, 908 So. 2d at 352. The aggravating circumstances were contemporaneous sexual

battery, pecuniary gain, and HAC. Crook v. State, 813 So. 2d 68, 73 (Fla. 2002). The trial court also found four statutory mitigating circumstances, that Crook was 20 years old (slight weight), the murder was committed while Crook was under the influence of an extreme mental or emotional disturbance (significant weight), his capacity to appreciate the criminality was substantially impaired (significant weight), and eighteen factors in Crook's background including that his psychological and emotional age was less than twenty and more akin to a three or four year old (moderate weight), low intelligence with a full scale IQ of 66 (moderate weight), extensive substance abuse starting at age 8, head injuries from being beaten with a pipe at age 4, and unstable home life (moderate weight). Crook, 908 So. 2d at 352-55. This Court was persuaded by overwhelming mitigation in Crook, which was proven by unrefuted testimony that supported the assigning of significant weight to several statutory mitigating circumstances. Id. at 359. Unlike Crook, the trial judge here found no statutory mitigating circumstances and, at most, assigned moderate weight, to a few non-statutory mitigating circumstances. As Appellant's case differs significantly from Crook, it remains among the most aggravated and least mitigated cases.

The death penalty is a proportionate sentence in this case. Given the significant five aggravating factors, which were assigned significant or great weight in this case, and the much

less weighty mitigation, the death penalty is appropriate as this case is one of the most aggravated and least mitigated. This Court should affirm the sentence.

STATEMENT REGARDING SUFFICIENCY OF THE EVIDENCE

Appellant does not contest the sufficiency of the evidence supporting the jury's verdict of guilt for the first-degree murder and kidnapping of Ricky Martin. Because this Court reviews this issue on direct appeal in every capital case, this statement is offered to assist the Court in that function.

Appellant's own letters reveal that Appellant planned to murder a white man in retaliation for the death of Trayvon Martin, which occurred approximately one month before Appellant murdered Ricky Martin. Appellant testified in depth that he severely beat Ricky Martin. Appellant also testified that he paused in his beating of Martin to tie his hands, feet, and mouth, because Martin refused to stop moving. Appellant taunted Martin's gang members by asking fellow inmates if he should kill Martin and by slapping Martin's naked rear. Appellant also admitted that he wished to humiliate Martin by these actions. Appellant expressed no remorse and admitted that if given the chance again, he still would have murdered Martin.

Appellant's own words alone are sufficient evidence to convict him of the first-degree murder and kidnapping of Martin.

Evidence of Appellant's guilt is overwhelming in this case and this Court should affirm the convictions.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 15th day of November, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Richard Bracey, Esq., mose.bracey@flpd2.com, Attorney for Appellee.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Jennifer A. Donahue
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