

**IN THE SUPREME COURT OF FLORIDA**

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SC20-1422

GRANVILLE RITCHIE  
*Appellant,*

v.

STATE OF FLORIDA  
*Appellee.*

On Appeal From The Thirteenth Judicial Circuit,  
In And For Hillsborough County, State of Florida  
*L.T. No. 29-2014-CF-011992-000-A-HC*

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**INITIAL BRIEF OF THE APPELLANT**

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## Preliminary Statement Regarding References

The trial transcripts in the instant case consist of twenty-seven volumes, which are paginated sequentially and consecutively. As there are no duplicate page numbers, counsel will not reference volumes. References to the 4,379-page trial transcripts are in the form (T. #.). References to the 2,475-page record are in the form (R. #.); this includes any references to exhibits.

The victim in this case was a minor. As such, her name will not be referenced in any way by counsel and will be redacted from any utilized quotations where it appears in the trial record. She will be referred to simply as “F.W.” throughout.

## Statement of the Case

On August 28, 2014, a Hillsborough County Grand Jury indicted the Appellant, Granville Ritchie (“Ritchie”), for Murder in the First Degree (count one), Sexual Battery (count two), and Aggravated Child Abuse (count three).<sup>1</sup> R. 103-06. The offenses were alleged to have been committed on May 16<sup>th</sup> and 17<sup>th</sup> of that year. The State sought the death penalty and intended to prove the following aggravators: (1) the victim was less than twelve years old, (2) the murder was committed during the commission of a sexual battery, and (3) the murder was especially heinous, atrocious, or cruel (“HAC”). R. 121, 137-38, 621-22.

The case proceeded to trial on September 9<sup>th</sup> through the 25<sup>th</sup> of 2019 before Circuit Judge Michelle Sisco and a jury. Ultimately, the jury found Ritchie guilty of Murder in the First Degree, as charged. The jury specifically found that the killing was both premeditated murder and felony murder, based on the finding that the murder occurred during the course of a sexual battery or was committed

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<sup>1</sup> See §§ 782.04(1), 794.011(2)(a) (Victim Less Than 12, Defendant More Than 18), 827.03(1)(a) and (2)(a), Fla. Stat. (2014).

during the course of aggravated child abuse. Defendant was also found guilty of Sexual Battery and Aggravated Child Abuse as charged. R. 947-48; T. 3778-79.

On September 26<sup>th</sup> and 27<sup>th</sup>, 2019, the Court conducted the penalty phase of the trial. The jury returned a verdict finding that Ritchie should be sentenced to death for the murder conviction. R. 958-60; T. 4366-68. A *Spencer* hearing was held on January 7, 2020.<sup>2</sup> R. 2088-2101.

On September 11, 2020, Judge Sisco imposed a death sentence as to the murder and prison sentences<sup>3</sup> on the remaining counts. R. 1045-70; 2102-58.

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<sup>2</sup> At that hearing, neither party presented additional witnesses or evidence.

<sup>3</sup> Life as to count two; 30 years as to count three. R. 1069.

## Statement of the Facts

While Ritchie does not concede guilt, he acknowledges through undersigned appellate counsel that the circumstantial evidence presented by the State is legally sufficient to withstand a motion for judgment of acquittal as to all three counts. *See Bush v. State*, 295 So. 3d 179 (Fla. 2016).

### A. Trial.

On May 16, 2014, Ritchie and Eboni Wiley (“Wiley”) picked up F.W. from her home in Tampa. T. 1710. Wiley was a friend of F.W.'s family, and she and Ritchie had recently become involved in a romantic relationship. T. 1688, 1698-1702. Ritchie drove Wiley and F.W. to a restaurant and then to his apartment<sup>4</sup> in Temple Terrace. T. 1713-16. Upon arrival, Ritchie gave Wiley "molly"; a drug similar in its effects to Ecstasy. T. 1716. Ritchie then sent Wiley to procure marijuana for him. T. 1722. Wiley left without F.W. T. 1722-24.

While in the apartment, F.W. was manually strangled until she died. T. 2580. Following her death, Ritchie informed Wiley via phone that F.W. had left the apartment to buy candy at a nearby pharmacy.

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<sup>4</sup> Ritchie’s mother also lived in the apartment but was not home. T. 1626.

T. 1730-31. Not finding her at the store, Wiley returned to the apartment, where she and Ritchie fabricated a story concerning F.W.'s whereabouts. T. 1733-34, 1746-48.

Later that evening, Ritchie drove Wiley back to Tampa. T. 1743-44. He then returned to the apartment and relocated the body, driving from the apartment in Temple Terrace toward Clearwater, across the Courtney Campbell Causeway.<sup>5</sup> T. 2912-83. The body was deposited utilizing access roads near the Causeway.<sup>6</sup> T. 1919-32. Ritchie then travelled to St. Petersburg to stay with his girlfriend, Kellisa Kelley. T. 3120-25.

Meanwhile, Wiley, along with F.W.'s family, met with police. T. 1751-52. Wiley initially lied to police and said she had taken F.W. to visit a female friend of hers, and while at that location, F.W. had run away from the friend's apartment. T. 1752. After being interviewed several more times, however, Wiley admitted that she and Ritchie had

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<sup>5</sup> Ritchie's whereabouts were established by way of cell tower data.

<sup>6</sup> An analyst from the National Oceanic and Atmospheric Administration said the body entered the water either on the north side of the Causeway or closer to the southeast side. T. 1919-20.

taken F.W. to his apartment, where the child disappeared while in his care. T. 1782, 1870.

On May 17, 2014, F.W.'s body was recovered from the water on the north side of the Causeway. T. 2089-95. The body was nude and the clothes she was last seen in were never found. T. 3049-51.

The Defense did not concede that Ritchie committed any of the charged crimes. T. 3400-05, 3671-88. Ultimately, the Defense suggested that Wiley was the one who murdered F.W., motivated by anger from a recent argument she and F.W. had and fueled by a drug Wiley admitted made her feel like "Satan was manipulating her." T. 3673-75, 3678-80.

The prosecutor asserted that F.W. was alive when Wiley left Ritchie's apartment, that a sexual battery occurred, and that an argument was not enough motive for Wiley to kill F.W. T. 3715-16.

#### B. Penalty Phase.

The State began the penalty phase by presenting victim impact testimony from F.W.'s mother.<sup>7</sup> As to two of the aggravators – 'the victim was less than twelve years of age' and the 'murder was

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<sup>7</sup> The victim impact testimony will be discussed in Issue II.

committed during the commission of a sexual battery’ – the State relied on guilt phase evidence.

As to the HAC aggravator, the State presented the testimony of Dr. Downs, a pathologist, who testified that strangulation could take several minutes and that F.W. could have been conscious for some of that time during which she would have been subjected to a high degree of both pain and fear. T. 3844-45, 3852-53, 3861-62. F.W. also had other injuries to her head and mouth – all of which would have been painful because of how innervated those areas are. T. 3827-32.

The Defense sought to establish two statutory<sup>8</sup> mitigators: (1) Ritchie’s capacity to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired, and (2) the murder was committed while Ritchie was under the influence of extreme mental or emotional disturbance. T. 3910. To that end, the Defense presented mental health experts.

Dr. Hyman Eisenstein, M.D., testified Ritchie suffered from

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<sup>8</sup> The Defense also sought to establish several non-statutory mitigators.

frontal lobe damage resulting from car accidents and childhood injuries, as well as executive functioning impairment, which all resulted in impulsive behavior. T. 3895, 3901-03. Dr. Eisenstein told the jury Ritchie's IQ score of 78 meant that he was borderline. T. 3933-35.

Neuropsychologist Dr. Joseph Chong-Sang Wu echoed that Ritchie did have brain injury from childhood physical trauma, which resulted in a failure to regulate impulses and control his emotions. T. 4027-28, 4034-35, 4040.

In response to Ritchie's mental health mitigation, the State presented the rebuttal testimony of Dr. Lawrence Holder, who said Ritchie did not have any brain damage (T. 4147-48), and Dr. Emily Lazarou who claimed Ritchie's school, employment, and jail records did not indicate he had any diminished mental capacity. T. 4189, 4203-05. The experts from the State and Defense also disagreed on whether Ritchie had Antisocial Personality Disorder; Dr. Lazarou claimed he did and Dr. Eisenstein asserted he did not. T. 3938, 4197.

To prove the harsh circumstances of Ritchie's childhood, the Defense introduced into evidence a video depicting the area of

Jamaica where he grew up and people who knew him.<sup>9</sup>

Following the penalty phase testimony and evidence, the jury unanimously determined that Ritchie should be sentenced to death. R. 958-60.

The Court's sentencing order reflected the existence of the following aggravators<sup>10</sup>: (1) The victim was less than twelve years of age, (2) the murder was committed during the commission of a sexual battery, and (3) HAC. R. 1049-53. All three of these aggravators were assigned great weight. R. 1049-52.

As to statutory mitigation, the Court found the Defense had established Ritchie had no significant history of prior criminal activity<sup>11</sup> and gave it moderate weight. R. 1055. The Court, however, found the Defense failed to establish the remaining statutory mitigators – that Ritchie committed the murder while under the influence of extreme mental or emotional disturbance and that Ritchie's capacity to appreciate the criminality of his conduct or to

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<sup>9</sup> The details of this video, as well as the rebuttal evidence the State presented to it, will be discussed in Issue III.

<sup>10</sup> § 921.141(6)(l), (6)(d), and (6)(h), Fla. Stat. (2019).

<sup>11</sup> § 921.141(7)(a), Fla. Stat. (2019).

conform his conduct to the requirements of law was substantially impaired.<sup>12</sup> R. 1058-59, 62-63.

As to the non-statutory mitigation<sup>13</sup> presented by the Defense, the Court found Ritchie suffered mental and physical abuse by his father and that the father was often absent because he had four different families. R. 1064. This was afforded moderate weight. R. 1064.

The Court also found the Defense had established Ritchie was the oldest of eighteen siblings and helped raise them, had a history of gainful employment, and had positive redeeming qualities; however it gave this mitigation little weight. R. 1065-66. While the Court also found the Defense established Ritchie was raised in a poverty-stricken and violent neighborhood, it gave that circumstance little weight as well. R. 1064-65.

The Court found the non-statutory mitigation regarding Ritchie's childhood head injury and his low risk of recidivism were not established. R. 1063-64, 66-67.

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<sup>12</sup> § 921.141(7)(b), (7)(f), Fla. Stat. (2019).

<sup>13</sup> § 921.141(7)(h), Fla. Stat. (2019).

Ultimately, the Trial Court imposed the death penalty. R. 1068-69.

## Summary of the Argument

The prosecutor's unrelenting misconduct throughout his penalty phase closing argument encouraged the jury to impose a death sentence for impermissible reasons including xenophobia [Issue I]. Florida's victim impact scheme is unconstitutional, and the Trial Court and jury's receipt of a religious plea in favor of the death penalty violated Ritchie's Due Process rights and rendered his death sentence arbitrary and capricious [Issue II]. The Trial Court's withholding from the jury significant aspects of Ritchie's mitigating evidence, followed by the State's rebuttal of the mitigating evidence which did come in, with improper, speculative testimony from a State Attorney's Office intern, severely impacted the jury's ability to fairly consider Ritchie's mitigating evidence of the abject poverty and tumultuous violence that defined his upbringing [Issue III].

## Argument

### **I. THE PROSECUTOR'S CLOSING ARGUMENTS DEPRIVED RITCHIE OF A FAIR TRIAL.<sup>14</sup>**

Closing argument “must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant.” *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). This is not a case of an extemporaneous, isolated instance of error. The prosecutor's numerous impermissible comments during closing arguments were calculated to manipulate the emotions of the jurors and denied Ritchie a fair penalty phase. Here, the cumulative effect of multiple improper closing arguments is intolerable.

#### A. SAME MERCY.

‘Same mercy’ arguments are “blatantly impermissible”. *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998). *See also Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992); *Rhodes v. State*, 547 So. 2d 1201, 1206 (Fla. 1989). The prosecutor violated this prohibition when he bluntly told the jury to reel itself in if it began considering extending

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<sup>14</sup> Appellant makes this argument under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and Article 1, sections 9, 16, and 17, of the Florida Constitution.

mercy to Ritchie during deliberations. Since F.W. experienced a merciless death, urged the prosecutor, any inclinations toward grace had to be extinguished.

So I want you to think about this, again, when you're back there deliberating, **when you're considering** whether you should give him life and **whether you should personally extend mercy** to this defendant. **Did he extend mercy to this little girl?**

T. 4294. (Emphasis supplied.)

Immediately after this comment, the Defense objected and moved for a mistrial. T. 4294-95. The Trial Court disagreed that the prosecutor made a 'same mercy' argument and allowed the prosecutor to continue, merely warning him from now on to only use the term mercy in "the context of HAC." T. 4295.

Here the prosecutor slyly conflated lack of mercy's relevancy to the HAC aggravator with the jury's ultimate and final decision – to kill Ritchie or mercifully let him live. When the prosecutor said "think about this, again" – "this" being "[d]id he extend mercy to this little girl?" – when they were deciding "whether [they] should personally extend mercy", he was not discussing the sufficiency of the HAC aggravator. He was clearly saying if they were inclined to extend

mercy to Ritchie, then they should refrain from doing so on account of the lack of mercy shown to F.W.

In a second violation in the same vein, the prosecutor encouraged the jury to regard mercy as a quid pro quo:

This isn't pleasant to think about. It isn't pleasant. It's not natural to sit here and think about this and walk through this. This is ugly. This is nastiness. But you have to think about this because you're considering what his penalty should be. And to ultimately, to be able to do that in an honest and fair and just manner, you have to consider what this little girl suffered and what she went through.

**Remember this when you're back there deliberating. Remember this when the idea of mercy maybe starts to [percolate] a little bit up into your mind.** Remember that during these several minutes at least three minutes to inflict all of these injuries to her body, **remember there was never, not for one second, relief for this little girl. She never had relief during this.** She was suffering in excruciating pain from here to the top of her head, from her genitals all the way up. There was nothing that wasn't unpleasant, painful about this murder. He absolutely brutalized her.

What this little girl endured, no child should have to go through. She suffered an agonizing death. This isn't a very efficient way of killing. But none of that stopped this defendant. And you can consider that when you're considering whether we have proven whether this is heinous, atrocious or cruel or torturous, because you can consider, like I said earlier, whether he exerted any mercy at all to her, any pity to her.

T. 4289-90. (Emphasis supplied.)

While true that a HAC determination is in part concerned with a lack of mercy shown to the victim, the prosecutor's comments here go beyond pointing that out. The difference between guiding the jury's deliberations as to the sufficiency of a HAC finding and what the prosecutor did here – encouraged the jury to consider lack of mercy when deciding whether to extend mercy to Ritchie – is significant. The jury was entitled by law to extend mercy to Ritchie despite its HAC determination. See Fla. Std. Jury Instr. (Crim.) 7.11; § 921.141, Fla. Stat. (2019) (“Regardless of the results of each juror’s individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.”). The prosecutor’s comments here blur that distinction and make it likely the jury relied on lack of mercy, not only when deliberating on aggravators but also during its ultimate deliberations as to whether Ritchie deserved to live or die. These blatantly impermissible ‘same mercy’ arguments were calculated to inflame jurors’ emotions and influence their sentencing

recommendation. *See Urbin*.

B. THE CUMULATIVE EFFECT OF OBJECTED-TO AND UNOBJECTED-TO PROSECUTORIAL MISCONDUCT.

The Defense filed a pretrial motion to preclude some of the same improper arguments that counsel now addresses in this brief, including: “same mercy” arguments, comments that “inflame the minds and passions of the jurors”, commands that the jurors “listen to the screams” of the victim, and arguments that equate the jury “recommend[ing] life imprisonment” with an abdication of their duty. R. 760-63. The State did not respond, and the Trial Court granted the motion. R. 811.

Additionally, the Defense objected during the State’s closing argument to the ‘same mercy’ comments discussed *supra* [part A]. Thus, this Court should consider “the cumulative effect of objected-to and unobjected-to comments”. *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007); *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999). The cumulative effect of the combined errors here was not harmless beyond a reasonable doubt. To the contrary, it deprived Ritchie of his right to have a jury fairly decide his fate. Accordingly, this Court should

reverse for a new penalty phase.

However, if this Court deems the Defense's objection during trial, as well as the one made pretrial, insufficient to preserve the issue of prosecutorial misconduct during closing argument, reversal is still necessary as "the prejudicial conduct in its collective import is so extensive that its influence pervade[d] the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1034 (Fla. 2000) (Pariente, J., concurring specially) (citing *Tyus v. Apalachicola N. R.R.*, 130 So. 2d 580, 587 (Fla. 1961); *Crew v. State*, 146 So. 3d 101, 108 (Fla. 5th DCA 2014); *Servis v. State*, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003); *Silva v. Nightingale*, 619 So. 2d 4, 5 (Fla. 5th DCA 1993). The blatant and emotionally-charged improprieties which pervaded the prosecutor's closing argument in Ritchie's penalty phase amounts to fundamental error requiring a new jury be empanelled to conduct an untainted sentencing proceeding.

C. GOLDEN RULE, SPECULATION ABOUT FACTS NOT IN EVIDENCE, AND IMAGINARY SCRIPT.

Inviting the jury to imagine the victim's final pain, terror, and defenselessness has long been prohibited in Florida. *Bertolotti*, 476 So. 2d at 133 n. 2 (finding golden rule violation where prosecutor argued “can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, fighting for her life ...”). *See also Jennings v. State*, 453 So. 2d 1109 (Fla. 1984); *Barnes v. State*, 58 So. 2d 157 (Fla. 1951). The prosecutor violated that proscription when he asked the jury “**[c]an you imagine the dread of knowing that your life is ending and you're feeling pain all over your body** as it's bleeding internally from all of these injuries, **the pain and suffering** of feeling the penetration, **feeling the tearing and ripping** of sensitive tissue ...”. T. 4287-88. (Emphasis supplied.) The prosecutor added that the pain the jury was imagining “would have been exponentially greater” when experienced by a “**little, innocent girl.**” T. 4288. (Emphasis supplied.) This compounded the previous ‘same mercy’ error as it was this very image – of the jurors’ own physical agony

and terror-stricken last moments, one and the same with F.W.'s – that the prosecutor told the jury the “[r]emember” if they were tempted to show Ritchie mercy. T. 4289.

Later in penalty phase closing argument, the prosecutor violated the golden rule again when he invited the jury to “go back” to the 60-second vigil he held for F.W. at the end of the guilt phase. T. 4293. This moment in the guilt phase closing argument the prosecutor was harkening back to was one where he stood silent for a full minute in order to demonstrate the length of time Ritchie would have been “compressing her neck waiting for her to die.” T. 3743-44. The prosecutor reminded the jury of the minute-long observance so they could imagine how long F.W. was “close to death” as Ritchie was “squeezing her neck” because according to their expert Dr. Downs this was the “science” of “how she died”. T. 4293-94. The prosecutor hoped the jury would experience “how excruciatingly and uncomfortably long one minute was.” T. 4293.

The prosecutor, by inviting the jurors to place themselves in the position of the victim, committed classic golden rule error. See *Doorbal v. State*, 837 So. 2d 940, 957 (Fla. 2003) (finding golden rule

violation where prosecutor argued: “Remember [the police detective who] came in and showed you how that Omega taser works. Many of you jumped. Can you imagine how that would feel on your skin right up close? How it felt on [the victim's] sweating legs and ankles.”). See also *Davis v. State*, 604 So. 2d 794, 797 (Fla. 1992) (finding the same where prosecutor argued: “[I]t might not be a bad idea to look at [the knife] and think about what it would feel like if it went two inches into your neck.”). Yet again this error compounded with the ‘same mercy’ error as this 60-second vigil was used to argue to the jury that they should not “personally extend mercy to [Ritchie]”. T. 4294.

The prosecutor resorted to another ‘golden rule’ variant when he relayed to the jury imaginary scenarios wherein F.W. (1) fearfully called 911, (2) asked herself why this was happening to her, and (3) looked into Ritchie’s eyes while she was dying. An “imaginary script” is a subtle form of a “golden rule” argument in which the prosecutor asks the jury to put the prosecutor's “own imaginary words in the victim's mouth,” thereby “trying to ‘unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused.’” *Urbini*, 714 So. 2d at 421 (quoting *Barnes*, 58 So. 2d at

159). *See also Gonzalez v. State*, 136 So. 3d 1125, 1153 (Fla. 2014) (prosecutor created an imaginary script in which the victim “fearfully wondered, [w]hat will happen to my children, my precious children.”).

During penalty phase closing argument, before recounting this imaginary scenario, the prosecutor played the 911 call; a recording which in actuality was nothing more than a few seconds of nondescript background noise before the line cut out<sup>15</sup>. Without any record proof that this occurred, the prosecutor then speculated that F.W. had to have been the one to make this hang up call and she did so because she was “scared out of her mind.” T. 4318-19. The prosecutor then further speculated the reason she was so scared was because “maybe” Ritchie had already “fondled” or “kissed” her or “taken her clothes off”. T. 4319. However, the fatal attack had not yet begun according to the prosecutor. He claimed “[Ritchie] wasn't strangling her to death at this point.” T. 4319. The prosecutor then speculated as to the time sequence of the attack saying the 911 call was “well before” the attack. T. 4319. This was no mistake. The prosecutor knew that the more sustained he could

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<sup>15</sup> The 911 hang up and unsuccessful call back attempts are in the record on appeal in CD format: State Ex. U-1, U-2, and U-3.

make F.W.'s mental suffering seem – the more protracted the panic – the greater the odds of a death sentence. Putting an elongated period of time between any initial apprehension F.W. felt and her rape and murder had no basis in the evidence and was only purposed to inflame the jury.

The prosecutor again went far beyond the evidence in creating an emotionally charged imaginary script wherein F.W. was raped and killed while pleading to herself – or perhaps some other, higher entity – for answers [T. 4316 (“She doesn't know what's happening. Why is he doing this? Why is he putting himself in me? Why is he doing this?”)], and begging Ritchie for her life by “looking into his eyes”. T. 4291. *See Garron v. State*, 528 So. 2d 353, 359-61 (Fla. 1988) (“Imagine the anguish and pain that [the victim] felt as she was shot in the chest and [dragged] herself from the bathroom into the bedroom where she expired.”); *Urbini*, 714 So. 2d at 421 (“Don't hurt me. Take my money, take my jewelry.”). *See also State v. Williams*, 794 N.E.2d 27, 51, ¶ 146 (Ohio 2003) (“she knows she is dying and she knows she can't do anything to protect her unborn fetus in those 30 seconds to a minute and a half”); *State v. Kleypas*, 40 P.3d 139,

287-88 (Kan. 2001)<sup>16</sup> (“this can't be happening to me, this isn't real”; “at some point she realized I'm going to die. This guy is going to kill me. Did she have even one moment to think about her parents. Did she have a moment to think of her brother and sister—”).

It is worth noting that the prosecutor acknowledged to the jury that because of the “14th Amendment of our constitution” the penalty phase was the first and only time it was appropriate for him to talk about things like fear and suffering because it would have been an unfair consideration in the guilt phase of the trial.<sup>17</sup> T. 4284. However, the penalty phase was far from the first time the prosecutor had appealed to the jury’s emotions by referencing F.W.’s pain and distress. He did it several times in the guilt phase closing. After publishing the 911 recording, which – again – was nothing more than a dropped call, the prosecutor said:

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<sup>16</sup> *Kleypas* was overruled on other grounds by *Kansas v. Marsh*, 548 U.S. 163 (2006).

<sup>17</sup> This section seeks a new penalty phase, not a new guilt phase. To the extent that guilt phase summation is discussed, it is to prove the prosecutor had a pattern of making a particular argument or that the prosecutor did not make the complained of argument in isolation, or because the prosecutor literally asked the jury the recall a specific portion of their guilt phase arguments.

That's only a couple seconds long. But could you hear it? **Could you hear it in the quietness, in the lack of response in that 9-1-1 call?** Could you **hear the fear?** Yeah. And it's not just the kind of fear that we would have, **it's a special kind of fear.** It's the **fear that comes from the heart and the mind of a child,** the **fear that's based in vulnerability, fear that's based on innocence.** And in that call we can all in this courtroom **hear it loud and clear [her] fear.**

...

And we heard it in that call. You can almost **feel the rapid heartbeat.** You can almost **see the gaped up open eyes from fear;** the same heartbeat, the same pulse that this defendant must have felt within minutes of this 9-1-1 call in this up close and personal attack on this girl when he had his hands wrapped around her throat and **he could feel her blood pulsing through her carotid artery,** he could feel her pulse like someone feels a pulse on your wrist or on your neck to check your pulse rate, that bump, bump. And of course, as we know **it was probably bump, bump, bump, bump, bump. It was probably very rapid.**

T. 3688-90. (Emphasis supplied.)

**No, there is no other explanation for this 9-1-1 call,** and the evidence proves that crystal fear [sic]. This was a nefarious situation. **This little girl was in fear. She was terrified by something, yet she had the ability to pick up that call.**

**So what was going on? Had he taken her clothes off at that point? Had he tried to kiss her? Had he fondled her? Did he go into the other room to get a condom from the package of condoms we saw laying in the bedroom?** Something happened between the beginning and the continuation of the attack that led to

her death, something that allowed this little girl, smart little girl to get this phone and to make that **desperate cry for help that you can hear in that call. She is saying help me, protect me.**

T. 3693-94. (Emphasis supplied.)

In the very last moments of penalty phase closing argument, the prosecutor again referenced the 911 call. He used extreme emotional imagery to draw improper inferences based on a lack of evidence in the record, which provided no verifiable details about who called 911 or what F.W.'s last moments were like.

In that call I asked you a couple days ago if **you could hear the fear in her silence.** I'd ask you now, **can you hear the echoes in that call of the screams** that came after that **and the crying and the pain and the anguish that reverberated off the walls** of that empty apartment.

T. 4320. (Emphasis supplied.)

The prosecutor here went far beyond the evidence in his description of F.W.'s death, emotionally creating an imaginary script that F.W. called 911 prior to being killed – and did so because she was terrified – and died not only while fully conscious but while staring into Ritchie's eyes and screaming. *See Garron*, 528 So. 2d at 359-61; *Urbini*, 714 So. 2d at 421.

The prosecutor’s specious editorializing which occurred multiple times during closing argument was akin to improperly “offer[ing] a narrative gloss ... consist[ing] almost entirely of [his] personal opinions of what the [evidence] meant”. See *United States v. Peoples*, 250 F.3d 630, 640-41 (8th Cir. 2001) (reversing where an officer's lay opinion testimony about the contents of recorded phone conversations amounted to “a narrative gloss” **on “what defendants were thinking”** because the case agent neither personally observed the events recorded in the conversations nor heard the conversations as they were recorded). (Emphasis supplied.)

The prosecutor’s imaginings – especially about the silence on the 911 recording – “usurped the function of the jury to decide what to infer from the content of the calls”. See *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004) (finding officer's testimony as to his interpretations of telephone calls he had reviewed went beyond permissible lay opinion testimony in narcotics conspiracy prosecution; **agent was presented to the jury with an aura of expertise and authority which increased the risk that the jury would be swayed by his testimony, rather than rely on its own**

**interpretation of the calls**). (Emphasis supplied.)

It is improper for a witness to speculate about previously-admitted evidence that requires no explanation. *See United States v. Kilpatrick*, 798 F.3d 365, 380 (6th Cir. 2015) (citing *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007)). It is obviously improper for a prosecutor to do so as well. *Ruiz*, 743 So. 2d at 4 (“the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence”). It is even worse for the prosecutor here to have provided the jury with his own interpretation of literal silence.

Unlike the isolated comments in *Donald James Smith v. State of Florida*, SC18-822 (April 22, 2021), Ritchie’s prosecutor was not fairly characterizing facts in evidence when he played the 911 audio in both his guilt phase [T. 3688-89] and penalty phase [T. 4318-20] closing arguments, and provided his own imaginary script to augment the silence on the recording.<sup>18</sup>

Ultimately, the prosecutor's conduct was clearly and

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<sup>18</sup> “(Audio played:) Temple Terrace, 9-1-1. (Audio end.)” T. 4318.

unmistakably improper, unfairly aroused the jury's emotions, and destroyed Ritchie's fundamental right to have a penalty phase jury fairly evaluate the merits of his mitigation.

#### D. COMMENTS ON EXERCISING RIGHTS AND ANTI-IMMIGRANT SENTIMENTS.

Egregiously, the prosecutor attacked Ritchie's choice to exercise his constitutional right to a jury trial, and compounded this highly improper argument with a heavy-handed dose of xenophobia. The prosecutor told the jury Ritchie was lucky to have enjoyed all the rights our country affords criminal defendants "because he came to this country several years ago from his home country." T. 4284. Then he went much further and stoked the jury's anger by characterizing Ritchie – an immigrant – as someone who bit the hand that fed him:

He immigrated here to this country years ago. And as he lived here, he enjoyed the benefits of this country we live in, the greatest country on the face of the earth.

He enjoyed all these benefit[s] we talked about. **He enjoyed the due process rights** we talked about. **He enjoyed the fact that we carry the burden of proof to prove his guilt, that he is presumed innocent, that he is entitled to a jury of his peers** to not just determine whether he's guilty or not, but a jury of his peers to

determine the appropriate sentence. **Because this isn't Jamaica or some other country, this is the United States where this defendant gets to have you determine his sentence, not some bureaucrat, not some single judge, not some single person, not some star chamber**, but you, his fellow citizens. He [has] enjoyed all of these benefits. **He's enjoyed the benefit of a neutral and unbiased judge. He's enjoyed the benefit of competent -- very competent defense counsel** during this case.

T. 4301-02. (Emphasis supplied.)

The Sixth Amendment right to a jury trial is a fundamental right made obligatory on the states by the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). It is therefore improper for a prosecutor to comment on a defendant's exercise of his or her right to a jury trial. *See Evans v. State*, 177 So. 3d 1219, 1236 (Fla. 2015).

In *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986), as noted by this Court in yesterday's *Smith* decision<sup>19</sup>, the United States Supreme Court recognized that prosecutorial comments to the jury which "implicate other specific rights of the accused" are among the factors to be considered in determining whether there has been a violation of due process. *See also Bell v. State*, 723 So. 2d 896, 897

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<sup>19</sup> *Donald James Smith v. State of Florida*, SC18-822 (April 22, 2021).

(Fla. 2d DCA 1998) (holding that the trial court erred when it overruled an objection to the prosecutor's comment that the "only one reason we're here" was because the defendant had the right to a jury trial); *Johns v. State*, 832 So. 2d 959, 962-63 (Fla. 2d DCA 2002) (stressing that it was improper for the prosecutor to disparage the defendant for having exercised his right to a jury trial, and holding that the defendant was entitled to a new trial based on that comment, in combination with other improper comments).

A "request for trial by jury" may not be treated "as an aggravating circumstance" in a capital sentencing proceeding and a capital-sentencing scheme cannot allow the jury to draw an adverse inference from such constitutionally protected conduct. *Zant v. Stephens*, 462 U.S. 862, 885 (1983). If the government invites the jury to vote for death based on "inferences from conduct that is constitutionally protected ... for example ... the request for trial by jury, ... due process of law would require that the jury's decision to impose death be set aside." *Id.* See also *United States v. Whitten*, 610 F.3d 168, 177, 195, 201-02 (2d Cir. 2010) (finding the government's use of the defendant's demand for trial to suggest a lack of remorse

and refusal to accept responsibility had “an uncontrollable resonance for the jury”; new penalty phase was required despite a unanimous vote in favor of death).

*See also Burns v. Gammon*, 260 F.3d 892, 896-97 (8th Cir. 2001), where in the context of habeas corpus relief, the Eighth Circuit Court of Appeals held that trial counsel’s failure to object to the prosecutor’s comment that Burns should be punished for invoking his constitutional rights qualified as a meritorious ineffective assistance of counsel claim under *Strickland*.<sup>20</sup> The Eighth Circuit stressed that the “lack of a sufficient objection ... le[ft] the jury free to consider this **highly improper factor** in determining guilt and fixing sentencing” and that “[c]ounsel's failure to lodge this objection thus prejudiced Burns **and infected his entire trial with constitutional error.**” *Id.* (Emphasis supplied.) (citing *Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (holding prosecutorial misconduct during closing argument may be grounds for habeas relief when it “implicate[s] ... specific rights of the accused”).

Additionally, because this was a death penalty case, Ritchie

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<sup>20</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

could not have been sentenced to death without a unanimous jury making that determination based on a consideration of the legally appropriate circumstances. This record is silent as to whether Ritchie was offered any plea to either life imprisonment or a term of years, which would have been his only alternative to a jury trial. Even if he had been, the jury would not have been aware of it. So it was improper and misleading for the prosecutor to blame Ritchie in the penalty phase closing argument for exercising his right to a jury trial when in reality the prosecutor – not Ritchie – could have been the very reason an adversarial sentencing phase took place.

The other insurmountable problem with the prosecutor's argument is that it was designed to appeal to anti-immigrant sentiments. It is impermissible for "[a] prosecutor [to] urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future law-breaking. ... Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem."

*United States v. Boskovic*, 472 F. App'x 607, 610 (9th Cir. 2012) quoting *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994).

*See also Linic v. State*, 80 So. 3d 382, 392-93 (Fla. 4th DCA 2012) (finding the prosecutor’s “highly improper, prejudicial, and facts-not-in-evidence” **reference to the defendant as an ‘illegal immigrant’** as opposed to a ‘refugee’ “**repugnant especially given the current controversial nature of illegal immigration in this country.**”). (Emphasis supplied.)

The United States Supreme Court has noted that “[t]he [United States] Constitution prohibits racially biased prosecutorial arguments.” *McCleskey v. Kemp*, 481 U.S. 279, 310 n. 30 (1987). As such, comments that appeal to racial or ethnic bias require resulting convictions to be set aside. *See State v. Filipov*, 576 P.2d 507, 511-12 (Ariz. Ct. App. 1977) (finding remarks made by prosecutor during closing argument referring to the defendant as a “gypsy” and impliedly linking him to the mafia was improper appeal to passion and prejudice) (citing Judge Frank's dissent in *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d. Cir. 1946) (“If government counsel in a criminal suit is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, **the jury may become in his hands a lethal weapon** directed against defendants

who may be innocent. **He should not be permitted to summon that thirteenth juror, prejudice.**”). (Emphasis supplied.)

This Court said in *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1030 (Fla. 2000), that to establish that reversal is required based on unobjected-to argument<sup>21</sup>, the remarks must be improper, harmful, incurable, and the complaining party finally must also establish that the argument so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial. Although this Court did not specifically limit the types of improper argument that may fit within this category, it recognized that “the category necessarily must be narrow in scope. For example, **closing argument that appeals to racial, ethnic, or religious prejudices is the type of argument that traditionally fits within this narrow category of improper argument requiring a new trial even in the absence of an objection.**” *Id.* (Emphasis supplied.)

The prosecutor wanted the jury to regard Ritchie as a man

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<sup>21</sup> Ritchie’s case involves a combination of objected-to and unobjected-to error. See *Ruiz*, 743 So. 2d at 7; *Merck*, 975 So. 2d at 1061.

who they – and their country – had already granted so much to, only to have him betray them. He went so far as to use Ritchie’s supposed comfortable life in the county jail – because it was in the United States – as proof that he was taking advantage and being pampered: “You really think that would happen in Jamaica? You think that would happen in the countries of the Caribbean? It happens here in this country because he enjoyed all those rights, the constitutional rights.” T. 4302-03. (Emphasis supplied.)

This argument, as well as the earlier comment where the prosecutor emphasized that Ritchie was a foreigner who was lucky to be prosecuted in America [T. 4301-02] functioned as a calculated distinction between “us” (the prosecutor, the jury, and all of our other law-abiding countrymen) and “them” (Ritchie and other intruders). It sent a message that immigrants who commit crimes should be punished more severely than American-born offenders because wasting our country’s good grace and draining our resources compounds the crime itself. This is incendiary argument which has no place in deciding whether a defendant should live or die.

In *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 862-65 (Tex. App. 1990), the Texas Court of Appeals described counsel's argument that the jury should "be united" and "stick together as a community" as an "appeal[ ] to ethnic unity" that "demean[ed] the law and perhaps deepen[ed] the divisions from which society already suffers." The Court held that "incurable reversible error occurs whenever any attorney suggests, either openly or with subtlety and finesse, that a jury feel solidarity with or animus toward a litigant or a witness because of race or ethnicity." *Id.* at 866. The Court explained its "incurable-error" approach:

When a racial or ethnic appeal is made, the dispute is no longer confined to the litigants; there has been **an attack on the social glue that helps bind society together. ... The offense is against society, and it makes no difference whether the victimized-litigant has shown harm.** Lawyers have no right to undermine the ethnic harmony of society simply to win a lawsuit.

*Id.* at 865. (Emphasis supplied.)

*See Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 541 (2d Cir. 1992) ("No verdict may stand when it is found in any degree to have been reached as a result of appeals to regional bias or other

prejudice.”). See also *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985); *Superior Indus. Int’l, Inc. v. Faulk*, 695 So. 2d 376, 380-81 (Fla. 5th DCA 1997); *S.H. Inv. & Dev. Corp. v. Kincaid*, 495 So. 2d 768, 771-72 (Fla. 5th DCA 1986); and *HRC Guam Co. v. Bayview II L.L.C.*, 2017 Guam 25, ¶ 97-102 (Guam Dec. 29, 2017) (all reversing for new trials and condemning “us against them” pleas to the jury as creating prejudice by pitting “the community” against a nonresident corporation).

These divisive dichotomies are even more sinister in a criminal trial – particularly one where the State is seeking the death penalty – than in civil litigation. “While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because,” as this Court has said, “death is different.” *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000) (citing *Crump v. State*, 654 So. 2d 545, 547 (Fla. 1995)).

The United States Supreme Court has also repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases:

[T]he penalty of death is qualitatively different from a

sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

*See also State v. Shabazz*, 48 P.3d 605, 624 (Haw. Ct. App. 2002), where the prosecutor's opening statement referred to the rape victim several times as a "young local woman" who was "born and raised here in Hawai'i" and in contrast called the defendants "six African-American males". Citing *Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978) ("**Concern about fairness should be especially acute where a prosecutor's argument appeals to race prejudice in the context of a sexual crime, for few forms of prejudice are so virulent.**"). (Emphasis supplied.) The *Shabazz* Court held that the result of those characterizations was "a distinct and reasonable possibility that the prosecutor's references to race might have contributed to the convictions", and remanded the case for a "new trial, free of racial undertones". *Id.* at 629-30. In doing so, it totally dismissed the State's argument that the racial references

were trivial and isolated: “We reject outright the Government's claim that the prosecutor's remarks were fleeting and insignificant. **Even if brief, use of race as a factor in closing argument is improper[.]**” *Id.* at 625. (Emphasis supplied.)

In Ritchie’s case, the prosecutor’s arguments cast him as the “other” based on his nationality rather than his race (although Jamaica is known as an overwhelmingly majority black nation), but that does not make those arguments acceptable or harmless. Moreover, they were neither fleeting nor insignificant; instead they were calculated and were hammered home repeatedly. And most importantly, they were juxtaposed with Ritchie’s exercise of his constitutional rights.

These types of pleas are disgraceful, full stop. The prosecutor here plainly focused on and denigrated Ritchie’s country of origin – and contrasted it with the “greatest country on the face of the earth” – in urging the American jury to return a death verdict. This xenophobic appeal is wholly inconsistent with Ritchie’s due process rights and the objective goal of capital sentencing proceedings – that the defendant is sentenced for his crime, not for his nationality

or any other immutable trait. Of all of the improper pleas a prosecutor could make to a jury – and this prosecutor made a litany of them – this blow is the most foul. *Berger v. United States*, 295 U.S. 78, 88 (1935). It is intolerable for a prosecutor to infect this process with ethnic prejudices and to encourage the jury to make a decision based on bias rather than reason and the presented evidence.

This is especially true given how in recent years anti-immigrant ideology has become an increasingly hot button issue<sup>22</sup> due to it being conflated with other popular political issues, some of which – crime as well as the economy and the ethics of

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<sup>22</sup> “The 22% of Americans in July who say immigration is the top problem is up from 14% in June and is the highest percentage naming that issue in Gallup's history of asking the "most important problem" question. The previous high had been 19%. ... Republican views of immigration as the top problem have spiked to 35% from 21% in June. But the issue is becoming more top of mind to independents and Democrats as well; 18% of Democrats cited immigration this month, up from 10% in June, and independents' mentions are up four percentage points, to 17%.” Frank Newport, *Immigration Surges to Top of Most Important Problem List*, Gallup, July 18, 2018, <https://news.gallup.com/poll/237389/immigration-surges-top-important-problem-list.aspx>

public benefits spending<sup>23</sup> – are directly relevant here.

The specific myth about immigrants the prosecutor was fueling here – that immigrants are a drain on our public systems – has been both mainstreamed<sup>24</sup> and debunked<sup>25</sup>. The prosecutor should have treated this well-known misconception – one that was running rampant in 2019 – with extreme caution and avoided any

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<sup>23</sup> *Id.* (“Of course, partisan groups almost certainly have differing reasons for viewing immigration as the top problem currently. Republicans are likely thinking of the underlying problem of illegal immigration per se and its impact on the nation's economy and crime situation, while Democrats may be thinking more about the negative impact of the Trump administration's policies and actions in cracking down on immigration.”)

<sup>24</sup> *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.*, Center on Extremism, Nov. 2018, <https://www.adl.org/media/12249/download>

<sup>25</sup> Gretchen Frazee, *4 myths about how immigrants affect the U.S. economy*, PBS News, Nov 2, 2018, <https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy> (“Myth #1: Immigrants take more from the U.S. government than they contribute ... Fact: Immigrants contribute more in tax revenue than they take in government benefits”);

Francine D. Blau and Christopher Mackie, *The Economic and Fiscal Consequences of Immigration*, National Academies of Sciences, Engineering, and Medicine, 2017, <https://doi.org/10.17226/23550>)

argument that could have been interpreted as inflaming anti-immigrant sentiments. Instead, he exploited it in order to stigmatize Ritchie as a violent outsider intent on threatening our American way of life. Such arguments clearly trespass on the bounds of reasonable inference and fair comment on the evidence.

The American Bar Association (ABA) Prosecution Function Standard 3-1.2(b) (4th ed. 2017) states that “[t]he duty of the prosecutor is to seek justice, not merely to convict.” In the context of closing argument, ABA Prosecution Function Standard 3-6.8(c) (2017) states:

The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier’s duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

Standard 3-1.6(a) further states the prosecutor “should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin”.

The prosecutor's arguments were a dog-whistle<sup>26</sup> designed to embitter the jurors against Ritchie for being able to exercise American rights – rights that America (and not other lesser countries according to the prosecutor) bestows upon everyone on its soil.

The prosecutor's comments were not only incendiary, they were also false; further proof that they served no purpose other than fear-mongering. Contrary to the prosecutor's assertions<sup>27</sup>, Jamaica's constitution guarantees comparable due process and other legal protections to those afforded by the United States justice system like providing legal representation to the accused as well as an impartial judiciary.<sup>28</sup> Jamaicans also enjoy the right to trial by

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<sup>26</sup> Anti-immigrant sentiments are still prevalent in the United States with one-third of adults (34%) say immigrants are a burden because they take jobs and social benefits, and approximately 19% of Americans say that immigrants carry more responsibility for crime. Ana Gonzalez-Barrera and Phillip Connor, *Around the World, More Say Immigrants Are A Strength Than A Burden*, Pew Research Center, Mar. 2019, at 3-9.

<sup>27</sup> Suggesting that Jamaica would not have afforded Ritchie any constitutional rights like the right to due process, a jury trial, or an attorney to defend him. T. 4301-02.

<sup>28</sup> Jamaica Constitution, Chapter II, Section 20(1) and (2) ("fair hearing within a reasonable time by an independent and impartial court"); (6)(c) and (d) ("shall be permitted to defend himself in person

jury.<sup>29</sup>

Additionally, considering that this was a death penalty case, the prosecutor's baseless comments were especially pernicious because no matter the differences between a jury trial here or abroad – one thing is certain. If Ritchie had been tried in Jamaica, he would not have ended up on death row. Jamaica's last execution was in 1988.<sup>30</sup> According to a 2019 Amnesty International report, while Jamaica has retained the death penalty as a legal punishment, it does not have anyone on death row.<sup>31</sup> The last death

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or by a legal representative of his own choice"); (5) ("Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."); and (8) (double jeopardy prohibition).

<sup>29</sup> For murder trials, "twelve jurors shall form the array". The Jury Act, Section 31(1) (Jam.)  
<https://moj.gov.jm/sites/default/files/laws/Jury%20Act.pdf>

<sup>30</sup> *Jamaica: Submission to the U.N. Universal Periodic Review*, Amnesty Intl., Apr. 19, 2010, at 3.

<sup>31</sup> *Death Sentences and Executions Annual Reports*, Amnesty International Global Report, 2019, at 14, 17, 55.  
<https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF>

row inmate's death sentence was commuted in 2015.<sup>32</sup> No new death sentences have been reported.<sup>33</sup>

#### E. PRESIDENT REAGAN.

In order to persuade the jury to sentence Ritchie to death, the prosecutor converted Ritchie's poverty and physical abuse mitigation into aggravation by arguing Ritchie was just as capable as any other person of thriving despite his grim childhood. The prosecutor improperly argued that other people grew up in poverty and in abusive households – notably former President Ronald Reagan – and not all of those people went on to commit murder:

A lot of people have bad childhoods. A lot of people grow up in bad neighborhoods all over the world, and even in this country, all over the place, from the ghettos of Chicago to the Appalachian area up in West Virginia. **There is [sic] a lot of poor folks in this country, people who live in poverty that raise themselves up out of it.**

**There was a young man many, many, many years ago that had an abusive alcoholic father who beat him unmercifully,** a young man who would come home from school and find his dad passed out in the snow and find his dad passed out on the couch. And when he became a

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<sup>32</sup> *Death Sentences and Executions Annual Reports*, Amnesty Intl., 2013–2018.

<sup>33</sup> *Id.*

teenager, there were times when he brought his girlfriend home and he brought home his friends and his dad would be raging drunk or passed out either in the yard or outside the house or would come in while they were there raging drunk.

**That young man was able to pull himself up** to college at Eureka College and played football and baseball, and then later he became an actor, not a real well-known actor but an actor. Not too long after that he was the president of the Screen Actor's Guild in Hollywood. Not too long after that he became the governor of California, **and about a decade later he became our 40th President.** And you may not have cared for the politics of Ronald Reagan, but **everybody who knew him or saw him knew he was a gracious, kind man who grew up in that.**

T. 4303-04. (Emphasis supplied.)

When the prosecutor asked the jurors to consider that Ronald Reagan did not end up like Ritchie, he was making a blatant and improper appeal to the jury's emotions as well as improperly converting what was mitigating – the abject poverty and physical abuse suffered by Ritchie – into something aggravating. A prosecutor may not attach aggravating labels to factors that actually should weigh in favor of a lesser penalty. *See Walker v. State*, 707 So. 2d 300, 314 (Fla. 1997) (citing *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

This type of argument was deemed improper in *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999). In *Ruiz*, the prosecutor invoked the image of her father, a man who had served in the military during Operation Desert Storm despite receiving a brain cancer diagnosis shortly before his deployment because he felt it was his “duty.” *Id.* at 6-7. This Court found the infusion of the prosecutor’s father’s heroic service into Ruiz’s jury trial improper because “it contrasted the defendant (who at that point had been convicted of murder) unfavorably with [the prosecutor]’s heroic and dutiful father; ... it equated [the prosecutor]’s father’s noble sacrifice for his country with the jury’s moral duty to sentence Ruiz to death.” *Id.* at 7.

The prosecutor in this case even acknowledged, during closing argument, that as far as comparisons go this was an “extreme example[ ]”. T. 4304. It was indeed extreme. “The use of mitigation evidence is a product of the requirement of individualized sentencing.” *Kansas v. Marsh*, 548 U.S. 163, 174 (2006). The prosecutor improperly asked jurors to consider not the character and background of Ritchie as an individual, but instead to judge him against one of this nation’s most famous and revered public servants

of all time. According to Gallup polling data, although Reagan received average approval ratings during his tenure in the White House from 1981-1989, Americans have more recently upgraded their retrospective approval of the job he did as president.<sup>34</sup> Reagan has appeared in the Top 10 of Gallup's annual 'Most Admired Man' list more than 30 times.<sup>35</sup> Many Americans routinely rank Reagan as the "greatest U.S. President".<sup>36</sup>

Notably, the Defense was held to a more exacting standard. Pretrial, the State's request to ban the Defense from arguing that Ritchie was not the worst of the worst by comparing him to other

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<sup>34</sup> Frank Newport, Jeffrey M. Jones, and Lydia Saad, *Ronald Reagan From the People's Perspective: A Gallup Poll Review*, June 2004, <https://news.gallup.com/poll/11887/ronald-reagan-from-peoples-perspective-gallup-poll-review.aspx>

<sup>35</sup> *Id.*

<sup>36</sup> Frank Newport, *Americans Say Reagan Is the Greatest U.S. President, Lincoln and Clinton next on the list; Washington fifth*, Feb. 2011, <https://news.gallup.com/poll/146183/americans-say-reagan-greatest-president.aspx>;

Tim Malloy, *Trump Starts In The Hole As U.S. Voters Disapprove, Reagan, Obama Are Best Presidents In 70 Years*, Quinnipiac University Poll, Jan. 2017, [https://poll.qu.edu/images/polling/us/us01262017\\_Uhmk49b.pdf](https://poll.qu.edu/images/polling/us/us01262017_Uhmk49b.pdf)

notorious killers because it would “serve only to unfairly prejudice the jurors against the State” was granted by the Trial Court. R. 685-86, 804. The force behind the State’s request was addressed by this Court in *Herring v. State*, 446 So. 2d 1049, 1056 (Fla. 1984)<sup>37</sup>:

Evaluating the sentences of other defendants in unrelated crimes involves a number of variables. There is no requirement in [*Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] for the admission of such evidence in the sentencing phase. What *Lockett* does require is the admission of evidence that establishes facts relevant to the defendant's character, his prior record, and the circumstances of the offense in issue. The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant. The trial court, in determining the sentence to impose, must use its judicial experience in evaluating and weighing the aggravating and mitigating circumstances with the recommendation of the jury. **The use of sentences imposed on other defendants relates to the proportionality of the sentence and is an appropriate element to be considered by the trial judge in imposing sentence upon the defendant, but is not a matter for the jury.**<sup>38</sup>

(Emphasis supplied.)

This is fair enough and Ritchie does not challenge that

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<sup>37</sup> Receded from on other grounds, *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987).

<sup>38</sup> *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) (abandoning comparative proportionality review of death sentences).

particular pretrial ruling but it illustrates a double-standard employed by the Trial Court: the Defense could not compare Ritchie to other – ostensibly worse – murderers in a bid to save his life but the State was free to argue that since President Ronald Reagan made something of himself despite humble beginnings, Ritchie could have too, and because he didn't he deserves to pay with his life.

F. SPECULATION AS TO WHAT THE DEFENSE WITNESSES ON THE MITIGATION VIDEO MIGHT HAVE SAID IF CROSS-EXAMINED AT TRIAL.

The prosecutor lamented the fact that he did not get the opportunity to cross-examine those who gave testimonials in favor of Ritchie in the mitigation video. The prosecutor speculatively argued any cross-examination he would have done would have amounted to impeachment:

Neither of them, none of them, not a one of them was subjected to cross-examination about what their potential biases would be, their potential motives would be, what their past is, what their relationship is to the defendant other than a little blurb up there. None of them were subjected to the testing, **the due process testing that this defendant was able to receive all through this trial. We didn't get that. We weren't afforded that. We didn't get an opportunity and you didn't get an**

**opportunity to hear what we may have asked them and what they may have told us if we had cross-examined them.** You got a light-most-favorable-to-the-defendant version of facts about him.

T. 4299-4300. (Emphasis supplied.)

A prosecutor cannot suggest during closing argument that there are other witnesses who would corroborate the State's case had they been called to testify. *See Hutchinson v. State*, 882 So. 2d 943, 953 (Fla. 2004)<sup>39</sup> (“Improper bolstering occurs when the State ... indicates that information not presented to the jury supports the witness's testimony.”). If anything, it is worse to suggest that information not presented to the jury would refute a party's evidence. By placing before the jury testimony that was never elicited, the State itself testified. Such conduct is totally improper. *See Thompson v. State*, 318 So. 2d 549, 551 (Fla. 4th DCA 1975).

The prosecutor cannot encourage the jury to draw a negative inference from the fact that a defense witness was not physically present, or speculate as to what they might have said on cross examination. The prosecutor's remarks in this case did not merely

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<sup>39</sup> Abrogated on other grounds by *Depravine v. State*, 995 So. 2d 351 (Fla. 2008).

bring up the fact that Ritchie did not physically produce the video witnesses. Instead, he implied that had they been produced, that they would have been impeached resulting in testimony favorable to the State, and further that the only reason the defense did not call these witnesses was because the State would have exposed them as liars. As a result, the jury may well have disregarded the mitigation evidence, as the prosecutor intended.

#### G. TRUE AND JUST VERDICT.

Assertions by the prosecution that any juror's vote for a life sentence would be irresponsible and a violation of the juror's lawful duty are impermissible. *Urbini*, 714 So. 2d at 421. Here, the prosecutor told the jury that a death sentence was “**the true and just verdict in this case**” and a vote for death would allow the jury to live the “rest of the day, for the rest of the week, for the rest of this year and for the rest of [their] lives knowing [they] did the **right and just thing sentencing this defendant to death.**” T. 4318.

(Emphasis supplied.) This misconduct is especially harmful given that a single juror could have provided Ritchie with a life recommendation.

#### H. CUMULATIVE IMPACT.

The improper and inflammatory comments permeated the prosecutor's closing arguments in both phases of the jury trial. For a prosecutor's comments to warrant a new trial, they “must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.” *Salazar v. State*, 991 So. 2d 364, 372 (Fla. 2008).

There are a litany of such arguments present here. *See Urbin*, 714 So. 2d at 419 (describing the arguments in *Garron*). Although the Defense only objected to the ‘same mercy’ argument, the cumulative impact of the improprieties requires reversal. This court considers the cumulative effect of improper comments, both those objected to and those not objected to, in determining whether a defendant received a fair trial and/or penalty phase. *Ruiz*, 743 So. 2d at 7; *Brooks v. State*, 762 So. 2d 879, 899 (Fla. 2000); *see also Whitton v. State*, 649 So. 2d 861 (Fla. 1994) (even though no objection was made to first two

improper comments, reviewing court must consider all three comments in its harmless error analysis because harmless error test requires examination of entire record).

The cumulative effect principle is not limited to improper comment. This Court has held that “[w]here multiple errors are found, even if deemed harmless individually, ‘the cumulative effect of such errors’ may ‘deny to defendant the fair and impartial trial that is the inalienable right of all litigants.’” *Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005). The closing argument error here compounded, and was compounded by, the other errors present in this record: improper victim impact testimony which invoked the word of God in order to justify a death sentence, and improper limitation on – and rebuttal to – mitigation.

In the instant case, the prosecutorial misconduct did not consist of one or two isolated remarks. The prosecutor deliberately placed many improper considerations before the jury. His closing argument was a polemic, replete with non-evidentiary bases for a death verdict, which put at risk the jury's willingness and ability to fairly weigh the aggravating and mitigating evidence. *See Rhodes*, 547

So. 2d at 1206 (“While none of these comments standing alone may have been so egregious as to warrant a mistrial, this is not a case of merely a single improper remark. **The prosecutor's closing argument was riddled with improper comments** ... [w]e believe the cumulative effect of the improper remarks in the absence of curative instructions was to prejudice Rhodes in the eyes of the jury **and could have played a role in the jury's decision to recommend the death penalty.**”). (Emphasis supplied.) *Compare Richardson*, 604 So. 2d at 1109 (concluding that, in light of the entire record, one comment by the prosecutor was harmless beyond a reasonable doubt); *Kearse v. State*, 770 So. 2d 1119, 1130 (Fla. 2000) (finding a single erroneous comment not so egregious as to require reversal of the sentencing proceeding).

The offensiveness of the prosecutor's comments in this case was as problematic as their frequency. This jury was asked to sentence Ritchie to death because he is not one of us. The prosecutor claimed that the fact that Ritchie is not from this country and is unworthy of our rights and freedoms should factor into the jury's ultimate recommendation of death. A “reliable” sentencing verdict exists when

the courts can be confident that the decision-maker gave independent weight to the mitigation. *See Beck v. Alabama*, 447 U.S. 625, 638 n.13 (1980). Reasonable juries consist of twelve people who are not baited into jingoist, phobic impulses and are not instructed – by prosecutors – to be tempted by, much less succumb to, zealotry.

“Although this legal precept—and indeed the rule of objective, dispassionate law in general—may sometimes be hard to abide, the alternative—a court ruled by emotion—is far worse.” *Jones v. State*, 705 So. 2d 1364, 1367 (Fla. 1998). By injecting elements of emotion and fear into the jury's deliberations, this prosecutor ventured “far outside the scope of proper argument”, “overstepped the bounds of zealous advocacy”, and entered into “the forbidden zone of prosecutorial misconduct.” *Garron*, 528 So. 2d at 359–60.

Counsel acknowledges that prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the death sentence and remanding for a new proceeding. *See Bertolotti*, 476 So. 2d at 133. However, the actions of the prosecutor in this case was so egregious, inflammatory and unfairly prejudicial that a new sentencing proceeding is the only adequate remedy. The prosecutor’s

willingness to deliver a closing argument so riddled with improper comments is remarkable given this Court's repeated pronouncements. For decades, this Court has been “deeply disturbed” by “continuing violations of prosecutorial duty, propriety, and restraint” in closing arguments. *Garron*, 528 So. 2d at 359-60. Prosecutors are not heeding these warnings and this Court’s rebukes are becoming toothless.

The reason why prosecutors utilize this strategy – of appealing to raw, base emotions – is simple and obvious: it works. It dependably yields rewards (death sentences) and is associated with exceedingly low levels of risk (of reversals). The longer this Court tolerates prosecutors’ confident disregard of its warnings – without retrials as a consequence – the longer prosecutors will persist in the violations themselves and mold young protégés to do the same.

As the United States Supreme Court observed more than 80 years ago, a prosecutor

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. **But, while he may strike hard blows, he is not at liberty to strike foul ones.** It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Berger v. United States*, 295 U.S. 78, 88 (1935). (Emphasis supplied.)

This “foul blows” quotation from *Berger* has been relied on many times by Florida courts. Of the cases citing *Berger*, there are three instances of this Court reversing a death penalty case for preserved closing argument error. *Delhall v. State*, 95 So. 3d 134, 169 (Fla. 2012) (reversing death sentence where prosecutor denigrated mitigation and commented on future dangerousness); *Cardona v. State*, 185 So. 3d 514, 522 (Fla. 2016) (reversing convictions and death sentence where prosecutor argued in guilt phase closing argument that the case was about “justice” for the victim and denigrated the defense); *Gore v. State*, 719 So. 2d 1197, 1197 (Fla. 1998) (reversing for a new trial based on the cumulative effect of the prosecutor's improper cross-examination of Gore and personal attacks on him during guilt phase closing argument).

Several other Florida courts citing *Berger* have found that prosecutorial misconduct during closing argument amounted to fundamental error and reversed for new trials, even in serious cases. *Cochran v. State*, 711 So. 2d 1159, 1163 (Fla. 4th DCA 1998) (second degree murder); *Rosso v. State*, 505 So. 2d 611, 613 (Fla. 3d DCA 1987) (second degree murder and attempted first degree murder); *DeFreitas v. State*, 701 So. 2d 593, 600 (Fla. 4th DCA 1997) (aggravated assault with a firearm); *Miller v. State*, 712 So. 2d 451, 452 (Fla. 2d DCA 1998) (burglary of a dwelling). *See also Grant v. State*, 194 So. 2d 612, 615 (Fla. 1967) (reversing death penalty case for a new trial, despite there being no objection, where prosecutor suggested to jury if they did not impose the death penalty this defendant would get out of prison and come back to harm the community).

Several of these cases involved similar misconduct to that indulged in by Ritchie's prosecutor. *See Cochran*, 711 So. 2d at 1162 (appeals to emotion and sympathy, personal opinions of the prosecutor and references to facts not in evidence, and equating conviction with serving some larger social good); *Miller*, 712 So. 2d at

453 (emotional appeals, personal opinion of the prosecutor);

*DeFreitas*, 701 So. 2d at 601 (golden rule).

In Judge Blue's oft-cited specially concurring opinion in *Luce v. State*, 642 So. 2d 4, 4 (Fla. 2d DCA 1994), he admonished: "Trial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of The Florida Bar." Unfortunately overuse of the harmless error doctrine "feeds the virus that [courts] wish to cure." *Id.* In any event, the prosecutor's misconduct in the instant case was anything but harmless, especially in light of the unanimity requirement for a death verdict.

In *Darden v. Wainwright*, *supra*, as noted in *Smith*, the Supreme Court discussed six factors in evaluating a due process claim arising from a prosecutor's inappropriate comments: (1) whether the prosecutor manipulated or misstated the evidence, (2) whether the comments implicated other specific rights of the accused, (3) whether the comments were invited by or responsive to defense counsel's

arguments, (4) whether the trial court's instructions ameliorated the harm, (5) whether the evidence weighed heavily against the defendant, and (6) whether the defendant had an opportunity to rebut the prosecutor's comments. *Id.* at 181.

Ritchie's prosecutor went outside the evidence, and provided imaginary evidence, throughout his penalty phase closing argument. The prosecutor here ruthlessly blamed Ritchie – a capital defendant who likely had no other choice – for exercising his constitutional right to have a jury decide his ultimate fate. None of the improper arguments addressed in this brief were in any way responsive to arguments made by the Defense.

While the State may claim the guilt phase evidence against Ritchie was overwhelming, this was penalty phase closing argument. The issue was no longer whether Ritchie committed a capital crime. The issue in the penalty phase was whether he should live or die.

Moreover, nothing suggests that the factors discussed in *Darden* were intended to be exclusive. This penalty phase was also tarnished by yet another especially insidious argument, designed to cast Ritchie as an outsider and to stoke anti-immigrant sentiment

which has been on the rise in recent years. Worse yet, these xenophobic comments were deliberately linked by the prosecutor to Ritchie's exercise of his constitutional rights.

The prosecutor's misconduct throughout the entire penalty phase closing argument deprived Ritchie of a fair sentencing proceeding and fundamentally tainted the jury's vote in favor of death. This record, with this level of incitement, cannot assure this Court beyond a reasonable doubt that the improper arguments did not influence the jury, or an individual juror or jurors, to reject mercy [see part A], to reject or downgrade Ritchie's mitigating evidence, or to reject the alternative of life imprisonment. Ritchie is thus entitled to a new penalty phase before a new jury.

## **II. THE VICTIM IMPACT TESTIMONY RENDERED THE DEATH SENTENCE UNCONSTITUTIONAL.<sup>40</sup>**

This section raises a facial constitutional challenge as well as an as applied challenge to Florida's victim impact scheme, which allows capital jurors to consider impermissible sentencing factors. Pretrial, the Defense filed a motion raising a constitutional challenge to victim impact that was denied by the Trial Court. R. 775-79, 815.

### **A. FLORIDA'S VICTIM IMPACT SCHEME IS UNCONSTITUTIONAL.**

Victim impact evidence has, as a general matter, been found to not violate the Eighth Amendment. The United States Supreme Court held in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991):

[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

However, in Florida the admission of victim impact evidence is governed more specifically by § 921.141(8), Florida Statutes (2019),

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<sup>40</sup> Appellant makes this argument under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Art. I, § 2, 9, 17 and 21 of the Florida Constitution

which states:

Once the prosecution has provided evidence of the existence of one or more aggravating factors as described in subsection (6), 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.

In *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1992), this Court approved the use of victim impact evidence as long as it is limited to that which is relevant as specified in the statute. Counsel respectfully submits that *Windom* was wrongly decided and should be reconsidered. The introduction of evidence concerning the impact of the victim's death on survivors, even as limited by the holding in *Windom*, violates Art. I, § 2, 9, 17 and 21 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

i. PSYCHOLOGICAL IMPACT.

The true impact of this type of evidence on juries cannot be sufficiently explained without psychology. Florida's scheme simply

pretends that jurors (1) are not capable of understanding human loss without being directly confronted with it by emotional family members, and (2) are consummate stoics who possess an unwavering ability to navigate around such landmines and temperately arrive at a verdict.

As for the victim's uniqueness, impact evidence carries the threat that jurors will weigh the relative worth of the victim against the defendant they have just found guilty of murder. *See, e.g.,* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (finding socioeconomic status to have direct effects on death decisions).

And as for the "impact" of the murder, psychology tells us experiencing negative emotions like anger can prompt a punitive reaction. *See* Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 436 (2003). The exposure to victim impact evidence risks harsher penalty judgments motivated by retribution rather than the blameworthiness of a defendant.

The same is true for positive emotions like sympathy and compassion. Jurors most easily feel empathy for people most like themselves – the more that the victim's characteristics, such as class, resemble the juror's, the more easily the juror can imagine the victim's pain, fear, and survivors' desire to have the defendant punished. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 399 (1996). This suggests jury verdicts vary in severity according to the perceived worth of the victim.

Interviews with capital jurors also reveal that the articulateness, appearance, and demeanor of the victim impact witness may have a significant impact on the jury. See Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 109 (1997). Because these characteristics are likely to correlate with wealth, class, or nationality<sup>41</sup>, victim impact statements indirectly present the jury

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<sup>41</sup> For example, interviews from past death-sentencing jurors suggest the uncomfortable conclusion that the English skills of the victim's family member may, for example, influence the jury in such a way that they value less the lives of immigrant defendants from non-English speaking countries whose family members have not yet

with status information that should not enter into its sentencing decision.

Further, jury instructions addressing the use of victim impact evidence have proved futile in ultimate effect. See Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 180 (1999) (citing William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1093 (1995) (noting that three-quarters of the preliminary sample of jurors reported that instructions “simply provided a framework for a decision already made by most jurors”); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing: Guided or Misguided?*, 70 IND. L.J. 1161, 1176 (1995) (concluding that juror misunderstandings of instructions “increases the likelihood of the jury returning a verdict of death”)). This is especially true of Florida’s jury instructions, which merely tell the jury to not consider this evidence aggravation. See Fla. Std. Jury Instr. (Crim.) 7.11.

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become fluent in English. See Scott E. Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1161 (1997).

At this point, what this Court must acknowledge is that while victim impact evidence does convey some sort of information, it also has the potential to arouse emotions such as disgust toward a defendant, instill a sense of horror in jurors and judges, and increase the likelihood of a stiff sentence. See Monica K. Miller et. al., *How Emotion Affects the Trial Process*, 92 JUDICATURE 56, 57 (2008). These levels of emotion cannot be recaptured once released as one federal district court judge observed:

I cannot help but wonder if *Payne* . . . would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony . . . and the jurors' sobbing during the victim impact testimony still rings in my ears.

*United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005) (Bennett, C. J.).

ii. VICTIM IMPACT AMOUNTS TO NON-STATUTORY AGGRAVATION.

This type of evidence is not relevant under Florida's statutory scheme to determine a defendant's eligibility for capital punishment, nor is it relevant to determine whether a defendant should receive the

death penalty after eligibility is determined.

In Florida the death penalty is imposed based solely on a determination of whether mitigation is outweighed by specific statutory aggravating factors. The sentencer is precluded from using an aggravating consideration not enumerated in Section 921.141(6), Florida Statutes, as a basis for imposing capital punishment. See *Zack v. State*, 911 So. 2d 1190, 1208 (Fla. 2005) (“[t]he only matters that may be considered in aggravation are those set out in the death penalty statute.”). It also cannot be part of the weighing process. See *Alston v. State*, 723 So. 2d 148 (Fla. 1998). Victim impact is irrelevant to any statutory aggravating factor, and irrelevant to rebut any mitigating factor. The prejudice arising from such emotionally wrenching evidence necessarily outweighs its minimal, or more accurately nonexistent, probative value, thus also violating section 90.403, Fla. Stat. The jury’s exposure to such inflammatory evidence without guidance as to how it is to be used in the sentencing determination – which is to say not at all – renders Florida’s death penalty scheme unreliable, and therefore violative of due process and the Eighth Amendment.

B. EVEN ASSUMING THAT SOME VICTIM IMPACT EVIDENCE IS CONSTITUTIONALLY PERMISSIBLE, THE TESTIMONY OF THE VICTIM'S MOTHER IN RITCHIE'S PENALTY PHASE EXCEEDED ALL RECOGNIZED BOUNDS.

Even if generally constitutional, victim impact evidence can become “so unduly prejudicial” as to render the trial fundamentally unfair and violate the due process secured by the Fourteenth Amendment to the U.S. Constitution. *Payne*, 501 U.S. at 825. *Payne* itself prohibits “the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence.” *Id.* at 830 n. 2. Even though there was no objection below, the victim impact testimony in this case impermissibly aroused the jury so much that it amounts to fundamental error.

i. THE BIBLE VERSE RECITED BY THE VICTIM'S MOTHER IMPROPERLY ENCOURAGED THE JURY TO IMPOSE A DEATH SENTENCE BY APPLYING BIBLICAL LAW.

The victim's mother concluded her victim impact testimony with vivid scripture:

Matthew 18:16 [sic].<sup>42</sup> "If anyone causes one of

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<sup>42</sup> The “18:16” cite is slightly inaccurate. This particular verse is

these little ones, those who believe in me, to stumble, **it would be better for them to have a large milestone [sic] hung around their neck and to be thrown in the depths of the sea."**

**That scripture is talking to** someone that knows better. And **Granville Ritchie** knew better.

T. 3818. (Emphasis supplied.)

This is a call for the jury to rely on God's law – Biblical law – instead of Florida law, when deciding whether to impose the death penalty. The “primary vice” in referencing religious authority during a death penalty trial is that it may “diminish the jury's sense of responsibility for its verdict and ... imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions.” *Ferrell v. State*, 686 So. 2d 1324, 1328 (Fla. 1996) (citing *People v. Wash*, 861 P.2d 1107, 1135–36 (Cal. 1993)).

Invocations of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific

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found in the Bible – at least in the *King James*, *New American Standard*, and *New International* versions – in the book of Matthew at 18:6.

factors it is to consider in reaching a verdict. *See Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2000) (citing *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (holding that capital sentencing statutes must “channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death”)). “Biblical concepts of vengeance ... do not recognize such a refined approach.” *Id.* (citing *Tison v. Arizona*, 481 U.S. 137, 180–81 (1987) (Brennan, J., dissenting) (noting the “crude proportionality of ‘an eye for an eye’ ”); and citing *Coker v. Georgia*, 433 U.S. 584, 620 (1977) (Burger, C.J., dissenting) (“As a matter of constitutional principle, [the Eighth Amendment proportionality] test cannot have the primitive simplicity of ‘life for life, eye for eye, tooth for tooth.’ ”)).

In the context of closing argument, this particular Matthew 18:6 verse – the ‘millstones for child murderers’ appeal – has often been condemned as improper and prejudicial. In *Commonwealth v. Brown*, 711 A.2d 444 (Pa. 1998), the prosecution stated, “It is better that you had a millstone tied around your neck and be cast into the

deep, than that you harm a child.” *Id.* at 457. The Pennsylvania Supreme Court, finding the prosecutor's statement parallel to Matthew 18:6, reversed the sentence because the prosecutor made an impermissible reference to biblical law. *Id.*

In *Long v. State*, 883 P.2d 167, 177 (Okla. Crim. App. 1994), the Oklahoma Court of Criminal Appeals held that the prosecutor improperly used the Matthew 18:6 verse to argue that God was on the side of a death sentence. The Court called the prosecutor’s comments “rank misconduct” and said any “attempt to make [the jury’s] task somehow easier by implying God is on the side of a death sentence is an intolerable self-serving perversion of Christian faith as well as the criminal law of this State.” *Id.*

Also in the context of closing argument, but in reference to a different biblical verse, the Supreme Court of Georgia ordered a new penalty phase for a defendant whose “right to due process as secured by [the state statute governing review of death sentences]<sup>43</sup>, the Georgia Constitution, and the Constitution of the United States was abridged when the trial court allowed the inappropriate

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<sup>43</sup> OCGA § 17-10-35.

arguments<sup>44</sup> from the Bible over objection.” *Carruthers v. State*, 528 S.E.2d 217, 223 (Ga. 2000).<sup>45</sup>

Turning back to victim impact specifically, and religious messages more broadly, other states have reversed death sentences on account of biblical references during victim impact testimony. See *Malone v. State*, 168 P.3d 185, 209-15 (Okla. Crim. App. 2007) (finding that victim’s wife imploring jury to show “no mercy” to defendant and to “leave the business of mercy for [defendant] in the hands of the Heavenly Father, where it belongs” suggested that jurors had a religious obligation to vote for death and that doing so might be part of jury's “divine undertaking in upholding and

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<sup>44</sup> The prosecutor stated:

Now, ladies and gentlemen, let me talk to you a moment about some biblical references that help us in this case. Deterrence is very important and the Bible suggests to us why deterrence is appropriate. Romans tells us that every person is subject to the governing authority, every person is subject. And in Matthew it tells us, who sheddeth man's blood by man shall his blood be shed for in the image of God made [he] man. For all they who take the sword shall die by the sword, and this is a message that is very clear, that society must deter criminals.

<sup>45</sup> Overruled on other grounds by *Vergara v. State*, 657 S.E.2d 863, 866 (Ga. 2008).

enforcing the laws”). With respect to harmless error, the Court said “[w]e conclude that **while Malone might have had only a slim chance of avoiding a death sentence** in his original trial, the religious and duty-based plea of the victim's wife that Malone be shown “no mercy” **squelched whatever slim chance he had.**” *Id.* at 215. (Emphasis supplied.)

In 1999, the same Court vacated a death sentence and reduced the defendant’s sentence to life imprisonment because he was denied a “fair and reliable sentencing proceeding” due to “counsel's failure to subject the State's case in aggravation to adversarial testing, ... the admission of improper victim impact evidence and the prosecutor's prejudicial argument”. *Washington v. State*, 989 P.2d 960, 980 (Okla. Crim. App. 1999). The Court found that a letter from the victim’s father, which stated “Our Bible say's [sic] eye for eye” and requested that the jury accomplish “the right Godly justice,” “exceeded the bounds of permissible victim impact evidence given the overamplified request for the death penalty and the biblical references”. *Id.* at 978.

*See also State v. Payne*, 199 P.3d 123, 150 (Idaho 2008)

(finding inadmissible comments describing defendant as “evil”, “a sociopath”, “a cold-blooded killer”, “unremorseful”, and expressed wishes that defendant “rot in hell,” “burn in hell” or be tortured, with one witness noting Bible passages he wished the court to consider, constituted characterizations and opinions about defendant, the crime, his appropriate punishment, and calls to religious authority as the basis for punishment).

In Matthew 18:6, Jesus warns that a harsh judgment will come to those who cause harm to children. Here, F.W.’s mother told the jury directly that the verse applied to Ritchie and thus the Bible says Ritchie should be drowned for what he did. [Drowning was a common form of execution used in many ancient civilizations<sup>46</sup>, as well as in the Bible<sup>47</sup>.] Comparing Ritchie to the irredeemable sinners that Jesus was referencing in Matthew 18:6 suggested to

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<sup>46</sup> MAX RADIN, THE LEX POMPEIA AND THE POENA CULLEI, JOURNAL OF ROMAN STUDIES 119-30 (Vol. X 1920); SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 496 (1978); EDWARD J. WHITE, LEGAL ANTIQUITIES: A COLLECTION OF ESSAYS UPON ANCIENT LAWS AND CUSTOMS 277-78 (2009).

<sup>47</sup> *New International Version Bible*, Gen. 6-9 (Genesis Flood narrative).

the jury that God would condone, or even encourage, the death penalty in this case.

The jurors' personal religious affiliations are largely unknown in this case save a few comments during voir dire. However, the percentage of Americans who believe in God has consistently hovered around the 90th percentile.<sup>48</sup> Accordingly, it is likely that many of Ritchie's jurors were influenced by invocations of God's guidance concerning capital punishment. Regardless of the religious affinity or biblical literacy of Ritchie's jurors, there should be no question this took a significant emotional toll. Immediately after the Matthew 18:6 verse was recited, one of the jurors had such a strong reaction to the testimony – she was reduced to tears – that the proceedings had to be temporarily halted. T. 3819-20.

- ii. THE BIBLICAL VERSE ALSO AMOUNTED TO AN IMPROPER COMMENT ON THE CRIME, THE DEFENDANT, OR THE APPROPRIATE PUNISHMENT.

The punishment desired by a victim's survivors is irrelevant to the sentencing consideration. It clearly offends the Eighth Amendment, pursuant to *Payne, supra*, and should not have been

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<sup>48</sup> Dalia Fahmy, *Key findings about Americans' belief in God*, Pew Research Center, April 25, 2018.

presented to the jury. Permitting F.W.'s mother to opine as to her preferred sentence for Ritchie flagrantly violates his due process rights guaranteed by the U.S. Constitution. *See Payne*, 501 U.S. at 830 n. 2 (“*Booth [v. Maryland]* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.”); *Booth v. Maryland*, 482 U.S. 496, 508–09 (1987) (“The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision making we require in capital cases.”); *see also Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) (“[T]he *Payne* Court did not alter *Booth's* holding that admitting evidence of the victims' opinions of the crime and of the appropriate sentence for the defendant violates the Eighth Amendment ...”).

These statements also violate Ritchie's corresponding rights under Florida law. *See* § 921.141(8) (“Characterizations and opinions about the crime, the defendant, and the appropriate sentence **shall not be permitted** as a part of victim impact

evidence.”). (Emphasis supplied.)

This biblical plea to the jury for death constitutes reversible error. In *Card v. State*, 803 So. 2d 613, 627–28 (Fla. 2001), this Court found certain comments<sup>49</sup> exceeded the proper bounds of victim impact evidence because it amounted to a comment on the defendant and the crime and provided an opinion as to proper punishment. Because defense counsel failed to contemporaneously object to this testimony, the issue was reviewed for fundamental error and this Court held it did not meet that standard “**because the testimony came during the *Spencer* hearing and outside the presence of the jury.**” *Id.* at 628. (Emphasis supplied.) Just like the comments in *Card*, the comments here passed on Ritchie himself, the crime itself, and an opinion – one divinely sanctioned – as to the appropriate

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<sup>49</sup> The victim’s granddaughter testified:

**And in the Bible, one of the laws in the Bible says who so shedith [sic] man's blood by man, his blood be shed, from the image of God. So I just, I really think he's got it really easy. And I think you saw on the news when I, when I made my comment about how I would rather die in the electric chair, to where my death would be quick and easy, than to have my fingers cut off and my hair pulled back and my throat slit.**

*Id.* at 627, n. 11 (Emphasis supplied.)

punishment. Unlike *Card*, the jury heard all of it.

*Compare Walls v. State*, 926 So. 2d 1156, 1179 (Fla. 2006) (finding, in the context of ineffective assistance of appellate counsel for failure to raise victim impact issue, that, despite the improper testimony, “[t]he judge alone saw this improper victim impact evidence” and “any error ... **would not be fundamental error because the jury never saw the letters** and were never exposed to this evidence”). (Emphasis supplied.)

*Compare also Jordan v. State*, 176 So. 3d 920, 934 (Fla. 2015) (holding there was no fundamental error **because**, in part, the victim's aunt “**did not opine about ... the appropriate sentence**”); *Kalish v. State*, 124 So. 3d 185, 211 (Fla. 2013) (“The statements were not overly emotional and did not mention Kalisz. **The daughters did not implore the jury to impose the death penalty** or to seek revenge on Kalisz for their mother's death.”).

Other state courts have reversed for violations similar to the one here. In *Gaston v. State*, 265 So. 3d 387, 444 (Ala. Crim. App. 2018), the Court of Criminal Appeals of Alabama reversed a death sentence after relatives “provided the jury with their

characterization of [Gaston] and his crime as well as their desire for the jury to recommend a sentence of death”.

*See also State v. Lovelace*, 90 P.3d 298, 305–06 (Idaho 2004), where two victim impact statements included opinions advocating that Lovelace be sentenced to death. Ultimately, the Court declined to apply harmless error analysis and remanded the case for resentencing with directions to exclude victim impact statements calling for the death penalty “in order not to violate the Eighth Amendment.” *Id.* at 306. The Court emphasized that to “allow the introduction of victim testimony espousing the death penalty for consideration by a jury is reversible error.” *Id.*

The emotionally fraught victim impact statement in this case resulted in a denial of due process. F.W.'s mother's biblical plea for the death penalty suggested that her will, as well as God's will, should take precedence over a dispassionate weighing process. The State cannot meet its “harmless error” burden of showing beyond a reasonable doubt that F.W.'s mother's biblical plea for revenge had no effect on the jury's (or one or more individual jurors') decision to

impose the death penalty on Granville Ritchie.<sup>50</sup>

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<sup>50</sup> At sentencing, in front of the Judge, F.W.'s mother gave more improper victim impact testimony. She said "I'm here wearing all black because **I'm here to bury this Jamaican today**". R. 2126. She continued "**through our Lord, Jesus Christ, we command to Almighty God**, our brother, Granville Ritchie, and **we command his body to the ground**". R. 2126-27. She asked specifically for the death penalty then said "[t]he only thing I regret today is that I cannot ask ... **for him to be hung**." R. 2127. (Emphasis supplied.)

Counsel does not raise this as an independent issue because it does not rise to the level of fundamental error as the sentencing hearing was on September 11, 2020, and the Judge's sentencing order (dated the same day) indicates she had already made her decision. R. 1045-70, 2102-58.

However, regardless of timing, these comments were highly improper and should not have been permitted. The mother's statement about "bury[ing] this Jamaican" was an entreaty to impose the death penalty as well as a denigration of Ritchie because of his heritage, and harkened back to the same kind of xenophobia committed by the prosecutor in closing argument [discussed in Issue I]. She also said she "felt like [the Trial Court and court personnel] put [themselves] in mother mode" and "put [themselves] in my shoes", which was a further effort to encourage a death sentence based on emotion and sympathy. R. 2130.

Judges are not immune from being influenced by improper passionate pleas from grieving survivors and, in this case, the Judge's unguarded comments in response to the mother demonstrated the strong emotional connection she felt towards her. Immediately after her testimony concluded, the Trial Court addressed her specifically, saying she had "thought long and hard about what" she was going to say to F.W.'s mother. R. 2128. The Trial Court said she felt a connection with her because they were both mothers, and "you're a better, stronger woman than I am". R. 2128-30. These comments clearly demonstrate that F.W.'s mother was accurate in feeling like the Trial Court had "put [herself] in mother mode" and "put [herself] in my shoes". R. 2128-30.

### **III. THE TRIAL COURT ERRED BY LIMITING THE PRESENTATION OF RELEVANT MITIGATING EVIDENCE AND BY ALLOWING IMPROPER REBUTTAL.<sup>51</sup>**

The Defense presented a video compilation of Ritchie’s family, friends, and fellow community members. Over objection [T. 3597-98, 4066], the Trial Court redacted relevant portions of the video that included footage and commentary on the poverty and violence in the area when Ritchie was growing up and interfamilial violence he experienced. The exclusion of this evidence violated Ritchie’s right to present relevant mitigating factors. *See Lockett v. Ohio*, 438 U.S. 586 (1978). The State was then permitted to rebut the video with a lay witness – an intern in the State Attorney’s Office – who provided such speculative and prejudicial testimony that it created an unacceptable risk that the jury would disregard the mitigation video entirely.

Counsel is raising two claims here: that the Trial Court erred in redacting relevant mitigating evidence from the video that the jury should have been able to consider [part B], and that the State presented improper rebuttal evidence to the mitigation video [part C].

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<sup>51</sup> Appellant makes this argument under the Eighth and Fourteenth Amendments of the United States Constitution, and Article 1, sections 9, and 17, of the Florida Constitution.

These two errors, in concert, frustrated the jury's ability to fairly consider Ritchie's poor and violent upbringing and amounts to fundamental error. Prior to any argument, counsel will detail what exactly the video entailed and what was redacted from it [part A].

#### A. THE MITIGATION VIDEO.

The video showed<sup>52</sup> that Ritchie grew up in an extremely poor area regarded as "lower class" by societal standards. T. 4082, 4086-87. He did not live near basic resources like grocery stores. T. 4087. Residents were also routinely unable to pay for things like water and electricity, sometimes even relying on rainwater instead. T. 4087-88. Many of them used the bathroom and bathed from the same communal latrine. T. 4087-88.

The video described violence in the neighborhood so prevalent it was labeled a "war-type area". T. 4089. Drugs and violence were a

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<sup>52</sup> The video was not just audio interviews. It also showed photographs and video clips of Ritchie's actual neighborhood. It is in the record on appeal in CD format. Def. Penalty Phase Ex. 1 (D-1).

The speakers in the video also relayed things like Ritchie's charitable nature, his work ethic, and other good qualities. However, since the vast majority of those clips were not redacted and are not at issue here, counsel will not detail those portions of the video.

way of life people engaged with in order to survive. T. 4085. Some of Ritchie's family members, including his father, became victims of local gun violence. T. 4084.

The video also detailed harrowing violence Ritchie personally experienced at the hands of his father. Ritchie's father had several different sets of children with various women, including Ritchie's mother. T. 4071-72. He was physically abusive to all of those women [T. 4072-74], as well as all of his children, with Ritchie receiving the brunt of his wrath [T. 4072-76, 4079-80]. Ritchie's father was also sexually abusive to at least one of his daughters. T. 4077-79.

Unfortunately, the jury did not hear any of the mitigating evidence in the portions of the video redacted by the Trial Court. Counsel will now detail those redactions. One of the speakers on the video, a local, was driving the Defense team around and commenting on certain violent dynamics in Ritchie's neighborhood – the area of Maxfield Avenue. On the grounds that the video did not establish that the driver had the requisite knowledge, the Trial Court ordered a portion of the video redacted where the driver, who was describing Ritchie's neighborhood, said “[t]his is Maxfield

Avenue. Back in the 80's, it was a hot avenue or a road. Hot meaning a lot of gang violence ...”. T. 3638.

Because it did not relate to the timeframe in which Ritchie lived in the neighborhood, the Trial Court also redacted portions of the video discussing recent shootings [T. 3638, 3644-46], travel warnings and restrictions, and commentary about the violence present in Ritchie’s neighborhood when the Defense team was visiting. T. 3644-47. For the same reason, the Trial Court did not let a speaker who lived in Ritchie’s neighborhood discuss how newcomers to the neighborhood were shot and killed and how her neighbor’s house was burned down [T. 3630], and did not allow Ritchie’s brother to talk about police corruption and brutality [T. 3633], even though they were both from the same neighborhood as Ritchie.

#### B. IMPROPER LIMITATION ON MITIGATION.

As of 2019, Ritchie had been in the U.S. for about eight years, meaning he would have left Jamaica around 2011. T. 3630. Ritchie was born in 1978, making the relevant timeframe for evidence about his upbringing and life in Jamaica 1978-2011. The Trial

Court redacted a portion of the video where the driver said “[t]his is Maxfield Avenue. Back in the 80's, it was a hot avenue or a road. Hot meaning a lot of gang violence ...”. T. 3638. This portion of the video was describing gang violence in Ritchie’s neighborhood. The jury should have been able to hear what Ritchie’s neighborhood was like in the 1980s when he would have been anywhere from approximately two to twelve years old.

The jury should have also been able to hear another redacted portion of the video where the driver was discussing the 2010 extradition to the United States of a local community leader because he explained the extradition caused gang activity in the area to flourish even more than normal. T. 3639. This was also within the timeframe that Ritchie was living in the area so it was relevant to the jury’s consideration of mitigation.

The jury should have also heard about the recent shootings [T. 3638, 3644-46], travel warnings and restrictions, and commentary about the violence present in Ritchie’s neighborhood when the Defense team was visiting. T. 3644-47. Likewise, the jury should have been able to consider testimony about local police corruption

and brutality [T. 3633], as well as how newcomers to the neighborhood were either terrorized or killed [T. 3630]. As the Defense pointed out [T. 3597-98], current violence could have tended to prove how violent the neighborhood was when Ritchie was there as the high level of violence in the area had been present for some time. It also could have explained any question the jury had about a lack of mitigation investigation.

Ritchie needed only a single juror to regard his impoverished and physically abusive childhood as a good enough reason to spare his life; thus this Court cannot be certain these improper redactions had no effect on the death sentence. *Porter v. McCollum*, 558 U.S. 30, 43 (2009) (“It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with [the victim].”).

### C. IMPROPER REBUTTAL.

The improper limitation on mitigation was worsened by the Trial Court permitting the State to present the jury with rebuttal evidence that – specifically because of the Trial Court’s numerous redactions

of portions of extremely compelling commentary from the mitigation video – ended up being more exhaustive than Ritchie’s mitigation presentation.

To rebut Ritchie’s claims of the poverty and violence he had to endure, the State called one of their office interns, Ms. Georgette Redley. T. 4101-17. Ms. Redley had been in the United States since 2005 but was from Jamaica and typically visited on an annual basis. T. 4101-03. Despite not being from the same neighborhood and having zero personal knowledge of Ritchie or his family, Ms. Redley was permitted to speculatively provide the jury with irrelevant, prejudicial, and misleading information

When Ms. Redley began talking about how politics worked in Kingston, the Defense unsuccessfully objected on the grounds of speculation. T. 4111-12. Based on her watching the mitigation video, she went on to surmise that Ritchie’s father must have held an elevated position in the community because of his heavy involvement in local politics, and she further speculated that Ritchie’s father got extra money from politicians in order to shore up community support. T. 4112-13. Contrary to the mitigation presentation, and

despite having absolutely no personal knowledge of Ritchie or his upbringing (T. 4118), Ms. Redley also guessed Ritchie's family would have either had "one of the best homes in the garrison" or "[didn't live] in that community" at all. T. 4116.

She also repeatedly cast doubt on the level of violence where Ritchie grew up. T. 4113-14, 4116-17. Ms. Redley told the jury when she was in high school, which would have been around 1995-1999 since she was born in 1981 [T. 4101], she was able to walk the streets and go to parties. T. 4121. She expressed her personal disbelief towards the crime statistics about the high murder rate in 2002 she was confronted with on cross, yet she ultimately acknowledged she was not aware of any crime statistics that conflicted with the ones the Defense presented. T. 4119-21, 4124.

Once the defense advances a theory of mitigation, the State has a right to rebut but is limited by the rules of evidence. *See Wuornos v. State*, 644 So. 2d 1012, 1017-18 (Fla. 1994). Once Ms. Redley admitted she did not have any personal knowledge of the circumstances of Ritchie's upbringing she should not have been allowed to testify. See § § 90.401, Fla. Stat. (2019) ("Relevant evidence

is evidence tending to prove or disprove a material fact.”); 90.403 (“Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.”).

Additionally, a lay witness generally may not testify in terms of an inference or opinion, because it usurps the function of the jury. C. Ehrhardt, Florida Evidence § 701.1, at 386 (2d ed. 1984). A lay witness may testify using an inference or opinion only under limited circumstances:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions **and his use of inferences or opinions will not mislead the trier of fact** to the prejudice of the objecting party; and

(2) The opinions and inferences **do not require a special knowledge**, skill, experience, or training.

§ 90.701(1), (2), Fla. Stat. (2019). (Emphasis supplied.)

The State could have called an expert, if they had one, who was qualified to speak to the sociology of Jamaica. Instead, they decided to rely on an intern in their own State Attorney’s Office (who would

have a clear incentive to please her supervisors) to speculate in their favor on socioeconomic topics and statistics on localized violence. Ms. Redley, who admitted she did not possess any specialized knowledge whatsoever about Ritchie, misled the jury by providing opinions about Ritchie's neighborhood not being violent when he was growing up and Ritchie's family being well-off.

If lay opinion is nothing more than speculation, it is not admissible. *See Chesser v. State*, 30 So. 3d 625, 626-28 (Fla. 1st DCA 2010) (reversing conviction for DUI manslaughter where lay opinions were elicited that opined that the word "threw" – a word the defendant used – meant intoxicated; distinguishing from decisions in which law enforcement officers were allowed to testify as experts regarding the meaning of codes or slang terms used by drug dealers based on their specialized knowledge and experience, because the lay witnesses in Chesser's case "were not qualified as experts of any kind.")

*See also Garron*, 528 So. 2d at 356 (finding testimony of former assistant state attorney originally charged with prosecuting the case that the defendant, in his lay opinion, did not appear to be psychotic

or insane under the legal definition of sanity was inadmissible in murder prosecution in which defendant raised insanity defense, where state attorney's contact with defendant began with first appearance hearing conducted day after shooting incident).

The task of the Ritchie's jury at the penalty phase of his trial was to fairly evaluate his mitigating evidence, and fairly weigh it against the State's aggravating evidence. The scope of any rebuttal by the State should have been limited to either relevant personal observations or historical data that would tend to disprove Ritchie's claims that he suffered familial and communal poverty, violence, and abuse. To that end, Ms. Redley could provide nothing but speculative opinion as she never observed Ritchie or any of his family members, and also lacked familiarity with the specific neighborhood where he lived.<sup>53</sup>

But the presentation of Ms. Redley's testimony certainly was not limited to questions about the poverty and violence in the area.

Despite having no personal knowledge of the abuse Ritchie suffered

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<sup>53</sup> She did not live off of Maxfield Avenue like Ritchie did, although she went to school "10 minutes from Maxfield" so she surmised "if there was violence going on," she would have noticed. T. 4118-19.

[T. 4118], she equated the physical abuse described in the mitigation video to her own “whooping[s]” growing up, saying “it’s nothing”, it’s “tough love”, and “just the way we grew up.” T. 4104.

The video did not describe mere “whoopings” by any means. The speakers in the video recalled instances of extreme physical abuse from Ritchie’s father, including: Ritchie being beaten for breaking up a fight between his father and one of his father’s girlfriends which was so severe it sent her to the hospital [T. 4073-74]; Ritchie’s father beating his children even despite “blood running” and sometimes using a “thick belt” [T. 4075-76]; Ritchie being beaten with “wire and board” [T. 4081]; Ritchie being the son who received the majority of the beatings compared to the father’s other children [T. 4080]; Ritchie being beaten by his father for trivial infractions such as not scoring enough football goals, talking to members of rival families, and not maintaining the same grudges the father had in the community [T. 4080-81]; the father routinely beating one of his other sons (Jason) “for being gay” [T. 4079]; and the father admitting he had “molested one of his daughters” [T. 4077].

A single juror voting to save Ritchie’s life would have resulted in

a life sentence. Any or all of the jurors could have thought Ms. Redley's testimony was proof Ritchie was making up his Jamaica mitigation entirely, the alleged abuse included. The risk is especially high given the prosecutor's later urging in penalty phase closing argument for the jury to do just that – regard Ritchie as a “manipulator” [T. 4286, 4302-03, 4306-07, 4310, 4313] who “decei[ves]” everyone around him [T. 4302] who was essentially wasting everyone's time with a trial [T. 4301-03].

There were also several instances in penalty phase closing argument where the prosecutor directly told the jury to use Ms. Redley's testimony to justify disregarding Ritchie's mitigation. He argued that Ms. Redley discounted the mitigation evidence of violence in Ritchie's neighborhood in Kingston and that this proved that Ritchie – counter to the Defense's assertions – grew up in privilege. T. 4298-4301. *See Brooks*, 918 So. 2d at 201 (Fla. 2005) (finding court's error in permitting impeachment of trial testimony compounded by prosecutor during closing arguments). *See also Wilson v. State*, 72 So. 3d 331, 335 (Fla. 4th DCA 2011) (holding trial court's abuse of discretion in “allowing the State to elicit rebuttal

testimony” was “compounded by the State when, during closing argument, the prosecutor improperly focused the jury's attention on [the] improper rebuttal testimony”); *Fino v. Nodine*, 646 So. 2d 746, 750 (Fla. 4th DCA 1994) (finding error in admitting lay opinions compounded by counsel's closing argument).

Additionally, the error of the improper rebuttal was compounded by the limitations placed on the mitigation video by the Trial Court. Over objection, the Trial Court ordered redactions from the mitigation video on some of the very same topics Ms. Redley was allowed to testify about. For example, The Trial Court ordered redactions of portions of the video where a local speaker explained that those in the area often turn to either prostitution or violence to make money and some people from the area will use the addresses of people who live in more well-respected areas in order to get into choice schools or to put on job applications. T. 3646-48. This evidence could have given the jury much needed context to combat Ms. Redley’s claim that where Ritchie went to high school amounted to proof that he had high intellect and came from an influential, wealthy family. T. 4107.

The Trial Court also disallowed most of the speakers in the mitigation video from discussing local violence even though some of it occurred in the 1980s, which would be a highly relevant time period. The reasoning behind these redactions, according to the Trial Court, was that the speakers in the mitigation video were referencing either periods of time or geographical areas too remote from when and where Ritchie grew up there. But this limiting principle applied equally to the bulk of Ms. Redley's testimony, given that Ms. Redley was permitted to speculate wildly that Ritchie's neighborhood was safe (despite admitting she knew nothing of any official crime rate data in and around the relevant time period). She assumed Ritchie's neighborhood was as safe as her own because she lived nearby.

Thus, the State was able to improperly rebut mitigating evidence that the Defense presented, and also improperly rebutted aspects of the mitigating evidence that the Defense was never able to present in the first place. Therefore, the State cannot show beyond a reasonable doubt that the cumulative effect of the limitation of, and improper rebuttal to, the mitigation presented did not contribute to the jury's death verdict. A new jury penalty proceeding is required.

Conclusion

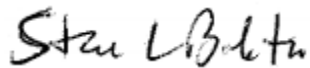
Appellant, Granville Ritchie, respectfully asks this Court to reverse his death sentence and remand with directions to grant him a new jury penalty phase.

Respectfully submitted,



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Certificate of Compliance

I certify, as required by Fla. R. App. P. 9.210 (a)(2)(C), this document contains 19,234 words, excluding the parts of the document exempted by Fla. R. App. P. 9.045 (e). I further certify that this document complies with the typeface requirements of Fla. R. App. P. 9.045 (b).



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