IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF THE APPELLANT

Howard L. "Rex" Dimmig, II
Public Defender, 10th Jud. Circuit

Rachel Paige Roebuck (FBN 118886)
Assistant Public Defender

Steven L. Bolotin (FBN 236365)
Assistant Public Defender
Law Office of the Public Defender
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
(863) 534-4200
rroebuck@pd10.org

Counsel for Appellant

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Statement Regarding Oral Argument

The State makes an **ipse dixit** declaration that "oral argument is not necessary on this appeal" because it "will not materially aid the decisional process." AB. iv. The State offers no case-specific explanation for this bald assertion, nor does it provide any reason why Granville Ritchie's death sentence should not receive the same review on direct appeal that every other capital defendant has received since the adoption of Florida's post-*Furman*[1] death penalty statute in 1972.

Either the state is arbitrarily singling Ritchie out, or else this is the second[2] of many such requests to come. To the best of undersigned counsel's knowledge (and co-counsel Bolotin has represented approximately 60 capital defendants on direct appeal since 1982, and is familiar with hundreds of other death penalty cases handled by his colleagues in Bartow, Tallahassee, and around

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[1] *Furman v. Georgia*, 408 U.S. 238 (1972).

[2] *See* State's Ans. Br., *Michael A. Gordon vs. State Of Florida*, Docket No. SC20-284 (Mar. 1, 2021), at pg. viii. [Notwithstanding the State's request, this Court scheduled oral argument in Gordon the same day it granted Gordon's motion for extension of time to file his reply brief.]

the state), this Court has **always, sua sponte**, scheduled and heard oral argument in all Florida capital direct appeals. It has never been required or expected that appellate counsel would file a written request for oral argument, and as far as the undersigned is aware the State has never, until now (and both times by the same Assistant Attorney General), suggested that the Court dispense with oral argument.

"Death is different", and "[t]he United States Supreme Court has . . . repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). Meaningful appellate review is essential to minimize the risk of arbitrary imposition of the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976).

Even in a noncapital context, where oral argument is not necessarily required in every case, appellate judges and commentators have recognized its value. Oral argument "is the only time that all of the members of the court and all of the lawyers are together to discuss the case." *In re Schwartz*, 755 So. 2d 110, 114 (Fla. 2000), quoting Myron H. Bright and Richard S. Arnold [both

former judges on the U.S. Eighth Circuit Court of Appeals], *Oral Argument? It May Be Crucial!*, A.B.A. J., Sept. 1984, at 68,69.

> The argument can isolate and clarify the core issues. [Vague points, complex points, and points that were simply overlooked] may become evident during oral argument. Most significantly, oral argument provides the attorney with his or her only opportunity to face and speak directly to the judges about the case and the contentions made by counsel.

Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L.REV. 35, 36 (1986) (footnote omitted).

Judge Bright quotes former Chief Justice Rehnquist, speaking in a panel discussion of oral advocacy:

> You could write hundreds of pages of briefs, and you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process.

Id. at 36-37 (footnote omitted).

> Another essential function of oral argument is to raise the judge's confidence level in the correctness of the decision reached on the case in conference. The argument gives the court, with all of the panel members participating, an opportunity to test ideas and to discuss problems about the case with counsel. The free interchange of ideas pursued at oral argument increases the court's ability to reach the right and just result.

Id. at 38.

According to Judge Bright, "the most significant **proof** of the unique value of oral argument" comes from appellate judges themselves; in a study of over 200 statements eighty percent of judges said that oral arguments are very important to the resolution of cases. *Id.* at 39 (emphasis in article). "Chief Justice Rehnquist, for example, has stated that oral argument may not cause a 180 degree shift in his tentative impression, but it has "at least changed some of my ideas … in a large minority of cases that are argued – somewhere between 25 percent and 50 percent." *Id.* at 40.

Similarly, former Justice Stanley Mosk, the longest tenured member of the California Supreme Court, made the following observations:

> . . . [O]ral argument provides an important forum for an interchange of ideas between counsel and the judges, and between the judges themselves. The members of the court are given the opportunity to probe, to seek answers to questions that may have arisen in their minds. A justice may challenge his own temporarily formed opinion about the case by probing questions pro and con on the position he may have in mind. And, on perhaps rare occasions, attorney responses to questions from the bench may alter a previous tentatively reached conclusion. Further,

> appropriately designed questions by one justice may convince a doubtful colleague who had previously indicated reservations to reach a preferred conclusion.

Stanley Mosk, *In Defense of Oral Argument*, 1 JOURNAL OF APPELLATE PRACTICE AND PROCESS 25, 27 (1999) (footnote omitted).

Justice Mosk concluded by saying "I believe most appellate judges would agree that oral argument performed effectively is of crucial significance. Careful and thoughtful preparation - - by both the attorneys and the appellate judges - - will ensure that oral argument continues to positively contribute to the decision-making process." *Id.* at 29-30.

Oral argument holds appellate counsel's feet to the fire and requires him or her to defend the assertions made in the briefs. Ritchie welcomes that opportunity, while the State evidently would prefer to avoid it. Very often – both recently and throughout the decades – this Court in affirming or reversing death sentences has pointed to concessions made by the State or the Defense when confronted by questioning at oral argument.[3]

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[3] *See Craft v. State*, 312 So. 3d 45, 55 (Fla. 2020); *Lawrence v. State*, 308 So. 3d 544, 551 n.4 (Fla. 2020); *Craven v. State*, 310 So. 3d 891, 906 n.9 (Fla. 2020); *Pasha v. State*, 225 So. 3d 688, 703

This case involved a slew of improper comments by the prosecutor during closing argument, as well as biblical comments made by F.W.'s mother who unequivocally advocated Ritchie be put to death, a prayer that she claimed was blessed by God. Every single one of those comments was directed at the jurors, who ultimately voted to condemn Ritchie to death. A life vote from even a single juror would have saved his life. The State should be called to defend its apparent position that every juror who voted to end Ritchie's life was able to ignore the multiple improper considerations urged by the prosecutor and the victim's mother.

Notwithstanding the State's dismissive tone [AB. iv], there is no such thing as a "routine" death penalty case, and certainly not to the

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(Fla. 2017); *Oyola v. State*, 158 So. 3d 504, 509 n.12 (Fla. 2015); *Ellerbee v. State*, 87 So. 3d 730, 737 (Fla. 2012); *McCray v. State*, 71 So. 3d 848, 878 (Fla. 2011); *Wright v. State*, 19 So. 3d 277, 305 (Fla. 2009); *Deparvine v. State*, 995 So. 2d 351, 370 (Fla. 2008); *Grim v. State*, 841 So. 2d 455, 463 (Fla. 2003); *Knight v. State*, 770 So. 2d 663, 666 n.4 (Fla. 2000); *Floyd v. State*, 569 So. 2d 1225, 1229 (Fla. 1990); *Cheshire v. State*, 568 So. 2d 908, 911 (Fla. 1990); *Parker v. State*, 456 So. 2d 436, 441 (Fla. 1984); *Rembert v. State*, 445 So. 2d 337, 340 n.* (Fla. 1984); *Fitzpatrick v. State*, 437 So. 2d 1072, 1076 (Fla. 1983); *Clark v. State*, 379 So. 2d 97, 102 (Fla. 1979). *See also Drake v. State*, 400 So. 2d 1217, 1219 n.3 (Fla. 1981); *Braddy v. State*, 111 So. 3d 810, 874 (Fla. 2012) (Quince, J., dissenting); *Durousseau v. State*, 55 So. 3d 543, 567 (Fla. 2010) (Pariente, J., dissenting).

person the State is seeking to execute. The State's cavalier assertions that oral argument is "not necessary" and "will not materially aid the decisional process" fly in the face of nearly five decades of established capital appeals procedure in this state.

Argument

I. CLOSING ARGUMENT

A. IN LIGHT OF THIS COURT'S REPEATED WARNINGS AGAINST PROSECUTORIAL MISCONDUCT IN CAPITAL PENALTY TRIALS, THE STATE'S EFFORT TO ISOLATE AND DOWNPLAY PROSECUTOR HARMON'S NUMEROUS IMPROPER AND INFLAMMATORY COMMENTS TO THE JURY SHOULD NOT BE REWARDED

Throughout its brief, the State both downplays and mischaracterizes Assistant State Attorney Harmon's improper and inflammatory remarks, which permeated his penalty phase closing argument. AB. 38, 44-45, 48-71. The State further repeatedly asserts – without acknowledgment of the fact that if even a single juror was persuaded by these improper arguments to vote for death instead of life imprisonment it would have changed the outcome – that the prosecutor's remarks were "harmless". The State is wrong, and it cannot meet its burden of showing beyond a reasonable doubt that Mr. Harmon's misconduct did not have its intended impact on the jury.

Florida's capital prosecutors have made it abundantly clear they will continue to employ improper tactics to sway jurors and obtain

death verdicts, as long as there are no meaningful consequences. Ritchie's case provides yet another example of comments made during closing argument that are intolerable in the courtrooms of the State of Florida. Enough is enough.

The system cannot work properly if trial attorneys are confident that appellate courts will tolerate improper argument. "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." *Luce v. State*, 642 So. 2d 4, 4 (Fla. 2d DCA 1994) (Blue, J., specially concurring). This precept should be enforced, not merely recited.

Almost forty years ago, seemingly fed up, this Court invited the Bar to take action. *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985) ("This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings."). Then after another twenty years went by, still plagued by "this problem with unacceptable frequency", this Court submitted a prosecutor's

misconduct to the Florida Bar. *Ruiz v. State*, 743 So. 2d 1, 10 (Fla. 1999).

Yet, here we are again, and in a case as serious as this, "where a defendant's life hangs in the balance." *Ruiz*, 743 So. 2d at 9. It begs the question: if Prosecutor Harmon was truly so confident that the jurors would agree that Ritchie deserved to die based on the evidence alone, why inject such "pure gratuity" and risk a reversal? *See Stewart v. State*, 51 So. 2d 494, 494 (Fla. 1951). After all, no public interest is served when the State seeks to obtain a conviction by injecting reversible error into a trial "when it knows or should know that the error may later require reversal." *See Bullard v. State*, 436 So. 2d 962, 964 (Fla. 3d DCA 1983) (citing DeFoor, *If Oratory Comes, Can Reversal Be Far Behind?*, 57 FLA.BAR.J. 505 (1983). Only if the prosecutor is confident that his misconduct will **not** result in reversal will he resort to improper tactics.

In *D'Ambrosio v. State*, 736 So. 2d 44, 48 (Fla. 5th DCA 1999) (reversing a capital sexual battery for prosecutorial misconduct), the Fifth District expressed that understanding: "It is very difficult to understand why an experienced prosecutor … would act so

unprofessionally, and why two other lawyers, the defense attorney and the judge, would permit such behavior to jeopardize a very sensitive trial for the most terrible of crimes." Indeed, there have been plenty of warnings that this kind of indulgence "is a perilous practice." *Westley v. State*, 416 So. 2d 18, 20 (Fla. 1st DCA 1982). *See also Briggs v. State*, 455 So. 2d 519, 521 (Fla. 1st DCA 1984) (mapping over thirty years' worth of toothless rebukes, and vowing to "fashion a special remedy" if prosecutors persisted with their "excessive preoccupation with obtaining a conviction at any cost"). And prosecutorial misconduct is especially egregious when it is used to obtain **a death verdict** at any cost. *See Urbin v. State*, 714 So. 2d 411, 422 (Fla. 1998) ("We are compelled once again to emphasize that the prosecutor has a "duty to seek justice, not merely 'win' a death recommendation."); *Delhall v. State*, 95 So. 3d 134, 170 (Fla. 2012) ("The prosecutor in this case, by her overzealous and unfair advocacy, appeared to be committed to winning a death recommendation rather than simply seeking justice.").

B. THE "SAME MERCY" ARGUMENT

Contrary to his disclaimer ("I didn't say that"[4]) – which the trial judge agreed with – and contrary to the State's implied assertion on appeal, Assistant State Attorney Harmon was not merely arguing (in support of the HAC aggravator) that the **crime** was pitiless; he was urging the jurors to respond tit for tat. "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). The emotional and inflammatory message was clear: no mercy for F.W. equates to none for Ritchie. This exact tactic – designed to influence the jury to return a death verdict – has been repeatedly condemned by this Court as "blatantly impermissible". *Brooks v. State*, 762 So. 2d 879, 901 (Fla. 2000); *Urbin*, 714 So. 2d at 421; *see also Rhodes v. State*, 547 So. 2d 1201, 1206 (Fla. 1989).

The State attempts to soft-pedal – as is the recurring theme throughout its Answer Brief – contending that this same mercy

[4] T. 4295.

argument was rendered innocuous because it was phrased "rhetorically", as opposed to an "express[] argu[ment] to the jury that it should show no more mercy to Ritchie than he showed to the victim". AB. 49. But rhetorical questions are all the more compelling for their dramatic impact. What is rhetorical, and thus powerful, about the question "Did he extend mercy to this little girl?" is the unspoken answer in the minds of the jurors: "No!" Juxtaposed with his immediately preceding comment that he wanted the jurors to think about this when deciding whether or not to "personally extend mercy" to Ritchie, the prosecutor's meaning could not have been lost on them.

[*Contrast Conahan v. State*, 844 So. 2d 629, 640-41 (Fla. 2003), improvidently relied on by the State at AB. 49, in which the prosecutor "did **not** urge the jury to show the defendant as much mercy as he showed his victim" (emphasis supplied), but instead commented on the Florida statutory scheme which strikes a balance between the equally important values of mercy and justice.]

The State, in its summary of argument, allows that the same mercy remarks are "the one objection which may have been

preserved" [AB. 38], but then incorrectly and hypertechnically contends in the body of its brief that the objection (and motion for mistrial) were not preserved below, on the theory that defense counsel waived his objection by failing to obtain a ruling. AB. 41-44.

When the prosecutor urged the jury, in "considering whether you should give him life and whether you should personally extend mercy to this defendant", to think about "Did he extend mercy to this little girl?", defense counsel objected, asked to approach the bench, moved for a mistrial, and cited case law. The prosecutor defended his comments: "It's on the jury instruction on HAC, whether it's merciless or pitiless. **I'm talking about his failure to exercise mercy to her.** Clearly, it's part of the instruction on HAC." When defense counsel took issue with the prosecutor's explanation ("The difference is, you can't say give the same mercy he gave to – ") the prosecutor cut him off – "I didn't say that." Defense counsel said "Yes", whereupon the judge agreed with the prosecutor's interpretation of his remarks: "**I don't recall him saying that**, but obviously relate the term mercy related to the context of HAC. Don't relate it to any mercy the jury may or may not show the defendant,

okay. All right. Thank you." T. 4294-95 (emphasis supplied).

By agreeing with the prosecutor's mischaracterization of his comments, and disagreeing with the defense's accurate characterization, the judge made it entirely clear, without saying magic words, that she was overruling the objection and denying the motion for mistrial. Defense counsel had stated the grounds for the objection and both parties had made their positions clear. Further argument would have amounted to a continuation of the "Did not! Did too!" exchange; it would have been futile, and it was not required to preserve the issue for review. The contemporaneous objection rule "places the trial judge on notice that error may have been committed, and provides [him or her] an opportunity to correct it at an early stage of the proceedings." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978); *Corona v. State*, 64 So. 3d 1232, 1242 (Fla. 2011). Those objectives were satisfied here.

Just as objections do not require "magic words" [*see, e.g.*, *Corona*, 64 So. 3d at 1243; *Connor v. State*, 987 So. 2d 130, 133 (Fla. 2d DCA 2008); *Williams v. State*, 414 So. 2d 509, 511-12 (Fla. 1982)], neither do rulings. As recognized in *Colvin v. Williams*, 564 So. 2d

1249, 1250 (Fla. 4th DCA 1990), the appellate court rejected Williams' claim that Colvin had waived an evidentiary issue by failing to obtain a specific ruling from the trial court:

> It is the trial court's responsibility to make a dispositive ruling on all objections or motions that are properly brought before it. We can hardly fault a litigant, once a proper objection has been lodged with the court, if the court's response is something other than a clear "sustained" or "overruled." In this case, it appears that the trial court responded to appellant's objection by simply saying "fine." (We would infer that if the trial court intended to prevent appellee's counsel from asking further questions in this area, the court would have been clearer in its response to appellant's objection.)

Id. at 1250.

Similarly in *Powell v. State*, 985 So. 2d 1168, 1170 (Fla. 4th DCA 2008), the appellate court, in reversing an involuntary commitment under the Sexually Violent Predator Act due to the cumulative impact of improper closing argument, said:

> We also note that after defense counsel objected to some of the state's arguments, the trial court did not specifically sustain or overrule the objection, stating in one instance that the argument was "closing argument, it's not evidence, I explained that to them." For adequate appellate review, it is necessary that trial courts make specific rulings to objections raised.

The trial court's response to the defense's objection and motion for mistrial in the instant case is similar to *Colvin* and *Powell* in that she did not say the words "sustained" or "overruled", but it is different in that Judge Sisco did not merely "punt" (as in *Colvin* and *Powell*); she expressed disagreement with the defense's contention that the prosecutor had made a same mercy argument.

The Fourth DCA distinguished *Colvin* in *Carratelli v. State*, 832 So. 2d 850, 857 (Fla. 4th DCA 2002), in which the trial judge made **no** response to defense's counsel's motion (emphasis in opinion); therefore "[a] ruling on that issue cannot … be inferred from the record." Similarly, in *Schreidell v. Shoter*, 500 So. 2d 228, 233 (Fla. 3d DCA 1986), the trial judge made no response to the appellant's objection and motion for mistrial. And, unlike the trial court's response in *Newton v. S. Fla. Baptist Hosp.*, 614 So. 2d 1195, 1196 (Fla. 2d DCA 1993), instructing the jury that what the attorneys say is not evidence, the judge's response in the instant case was not ambiguous.

The case law relied on by the State is off point. In *Smith v. State*, No. SC18-822, 2021 WL 1572359 (Fla. Apr. 22, 2021), the trial judge

twice reserved ruling on Smith's motion for change of venue until an attempt was made to seat a jury in Duval County. [Under Florida law, "the need to change venue [ordinarily] should not be determined until an attempt is made to select a jury" where the crime occurred.[5]] When a jury **was** selected in Duval County, defense counsel affirmatively stated that they had no further objections, and they did not renew the change of venue motion. *Jones v. State*, 998 So. 2d 573 (Fla. 2008) involved one aspect of a multi-pronged postconviction Brady[6] claim which was never addressed by the trial court; while *Rhodes v. State*, 986 So. 2d 501 (Fla. 2008) – also a postconviction case – involved a motion to depose a DNA expert, upon which the trial court expressly **postponed** ruling because of procedural complexities arising from the unusual timing of the motion.[7] Thus in both *Jones* and *Rhodes*, this Court was left with "nothing to review".

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[5] *See, e.g.*, *Morris v. State*, 233 So. 3d 438, 444-45 (Fla. 2018); *Henyard v. State*, 689 So. 2d 239, 345 (Fla. 1996).

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] As Justice Lewis, concurring in part and dissenting in part, explained, "both the trial court and Rhodes operated under the belief that the DNA testing and subsequent discovery with regard to that testing was a separate issue from the Rule 3.850 motion." 986 So. 2d at 515.

That is a far cry from the instant case, where the "same mercy" comment was objected to and debated and the trial judge, without using the word "overruled", clearly manifested her agreement with the State's position.

Since the prosecutor's blatantly impermissible "same mercy" rhetoric – designed to obtain a death verdict by inflaming jurors' emotions and stoking eye-for-an-eye impulses – was preserved, the remaining question is whether the State, as the beneficiary of its own improper tactic, can show beyond a reasonable doubt that it could not have contributed to the penalty verdict. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986); *Perry v. State*, 801 So. 2d 78, 91 (Fla. 2001); *Johnson v. State*, 44 So. 3d 51, 53 (Fla. 2010); *Lindsey v. State*, 14 So. 3d 211, 218 (Fla. 2009) (Quince, J., concurring) (where prosecutor's comments were improper, prejudicial, and made with the apparent goal of inflaming the jury, "it cannot be concluded that these comments did not affect the jury's decision to impose the death penalty").[8]

[8] The unanimous opinion of the Court in *Lindsey* reversed his murder conviction for insufficiency of the evidence, and expressly did not address any other issue. 14 So. 3d at 212, 214, 216.

The "same mercy" argument, in and of itself, is extraordinarily prejudicial; it is "an unnecessary appeal to the sympathy of the jurors calculated to influence their sentencing recommendation" [now verdict]. *Urbin*, 714 So. 2d at 421-22; *Rhodes*, 547 So. 2d at 1206. When a prosecutor (or even a civil trial litigator) tosses the proverbial "skunk into the jury box"[9], or when "an elephant has passed through the courtroom"[10], the jury's verdict may well be compromised. *See, e.g.*, *Barnes v. State*, 743 So. 2d 1105, 1108 (Fla. 4th DCA 1999) (reversing for new trial due to prosecutorial remark referring to key defense witness as "hired gun" – even though "[i]t is true that the prosecutorial excess is but a single comment" – where it could not be shown that the comment did not contribute to Barnes' conviction).

Under Florida's capital sentencing statute, if even a single juror voted for life imprisonment, that would have been Ritchie's sentence. Florida's Standard Jury Instruction 7.11 (Criminal) – which the Court has referred to as the "mercy instruction" – informs the jury that

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[9] *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1158 n.1 (Fla. 5th DCA 1994).

[10] *Willey v. Ketterer*, 869 F.2d 648, 652 (1st Cir. 1989); *LeBlanc v. Am. Honda Motor Co.*, 688 A.2d 556, 583 (N.H. 1997).

"[r]egardless of the results of each juror's 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." *See Woodbury v. State*, No. SC19-8, 2021 WL 1418851, at *17 (Fla. Apr. 15, 2021). The prosecutor's emotional "same mercy" rhetoric undercut the mercy instruction, and could easily have had its intended effect of persuading one or more jurors **not** to extend mercy (whether they found the mental mitigating evidence and/or Ritchie's lack of criminal history weighty, or even if they did not). *See also Satterwhite v. Texas*, 486 U.S. 249, 250 (1988) ("[E]valuation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.").

Moreover, the "same mercy" argument was far from the only elephant in the courtroom; just the only preserved one. Mr. Harmon brought a herd of elephants. "[U]nobjected to improper argument bolsters the defendant's position that the preserved error was harmful." *Lenz v. State*, 245 So. 3d 795, 799 n.1 (Fla. 4th DCA 2018), citing *Ruiz*, 743 So. 2d at 7 ("When the properly preserved comments

are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted."). When improper comments are made during closing argument, appellate courts consider "the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial." *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007), citing *Brooks*, 762 So. 2d at 898-99; *Evans v. State*, 177 So. 3d 1219, 1238 (Fla. 2015)[11]; *Gooden v. State*, 266 So. 3d 858, 862 (Fla. 4th DCA 2019).

Prosecutor Harmon's comments throughout his penalty phase closing argument dovetail perfectly with the theme of the "same mercy" comment: the jury should return a death verdict for reasons beyond the evidence and inconsistent with the law. [See Initial Br., 18-52.] Ritchie had the temerity to come here from Jamaica, commit a heinous murder, and then take advantage of the panoply of constitutional rights America affords. Mr. Harmon painted a vivid and emotional picture, unsupported by the evidence, an imaginary

[11] *Evans* was receded from on other grounds in *Johnson v. State*, 252 So. 3d 1114, 1118 (Fla. 2018).

script of what F.W. was thinking and experiencing at the time of her death, and he invited the jurors to imagine themselves in her place. Mr. Harmon unfavorably contrasted Ritchie, whom he had just cast as a foreigner and an outsider, with President Ronald Reagan, and argued extra-record biographical facts (which would not be common knowledge) to suggest that since Reagan overcame a tough childhood to become "a gracious, kind man" [T. 4305], Ritchie should have done the same. This too was entirely improper. *Ruiz*, 743 So. 2d at 7.

In *Delhall v. State*, 95 So. 3d 134, 170 (Fla. 2012), this Court stated that it could not conclude that the prosecutor's misconduct "did not influence the jury to reach a more severe penalty recommendation [i.e., death] than it would have otherwise." The Court also observed, "[t]he prosecutor …, by her overzealous and unfair advocacy, appeared to be committed to winning a death recommendation rather than simply seeking justice." *Id.*

The same is true in Ritchie's case. Moreover, the unfairness of his penalty phase was compounded by yet another extraordinarily inflammatory comment (although this one cannot be attributed to Mr. Harmon) which urged jurors to impose the death penalty for

reasons outside the law. This occurred at the end of F.W.'s mother's emotionally wrenching victim impact testimony, when she quoted a biblical injunction from Matthew 18:6: "If anyone causes one of these little ones, those who believe in me, to stumble, it would be better for them to have a large [mill]stone hung around their neck and to be thrown into the sea. That scripture is talking to someone that knows better. And Granville Ritchie knows better." [See Issue II, *infra.*]

A plea like this, conveying to the jurors that **God** would have no mercy on a child killer like Granville Ritchie, would likely have resonated with at least some of the jurors, and could have swayed them to vote for death over life for improper reasons.

Even the State concedes that this "quotation of scripture and final comment about Ritchie exceed[s] the scope of evidence relevant to the statute", but merely contends that it did not become a "feature" of the penalty phase because she only said it once and the prosecutor did not repeat it. AB. 77. However, this is not the sort of thing you have to say twice in order for it to have an impact on jurors. The biblical quotation was "harmless", according to the State, "because the Capital Sentencing Order (DR:5-26) correctly

determined that the aggravation in this case was strong and the mitigation was relatively weak." AB. 77. The flaw in the State's position is that there was extensive **evidence** of mental mitigation in this case, and its strength or weakness – for the purpose of the penalty verdict – depended on individual **jurors'** assessment of the credibility of the competing experts. *See Holsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988) (although the trial court rejected the defense expert's testimony and gave little weight to lay witnesses regarding Holworth's drug and alcohol problem, "[t]he jury, however, may have given more credence to this testimony"). Also, an untainted jury might have weighed Ritchie's lack of a criminal history in favor of a life sentence.

Additionally, there is record support that the jury, at the very least, may not have been unanimous throughout its deliberations. A few hours in, they sent a note inquiring: "after we have reached a final verdict in the penalty phase will each individual juror have to say what their vote was in the courtroom? **Will we be polled if it is not a unanimous decision for death?**" R. 957; T. 4362. (Emphasis supplied.)

If even a single wavering juror was swayed to vote for death by any or all of Mr. Harmon's or F.W.'s mother's improper comments, then these comments by definition were not "harmless". If a single juror had voted for life imprisonment, there would have **been** no Capital Sentencing Order. An unfair jury penalty trial and a tainted death verdict cannot be salvaged by the judge's subsequent findings.

C. COMMENTS ON EXERCISE OF CONSTITUTIONAL RIGHTS, COUPLED WITH APPEALS TO XENOPHOBIA

The State is engaging in sophistry and verbal gymnastics when it claims the prosecutor "never even mention[ed] Ritchie's exercise" of his right to a jury trial, and "merely acknowledge[d] that this right exists". AB. 59. While the prosecutor did not say the word "exercised" he used its synonym – "enjoyed" – repeatedly when referencing Ritchie's constitutional rights. How does one enjoy a right without exercising it? There is no doubt that such an argument is improper. *See Evans*, *supra*, 177 So. 3d at 1236; *Johns v. State*, 832 So. 2d 959, 962 (Fla. 2d DCA 2002).

What's more, this Court rejected the State's contention that merely mentioning a defendant's jury trial rights was benign in

Evans, 177 So. 3d at 1236, where the prosecutor said "[t]his is what America is about. Everybody has a right to a jury trial ... regardless of the evidence against you. It could be on videotape. It could be in front of a hundred priests. You have a right to a jury trial." In finding the comments improper, this Court said "[a]lthough the State contends that the prosecutor was merely referencing a truism of American constitutional rights, **this begs the question why the prosecutor felt it was even necessary to reference the right to a jury trial in America – not once but twice."** (Emphasis supplied.)

In Ritchie's case, the prosecutor hammered the point repeatedly – **ten times** in two separate portions of his penalty phase closing argument using the word "enjoyed" – to draw the jury's attention to the benefits Ritchie received by immigrating to this country; due process rights, burden of proof, presumption of innocence, jury of peers, neutral and unbiased judge, "very competent defense counsel", even humane treatment in jail. "You really think that would happen in Jamaica? You think that would happen in the countries of the Caribbean? It happens in this country because he enjoyed all those rights, the constitutional rights." T. 4303. "He immigrated to this

country, and as he lived here, he enjoyed the benefits of this country we live in, the greatest country on the face of the Earth." T. 4301. Mr. Harmon's juxtaposition of Ritchie's constitutional rights with anti-immigrant, "us vs. them", rhetoric – a theme, not a stray remark – is so egregious that even if it stood alone it would have poisoned Ritchie's penalty trial.

The "unconstitutional conditions doctrine" keeps the prosecution from "trenching on [a] defendant's rights and privileges". *United States v. Whitten*, 610 F.3d 168, 194 (2d Cir. 2010), quoting *United States v. Parker*, 903 F.2d 91, 98 (2d Cir. 1990). Accordingly, the prosecution cannot use a defendant's exercise (or, presumably, his enjoyment) "of specific fundamental constitutional guarantees against him at trial". *Whitten*, at 194, quoting *Burns v. Gammon*, 260 F.3d 892, 896 (8th Cir. 2001). "[A]" capital-sentencing scheme cannot allow the jury to draw an adverse inference from constitutionally protected conduct such as a request for trial by jury". *Whitten*, at 194.

See also Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (among the prosecutor's numerous comments, "which we

can only describe as outrageous", he sought to inflame the jury by "improperly imply[ing] that Cunningham had abused our legal system in some way by exercising his Sixth Amendment right to a jury trial").

The State disingenuously suggests that the prosecutor's comments "were made in response to the mitigating factor asserted by Ritchie that he was raised in a poverty-stricken and violent neighborhood in Kingston, Jamaica." AB.60. [The State does not and cannot contend that Mr. Harmon was responding to anything defense counsel said in closing argument, since the State went first.] What on Earth does that have to do with the exercise of constitutional rights? If rebuttal of mitigation had been the prosecutor's intent he could and would have said something like, "Ritchie may have been raised in poverty in Jamaica, but our witness (Redley) said his circumstances weren't all that bad. He may have been abused by his father, but now he is a man in his thirties who committed a heinous crime so the circumstances of his childhood are remote and should be given little weight." Nothing about Ritchie's Jamaica mitigation is relevant to American constitutional rights, and the State's attempt to

characterize Mr. Harmon's diatribe as fair reply is nothing short of bizarre.

The Eighth Amendment requires heightened reliability in capital sentencing. *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000), quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Sumner v. Shuman*, 483 U.S. 66, 71-72 (1987). By repeatedly calling the jury's attention to the panoply of constitutional rights Ritchie was able to take advantage of, which (according to Mr. Harmon) would not have been available to him if he'd stayed in Jamaica (where by Harmon's clear implication, he belonged), he irreparably tainted the jury's penalty verdict. Ritchie's death sentence was obtained in violation of the due process protections of the Fifth, Sixth, and Fourteenth Amendments (the very definition of fundamental error)[12] and the reliability standards of the Eighth Amendment, and it cannot constitutionally be carried out.[13]

D. RESERVATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

The State claims that Ritchie was not deprived of a fair trial [AB.

[12] *See, e.g.*, *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993).

[13] *See* Ritchie's Initial Br., pgs. 29-31, 33, 37-40, 55-56, 60-62.

71], and that there is no legal basis for vacating his death sentence. AB. 38, 40. Ritchie strongly disagrees. Because his death sentence can and should be reversed for a fair penalty trial based on cumulative prosecutorial misconduct (if the Court finds that the "same mercy" objection was preserved) or based on fundamental error (if, as the State contends, defense counsel waived his objection and motion for mistrial), Ritchie's appellate counsel – "preserving the more effective remedy and eschewing the less effective" – have chosen not to raise in this direct appeal a claim of ineffective assistance of counsel. *See Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987). In the event that his death sentence is affirmed on direct appeal, Ritchie reserves the right to raise all appropriate ineffectiveness claims in state and federal postconviction proceedings where evidentiary development can take place. *Sanchez-Torres v. State*, 130 So. 3d 661, 673 (Fla. 2013).

That being said, the Eighth Circuit's IAC decision in *Burns v. Gammon*, 260 F.3d 892, 896-98 (8th Cir. 2001) – a habeas appeal which was not a death penalty case, but one where under Missouri law the jury determined both guilt and sentence – the prosecutor

asked the jury to consider Burns' exercise of his constitutional rights to a jury trial and to confront witnesses. The Eighth Circuit Court of Appeals found that trial counsel's failure to sufficiently object "prejudiced Burns and infected his entire trial with constitutional error." The Court further found that "[w]hile many ineffective assistance of counsel claims need further development of the record" at a postconviction evidentiary hearing to determine the reasoning behind counsel's actions (or inaction), "this claim is not one of those", and "no sound trial strategy" could excuse it. "[T]he underlying error – the prosecutor's closing argument derogating Burns' constitutional right to a jury trial and to confront witnesses" was "so serious as to deprive [Burns] of a fair trial with a reliable result." Accordingly, Burns' trial attorney was not functioning as "counsel" as guaranteed by the Sixth Amendment. *Id.* at 897.[14]

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[14] The *Burns* Court further found that counsel's deficient performance prejudiced Burns in his state appeal:

> Further, trial counsel's failure to make a constitutional argument concerning the prosecutor's remarks started a chain reaction of burdensome review by the Missouri appellate courts and this court. *Combs*, 205 F.3d at 286. Because trial counsel did not make the constitutional objection, the Missouri Court of Appeals and this court

In the instant case, Mr. Harmon's misconduct was even more egregious than in *Burns*, because he linked Ritchie's "enjoyment" of multiple specific constitutional rights with his status as an immigrant outsider. Moreover, the proceeding which Mr. Harmon infected with constitutional error was a death penalty trial, in which the Eighth Amendment requires a heightened degree of reliability. This Court should make protracted postconviction proceedings unnecessary, and reverse based on the cumulative impact of Mr.

> reviewed the prosecutorial misconduct claim only for plain error to determine whether the comments had "a decisive effect" on the outcome of the trial. *State v. Burns*, 759 S.W.2d 288, 294 (Mo.Ct.App.1988); *Burns I*, 173 F.3d at 1096. Plain error review is much more onerous for both the direct appeal defendant and the habeas corpus petitioner than is review for a defendant or petitioner pursuing a properly preserved prosecutorial misconduct claim. *See Roe v. Delo*, 160 F.3d 416, 419 (8th Cir.1998) (courts recognize "more rigorous" plain error standard is appropriate where federal constitutional error has not been properly preserved). Counsel's performance thus prejudiced Burns at trial, on direct appeal, and on collateral review. But for counsel's unprofessional errors, the result of either the trial or the later appeals would likely have been different, and Burns can therefore establish that counsel's deficient performance prejudiced his defense. *Pryor*, 103 F.3d at 713.

Id. at 897-98.

Harmon's repeated improper and inflammatory remarks calculated to obtain a death verdict.

E. GOLDEN RULE AND IMAGINARY SCRIPT

Can you imagine the dread of knowing your life is ending? If this is not a golden rule argument, what would be? It is not the description of the crime, or even a description of the pain associated with the crime, if supported by the evidence, that violates the prohibition against golden rule argument. *See Shaara v. State*, 581 So. 2d 1339, 1341 (Fla. 1st DCA 1991) (holding that asking the jury to **consider** what the victim had gone through was not a golden rule violation). (Emphasis supplied.) Instead, it is "the technique" Prosecutor Harmon used in the instant case "of asking jurors to place themselves in the position of the victim" that is improper. *Lucas v. State*, 335 So. 2d 566, 567 (Fla. 1st DCA 1976) (reversing for new trial because the prosecutor described the crime involved (rape), and asked the female members of the jury, 'Think how you ladies would feel if that happened to you.').

Ritchie's prosecutor went far beyond what was "established by the evidence" [AB. 54] when he asked the jurors to vicariously

experience personal pain by asking them if "**you**" could "imagine the dread" of knowing that "**your** life" was ending and "**you're** feeling pain" all over "**your** body". T. 4287-88. (Emphasis supplied.) Indeed, the repeated use of the pronoun "you" indicates that the invitation was improper. *See Martin v. State*, 311 So. 3d 778, 813 (Fla. 2020) (citing *Braddy v. State*, 111 So. 3d 810, 843 (Fla. 2012)).

See Bullard v. State, 436 So. 2d 962, 963 (Fla. 3d DCA 1983) (reversing for new trial "solely" because of prosecutor's golden rule argument; "Imagine yourselves as coming out of a club, imagine some individual coming up to you, pointing a gun in your face like this, tell me what you see, give me your money, give me watches, give me everything you got"); *Holliman v. State*, 79 So. 3d 496, 500 (Miss. 2011) (reversing for new trial for golden rule violation alone where prosecutor asked jurors how they would feel if a loaded shotgun was pointed in their faces).

These comments cannot be justified as efforts to establish HAC. The prosecutor could have sufficiently summarized the medical testimony about F.W.'s pain, thus providing the jury with a basis for HAC without resorting to improper pleas. *See People v.*

Vance, 116 Cal. Rptr. 3d 98, 111-22 (Cal. Ct. App. 2010) (reversing for new trial where prosecutor told jury "you have to walk in [the victim's] shoes. You have to literally relive in your mind's eye and in your feelings what [the victim's] experienced the night he was murdered. You have to do that. You have to do that in order to get a sense of what he went through.").

Regarding the prosecutor's imaginary script, the State concedes that this argument technique has been condemned by this Court [AB. 54-55], and that Mr. Harmon's "statements about the fear she felt, his speculation whether she called because Ritchie possibly kissed her, fondled her, or undressed her, and that he did so well before raping and killing her, may exceed what can reasonably be inferred from the evidence actually introduced." AB. 58. Nevertheless, the State thinks such comments should not result in reversal, because they did not result in reversal in *McDonald v. State*, 743 So. 2d 501, 504-05 n.9 (Fla. 1999). AB. 55-59. In McDonald, unlike the instant case, there were **no** preserved objections to the prosecutor's closing argument, there was no reference to the exercise of constitutional rights, and the "American

way" comment was innocuous compared to Mr. Harmon's immigrant theme. There was no same mercy argument. While this Court in *McDonald* characterized the imaginary script technique as "clearly prohibited" and the Court expressed that it continues to be "very concerned about improper arguments in death cases", it did not believe that the comments in *McDonald* so tainted the jury's verdict as to necessitate a new penalty trial. 743 So. 2d at 505 n.9. And if golden rule and imaginary script were the only – or the most egregious – violations in Ritchie's case, maybe *McDonald* would be more persuasive. But the totality of Mr. Harmon's transgressions so far exceeded those in *McDonald* that this Court cannot conclude that the jury's verdict was untainted.

F. PRESIDENT REAGAN

Counsel did not "misapprehend[]" [AB. 62] the purpose of the comparison to President Reagan, and this Court should view with extreme skepticism the State's false comparison of the comments by Ritchie's prosecutor to the ones in *Bush v. State*, 295 So. 3d 179, 211 (Fla. 2020). AB. 62. That case involved comments about Bush **himself** having the ability to "pull[] himself up" despite his childhood

and "graduate high school" due to his "strong work ethic". That type of argument – a direct reference to **the defendant** having demonstrated the proven ability to overcome, at least to some extent, the trauma of his past – is proper as it tends to disprove any contention by the defense that a defendant's traumatic childhood should disqualify him from being sentenced to death.

On the other hand, Ronald Reagan's difficult childhood is entirely irrelevant to whether Granville Ritchie should live or die. Four of the five factors discussed in *Ruiz*, 743 So. 2d at 6, regarding the prosecutor's contrasting Ruiz with her father's sacrifice in Desert Storm, apply to Mr. Harmon's Reagan comparison. It contrasted Ritchie unfavorably with a much-admired American hero; it placed before the jury irrelevant factual matters outside the evidence; it could not be cross-examined or rebutted; and it suggested that the jury had a moral duty to sentence Ritchie to death. And there is another factor to consider **beyond** *Ruiz*; here the prejudice from the Reagan comparison was compounded in light of the prosecutor's flag-waving comments made immediately prior, contrasting the United States ("the greatest country on the face of the earth") against

Ritchie's native Jamaica.

G. REMEDY

Taken as a whole, Mr. Harmon's misconduct "utterly … destroy[ed]" Ritchie's most important right under our system, the right to the "essential fairness of (his) criminal trial." *See Peterson v. State*, 376 So. 2d 1230, 1233-34 (Fla. 4th DCA 1979). That this occurred in a capital penalty phase resulting in a death sentence renders that sentence unreliable and constitutionally invalid. The only remedy is reversal for a new – fair – penalty trial.

II. VICTIM IMPACT

The State correctly concedes that it was improper for F.W's mother to invoke God's vengeance in front of the jury [AB. 77], but goes on to rely on *Kormondy v. State*, 845 So. 2d 41, 53-54 (Fla. 2003), to argue that this error was not fundamental because she only said it once. AB. 77. Some things don't need to be said twice to make an impact, and this is one of them. *Kormondy* in no way supports the State's position. In that case the victim impact testimony was **about the victim**, to show that he was an outstanding member of the community, a devoted husband, and a loving son. *Id.* at 54. That is the very purpose of legitimate victim impact evidence[15] [*Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995)], and nothing like the instant case, where the jury heard F.W.'s mother's entreaty that God himself would impose the death penalty on Ritchie and on anyone who harms a child. It may have been "but a brief moment" [AB. 77], but it was a crucial moment which may have swayed the life-or-death decision in the

[15] Assuming without conceding that Florida's current victim impact law in constitutional. *See* Ritchie's Initial Br., pgs. 63-69, arguing the contrary.

minds of one or more jurors.

F.W.'s mother's biblical plea to the jury was "so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." *Payne*, 501 U.S. at 836. If any member of the jury was a religious person – and it defies credulity to assume that none were – the invocation of God's will would have resonated powerfully. *Contrast Kalisz v. State*, 124 So. 3d 185, 211 (Fla. 2013) ("The statements were not overly emotional and did not mention Kalisz. The daughter's did not implore the jury to impose the death penalty or to seek revenge on Kalisz for their mother's death.") In the instant case, F.W.'s mother, immediately after speaking the biblical injunction "it would be better for them to have a large [mill]stone hung around their neck and to be thrown into the depths of the sea", told the jurors that that scripture was talking to Granville Ritchie.[16]

Contrast also Jordan v. State, 176 So. 3d 920, 934 (Fla. 2015) (finding no fundamental error where victim impact evidence simply demonstrated the victim's aunt's grief, noting the witness "did not

[16] "That scripture is talking to someone that knows better. And Granville Ritchie knew better." T. 3818.

opine about or characterize the murder or robbery, the defendant, or the appropriate sentence that Jordan should receive. As such, [the witness's] statement does not reach the foundation of the case or the merits of the cause of action. Thus, her victim impact statement is not fundamental error …"). *See, e.g.*, *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) ("[A]n error is deemed fundamental 'when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.' ").

Moreover, Ritchie does not have to show that the victim impact error **standing alone** was fundamental, and the State has Mr. Harmon to thank for that. His no-holds-barred closing argument deliberately steered the jurors away from an evidence-based life or death decision by enticing them to do the much easier thing: decide based on inflamed emotions. Since one of Mr. Harmon's many improper comments – the "same mercy" argument – was preserved, the State has the heavy burden to show beyond a reasonable doubt that the cumulative impact of his misconduct could not have contributed to the penalty verdict (which turned on each juror's individual weighing process). [As shown in Issue I, Reply Br., pgs.

24-26, the trial court's sentencing order findings do not remotely cure the unfairness of Ritchie's penalty **trial**. But for the relentless drumbeat of Mr. Harmon's improper arguments, and but for F.W.'s mother's egregiously inflammatory invocation of God's will that Ritchie should die, there might well never have **been** a capital sentencing order.]

III. LIMITATION OF MITIGATING EVIDENCE AND IMPROPER REBUTTAL

Ritchie will rely on his Initial Brief with regard to this Point on Appeal.

Conclusion

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his Initial Brief, Ritchie respectfully requests that this Court reverse his death sentence for a new penalty trial.

Respectfully submitted,

RACHEL PAIGE ROEBUCK (FBN 118886)
Assistant Public Defender

STEVEN L. BOLOTIN (FBN 236365)
Assistant Public Defender

Law Office of the Public Defender
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
(863) 534-4200
rroebuck@pd10.org

Counsel for Petitioner

Certificate of Service

I certify that a copy was served via the e-filing portal to the following this 10th day of August, 2021:

Assistant Attorney General Rick A. Buchwalter
rick.buchwalter@myfloridalegal.com
deborah.speer@myfloridalegal.com
paula.montlary@myfloridalegal.com

Office of the Attorney General
capapp@myfloridalegal.com

RACHEL PAIGE ROEBUCK
Assistant Public Defender

Certificate of Compliance

I certify, as required by Fla. R. App. P. 9.210 (a)(2)(C), this document contains 8,420 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).

RACHEL PAIGE ROEBUCK
Assistant Public Defender