No. _____

In the Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,

v.

RICHARD P. FRANKLIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

PAMELA JO BONDI
Attorney General of Florida

AMIT AGARWAL
Solicitor General

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
**Counsel of Record*

STEPHEN D. AKE
Senior Assistant Attorney General

JORDAN E. PRATT
JONATHAN L. WILLIAMS
Deputy Solicitors General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
(850) 414-3300
Carolyn.Snurkowski@myfloridalegal.com

Counsel for Petitioner

QUESTIONS PRESENTED

Whether the Sixth Amendment gives a defendant convicted of a capital crime the right to have a jury make statutorily mandated non-factual findings supporting the imposition of the death penalty, such as the determination that aggravating circumstances outweigh mitigating factors and the related moral judgment that the defendant should be sentenced to death.

Whether the Eighth Amendment requires jury sentencing in capital cases.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Supreme Court of Florida:

1) The State of Florida, petitioner in this Court, was the appellee below.

2) Richard P. Franklin, respondent in this Court, was the appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The State of Florida (hereinafter "the State") respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court (Pet. App. 1a–16a) is reported at ___ So. 3d ___, 2016 WL 6901498 (Nov. 23, 2016). The sentencing order of the state trial court (Pet. App. 17a–61a) is unreported.

JURISDICTION

The Florida Supreme Court entered judgment on November 23, 2016. Pet. App. 1a. On February 17, 2017, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including March 23, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a). The Florida Supreme Court grounded its judgment on its prior holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Pet. App. 14a–15a. For the reasons set forth in the petition for a writ of certiorari to review that case, no adequate and independent state-law ground precludes the exercise of jurisdiction here. *See* Pet. for Writ of *Cert.* 1, 14–17, *Florida v. Hurst*, No. 16-998 (filed Feb. 13, 2017).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Pertinent constitutional and statutory provisions are reproduced in Appendix C to this petition (Pet. App. 62a–71a).

STATEMENT

1. Prompted by this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the Florida legislature enacted statutory reforms intended "to assure that the death penalty will not be imposed in an arbitrary or capricious manner." *Proffitt v. Florida*, 428 U.S. 242, 252–53 (1976) (plurality opinion). By giving trial judges "specific and detailed" instructions, *id.*, such reforms sought to ensure that courts presiding over capital cases conduct "an informed, focused, guided, and objective inquiry" into the grave and difficult question whether a defendant convicted of first-degree murder should be sentenced to death. *Id.* at 259.

Under the statutory regime at issue here, a defendant convicted of a capital crime may not be sentenced to death unless the trial court makes certain specified findings—including the determination that at least one statutory aggravating circumstance exists and the determination that aggravating circumstances outweigh mitigating circumstances. *See* Fla. Stat. § 921.141(3) (2010). Pursuant to Florida's hybrid sentencing procedure, a sentencing jury renders an advisory verdict, but the judge makes the ultimate sentencing determinations. *See* Fla. Stat. § 921.141(2), (3). For several decades following the enactment of that scheme, this Court repeatedly reviewed and upheld the constitutionality of Florida's capital sentencing procedures. *Hurst v. Florida*, 136 S. Ct. 616, 623 (2016); *see, e.g.*, *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Enmund v. Florida*, 458 U.S. 782 (1982); *Dobbert v. Florida*, 432 U.S. 282 (1977).

2. While incarcerated in a Florida prison and serving life sentences for first-degree murder, armed robbery with a firearm, and aggravated battery with a firearm, Respondent, Richard P. Franklin, attacked and murdered a correctional officer with a 10½ inch long shank he had purchased from his cellmate. Pet. App. 2a. During the fatal attack, the officer incurred a laceration wound in his neck almost three inches deep, severing the jugular vein and other blood vessels. In addition, the officer's left lung was punctured, causing one-fifth of his blood to fill his chest cavity and collapsing the lung. The officer sustained additional incisions on his face and scalp, as well as a fractured temporal bone and defensive wounds on his arms and other portions of his body. Pet. App. 6a–7a.

A jury convicted Franklin of first-degree premeditated murder, and at the penalty phase, the State introduced into evidence certified copies of the judgments and sentences regarding Franklin's prior violent felony convictions. Pet. App. 7a. In mitigation, the defense presented testimony from Franklin's father and sister. Franklin also testified about the circumstances of his prior convictions. Pet. App. 7a. Thereafter, the jury returned an advisory recommendation of death by a vote of nine-to-three. Pet. App. 7a.

Following a hearing, the trial court imposed a death sentence and found five aggravating circumstances: (1) the capital felony was committed by a person under a sentence of imprisonment or placed on community control or on felony probation; (2) the defendant was previously convicted of another violent felony; (3) the capital felony was committed to disrupt

or hinder the lawful exercise of any governmental function; (4) the capital felony was especially heinous, atrocious, or cruel; and (5) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Pet. App. 8a.

The court found no statutory mitigating circumstances and seven non-statutory ones. Pet. App. 8a. After weighing the aggravation and mitigation, the trial court determined that "the aggravating factors clearly, convincingly, and beyond a reasonable doubt outweigh the mitigating factors. In fact, the mitigating evidence is minimal and does not come close to outweighing the aggravating factors." Pet. App. 8a (quotation marks omitted). The court sentenced Franklin to death, and he appealed. Pet. App. 8a.

3. After Franklin was sentenced but before the Florida Supreme Court decided his appeal, this Court held in *Hurst v. Florida* that Florida's capital sentencing regime violated the Sixth Amendment, overruling two prior cases rejecting Sixth Amendment challenges to Florida's capital sentencing regime "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for the imposition of the death penalty." 136 S. Ct. 616, 624 (2016). On remand, the Florida Supreme Court interpreted *Hurst* to require findings not just of an aggravating circumstance, but also that such circumstances were sufficient to warrant death and were not outweighed by mitigation. All of these determinations had to be made unanimously, along with a similarly unanimous recommendation of death. *Hurst*, 202 So. 3d at 44.

Based on this interpretation of *Hurst*, the Florida Supreme Court vacated Franklin's death sentence, remanding for a new penalty phase proceeding. The court reasoned as follows:

> Franklin contends that Florida's capital sentencing scheme is unconstitutional in light of the United States Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), because the jury that recommended death did not find the facts necessary to sentence him to death. We agree. *See Hurst v. State*, 41 Fla. L. Weekly S433, S439 (Fla. Oct. 14, 2016). In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any *Ring*- or *Hurst v. Florida*-related error is harmless. *See id.* at S443. We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*. *See id.* at S438. . . . Accordingly, we vacate Franklin's death sentence and remand this case for a new penalty phase proceeding.

Pet. App. 14a–15a.

4. On February 13, 2017, the State petitioned for a writ of certiorari to review the Florida Supreme Court's decision in *Hurst*. As that petition explains (at 18–33), the Florida Supreme Court's decision in *Hurst*

conflicts with this Court's prior holdings in cases involving Sixth and Eighth Amendment challenges to Florida's capital sentencing regime, in addition to Sixth and Eighth Amendment holdings in other state high courts and federal appellate courts. As the petition also explains (at 14–17), the Florida Supreme Court's analysis of the right to a jury trial under the Florida Constitution is not an adequate and independent state-law ground for the judgment that would divest this Court of jurisdiction to review the case. The response to the State's petition in *Hurst* is due April 19, 2017, and the conference date has not yet been set.

REASONS FOR GRANTING THE PETITION

In this case, the Florida Supreme Court vacated the death sentence based on its decision in *Hurst*. As the State explained in its petition for a writ of certiorari in *Hurst*, there is a clear conflict between the Florida Supreme Court's Sixth and Eighth Amendment holdings and prior decisions of this Court, other state high courts, and the federal courts of appeals. In conjunction with other subsequent rulings, including the decision below, the Florida Supreme Court's decision in *Hurst* has "plunge[d] the administration of the death penalty in Florida into turmoil," *Mosley v. State*, __ So. 3d __, Nos. SC14-436, SC14-2108, 2016 WL 7406506, at *32 (Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part). These factors justify this Court's review of the Florida Supreme Court's decision in *Hurst*.

Accordingly, the State requests that the Court hold this petition pending its disposition of the State's petition in *Hurst* and dispose of this case accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in *Florida v. Hurst*, No. 16-998, and then be disposed of as appropriate.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida

AMIT AGARWAL
Solicitor General

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
**Counsel of Record*

STEPHEN D. AKE
Senior Assistant Attorney General

JORDAN E. PRATT
JONATHAN L. WILLIAMS
Deputy Solicitors General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
(850) 414-3300
Carolyn.Snurkowski@myfloridalegal.com

Counsel for Petitioner

MARCH 23, 2017

APPENDIX

APPENDIX A

Supreme Court of Florida

No. SC13–1632

RICHARD P. FRANKLIN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[November 23, 2016]

PER CURIAM.

This case is before the Court on appeal from a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons discussed below, we affirm the conviction, vacate the sentence of death, and remand for a new capital sentencing proceeding.

STATEMENT OF THE CASE & FACTS

Richard Franklin appeals his conviction and sentence for the first-degree murder of Sergeant Ruben Thomas. At all relevant times, Franklin was an inmate at the Columbia Correctional Institution (CCI), Annex Unit in Columbia County, Florida. He was serving life sentences for prior convictions of first-degree murder and armed robbery with a firearm as well as a term of years for a prior conviction of aggravated battery with a firearm. Franklin was residing in room 3206 on the second floor of Quad 3, T Dorm. Two or three months before the murder in question, Franklin's cellmate, Robert Acree, sold Franklin the murder weapon: a 10.5 inch by 1.5 inch shank or knife.

Thomas was a corrections officer at CCI. On the night of his murder, Thomas was working the 4 p.m. to 12 a.m. shift in T Dorm as the dorm sergeant. He and dorm Officer Bradley Myer were stationed in the officer's station or control room. The officer's station was surrounded by a large octagon-shaped sallyport or vestibule that, in turn, separated the officer's station from the four surrounding quads where the inmates resided. There was an additional area within the sallyport that separated the sallyport from the entrance to the officer's station, with an outer swinging door leading into the additional area and an inner door leading from that area into the officer's station. Because the control consoles for T Dorm's quads were located in the officer's station, at least one officer always had to be present in the officer's station in order to operate the controls.

On March 18, 2012, shortly after the 10:30 p.m. master count of the inmates, Franklin removed from the air vent in his cell a piece of cardboard that typically was used to control the cell's temperature. He then used the Quad 3 intercom to summon Thomas to the cell under the false pretense that water was leaking from the vent. Thomas informed Myer that he was going to inspect an inmate's cell. Once Thomas entered Quad 3, he generally inquired about who had water coming from their vent, to which Franklin responded, "Up here, Sarge," and called out his cell number.

Thomas approached the cell, and Franklin called him to the back to look up at the vent. Witnesses testified that Thomas was carrying a bag of potato chips at that time and did not appear prepared to fight. The record generally reflects that either as Thomas was inspecting the vent or as soon as he looked back down, Franklin punched him in the face, breaking his nose and causing it to bleed "real bad." A brief tussle ensued, during which time Franklin hit Thomas in the stomach and chest area and knocked Thomas's radio out of his hand. Thomas's panic button also ended up on the floor.

Thomas managed to disengage himself and flee from the cell. Myer testified that he saw Thomas running across the second-floor catwalk toward the front of the quad, down the staircase, out the quad's sliding entrance door, and toward the outer officer's station door in the sallyport. By the time Thomas reached the bottom of the staircase, Franklin

emerged from the cell while brandishing his shank and ran or "fast walked" in the same direction as Thomas. The sliding entrance door was closing, but Franklin managed to capture it and push it back far enough to squeeze through into the sallyport.

As Thomas approached the officer's station, he hollered, "back door, back door," meaning for Myer to unlock the outer door to the officer's station. Myer complied and simultaneously radioed for backup. Once Thomas got through the outer door, he tried to close it. However, Franklin caught up and wedged his foot in the doorway to prevent the door from shutting and locking. Franklin testified that he initially did not think he would catch Thomas, but when he was able to wedge the outer door, he got excited and thought to himself, "I got you," and that he had an opportunity to "whup [Thomas's] ass."

A struggle over the outer door ensued; Thomas tried to pull the door closed while Franklin attempted to force it open. Each time the door opened, Franklin struck at Thomas with the shank in a downward motion. Inmate Samuel Selig specifically recalled Franklin burying the shank into Thomas' neck, causing blood to squirt inside the vestibule area just outside the officer's station. He also recalled the outer door eventually closing, after which Thomas fell to his hands and knees, coughed up blood, and rolled over onto his back. The struggle lasted approximately thirty seconds.

By that time, inmates in each quad had gathered on the quad windows in observation. They began beating on the glass and hollering. Franklin subsequently walked around the vestibule and made a cutthroat gesture with his right thumb toward the inmates. He then entered Quad 2.[1]

Captain Michelle Nipper responded to the annex. Upon arriving at T Dorm, she ordered the officers to lock down the inmates in each quad. A standoff at the Quad 2 door eventually began between Franklin and the corrections officers; Franklin was locked inside the quad, and the officers were gathering in front of the quad door within the vestibule. At some point, Franklin brandished his shank and a canister of pepper spray. Captain Nipper ordered Franklin to relinquish the items and surrender, but he refused. Franklin removed prison uniforms from a laundry bag, tied them together, and fastened the garments to the outside of the showers and the fire exit door to prevent the officers from entering the quad through that door. He returned to the quad's front door, bellowed to Nipper, "Bitch, you ain't taking me alive," and violently shook the door.

Shortly thereafter, the Designated Armed Response Team or "DART" members arrived at T

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[1] The record reflects that several events relevant to Franklin's other convictions occurred while he was in Quad 2. Chiefly, he sucker punched Officer William Brewer, crushing his orbital socket and causing partial vision loss in his right eye. Franklin also confiscated Brewer's pepper spray canister.

Dorm. Franklin entered cell 2108 on Quad 2's first floor and broke the sprinkler head, causing the fire alarm and strobe lights to activate. Because water erupted from the sprinkler system, an ankle-high flood filled the quad and vestibule.

Additional officers, along with Assistant Warden Tony Anderson, had arrived at Quad 2's front entrance by that time. Franklin continued to disobey the officers' orders to relinquish his weapons and surrender himself. One of the officers sprayed Franklin with chemical gas through a porthole in the quad door in an attempt to force him to relinquish the weapons. Franklin wiped his face off and said in a "pissed off" manner, "I'm going to get another one of y'all, y'all come on. I'm ready for you." Franklin also attempted to spray the officers with his canister of pepper spray but ran out.

Using a non-lethal round, a DART member shot Franklin in the upper torso. Franklin fell to the floor and dropped his shank and pepper spray. The officers then rushed into the quad, administered more of the chemical gas, and apprehended Franklin.

Thomas died as a result of a laceration wound almost three inches in depth to the left side of his neck. The jugular vein and small blood vessels from the subclavian artery were cut. Thomas's left lung was punctured, and as a result, one fifth of his blood filled the left chest cavity and caused the lung to collapse. Thomas also sustained incised wounds on

the right side of his face and the left scalp, a fractured temporal bone, eight sharp-force defensive wounds on his arms, and at least fourteen blunt-force defensive wounds to other parts of his body.

On June 19, 2013, a jury convicted Franklin of first-degree premeditated murder.[2] During the penalty phase, the State presented evidence of Franklin's prior convictions and also permitted Thomas's mother and his fiancée to read prepared victim impact statements. The defense called Franklin's father and sister in mitigation. Franklin also testified in his defense, during which he explained the circumstances surrounding his prior convictions. The jury ultimately recommended a sentence of death by a nine-to-three vote.

Following a Spencer[3] hearing, the trial court, on August 2, 2013, sentenced Franklin to death.[4] In imposing the death sentence, the trial court found

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[2] Franklin was also charged with one count of possession of contraband by an inmate and one count of aggravated battery on a law enforcement officer in connection with him striking Officer Brewer in Quad 2. He was convicted as charged on the first count and, as to the second, convicted of the lesser included offense of felony battery.

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

[4] The trial court also sentenced Franklin to terms of years of five and fifteen years for the felony battery and possession of contraband convictions, and ordered all of the sentences to run consecutively to each other and to the sentences imposed for Franklin's prior convictions.

five aggravating factors,[5] no statutory mitigating factors, and seven nonstatutory mitigating factors.[6]

It concluded "that the aggravating factors clearly, convincingly, and beyond a reasonable doubt outweigh the mitigating factors. In fact, the mitigating evidence 'is minimal and does not come close to outweighing the aggravating factors.' " This appeal follows.

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[5] The aggravators were: (1) previously convicted of a felony and under a sentence of imprisonment or placed on community control or on felony probation—great weight; (2) prior violent felony conviction—great weight; (3) capital felony was committed to disrupt or hinder the lawful exercise of any governmental function—substantial weight; (4) the murder was especially heinous, atrocious, or cruel—very great weight; and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification—very great weight. The trial court also found an additional aggravating circumstance—the victim was a law enforcement officer engaged in the performance of his official duties—but merged it with the disrupt/hinder aggravator.

[6] Regarding the nonstatutory mitigators, the trial court found that Franklin: (1) had a childhood and adolescent years that were troubled, unstable, and violent—little weight; (2) was a great brother and uncle—little weight; (3) suffered a head injury from a gunshot wound as a teenager—some weight; (4) was effectively abandoned by his family—little weight; (5) intervened when a fellow inmate was being attacked—some weight; (6) exhibited good behavior during trial—little weight; and (7) exhibited remorse—very little weight.

ANALYSIS

Sufficiency of the Evidence

Franklin chiefly argues that the record does not support his conviction of first-degree murder. He admits that he murdered Thomas using a homemade shank but contends that the evidence presented at trial failed to show a premeditated design to kill him. In every capital case involving the imposition of the death penalty, this Court independently reviews the record to ensure there was sufficient evidence to sustain the conviction. Dausch v. State, 141 So. 3d 513, 517 (Fla. 2014). There was sufficient evidence to sustain a conviction "if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." Johnston v. State, 863 So. 2d 271, 283 (Fla. 2003) (citing Banks v. State, 732 So. 2d 1065 (Fla. 1999)); see also Dausch, 141 So. 3d at 517 (outlining elements of first-degree premeditated murder); § 782.04(1)(a)1., Fla. Stat. (2012).

According to this Court's precedent,

> [p]remeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001) (quoting Woods v. State, 733 So. 2d 980, 985 (Fla. 1999)). Premeditation may be inferred from circumstantial evidence such as "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Id. We have deemed evidence sufficient to support a finding of premeditation where it demonstrated a break between an initial crime and the ultimate decision to kill the victim. See Miller v. State, 42 So. 3d 204, 228 (Fla. 2010) ("Miller's statements that there was a break between his initial struggle with Smith during the attempted robbery and the ultimate decision to fatally stab her indicate that he was conscious of the nature of the act he was about to commit and the probable result of that act.").

Applying these principles, we conclude that the evidence in this case sufficiently demonstrates a premeditated killing. Regarding the nature of the murder weapon, Franklin killed Thomas with a homemade shank that he acknowledged was a dangerous weapon. The shank was 10.5 inches long and 1.5 inches wide. Its blade was extremely rough and caused jagged edges around Thomas's laceration and incised wounds. Expert testimony indicated that because the blade was blunt, more force was required to push it through one's skin than that required for a standard knife. Finally, Franklin testified that he wrapped rope around the shank's

handle so it would not fall off his wrist, presumably when using it in combat.

Next, the defense presented direct evidence that Thomas conducted three unnecessary "shakedowns" or searches of Franklin's cell, spoke with Franklin aggressively, and at one point ensured that Franklin was either the last inmate to eat or did not eat at all at dining time. Franklin testified that several days before the murder, a "childish" altercation regarding one of the dorm gates developed between him and Thomas. After he realized that discussing the altercation in private would not resolve the issue, Franklin invited Thomas to "handle [it] head up" in his cell or at the barber shop. According to Franklin, Thomas responded, "If you want me in there, you know how to get me down there."

Franklin and his roommate, Robert Acree, testified that on the night in question, Franklin removed a piece of cardboard from the cell vent that Acree typically used to control the air circulation. Franklin then used the quad intercom system to summon Thomas to the second-floor cell under the false pretense that water was leaking from the vent. Acree and another inmate testified that Thomas was eating a bag of potato chips and did not appear prepared to fight when he arrived at Franklin's cell. They also testified that once Thomas came into the cell and looked up at the vent, Franklin punched Thomas in his face, causing his nose or mouth to bleed profusely. Acree further explained that Thomas appeared shocked and caught unaware. A

tussle ensued, during which time Franklin hit Thomas twice more and knocked his radio out of his hand. The record reflects that Thomas's panic button also fell to the floor.

In light of these incidences, there undoubtedly were previous difficulties between the parties. The evidence nevertheless shows that Franklin unilaterally decided to resolve his and Thomas's dispute in a violent manner. And the fact that Franklin created the opportunity and need to engage in physical combat before sucker punching Thomas militates against the conclusion that the attack was not adequately provoked.

Even based on Franklin's version of the events, we are not convinced that Thomas expected a fight. Franklin testified that once Thomas came to the back of the cell and looked up at the vent, Franklin asked, "[W]hat's up? What's up now?" Thomas simply "laughed . . . and he went to eating his chips." At that point, Franklin struck Thomas. On cross-examination, Franklin explained that he perceived Thomas's laughing as not taking the situation seriously and that Franklin wanted to get the "fun and game[s] over with" because the joke was going to continue.

As to the nature and manner of the homicide and wounds inflicted, Thomas managed to disengage himself from the initial tussle and run out of the cell, down the front staircase, and out of Quad 3 toward the officer's station. State witnesses testified that

Franklin chased Thomas in the same direction. As Thomas was pulling closed the outer door to the officer's station, Franklin caught up and wedged his foot in the doorway, preventing the door from shutting and locking. A struggle over the outer door ensued, and each time the door opened and exposed Thomas's body, Franklin stabbed Thomas with the shank in a downward motion. Inmate Samuel Selig specifically recalled Franklin burying the shank into Thomas's neck, causing blood to squirt inside the vestibule to the officer's station. This episode lasted approximately thirty seconds.

Medical expert Valerie Rao testified that Thomas sustained a fatal laceration almost three inches in depth to the left side of his neck. The jugular vein and small blood vessels from the subclavian artery were cut and the left lung punctured, which caused one fifth of Thomas's blood to drain into his left chest cavity and his left lung to collapse. Rao testified that Thomas sustained one-inch incised wounds to his right cheek and just outside his right eye, and eight sharp-force defensive wounds on his arms. Rao also found a four-inch-long, top-to-bottom incised wound on Thomas's left scalp, along with a fracture to his skull underneath the wound. She opined that the bent tip of the shank's blade was consistent with having been caused by a forceful blow to Franklin's scalp. Rao determined that a considerable amount of force was exerted in order to fracture Thomas's skull and cause the blade's tip to bend.

This evidence shows that Franklin stabbed Thomas at least twelve times— with considerable force being used to inflict some, if not all, of the stab wounds. Also, the stabs wounds were inflicted not in a single, continuous manner, but at various points throughout the struggle at the officer's station door. As such, Franklin was afforded multiple intervals to reflect upon the fact that he was injuring Thomas with each overhand strike and inevitably would stab Thomas to death. The evidence further shows that there was a break between Franklin's initial assault upon Thomas in the second-floor cell and the subsequent decision to fatally stab him outside of the first-floor officer's station. See id. at 228. Given these factors, we conclude that Franklin exhibited a fully formed conscious purpose to kill Thomas. See Bradley, 787 So. 2d at 738.

Based on the evidence presented a trial, a rational trier of fact could find the existence of the elements of first-degree premeditated murder beyond a reasonable doubt. See Johnston, 863 So. 2d at 283. Accordingly, we conclude that the record sufficiently supports Franklin's conviction.

Ring & Hurst v. Florida Claim

Franklin contends that Florida's capital sentencing scheme is unconstitutional in light of the United States Supreme Court's decisions in Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 136 S. Ct. 616 (2016), because the jury that recommended death did not find the facts necessary

to sentence him to death. We agree. See Hurst v. State, 41 Fla. L. Weekly S433, S439 (Fla. Oct. 14, 2016). In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any Ring- or Hurst v. Florida-related error is harmless. See id. at S443. We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from Ring and Hurst v. Florida. See id. at S438.

However, we reject Franklin's argument that section 775.082(2), Florida Statutes (2015), requires that we remand his case to the trial court for imposition of a life sentence. See id. at S440. Accordingly, we vacate Franklin's death sentence and remand this case for a new penalty phase proceeding.

CONCLUSION

For the foregoing reasons, we affirm Franklin's conviction of first-degree murder, vacate Franklin's death sentence, and remand for a new penalty phase proceeding.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.
CANADY and POLSTON, JJ., concur in the conviction, but dissent as to the sentence.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Columbia County,

Paul Spurgin Bryan, Judge - Case No. 122012CF000312CFAXMX

Paul Spurgin Bryan, Judge - Case No. 122012CF000312CFAXMX

Nancy Ann Daniels, Public Defender, and Nada Margaret Carey, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Robert James Morris, III, Assistant Attorney General, Tallahassee, Florida,

for Appellee

APPENDIX B

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

STATE OF FLORIDA, CASE NO.: 2002-312-CF

Plaintiff,

vs.

RICHARD P. FRANKLIN,

Defendant

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SENTENCING ORDER

On May 3, 2012, the Defendant was indicted by a grand jury for three offenses: First-Degree Murder, Aggravated Battery on a Law Enforcement Officer, and Possession of Contraband in Prison. The Defendant proceeded to a jury trial, whereby he was represented by M. Blair Payne and Jonathan Austin (with additional participation by John Hendrick and Robert Baker III). The State was represented by Jeffrey A. Siegmeister, David Phelps, and John Durrett. On June 19, 2013, the jury found the Defendant guilty of three offenses: Count 1, First-Degree Murder for the death of Ruben Howard

Thomas, III, a capital felony, as charged in the indictment; Count 2, Felony Battery on William M. Brewer, a third-degree felony and lesser-included offense; and Count 3, Possession of Contraband in Prison, a second-degree felony, as charged in the indictment. Counts 2 and 3 are not capital offenses and will not be further addressed in the instant order except to announce their sentences.

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

This Court is mandated by section 921.141, Florida Statutes, to evaluate all statutory aggravating factors and all statutory and nonstatutory mitigating factors in making its decision. This Court presided over the guilt and penalty phases of the trial, considered the testimony and observed the demeanor of all witnesses, reviewed all exhibits introduced into evidence, listened to argument of counsel, reviewed the presentence report, and reviewed all sentencing memoranda. This Court also reviewed a multitude of relevant decisions issued by the Supreme Court of Florida and the United States Supreme Court concerning a judge's responsibility whenever the imposition of the death penalty is considered. This Order sets forth in writing the results of this judicial effort.

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

(a) The capital felony was committed by a person previously convicted of a felony

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

and under sentence of imprisonment or placed on community control or on felony probation.

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. The Defendant was previously convicted of three felonies and was currently serving an incarcerative sentence for at least one of these felonies.[2] Specifically, the Defendant's Classifications Officer, Kimberly Kennedy, testified that the Defendant had been previously convicted of armed robbery, aggravated battery, and first-degree murder. She further indicated that the Defendant was sentenced to a life sentence for his earlier first-degree murder conviction, a life sentence for his armed robbery with a firearm conviction, and a term of years in prison for his aggravated battery with a firearm. She also testified that, at the time of this crime, March 18, 2012, the Defendant was serving a prison sentence

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

for at least one of these prior felonies. The Defense did not attempt to challenge this aggravating factor but, instead, argued that assigning any significant weight "would run afoul of the preclusion of arbitrary application of the death penalty."

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

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

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. The Defendant was previously convicted of three felonies- a capital felony and two felonies involving the use of violence to a person. First, the State presented the Defendant's Judgment (Exhibit 101) for first-degree murder, a capitol felony. The Defendant attempted to minimize this murder by explaining that the killing resulted from his shooting a man in the leg with "buckshot," and the man subsequently died. The Defendant explained that he did not believe that a gunshot wound to the leg was necessarily a fatal wound, that people are often shot in the leg (especially in movies), and they do not die.

Regardless of the Defendant's attempt to minimize his criminal conduct, this offense, standing alone and proven by Exhibit 101 and the details having been further explained by the Defendant, satisfies this aggravating factor.

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

The Defense attempted to diminish these aggravating factors by arguing that these offenses occurred when the Defendant was merely twenty years old, and they are remote in time to the present offense. However; part of the remoteness is attributed to the fact that the Defendant has been continuously incarcerated for the past approximately eighteen years as a result of the previous felonies committed when the Defendant was twenty years old. Additionally, the Defense argued that because the same offenses were used to satisfy the previous

aggravating factor, this aggravating factor should either be "merged" with the previous aggravating factor or given little, if any, weight. This Court finds that this argument is also not compelling. Rose v. State, 787 So. 2d 786, 801 (Fla. 2001) (citing Hildwin v. State, 727 So. 2d 193, 196 n.3 (Fla. 1998)) (holding consideration of both aggravating factors, sections 921.14l(5)(a) and (b), did not amount to "improper doubling").

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

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[3] The Defendant was also contemporaneously convicted of a felony involving the use of violence; the felony battery of William M. Brewer. This contemporaneous felony involved a separate victim; therefore, it could have been considered under Florida law. See. e.g., King v. State, 390 So. 2d 315 (Fla. 1980); Pardo v. State, 563 So. 2d 77 (Fla. 1990); Stein v. State, 632 So. 2d 1361 (Fla. 1994); Francis v. State, 808 So. 2d 110 (Fla. 2002). However, the State did not request that either the jury or this Court consider this contemporaneous felony. Accordingly, it was not relied upon in this Court's decision to impose a death sentence.

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

There was no evidence presented to establish this aggravator.

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

There was no evidence presented to establish this aggravator.

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

There was no evidence presented to establish this aggravator.

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

There was no evidence presented to establish this aggravator.

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

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. Two of the most basic requirements of operating a prison facility are that people (both inmates and officers) are where they are supposed to be and order and control of the facility is maintained. However, the Defendant's conduct effectively disrupted the operation of the prison facility. The victim, as the dorm sergeant on staff on March 18, 2012, and the additional officer in the control room were responsible for the care, custody, and control of all inmates (more than 200) in the dorm at that time. As Warden Tony Anderson explained, a dorm sergeant has many duties both in and out of the control room. The dorm sergeant and his additional officer (if one is assigned) are in charge of count procedures, security checks, equipment inventory,

ensure call outs are conducted, and similar duties. Moreover, the dorm sergeant would regularly enter the common area in the dormitory, in particular, when inmates utilized the intercom system to report a maintenance problem in their cell. This is precisely what the Defendant did to get the victim to exit the control room and enter the dorm-he complained about the air vent in his cell.

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

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

This Court recognizes that the Defense disagrees with application of this aggravating factor because, they argue, this factor requires the jury to find that the Defendant committed this crime "*to*" disrupt the lawful exercise of any government function. ln other words, the Defense conceded that this crime did in fact cause disruption to the lawful operation of the prison facility. However, that disruption occurred after the crime, and, according to the Defense, the

Defendant did not engage in this conduct for the express purpose "*to*" disrupt the operation of the prison facility-that was merely an unintended consequence.

However, the Florida Supreme Court has repeatedly held "that in order. for the disrupt/hinder aggravator to be applicable, it is sufficient for the State · to show that the victim was killed while performing a legitimate governmental function." Phillips v. State, 705 So. 2d 1320, 1322 (Fla. 1997) (held that evidence establishing that victim was a parole officer directly involved with revoking the defendant's probation was sufficient to show that the murder was committed to disrupt or hinder the lawful exercise of a governmental function) (citing Jones v. State, 440 So. 2d 570, 577-78 (Fla. 1983)). The operation of a prison facility is a "legitimate governmental function," and the victim in this case was directly involved with the supervision of the Defendant. This Court recognizes that revenge or ill will towards the victim may have also been a motivating factor for the Defendant, as he testified during trial that he called the victim to his cell to inflict physical harm upon him. However, like the defendant in Phillips (who killed his parole officer for exercising his official duty), the Defendant murdered the victim because of his official duties. The victim in this case was a sergeant tasked with guarding the Defendant; the Defendant, like Phillips, did not agree or approve of the government

agent's conduct. Id. Proof beyond a reasonable doubt of the mere fact that the Defendant killed the victim while the victim was performing a legitimate governmental function is sufficient to establish this aggravator. However, as explained above, the State offered further proof of this aggravating circumstance.

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

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

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. This Court has considered the Defense's argument that any death, even automobile accidents, have some measure of heinousness and atrociousness to them and that it must be proved beyond a reasonable doubt that this case was "*especially*" heinous, atrocious, or cruel. This argument has been recognized and endorsed by the Florida Supreme Court. See, e.g., Amoros v. State, 531 So. 2d 1256, 1260 (Fla.1988) ("First-degree murder is a heinous crime; however, this statutory aggravating circumstance requires the incident to be '*especially* heinous, atrocious, and cruel [sic].'"); Tedder v. State,

322 So. 2d 908, 910 (Fla.1975) ("It is apparent that all ki11ings are atrocious .... Still, we believe that the Legislature intended something 'especially' heinous, atrocious, or cruel when it authorized the death penalty for first degree murder."). In fact, the Florida Supreme Court has explained that "only in torturous murders-those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another," are the elements of heinous, atrocious, or cruel met. Guzman v. State, 721 So. 2d 1155, 1159 (Fla.1998) (citing Kearse v. State, 662 So. 2d 677 (Fla. 1995)). According to the Defense, this case does not rise to that level. However, this Court disagrees for numerous reasons.

First, the trial testimony, particularly the testimony of the medical examiner, established that the victim was stabbed at least twelve times. Specifically, the medical examiner testified that the victim suffered eight defensive wounds, a wound to his skull, two wounds on the side of his face, and a mortal wound to his neck. Therefore, the capital felony was especially heinous, atrocious, or cruel. Francis v. State, 808 So. 2d 110, 134-35 (Fla. 2001) ("The [heinous, atrocious, cruel] aggravator has been consistently upheld where, as occurred in this case, the victims were repeatedly stabbed.") (citing Guzman v. State, 721 So. 2d 1155, 1159 (Fla.1998);

Brown v. State, 721 So. 2d 274,277 (Fla.1998); Atwater v. State, 626 So. 2d 1325, 1329 (Fla.1993)).

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

Third, the nature of the weapon further established the especially heinous, atrocious, or cruel nature of this crime. The weapon was crafted by the Defendant's cellmate, Robert Acree, who testified that he routinely made weapons while in prison. This particular weapon, a makeshift knife, was

admitted into evidence and measured approximately ten inches long. The blade is about one inch wide. A witness labeled the makeshift knife a "Conan-knife." The medical examiner explained that the makeshift knife was very thick and blunt except for the end that was sharpened to a point. These characteristics-the thickness and lack of sharpness of the blade-according to the medical examiner, would require one to use more force than if it were a standard-made knife to effectuate the injuries that the victim suffered.

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

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

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

victim after he had left the Defendant's cell. The Defendant opted, rather than end his physical attack when the victim exited the Defendant's cell, to pursue the bleeding victim. The Defendant's deliberate pursuit for approximately 150 feet during which the Defendant had time to reflect and could have abandoned his pursuit and brandishing of a knife further supports this aggravating factor.

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

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

The evidence establishes the existence of this aggravating factor beyond a reasonable doubt. The Florida Supreme Court has articulated a four-part test for finding this aggravator: "(1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification."

Victorino v. State, 23 So. 3d 87, 105-06 (Fla. 2009) (citing Lynch v. State, 841 So. 2d 362, 371 (Fla. 2003)).

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

Second, the Defendant, with great premeditation, carefully planned the attack and lay in wait for the victim to arrive in his cell which satisfies the second and third prongs. Hall v. State, 107 So. 3d 262, 278 (Fla. 2012), reh'g denied (Feb. 1, 2013) (citations omitted). There was evidence proven beyond a reasonable doubt that established more than the mere premeditation element that the jury found during the guilt stage and exhibited that the Defendant had thoroughly planned the attack. For example, the Defendant acquired a knife and

successfully hid it from prison officials. This supports the premise that the Defendant planned the attack. See, e.g., Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007) ("In a number of cases, [the Florida Supreme Court has] cited the defendant's procurement of a weapon in advance of the crime as indicative of preparation and heightened premeditated design."). In addition, the Defendant also manipulated his cell so that the victim would be required to inspect it. He called the victim on the intercom and reported the air vent issue to the victim. Prior to the victim's arrival, according to trial testimony, the Defendant either hid the knife on his person or purposefully placed it in a convenient location (not under the cell door where it was usually stored), establishing that the Defendant did not intend to merely report the air vent issue but, instead, intended on attacking the victim. After placing the intercom call, the Defendant waited for the victim to arrive. The victim entered the Defendant's cell carrying a bag of potato chips, which illustrates that the victim arrived without any indication that he would be physically attacked. The victim looked up at the air vent, and the Defendant struck the victim. The victim fled the Defendant's cell, and the Defendant pursued the victim with the knife that he retrieved from either his person or the convenient, prearranged location. The Defendant "fast-walked" after the injured victim, and, ultimately, the two simultaneously tugged on the door separating them as the Defendant continuously

stabbed the victim through the door opening. The door did not shut and lock due to the Defendant wedging his shoe into the door. Testimony from witnesses revealed that the Defendant was using overhand strikes through the opening in the door to stab the victim. During this attack, the Defendant had many opportunities to reflect and cease his attack on the victim; instead, the Defendant continued his deliberate pursuit of and physical attack on the victim. This series of acts prove beyond a reasonable doubt that the Defendant possessed a heightened intent to kill the victim-not just inflict harm upon him. See. e.g., Parker v. State, 873 So. 2d 270 (Fla. 2004) ("[The Florida Supreme Court has] previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead commits the murder."). These actions, according to settled case law, establish that the Defendant possessed heightened premeditation. McGirth v. State, 48 So. 3d 777, 793 (Fla. 2010) ("Sufficient evidence exists to support a trial court's finding on CCP where the defendant procures a weapon in advance, receives no provocation or resistance from the victim, and carries out the killing as a matter of course."); see also Williams v. State, 37 So. 3d 187, 195 (Fla. 2010); Franklin, 965 So. 2d at 98.

This Court is cognizant of the Defense's allegation that this aggravator has not been proven

beyond a reasonable doubt. According to the Defense, three eyewi1nesses from trial observed the initial altercation in the Defendant's cell and testified that the Defendant did not pull out the knife immediately. Although, as the Defense argued, the Defendant could have retrieved the knife and murdered the victim relatively easily in his cell (as the victim was rather defenseless with a bag of potato chips), he did not. This, according to the Defense, establishes that the Defendant did not act in a cold, calculated, or premeditated manner. In other words, if the Defendant had orchestrated a premeditated plan to kill the victim, he would have done so as soon as the victim arrived in the Defendant's cell, a more secluded location, and a time when the victim was more vulnerable. The Defense argued that this "plan" to punch the victim and then chase him through the dorm and struggle over the door does not make sense. These arguments by the Defense do not diminish the cold, calculated, and premeditated aggravating factor. Instead, it illustrates a different plan that the Defendant may have attempted. It does not diminish or discredit the detailed planning that the Defendant engaged in regarding the preparation of the weapon or his cell, which was used to effectively lure the victim into the Defendant's cell.

Finally, the Defendant acted without any moral or legal justification. As explained above, the attack was not the product of the victim's immediate

provocation. Instead, the Defendant explained that the victim, in previous interactions, had treated the Defendant with disrespect-including the gate incident. Witness testimony was somewhat conflicted regarding the victim's treatment of the Defendant. Some wi1nesses, including Lionel Tate, testified that the victim "hasseled" the Defendant and conducted frequent "shakedowns" of his cell, a cell which he shared with Robert Acree, a known weapon maker. Tate also testified that the victim did not allow the Defendant to eat on one occasion. On the other hand, other witnesses testified that the Defendant was not treated differently by the victim. And the Defendant even testified that the prior issues between him and the victim were immature and "childish." Even if the victim performed more frequent "shakedowns" of the Defendant's cell[4] or treated or talked to him in a disrespectful manner, such treatment clearly does not amount to legal or moral justification.

Therefore, this Court finds that this aggravating factor, that the murder was cold, calculated, and premeditated, and committed without moral or legal justification, has been proven beyond a reasonable

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

doubt This Court assigns this aggravating factor very great weight.

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

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

previous aggravating factor of hindering or disrupting the lawful exercise of a governmental function.

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

There was no evidence presented to establish this aggravator.

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

There was no evidence presented to establish this aggravator.

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

There was no evidence presented to establish this aggravator.

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

There was no evidence presented to establish this aggravator.

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

There was no evidence presented to establish this aggravator.

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

There was no evidence presented to establish this aggravator.

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

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

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

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

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

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

There was no evidence presented to establish this mitigating circumstance. In fact, evidence established that the Defendant initiated the interaction with the victim. As already explained in this Order, the undisputed evidence at trial established that the Defendant altered the air vent in his cell and then contacted the victim to come and examine the Defendant's cell. The victim arrived with a bag of potato chips in his hand and began to examine the air vent. This evidence does not establish that the victim was a participant or consented to the act; instead, it demonstrates that the victim arrived in the Defendant's cell unaware that he would be physically attacked. Furthermore, the victim's unsuccessful attempt to flee to safety further disestablishes this factor. Had the victim consented to the attack by the Defendant or been a participant, he would not have sought refuge. Therefore, this mitigating factor was not alleged or proven and does not apply.

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

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

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

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

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

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

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

There was no evidence presented to establish this mitigating circumstance. The Defendant was not a minor when he killed the victim, nor had he recently reached the age of majority. In fact, the Defendant was thirty-six years old when he killed the victim in this case. As such, the Defendant's age was not at issue, and this factor does not apply.

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

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

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

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

Conditions of Home and Personal Possessions. The childhood home of the Defendant was very small. The family, which would eventually include five children, shared a two-bedroom home. As described by his sister, it was a "raggedy shack" with holes in the floor. In fact, his mother fell through one of the holes in the floor during her second pregnancy. The Defendant's sister also explained that the home lacked most household luxuries, explaining that they

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

did not acquire a television until she was about ten years old.

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

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

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

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

by their parents. The family did not celebrate birthdays, Christmas, or Thanksgiving. Nor did they patronize movie theaters.

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

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

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

The Defendant was present in the home when his father shot the Defendant's older brother; however,

this incident was not further explained by any witnesses.

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

that the Defendant's childhood and adolescence had an ill effect on the Defendant. As such, this Court assigns little weight, individually and collectively, to each of the above mitigating circumstances surrounding the Defendant's childhood and adolescence.[6]

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

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

The Defendant's ability to transport his nephews and purchase things for them obviously ended when he was incarcerated approximately eighteen years ago. Further, as the Defendant's sister explained,

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

and further addressed below in (4), the Defendant's sister only visited him once since he has been incarcerated-sometime in l995. Accordingly, this caring and loving behavior exhibited by the Defendant towards his sister and nephews occurred at least eighteen years ago. Nonetheless, this testimony regarding how the Defendant behaved as a brother and uncle was unrefuted and, accordingly, supported by reasonably established evidence. However, this Court assigns this mitigating evidence little weight.

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

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

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

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

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

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

his family was with "his mother and brothers Larue and Lorenza Frankline" in 2002.

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

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

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

This Court finds that the evidence has reasonably established that the Defendant, along with a few other inmates, intervened in an altercation between Mr. Thomas and another inmate. The Defendant's conduct was undoubtedly commendable, and this mitigating factor is assigned some weight. See, e.g., Windom v. State, 886 So. 2d 915, 920 (Fla. 2004) (finding that affording "very little weight" to a defendant saving the life of two separate people was proper); Lugo, 845 So. 2d at 92 (finding that affording "little weight" to a defendant's exhibited "great acts of kindness in the past" was appropriate).

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

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

(7) The Defendant exhibited remorse.

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

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

Conclusion

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

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

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

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

factor. Here, the nature and quality of the mitigating evidence pales in comparison to the enormity of the aggravating factors proven in this case.

IT IS THE JUDGMENT AND SENTENCE OF THIS COURT:

1. For the First Degree Murder (Count I) of Ruben Howard Thomas, III, the Defendant is sentenced to be put to death in the manner prescribed by law. It is ORDERED that the Defendant be taken by the proper authority to the Florida Department of Corrections to be housed there until the date execution is set. It is further ORDERED that on such scheduled date, the Defendant be put to death.

2. For the Felony Battery (Count 2) on William M. Brewer, the Defendant is sentenced to serve a term of imprisonment in the Department of Corrections for five years.

3. For the Possession of Contraband in Prison (Count 3), the Defendant is sentenced to serve a term of imprisonment in the Department of Corrections for fifteen years.

4. These sentences are to run consecutive to each other and to the sentences previously

imposed by the Seventh Judicial Circuit Court in and for Volusia County.

5. Due to the sentences in the instant case being ordered consecutive to the Defendant's previous sentences and the fact that the Defendant was still serving the earlier-imposed sentences, the Defendant is not entitled to any presentence credit for the time he was incarcerated in the Department of Corrections awaiting disposition of the instant case. See *Cregg v. State*, 43 So. 3d 818 (Fla. 1st DCA 2010).

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

7. Even if the Defendant elects not to appeal, "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida." § 92l.l41(4), Fla. Stat.

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

/s/
PAUL S. BRYAN,
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

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

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

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

/s/
Person Sending Copies
[*Deputy Clerk]*

APPENDIX C

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI

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

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fla. Const. art. I, § 22

Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

Fla. Stat. § 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

Effective: October 1, 2010

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted

before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.— Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and

the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

designated as a sexual predator who had the sexual predator designation removed.

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

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

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

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

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

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

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

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

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

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

(7) Victim impact evidence.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.