IN THE SUPREME COURT OF FLORIDA

WILLIAM E. WELLS, III,

Appellant,

vs.

CASE No. SC21-1001
L.T. No. 04-2019-CF-000706

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final order of the circuit court for Bradford County, Florida, sentencing William E. Wells to death for killing William Chapman, a fellow inmate in the Florida Department of Corrections. (R. 1666-1686.) This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

I. Pretrial proceedings.

Mr. Williams and a co-defendant, Leo Boatman, were incarcerated at Florida State Prison along with Mr. Chapman were July 15, 2019, when Mr. Davis was killed. Mr. Wells was serving multiple life sentences at the time of the offense. (R. 445.)

An Indictment for first-degree premeditated murder and possession of a weapon was filed on November 4, 2019. (R. 31-33.) The State filed a Notice of Intent to Seek Death Penalty. (R. 48-49.) The Notice alleged four aggravating factors: that the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, that the defendant was previously convicted of a capital or violent felony, that the capital felony was especially heinous, atrocious or cruel, and that the capital felony

was committed in a cold, calculated and premeditated manner without any pretense of justification. (R. 48-49.) Mr. Wells had already filed a motion to represent himself and a motion to waive a jury trial (R. 35-37, 38-40), which were held pending a competency evaluation ordered on November 19, 2019. (R. 42-45.)[1]

At an arraignment hearing held on December 13, 2019, Mr. Wells requested that counsel be appointed. (R. 540-42.) Counsel immediately withdrew Mr. Wells's request for speedy trial. (R. 542.) Mr. Wells subsequently asked to discharge counsel and proceed pro se, and repeated his request to discharge appointed counsel in February 2020. (R. 55.)

At a case management conference on February 26, 2020, the court discussed with Mr. Wells his motion to dismiss his attorneys and proceed pro se, as well as his motion to withdraw his not guilty plea. (R. 755-72.) The court noted that a competency evaluation had

[1] A report submitted by licensed psychologist Harry Krop, dated December 9, 2019, noted Mr. Wells's psychiatric issues but opined he was competent to proceed to trial as well as competent to make a "cogent and rational decision" regarding self-representation. The report notes that Dr. Krop might have to revisit these conclusions should Mr. Wells decompensate during the pendency of his trial proceedings. (R. 1231-34.)

resulted in the opinion that Mr. Wells was competent to stand trial and competent to make decisions related to his case. (R. 759.) The court also noted "I believe Mr. Wells is competent to proceed and I believe that he is competent to make the decision as to whether or not he wishes to represent himself in this case." (R. 771.) The court then relieved regional counsel of their responsibility to represent Mr. Wells, appointing them as backup counsel instead. (R. 772.) Counsel stated "if we were required to jump into this, we would not be ready to go forward, Your Honor." (R. 773.) The court responded, "I understand that fully, that you would not be prepared to go forward and not be prepared to go forward as Mr. Wells intends to today." (R. 773.)

Next the court went through a plea colloquy with Mr. Wells and accepted a guilty plea, finding the plea was entered "freely and voluntarily and knowingly and intelligently." (R. 779-92.) Mr. Wells said he wanted to waive a jury in the penalty phase and did not intend to present mitigation. (R. 793-94.)

The office of counsel was renewed at a status conference on March 11, 2020, at which standby counsel was present, and Mr. Wells repeated he did not want counsel appointed. (R. 801-05.) Mr.

Wells was adjudicated guilty of both counts in the Indictment. (R. 65-66, 805-06.) He reiterated that he wanted to waive a jury trial and did not plan to present mitigation. (R. 806-07.) He repeated his desire to waive counsel, waive a jury trial, and present no mitigation at a status hearing on June 24, 2020. (R. 819-20.) He also stipulated to the State's alleged aggravating factors. (R. 821-24.)

II. Penalty phase/*Spencer* hearing.

The penalty phase trial began on August 3-4, 2020. (R. 552.) The court confirmed with Mr. Wells that he was taking his prescribed medications (R. 554-55) and that he did not want counsel appointed (R. 555-56). He also confirmed he did not want a jury. (R. 557-62.) The State noted his guilty plea and his stipulation to two aggravating factors, noting also his previous life sentences for five murders committed in 2003, one attempted murder in 2008, and one in 2011. (R. 563-64.)

Eric Brock. Sergeant Eric Brock, an officer at Florida State Prison, testified he was working on "I" wing at the prison on July 5, 2019, with two other officers. (R. 573-83.) He had not been at the prison long and did not know the inmates well. (R. 584.) As he was counting the inmates, one of the other two officers was watching

about 12 inmates in a room called the dayroom, which is approximately 15 by 8 feet with three benches and one small television. (R. 586-87.) That officer tole him he saw an inmate in the dayroom appear to start choking another inmate, so he ran to the dayroom. (R. 588.) He and the other officers saw two inmates rolling around and tried to get into the room, but were blocked by an inmate named Boatman who brandished two large shanks and told them if they came in they would be killed. (R. 589-96.) He called for help and saw inmate Boatman and Mr. Wells begin to stab the victim, inmate Chapman, in the eyes. (R. 597.) Additional officers arrived and tried unsuccessfully to push their way into the dayroom, but Mr. Wells was able to prevent their entry. (R. 598-601.) The other inmates in the room did not help the victim. (R. 601.) A special team arrived to remove the victim and place Boatman and Mr. Wells in restraints. (R. 602-03.)

John Carlisle. John Carlisle, a special agent with the Florida Department of Law Enforcement (FDLE), was tasked with investigating the killing of Mr. Chapman. (R. 610-11.) After viewing and narrating surveillance video from the dayroom, he reviewed handheld video taken of Mr. Wells soon after the incident. (R. 615-

26.) Mr. Wells was heard saying "Cracker called bro a motherfucker fucking fagot, trying to turn him into a fucking fag. This is what Assistant Warden McClellan wanted, and this is what he got." (R. 627.) Mr. Wells also stated "That's the dumbass for not giving me a death sentence for my last fuck boy from K wing." (R. 628.) Then he was heard to say "I think them dumbasses give me a death sentence this time. I betcha them dumbass jury in Bradford County give me a death sentence this time. They fucked up last time and give me a life sentence. I told them. […]" (R. 629.) Mr. Wells made additional statements acknowledging his participation in killing Mr. Chapman. (R. 630-31.)

Agent Carlisle also intereviewed Mr. Wells and recorded the interview, which was played during the hearing. (R. 632-40.) During the interview Mr. Wells again acknowledged his participation. (R. 639-40.) He stated he had prepared strips of fabric to tie Mr. Chapman with "a couple of days before so that you know it's cold, calculated and premeditated. No doubt about it." (R. 640.) During his investigation another inmate told Agent Carlisle he had overheard conversations between Mr. Wells and Mr. Boatman about their plans to kill someone. (R. 648.) Mr. Hodges was not in the day

room at the time of the attack on Mr. Chapman because Mr. Wells told him not to go that day. (R. 648.)

Kevin William Snow. Kevin Snow, a senior inspector with the Office of the Inspector General, stated he was assigned to investigate an incident at Florida State Prison in 2011. (653-54.) When he went to see Mr. Wells, he said Mr. Wells spontaneously told him "I want to go to death row." (R. 659.) He reinterviewed Mr. Wells several days later, and Mr. Wells confessed to participating in the killing of Xavier Rodriguez, a fellow inmate. (R. 660-62.) In that incident Mr. Wells and his co-defendant, Wayne Doty, attacked Mr. Rodriguez in an interview room at the prison. (R. 663-68.)

The hearing adjourned after Inspector Snow's testimony; when it resumed the next day, Mr. Wells asked for standby counsel to take over "due to some family issues." (R. 675.) Standby counsel was reappointed to represent Mr. Wells and immediately requested a continuance, referring to the prior written motion for a continuance. (R. 675, 678-80.) The court said it would give counsel "a moment to regroup" and then would consider what to do. (R. 676-77.) After a recess the court said it would allow the State to proceed with its final witness, the medical examiner, before

continuing the proceedings to allow the defense to gather mitigation. (R. 680-83.) The defense then moved for a mistrial:

> [W]e would move for a mistrial of this proceeding based on the 6th, 8th, and 14th Amendments and the essential due process protections that I don't believe Mr. Wells had available himself of to this point. The majority of the state's case is over. There has been no cross-examination, no objections. And I believe in the interest of fundamental fairness, we would just respectfully request this court to grant a mistrial.

(R. 686.) The court denied the request.

Dr. William Frank Hamilton. Dr. Hamilton, a medical examiner, performed the autopsy of William Chapman on July 6, 2019. (R. 687-90.) He noted numerous cuts around Mr. Chapman's eyes, a cluster of about 25 cuts and stabs on the right side of the neck, additional cuts on the left side of the neck, and ligature marks. (R. 692.) He counted 30 puncture wounds on Mr. Chapman's chest and abdomen, and an additional 13 in the posterior neck and trunk. (R. 696.) A piece of metal was stuck in his neck. (R. 696-97.) Dr. Hamilton opined the probable cause of death was "multiple modalities of injury, including ligature strangulation, blunt traumatic head injuries, and extensive sharp force injuries of

head, neck, and back." (R. 698.) He also noted extensive indicators of blunt trauma to the head. (R. 699.)

The State rested after Dr. Hamilton's testimony, and the hearing was continued for the retaining of a mitigation specialist and the development of mitigating evidence. (R. 700-01.)

Counsel filed a number of motions after being reappointed. These included a motion to declare section 921.141(6)(A), Florida Statutes, the "under sentence of imprisonment" aggravator, unconstitutional both as written and as applied (R. 868-72); a motion to declare section 921.141(6)(B), the prior violent felony aggravator, unconstitutional as both written and applied (R. 873-76); a motion to declare section 921.141(g)(H), the "especially heinous, atrocious, or cruel" aggravator, unconstitutional as written and as applied (R. 877-901); and a motion to declare section 921.141(6)(I), the "cold, calculated, and premeditated" aggravator, unconstitutional as written and as applied (R. 902-938). These motions were all denied in separate written orders. (R. 1441-48.)

The defense also filed a "Motion to Declare Florida's Capital Sentencing Scheme Unconstitutional and Violative of the Eighth Amendment, Corresponding Article I, Section 17 [of the] Florida

Constitution, and Evolving Standards of Decency and Incorporated Motion to Take Judicial Notice" (R. 951-963) and a "Motion to Preclude Death as a Possible Penalty and/or to Declare Sections 782.04 and 921.141, Florida Statutes, Unconstitutional on Multiple Grounds" (R. 964-75). The latter motion alleged, inter alia, improper proportionality and appellate review, arbitrary application, and a proliferation of aggravating factors. The defense also filed a "Motion to Bar the Death Penalty Based on Mental Illness." (R. 1235-42.) These motions were denied in separate written orders following a hearing on March 29, 2021. (R. 1455-62.)

In addition to these and other motions, the defense filed a "Motion for Adequate Time and Memorandum of Law." (R. 988-1025.) Among other reasons for asking for adequate time, the motion highlighted the effect of the COVID-19 pandemic on preparing a mitigation case after counsel was reappointed. This motion was denied following the March 29 hearing. (R. 1463-64.) The defense also filed "Defendant's Motion to Withdraw Plea, Withdraw Waiver of Penalty Phase Jury, Withdraw Stipulation to Aggravators and Motion for Mistrial" arguing Mr. Wells should be allowed to withdraw his plea and waivers in the interest of justice

and because of his severe mental health issues. (R. 1028-44.) The motion argued the trial court had never made a formal competency determination before allowing Mr. Wells to proceed with the plea or waivers. (R. 1030-31.)

And on March 22, 2021, the defense filed a "Motion to Continue Capital Re-Sentencing Hearing" asking to continue the sentencing hearing scheduled for April 26, 2021. (R. 1429-31.) This motion was denied following the hearing on March 29 (R. 1465-66), and the penalty phase resumed on April 26-28, 2021. (T. 1.) Five days before the penalty phase resumed, the defense filed "Defendant's Third Motion to Continue Capital Penalty Phase." (R. 1471-76.) This was followed by a motion for a *Richardson* heading based on video footage depicting Mr. Wells in the week leading up to the charged offense. (R. 1477-79.)

When the penalty phase resumed, the trial court addressed the defense motion for a *Richardson* hearing. (T. 3-7.) The defense requested a continuance as a remedy:

> The only sanction that we're actually asking for, your Honor, is a continuance. […] We're asking for the continuance, your Honor, that we've asked for three times so that our experts, who are all here and who we've all talked to,

> can view the video and then have their expert opinion on whether it's relevant or not.

(T. 7.)

The court denied the motion, stating it did not find either a *Richardson* or a *Brady* violation based on the State's failure to provide the video because the failure was inadvertent and the State did not rely on anything in the video. (T. 9-11.) The court also stated it would keep the defense request for continuance under advisement, adding "for the record that much of where we were with regard to many of the things that are being asked about that the court has tried to accommodate come under discovery and the preparation of the case, of course, which was mostly affected by the defendant's own choice to represent himself…" (T. 11.) The court also stated the timing of the defense request for counsel would "limit[] what the court is, I think, willing to do within reason in order to move forward." (T. 12.)

The defense renewed its motion for a continuance, explaining:

> William Wells is on trial for his life. We have not done the investigation that we — that he deserves in a case of this magnitude. This is his one shot. There's no jury that's been sworn. There's no prejudice to the state. If

> there is, it's minimal. They presented a day plus of testimony.
>
> William Wells has a long, complicated psychological history. There are 5,000 estimated pages of psychological records from just the Department of Corrections. We when got them they came in no particular order, not chronologically ordered. And I can advise the court that we have been furiously and diligently trying to make sense of the complicated matter and human being that is Billy Wells and that we've just scratched the surface. I would be remiss if I didn't stand before this court on the last day that a lawyer may ever get to speak for William Wells and ask this court for an adequate amount of time.
>
> For instance, our mitigation presentation, we hadn't had the ability to travel to Texas to talk to his family. This has been during COVID. We haven't fully fleshed out the 92 witnesses that testified — not testified, but listed by the state. We haven't had the ability to depose all the witnesses. And granted, the state's guilt — well, I call it the guilt phase, their aggravation, granted, they didn't call many witnesses, but they had their case agent refer to numerous inmates, sort of tell the whole story.
>
> We simply haven't had the time to investigate that in the manner that it should be investigated, given the stakes at issue in this litigation.

(T. 15-16.) The court denied the motion. (T. 17.)

The court and the parties then agreed to hear testimony from experts who would be testifying both in support of the defense

motion to withdraw Mr. Wells's plea and in support of the mitigation case. (T. 17-18.)

The defense also referenced the motion to withdraw the guilty plea, to declare a mistrial, and to withdraw the stipulation as to aggravating factors, and suggested the court could hear expert testimony in support of the motion that would also form part of the mitigation case. (T. 17-18.)

Dr. Jeffrey Danziger. Dr. Jeffrey Danziger, a forensic psychiatrist, stated he had reviewed extensive records and interviewed Mr. Wells for the purpose of offering an opinion about Mr. Wells's competency in early 2020. (T. 19-22, 23-25.) He gave the following conclusion:

> [F]irst, that Mr. Wells suffers from serious psychiatric and mental health issues, including schizoaffective disorder, posttraumatic stress disorder, and various cognitive deficits and limitations due to the history of head injuries, early exposure to alcohol and drugs and multiple adverse childhood experiences.
>
> Secondly, by virtue of those mental illnesses, my opinion is that while Mr. Wells was able to knowingly understand what he was doing in February and March of 2020, his mental health illnesses impacted his judgment and reasoning to where his decision-making was

> not intelligent. Further, it's my opinion that by virtue of mental illness, his ability to conduct the court proceedings was impaired substantially.

(T. 22-23.) Dr. Danziger stated the records reflected "significant brain injury" and "significant mental illness," including a diagnosis of bipolar disorder that was later changed to schizoaffective disorder. (T. 25.) Mr. Wells also showed symptoms of post-traumatic stress disorder (PTSD). (T. 26.) Dr. Danziger met with Mr. Wells in person twice, and those meetings factored into his evaluation of Mr. Wells's competency and then-current mental state. (T. 28.) During those meetings, among other things, Mr. Wells expressed despair, misery, and a desire to die. (T. 30-31.) Dr. Danziger concluded Mr. Wells's decisions were knowing, but that his judgment and reasoning were "unacceptably compromised" by his mental illness. (T. 30-31.) Also, although Mr. Wells was able to conduct himself appropriately during court proceedings, Dr. Danziger opined "that his severe mental illness render[ed] him unable to conduct the trial proceedings." (T. 32.) Asked about the colloquies the court had conducted with Mr. Wells, Dr. Danziger responded the colloquies demonstrated Mr. Wells's waivers of counsel and guilty plea had

been knowing, but "the issue was why was he doing it and to what extent his active and severe symptoms of mental illness played a role…." (T. 33.) Dr. Danziger also noted that competency is not static, but can change or fluctuate. (T. 34.) At the time Mr. Wells waived a jury trial, stipulated to aggravating circumstances, and asked to represent himself, Dr. Danziger's opinion was that he was not competent to do so. (T. 35-36.)

Johnny Hodges. Mr. Hodges, an inmate at Florida State Prison, stated he lived in a cell next to Mr. Wells there, and was able to hear and talk to him. (T. 54-55.) He testified Mr. Wells was upset with the psychiatric staff at one point, and said "you people's not gonna rest until somebody else get killed, and you keep telling me you're gonna do this and do that, and nobody's done anything at the time." (T. 56.) On cross-examination Mr. Hodges agreed Mr. Wells had told him Mr. Wells intended on killing somebody days before the charged murder. (T. 59.)

Dr. Heather Holmes. Dr. Holmes, a clinical and forensic psychologist, testified she had evaluated Mr. Wells in a previous proceeding and met with him twice relating to the instant case. (T. 60-64.) She also reviewed extensive record in connection with both

proceedings. (T. 64-65.) She opined that Mr. Wells suffered from PTSD. (T. 70.) Mr. Wells's father was a "raging alcoholic," extremely volatile, both physically and emotionally abusive, and started giving Mr. Wells alcohol when Mr. Wells was only four years old. (T. 71, 80.) When Mr. Wells was eight, his father shot him in the foot after the child wet himself in terror when his father shot at a beer can between the child's feet. (T. 72.) Dr. Holmes characterized the abuse Mr. Wells experienced as "really, really egregious." (T. 73.) Several years later, for Mr. Wells's 13th birthday, his father hired a prostitute and forced Mr. Wells to engage in sexual acts with her. (T. 75-76.) Mr. Wells was also exposed to domestic violence between his father and his stepmother, Selma. (T. 78-79.) Mr. Wells did not find out until he was 14 that Selma was not his biological mother. (T. 83.)

A close friend from childhood, Becky Boynton, was not allowed to go to his home if his father was there. (T. 81-82.) Ms. Boynton and Mr. Well's older half-sister, Nancy, were two of the most stable individuals in his life during his teen years. (T. 84-86.) However, Mr. Wells's father and stepmother relocated and took Mr. Wells with them when he was about 16. (T. 86.) Mr. Wells's father's health was

declining at that time, and he died when Mr. Wells was 17. (T. 87-88.) By the time Mr. Wells was 18 he had begun experiencing suidical thoughts. (T. 88-89.) A first marriage ended quickly, followed by a second marriage to a woman with young children. (T. 89-90.) One of his stepchildren was killed in a truck accident, which was devastating for Mr. Wells. (T. 91.) Mr. Wells and his second wife had one child together. (T. 91-92.) Mr. Wells later pleaded guilty to shooting his second wife, maintaining it was accidental and expressing remorse. (T. 92.) He tried to kill himself again shortly after his arrest for that previous episode. (T. 92.)

Dr. Holmes stated Mr. Wells had been diagnosed with bipolar disorder, schizoaffective disorder, PTSD, and major depressive disorder with psychotic features. (T. 94.) He also had a history of hallucinations. (T. 94-95, 96-98, 102-04.) He made numerous suicide attempts while in the Department of Corrections and was hospitalized a total of ten times. (T. 95, 100-02.) Dr. Holmes agreed that Mr. Wells's mental health issues "significantly impair[ed] his ability to exercise rational judgment in general." (T. 98.)

Dr. Holmes also described a recurring pattern in which Mr. Wells's mental state would deteriorate, his PTSD symptoms would

increase, he would experience suicidal ideation, and he would revisit the original homicides that led to his incarceration. (T. 104-05, 112-27, 129-31.) In particular, she stated that in the period leading to the charges at issue in this case, he was experiencing symptoms similar to those he had exhibited before an earlier offense in 2008:

> The pattern is so similar. There's depression, feelings of not wanting to live — I'm sorry, being conflicted about not wanting to live or die. There's the introduction of visual hallucinations, decompensation, giving up on medication, asking staff for assistance. It's almost — and saying I don't want to hurt anybody, I just want help.

(T. 127.)

Dr. Holmes described specific events preceding the charged offense. (T. 111-.) Mr. Wells was frustrated at the length of time he had been on "CM" (close management) — since 2007 or 2008 — and went on a hunger strike in August 2018. (T. 112, 113.) In November 2018 he received permission to marry his longtime friend, Becky Boynton. (T. 112.) He also received permission for a video visit with Ms. Boynton, who had not seen him in person in years, and she had purchased a tablet for that purpose. (T. 112-13.) The visit was

to take place two days after Christmas in 2018; a few minutes before the visit, Mr. Wells was informed he was not eligible for video visits. (T. 113.) Then, in March 2019, he was told he would not be allowed contact visits, which meant he would not be able to get married at all. (T. 115.) In May 2019, Mr. Wells was scheduled to have his first visit in 11 years, with Ron Summers, a former teacher. The visit did not occur, nor did it take place on either of two rescheduled dates. (T. 115-16.)

In June 2019 Mr. Wells wrote a grievance letter protesting the way his contact with Ms. Boynton had been canceled, requesting that he be let off CM, and requesting that he be moved to a special psychiatric unit. (T. 117.) He also emailed a mitigation specialist, in an email intercepted by prison staff, about thoughts of suicide. (T. 118.) He was referred to a prison psychologist, Gwendolyn Lockwood, who memorialized their conversation. (T. 119.) He reported hallucinations and depression. (T. 119-20.) Ms. Lockwood's notes indicated Mr. Wells needed to be considered for a different level of psychiatric care and that he should not remain where he was then housed. (T. 121-22, 124.) However, although a staffing apparently took place where Mr. Wells was discussed, Ms.

Lockwood's observations and concerns were not mentioned at all, and his level of care was not changed. (T. 124-26.)

Dr. Holmes was asked "When Billy Wells says he's decompensating and he's afraid he's going to hurt somebody and asks for help, is Billy Wells somebody that cries wolf?" She responded, "Unfortunately in my experience, no." (T. 127.) He was still on close management and his level of psychiatric care had not changed on July 5, 2019, when he was allowed to go to the day room. (T. 128.)

The court questioned Dr. Holmes about the video she had not been able to see, and she explained she would have expected any video to corroborate her testimony, but that she would prefer to review all available video in case something on the video contradicted her assessment of Mr. Wells's mental state in the days leading up to the charged offense. (T. 155-57.) She added that even Ms. Lockwood's detailed notes did not cover the seven days immediately prior to the charged offense. (T. 158.) She said it would be useful to have information about his mental state during that time period, as it might relate to the charged aggravating factors

and also might indicate whether additional decompensation took place. (T. 159-60.)

Dr. Joseph Chong-Sang Wu. Dr. Joseph Wu, a psychiatrist, testified as an expert in neuroimaging and forensic psychiatry. (T. 165-68.) He reviewed existing records and imaging from Mr. Wells's previous trial in 2017, and also recommended and reviewed additional imaging that was not available in the earlier proceeding. (T. 168-69.) Mr. Wells's scans showed several abnormalities including a "hypofrontal pattern," in which the frontal cortex is not as active as other areas of the brain, which is seen in conditions such as traumatic brain injury, schizophrenia, or bipolar disorder. (T. 179-80.) Dr. Wu stated people who have this condition have difficulty regulating impulse. (T. 180.) The ratio of frontal cortex to occipital cortex was also low and showed a worsening between 2017 and 2021. (T. 181-82, 184-87, 198-200.) Dr. Wu said the worsening was consistent with a chronic traumatic encephalopathy ("CTE"), a condition that can only be diagnosed with certainty after death. (T. 182-83.) The scans revealed patterns similar to those Dr. Wu had observed in former professional football players. (T. 188-89.) The shrinking of certain areas of the brain that occurs with CTE is

associated with lack of regulation of behavior, impaired judgment, and impaired impulse control. (T. 190.)

Dr. Wu said he had identified at least nine traumatic brain injuries Mr. Wells had experienced since the age of 11 that could have contributed to the development of CTE. (T. 190-91.) Behaviors such as suicidal ideation and emotional instability, as well as depressing and impulse control, would be consistent with early stages of CTE. (T. 192-93.) He gave several examples of individuals who had become violent towards themselves or others and were found to suffer from CTE, and explained the impaired judgment and impaired ability to consider consequences associated with CTE would not always prevent some degree of planning: "you can have some part of the executive function which are functioning and some parts which are clearly impaired. It's not like it's all or none." (T. 196.) In addition to the traumatic brain injuries, Dr. Wu identified two instances of possible hypoxic brain injuries in Mr. Wells's youth: one a near-drowning when he was two years old, and another one when his head was held down in water at the age of eight. (T. 200-01.) These incidents were also potential causes of frontal lobe impairment. (T. 201-02.)

Dr. Wu then discussed a different type of imaging called diffusion tensor imaging, or DTI, and stated Mr. Wells's results on this form of imaging showed additional abnormalities consistent with causes including brain injury, childhood abuse, psychosis, and fetal alcohol spectrum disorder. (T. 203-11.) Other abnormalities were, in Dr. Wu's experience, similar to individuals with a history of prenatal exposure to alcohol. (T. 211-16, 222-32.) The limited information available about Mr. Wells's biological mother was consistent with a history of drinking, including during pregnancy. (T. 216, 234.)

In addition, Mr. Wells's brain showed an enlarged amygdala on one side; Dr. Wu stated this asymmetry was unusual but could be explained by a combination of early neglect, leading to enlargement of the amygdala, combined with one of the later traumatic brain injuries noted in Mr. Wells's history. (T. 236-38, 240.) Based on his analysis of the scans, Dr. Wu formed the opinion that Mr. Wells suffered from traumatic brain injury, fetal alcohol spectrum disorder, childhood neglect and abuse, psychosis or schizophrenia, and mood disorder, and was at high risk for CTE. (T. 240, 243-46, 248-49.) Based on his analyses and the other testimony he had

listened to during the penalty phase, Dr. Wu also stated he did not believe Mr. Wells was neurologically able to exercise proper judgment in representing himself. (T. 251.)

Nathan Shoemaker. Nathan Shoemaker, a former teacher, testified he knew Mr. Wells through a dropout prevention program. (T. 299-301.) He recalled Mr. Wells as a "likeable young man" who interacted well with others and was able to complete the program. (T. 301.) Later he observed Mr. Wells with Mr. Wells's children and said he was a loving father. (T. 304-05.) He knew the passing of Mr. Wells's stepson had a devastating effect on him. (T. 305.)

Ron Summers. Ron Summers, another former teacher in the dropout prevention program, also remembered Mr. Wells and said he was pleasant and did everything that was required of him. (T. 311-13.) He also observed Mr. Wells later with his children and noted a difference in demeanor after Mr. Wells's stepson was killed. (T. 316-17.) Mr. Summers described four dates of potential visits with Mr. Wells that did not take place; one did not take place because he had other plans, but others were cancelled because of scheduling decisions in the Department of Corrections. (T. 318-19.)

Gwendolyn Yvette Lockwood. Gwendolyn Lockwood, a social worker, worked at Florida State Prison for about three and one-half years doing individual counseling with inmates. (T. 325-26.) She described consistent difficulties in providing mental health treatment there, including long waits to see inmates and inmates' reluctance to leave their cells because the cells would be ripped apart while they were out. (T. 327-28.) She was not able to change an inmate's level of care, but would report concerns to the director who had that authority. (T. 328-29.) Mr. Wells was on her caseload from April 2016 until July 2019; she described him as "very respectful" to her. (T. 329.)

Ms. Lockwood testified to numerous signs Mr. Wells was decompensating in the period leading up to the charged offense. (T. 330-.) Among other things, he reported "visual and auditory hallucinations, anxiety, agitation, and flashbacks" in May 2019. (T. 331.) In June, he wrote an email expressing frustration that his issues were not being taken seriously. (T. 334.) She had a conversation with him in response to that email where he reported depression and expressed the fear he would hurt someone if he didn't get help. (T. 336-37.) She was concerned about him losing

control. (T. 339.) She documented this in his chart and noted that his symptoms were "acute," including anxiety, depression, and visual hallucinations. (T. 339, 341-42.) Despite his symptoms, he was cooperative with her, from which she inferred that he wanted her help. (T. 340-41.) However, he did not want to be removed to the special "self-harm observation unit." (T. 344.)

Ms. Lockwood reported her concerns directly to the medical director. (T. 345-46.) She was not able to be at Mr. Wells's next staffing, but the director was. (T. 347.) To the best of her knowledge, the director never went to see Mr. Wells and Mr. Wells was never provided with additional mental health care. (T. 348-50.)

Dr. Terry Allen Kupers. Dr. Kupers, a medical doctor with a degree in social psychiatry, stated he had provided expert testimony between 70 and 100 times on subjects relating to jail and prison conditions as well as the quality of mental health care in prison settings. (T. 366-68.) In addition to reviewing medical, DOC, and trial records, he interviewed Mr. Wells by video call on two occasions. (T. 369.) Dr. Kupers testified about how damaging certain prison practices such as solitary confinement are for inmates in correctional facilities, particularly those with mental

illness. (T. 371-85.) He specified that "close management" in the Florida prison system is a form of solitary confinement because the only contact inmates have with others in a small room, about 18 by 8 feet, where approximately 12 prisoners are taken with no staff, no activities except a television, and no supervision. (T. 371.)

Dr. Kupers reviewed Mr. Wells's mental health history, noting Mr. Wells had consistently been diagnosed with serious mental health issues from the age of 17, and explaining that people with serious diagnoses often are diagnosed differently at different times "because often it take a while for the mental illness to fully show itself." (T. 387-89.) Dr. Kupers also stated that the types of hallucinations Mr. Wells reported were a "red flag" for an organic brain syndrome or neurocognitive disorder.) (T. 391-93.) He noted strong evidence for brain damage caused by early alcohol consumption or fetal alcohol spectrum disorder, as well as the evidence of CTE found by Dr. Wu. (T. 393.) He summed up Mr. Wells's diagnoses as follows:

> So we've got at least three things going on here, and I can list five more diagnoses, but the three main things I would focus on just for simplicity of explanation are schizoaffective disorder, neurocognitive disorder, each with

> their own history and starting point, and then solitary confinement, which exacerbates all of them.

(T. 395.)

Dr. Kupers stated he believed Mr. Wells's mental illness would affect his ability to represent himself. (T. 399.) He stated he agreed with "a lot" of what Dr. Krop and Dr. Danziger had concluded regarding Mr. Wells's competency, but had significant disagreements with them as well. (T. 399.) Regarding Dr. Krop's opinion, Dr. Kupers suggested that opinion did not adequately take into account a neurocognitive disorder when Dr. Krop suggested that Mr. Wells was sufficiency aware of his decompensation to ask for help if he needed it. (T. 399-400.) But Mr. Wells's neurocognitive disorder was not something that would wax and wane; it was a progressive, "ongoing, continuous thought disorder." (T. 400.) As to Dr. Danziger's analysis, Dr. Kupers stated he agreed Mr. Wells could make decisions knowingly but believed that his capacity to think abstractly and broadly was impaired. (T. 401-02.) He reviewed Mr. Wells's efforts to get help during the time period leading up to the charged offense (T. 402-05), concluding:

> So here we've got Mr. Wells going from one clinician to another saying do something, get me out of solitary, get me the mental health care I need — which, by the way, in my opinion, cannot occur in solitary — or I'm going to kill someone, it was not a threat. He was pleading for help. And that's his mental state when he went into that incident.

(T. 405.) Dr. Kupers added that the only person among prison staffers and mental health staff who was not negligent in their response to Mr. Wells was Ms. Lockwood. (T. 405-06.)

Dr. Kupers agreed that Mr. Wells could not appreciate consequences of his conduct, noting a connection with CTE. (T. 406-08.) He agreed that Mr. Wells's "mental illness, as affected by his brain damage and his solitary confinement," affected his ability to conform his conduct to the requirements of the law. (T. 408.) Specifically, as to statutory mitigating factors, Dr. Kupers opined:

> Area B, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Absolutely.
>
> And number F, the capacity of the defendant to appreciate the criminality of his or her conduct or conform his or her conduct to the requirements of law was substantially impaired. Absolutely.

(T. 409.)

Dr. Kupers stated Florida has an "extraordinarily high percentage" of prisoners in solitary confinement, and that it is not possible to provide adequate mental health treatment there. (T. 409, 414.) He stated Mr. Wells's mental health symptoms had worsened since 2008, when Mr. Wells was placed in close management. (T. 412-13.) He opined that close management was accelerating the deterioration caused by Mr. Wells's neurocognitive disorder. (T. 413-17.) He also reviewed parallels between Mr. Wells's mental health symptoms preceding the charged offense and those that preceded earlier offenses in 2008 and 2011, noting similar hallucinations, depression, suicidality, and attempts to get help. (T. 422-31.) Mr. Wells had been sent to a specialized mental health unit previously and did very well there; in each of the 2008, 2001, and 2019 incidents where he harmed another person, he was off his medication and unable to get the help he needed. (T. 448-51.) He said Mr. Wells was "screaming for help" at the time of the charged offense: "Denouncing to officers and mental health staff that you're going to kill somebody is a way of saying please stop me." (T. 452.) When asked whether the offense would have happened had Mr.

Wells been in an appropriate therapeutic environment, he stated "absolutely not." (T. 455.)

The defense rested its mitigation case after Dr. Kuper's testimony, and the court reviewed several procedural matters before confirming that Mr. Wells would not testify at that time. (T. 493-501.) As to the outstanding defense motions, the court ruled:

> […] I don't need any argument on the 8th Amendment motion unless you want to make any that I haven't already heard which is separate from the mitigation aspect of that, but I want to review that again. I was looking at it, but I'll make a ruling on that prior to the Spencer date.
>
> But on the motion to withdraw, the court denies the motion to withdraw plea. The court remains convinced that Mr. Wells made a knowing and intelligent decision to represent himself, and I will stand on the record as to that, notwithstanding the evidence which has been presented to the court that he suffers from mental illness, and albeit certainly at times has serious ramifications from that.
>
> […] His competency as we would talk about it in terms of 3.850, for example, his competency to represent himself at that level is different from his competency to make the decision to exercise his constitutional right to represent himself. […] But the court is convinced that he, in fact, not only was lucid, rational to make that decision and capable of making that decision, that was a decision that was made

> over several opportunities to reflect between those times, and he continued to exercise that decision until he was faced with circumstances where he then I think came to the realization that he was not equipped to continue to move forward and requested counsel, which was granted. So the court denies the motion.

(T. 501-02.) The defense and state then presented closing remarks. (T. 504-536.) Following the hearing, both sides submitted sentencing memoranda. (R. 1607-22; R. 1623-62.) The defense also filed a written motion to renew all previous motions and objections, which was denied on May 25, 2021. (R. 1663-64; R. 1665; R. 1729.)

III. Sentencing.

Sentencing took place on May 25, 2021. (R. 1729.) The court began by stating it had maintained all its prior rulings in response to the defense motion renewing all motions and objections, and that it had reviewed the sentencing memoranda. (R. 1729-30.) The defense brought up the video from the Department of Corrections that was the subject of its prior *Richardson* motion and informed the court it had received about 300 hours of video which had not yet been reviewed in its entirety because of technical issues caused by the format in which the State provided it. (R. 1730-34.) The court responded that it would be speculative to say the video contained

any exculpatory information or additional insight that had not already been presented, and denied a request for a continuance. (R. 1734-36.) The defense clarified that it believed the video would relate to the alleged aggravating factors; the court did not change its ruling. (R. 1737.) The defense also renewed its motion for a mistrial as a remedy for allowing Mr. Wells to enter his plead, waivers, and stipulations. (R. 1737-38.) The court denied that motion as well. (R. 1738.)

Mr. Wells made a statement that began with apologies to the court and Mr. Chapman's sister. (R. 1740-41.) He then reviewed and expanded upon several of the incidents that had been mentioned during the mitigation phase, including physical abuse by his father, being forced into sexual activity by his father, and early exposure to drugs and alcohol. (R. 1741-45.) He talked about his marriages and birth of his son and how much that meant to him. (R. 1745-48.) He described the trauma of losing his stepson, who was crushed by a truck. (R. 1748.) He talked about his original offenses, including the death of his wife, and about making the decision to give custody of his son to a relative, knowing he would probably never see or hear from him again. (R. 1749-55.) And he

talked about his mental health issues, about the prison system's failure to address them, and his pleas for help, concluding:

> I'm not here to escape or circumvent justice. I do have to be punished. You're thinking that has been done before and it didn't work. There's a reason it didn't work. I was failed by a system that was supposed to help me, and it failed me in my darkest hour.
>
> Even still I can only fault myself. My own actions put me in prison, and I accept the responsibility for that. But my mental health treatment is not just a right. It's a need. And as a human being, it's deserved.

(R. 1763.)

After a recess, the court pronounced sentence by reading from a written sentencing order. The court found that "the aggravating circumstances in this case far outweigh the mitigating circumstances." (R. 1764.) The court stated it had considered the mitigating circumstances "contextually" and that the defendant's history of violent felonies, his planning for the charged offense, the brutality of the charged offense, and the actions the defendant took to ensure no one would intervene "far outweigh[ed] the mitigating circumstances." (R. 1765-66.) The court then sentenced Mr. Wells to death. (R. 1766.) The court also sentenced Mr. Wells to time

served, or 690 days, on the charge of possession of a weapon. (R. 1767.)

The court also filed a detailed written sentencing order. (R. 1666-88.) The sentencing order made the following findings regarding aggravating factors and mitigating circumstances:

1. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment. The court noted Mr. Wells's stipulation to this factor and gave it great weight. (R. 1667-68.)
2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of force of violence to the person. The court found this had been established beyond a reasonable doubt and gave it very great weight. (R. 1668-69.)
3. The capital felony was especially heinous, atrocious or cruel. The court found this had been established beyond a reasonable doubt and gave it great weight. (R. 1669-71.)
4. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court

emphasized that the defendant and co-defendant began planning the attack on Mr. Chapman days before the crime, found this had been proven beyond a reasonable doubt, and gave it great weight. (R. 1671-74.)

The court also reviewed statutory mitigating circumstances and found that none of them had been established by the evidence. (R. 1674-78.) In particular, the court rejected the arguments that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (R. 1674-77) and that the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired (R. 1677-78). The court noted Mr. Wells's extensive mental health history, but added "the Court does not find that the Defendant reasonably established that he was acting under the influence of an extreme mental or emotional disturbance when he committed the crime." (R. 1676.) The court pointed to the defendant's planning and his expressed desire to better his living conditions by being transferred to death row in rejecting the mitigating evidence relating to his mental health history. (R. 1676-77.)

Regarding Mr. Wells's ability to conform his conduct to the requirements of law, the court held:

> This mitigator was not established by the evidence. The Defendant understood full well the criminality of the offense as well as the penalty prescribed. There is no credible evidence in this case that the Defendant's ability to conform his conduct was impaired or that he did not know that killing the victim was wrong. […] Although the Defendant has an extensive mental health history, there is no evidence that [he] was not thinking clearly before, during, or immediately after his offense.

(R. 1677-68.)

Finally, the court reviewed nonstatutory mitigating circumstances and assigned weight to them as follows:

A. The defendant experienced extreme childhood abuse and neglect and other traumatic events in early adulthood (slight weight).

B. The defendant suffers from serious mental illness and neurocognitive issues and the defendant was in solitary confinement/close management for thirteen years (some weight).

C. After the instant offense, the defendant has been cooperative with authorities in this matter (slight weight).

D. The defendant has taken responsibility for the instant offense (slight weight).

E. The defendant has always been respectful to the FDOC staff and to the court throughout these proceedings (some weight).

F. The defendant has struggled with substance abuse and alcoholism throughout his life (slight weight).

G. The defendant's mental health needs were neglected by FDOC. Regarding this mitigator, the court noted: "*The Court finds only that the recommendation of Ms. Lockwood to move forward the Defendant's mental health review to be proven by the greater weight. Otherwise, the Court does not find by the greater weight of the evidence that FDOC neglected the Defendant's mental health treatment. […] Notwithstanding any failure of FDOC towards the Defendant, the Court does not find that the murder was the product of any such failure. The court gives this mitigator slight weight.*"

H. The defendant has shown remorse for the murder (slight weight).

(R. 1678-83.)

The court added, in conclusion, that "[a]lthough specific mitigating circumstances addressed in the Defendant's sentencing memorandum may not have been particularly articulated above, this Court has considered them contextually within the categories listed above; and given them the appropriate weight as part of those substantive categories." (R. 1683.) The court concluded that the aggravating circumstances "far outweigh the mitigating circumstances which the Court has heard and considered." (R. 1684.)

SUMMARY OF THE ARGUMENT

Issue I. The trial court abused its discretion in denying standby counsel the adequate preparation time it requested after Mr. Wells asked to have counsel appointed to represent him in the penalty phase. The extraordinary complexity and high stakes of death penalty litigation impose extensive responsibilities on counsel, and in this case counsel's preparation was additionally hampered by the effects of a pandemic that made every aspect of investigation and litigation more difficult.

Issue II. The trial court abused its discretion in finding two statutory mitigating factors relating to Mr. Wells's mental health had not been proven. The defense provided extensive and completely unrebutted testimony from several experts explaining Mr. Wells's lengthy mental health history, which included early alcohol exposure, significant adverse childhood experiences, and brain injuries, all of which contributed to incurable neurocognitive disorder as well as several mental health diagnoses.

Issue III. Florida's capital sentencing scheme requires multiple determinations before the death penalty can be imposed. These determinations include a finding that one or more aggravating

factors are present, a finding that the aggravating factor or factors are sufficient to impose death as a penalty, and a finding that the aggravating factor or factors outweigh any mitigating evidence presented. *See* § 921.141(2), Fla. Stat. These findings increase the penalty available for the charged crime and, therefore, must be proven beyond a reasonable doubt. However, here the trial court did not make the requisite findings beyond a reasonable doubt, and imposing sentence without meeting that burden of proof was fundamental error.

Issue IV. Because this Court has previously rejected, among other things, the argument as to Issue III, and because the Court has discarded proportionality review of death sentences, Florida's death penalty sentencing scheme fails to meaningfully and rationally narrow the class of defendants eligible for execution. Therefore, the sentence violates the Eighth Amendment and, though the Conformity Clause, the Florida Constitution.

Issue V. The Eighth Amendment bars execution of the severely mentally ill for the same reasons it bars execution of minors and the intellectually disabled: because the unique characteristics of the severely mentally ill render them less culpable than defendants

without similar mental health challenges. Severe mental illness can create a severe mental or emotional disturbance before, during, or after an offense. Severe mental illness also reduces culpability by making a defendant unable to exercise the judgment necessary to conform his conduct to the requirements of the law, even if he understands his conduct is wrongful or illegal.

ARGUMENT

I. The Court Abused Its Discretion When It Denied the Defense a Continuance for Adequate Time to Investigate Potential Mitigation after Reappointing Counsel Halfway through the Penalty Phase Even Though the Defense Identified Numerous Specific Ways in Which It Was Hampered in Preparing to Present Mitigation.

The trial court abused its discretion in denying the defense's repeated pleas for adequate time to prepare a mitigation case. The denial of a motion for continuance is reviewed for abuse of discretion. *See, e.g.*, *Barnhill v. State*, 834 So. 2d 836, 847 (Fla. 2002). An abuse of discretion occurs when the denial results in undue prejudice to the defendant. *Id.* (citing *Fennie v. State*, 645 So. 2d 95, 97 (Fla. 1994)).

Defendants have the right to a reasonable time period for counsel to prepare for trial. *E.g.*, *McKay v. State*, 504 So. 2d 1280, 1282 (Fla. 1st DCA 1986). The right is not absolute, and when a defendant requests a continuance "on the eve of trial in order to allow time for recently retained counsel to prepare," the right is balanced against a number of factors, including:

> 1) the time available for preparation, 2) the likelihood of prejudice from the denial, 3) the defendant's role in shortening preparation time, 4) the complexity of the case, 5) the availability of discovery, 6) the adequacy of counsel actually provided and 7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime.

Id. (holding defendant suffered no prejudice from the denial of a continuance in a case that was "not complex" and where there were no discovery issues). Forcing trial counsel to proceed unprepared is an abuse of discretion. *See, e.g.*, *Jackson v. State*, 998 So. 2d 1175, 1177 (Fla. 5th DCA 2008).

In addition, in a capital case, counsel has an ethical duty to fully investigate potential mitigation. *E.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003). The standards governing capital representation explicitly recognize that death penalty cases are "extraordinarily complex" and create special ethical duties. *See* American Bar Association Criminal Justice Section, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 55 (Oct. 1989); *see also White v. Bd of Cnty. Comm'rs of Pinellas Cnty.*, 537 So. 2d 1376, 1380 (Fla. 1989).

Here, standby counsel made clear even before being reappointed during the penalty phase that the ethical demands of representing Mr. Wells would require additional time for preparation should he decide to request counsel. Standby counsel filed a motion to continue (R. 514-18) on July 23, 2020, citing Rule Regulating the Florida Bar 4-1.1, which states "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." (R. 516.) Standby counsel also cited the comments to that rule, which state that "[t]he required attention and preparation are determined in part by what is at stake...." *Id.* The motion stated standby counsel had not been able to "engage in the necessary preparation for a proceeding which could potentially end in the execution of the Defendant." (R. 517.) This motion was denied "without prejudice to Standby Counsel moving for a continuance at the time of the penalty phase if Defendant requests that Standby Counsel take over as trial counsel during the penalty phase." (R. 520.)

Standby counsel renewed the request for a continuance during the penalty phase proceedings on August 4, 2020, stating:

> This litigation has moved very, very quickly. Our office was appointed around the beginning of the year. He's been pro se — I believe since at least February he asked immediately to be pro se. This court granted — this court appointed the Office of Regional Conflict Counsel at the end of last year. This court entered an order allowing the defendant to proceed pro se in February of this year.
>
> Immediately following that, as I articulated earlier, and as we're all well aware, there has been a global pandemic of the COVID-19 virus that has severely hindered any preparation that we would have been able to do were we legally authorized to do so.
>
> As it stands today, as I articulated in the motion that we previously filed, which I would be renewing, as his lawyer we have an ethical responsibility of thoroughness. As it stands now, we don't have anyone under subpoena. We don't have any experts. We've been totally and completely unable to prepare for his sentencing phase. We have not been able to conduct an adequate investigation into the background nor to take any of the necessary steps in order to adequately represent him in this penalty phase.
>
> The state has another witness to call. We have not had the opportunity to depose that person nor have we had the opportunity to take any depositions, and at this time we would ask this court at a minimum for a continuance of enough time for us to adequately represent this man, which includes to investigate and accumulate witnesses to present.

(R. 678-79.)

The court responded that it had reviewed the court record of Mr. Wells's previous trial, and that counsel could call on the mitigation specialist and experts who had participated in that case so as to expedite the current case. (R. 682.)

The case was stayed pursuant to an order of the First District Court of Appeal until February 2021.[2] On March 11, 2021, counsel filed a motion asking for adequate time for preparation. (R. 988-1025.) The motion noted that the State had listed 95 Category A witnesses and that Defendant's prison records were over 5000 pages long. (R. 989.) Counsel also noted that a defense attorney in a capital case is held to the highest standards. (R. 990-91.) Guidelines for representation of capital defendants require counsel to conduct an extensive investigation into all aspects of the Defendant's background. (R. 990-91.) Counsel represented that even in normal times the amount of time for preparation would have been inadequate, but that in addition the COVID-19 pandemic had "seriously hindered" counsel's preparation. (R. 991.) Counsel

[2] See William E. Wells III v. State of Florida, Case No. 1D20-2591 (petition for writ of prohibition).

also stated that it was not ethically possible to simply rely on the mitigation investigation performed in a prior case. (R. 994.)

The memorandum of law accompanying the motion emphasized counsel's duty to conduct a thorough investigation (R. 1005-07); to exercise greater vigilance in identifying, raising, and pursuing all available legal claims (R. 1007-11); to investigate and litigate prior bad acts (R. 1011-12); to conduct a thorough mitigation investigation (R. 1012-17); and to obtain expert witnesses (R. 1018-22). The memorandum also emphasized that counsel's duties could not be lessened or relieved merely because Mr. Wells had already gone through a capital trial on an unrelated offense. (R. 1022-23.)

At the motion hearing on March 29, 2021, counsel reiterated the bases for the requested continuance:

> Judge, there are 95 listed category A witnesses in this case. I can advise the Court that in preparation that our requirements are to investigate thoroughly all aspects of the case and all aspects of Mr. Wells' background, and we have been unable to effectively to do either in the time. We ordered, for example, his prison records. We ordered them, they took months to get, they were approximately 5000 pages and not chronologically ordered and we

> have been diligently going through all of his records.
>
> We have been doing what we can to investigate his background. This is in the midst of a global pandemic. To say this has been a strange year would be an entire under statement. What would normally not enough time, during this pandemic we've found ourselves faced with mountains that we've never seen before.
>
> Mr. Wells by virtue of being faced with the death penalty is entitled to as much due process as anybody or anything. The amount of preparation and required attention is at its apex in capital litigation. The COVID-19 pandemic has hampered our ability to do prison visits, it's slowed us down in every possible way.

(R. 1842.)

The court's denial of a continuance appears to have been premised in part on the court's familiarity with previous proceedings involving Mr. Wells. However, there is no exception to a capital defense attorney's ethical duty allowing the recycling of evidence without an investigation. Although Mr. Wells's constitutionally protected right to represent himself played a part in counsel having inadequate time to prepare, counsel was forthright with the trial court that additional time would be needed if Mr. Wells changed his mind. The court knew — and seemingly agreed —

that if standby counsel had to assume the full duties of representing Mr. Wells, additional time would be needed.

And, although the timeline of the case does reveal a continuance after the State concluded its penalty phase evidence, the denial of additional time did not adequately consider the effect of the COVID-19 pandemic on trial preparation. Travel and in-person meetings were not possible for an extended period of time; obtaining documents or conducting depositions was exponentially more difficult. At the sentencing hearing the defense was still reviewing video that had been delayed because of technical difficulties. It was simply not reasonable to expect counsel to assume the responsibility of preparing a mitigation case and then not give counsel the additional time it requested during a period when the entire legal system was bending to accommodate new strains created by a worldwide pandemic. The denial of counsel's request created undue prejudice by hampering counsel's investigation of the mitigation case, and therefore was an abuse of discretion.

II. The Court Abused Its Discretion in Disregarding Uncontroverted Expert Testimony Concluding Both That Mr. Wells Was Experiencing Extreme Mental and Emotional Distress at the Time of the Charged Offense, and That He Was Unable to Conform His Conduct to the Requirements of Law.

The trial court must find a mitigating circumstance if it has been established by the greater weight of the evidence. *E.g.*, *Williams v. State*, 37 So. 3d 187, 204 (Fla. 2010) (citations omitted). A proposed mitigator may be rejected if not proven or if its rejection is supported by competent, substantial evidence. *See id.* Competent, substantial evidence is evidence "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Dausch v. State*, 141 So. 3d 513, 517-18 (Fla. 2014). Trial courts have broad discretion in issues relating to mitigation, but that discretion is not unlimited. *See Williams*, 37 So. 3d at 204. When the evidence supporting a mitigating circumstance is unrebutted expert testimony, the rejection must have a basis such as conflicting evidence, credibility or impeachment of the witness, or other reasons. *See id.*

The statutory mitigator of having impaired capacity is "provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." *Perri v. State*, 441 So. 2d 606, 608 (Fla. 1983); *see also, e.g.*, *Francis v. State*, 808 So. 2d 110, 140 (Fla. 2001) and *Campbell v. State*, 571 So. 2d 415, 418-19 (Fla. 1990) (recognizing that a defendant can be legally sane for purposes of standing trial and still demonstrate diminished capacity for purposes of mitigation purposes). While a court is not required to accord mental health mitigation any particular weight, *see Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) (receding from *Campbell* to the extent that decision did not allow a trial judge to give "no weight" to a mitigating factor), a court errs when it disregards substantial mental health evidence because the defendant appears to know what he was doing at the time of the offense was wrong.

Here, no competent, substantial evidence refuted expert testimony that, at the time of the charged offense, Mr. Wells was in extreme emotional or mental distress and unable to conform his conduct to the requirements of law. The State did not present any

competing expert testimony to rebut the testimony of Dr. Danziger, Dr. Holmes, Dr. Wu, and Dr. Kupers.

Dr. Holmes testified that Mr. Wells was decompensating in the months leading up to the charged offense, that he tried to seek help, and that there were similarities between the pattern of Mr. Wells's symptoms in 2019 and those preceding earlier offenses. (T. 112-31.) Dr. Wu testified extensively based on scans of Mr. Wells's brain and gave the opinion that Mr. Wells suffered from traumatic brain injury, fetal alcohol spectrum disorder, childhood neglect and abuse, psychosis or schizophrenia, and mood disorder, as well as having a high likelihood of CTE. (T. 240-29.) And Dr. Kupers testified that Mr. Wells suffered from schizoaffective disorder, neurocognitive disorder, and likely had brain damage from prenatal and childhood alcohol exposure, exacerbated by solitary confinement. (T. 391-95.) In addition to affecting Mr. Wells' ability to represent himself, Dr. Kupers testified that Mr. Wells committed the charged felony while under the influence of extreme mental or emotional disturbance, and that Mr. Wells's capacity to confirm his conduct to the requirements of the law was substantially impaired at the time. (T. 408-09.)

Moreover, although Dr. Danziger's evaluation was directed at Mr. Wells's competency in 2020, his conclusions were consistent with those of other experts. Specifically, Dr. Danziger concluded that Mr. Wells suffers from schizoaffective disorder, post-traumatic stress disorder, and cognitive deficits attributable to a history of head injuries, early exposure to alcohol and drugs, and multiple adverse childhood experiences. (T. 22.) He also testified that Mr. Wells's mental conditions, while not preventing him from acting knowingly, prevented him from exercising judgment and impaired his decision-making ability. (T. 22-23.)

The trial court improperly disregarded this extensive, unrefuted expert testimony, dismissing it because Mr. Wells and his co-defendant showed signs of planning the offense and Mr. Wells appeared to display clarity of thought before and after the offense. However, even if these characterizations are accepted as wholly accurate, they are insufficient to rebut the expert testimony. In fact, they are entirely consistent with the expert testimony. Dr. Danziger, for example, testified that Mr. Wells was capable of making knowing decisions, but that his mental illnesses hampered his judgment. (T. 31-34.) Dr. Wu similarly explained that Mr. Wells's ability to act

knowingly was accompanied by numerous conditions that made it difficult for him to exercise judgment and impulse control. (T. 240-51.) Dr. Kupers agreed Mr. Wells could make decisions knowingly but believed that his capacity to think abstractly, exercise judgment, and conform his conduct was impaired, and explained that Mr. Wells' abilities coexisted with his impairments. (T. 401-09.)

In sum, the expert testimony that Mr. Wells acted under extreme mental or emotional disturbance, and that he was unable to conform his conduct to the requirements of the law, was unrebutted and not contradicted by other evidence, and the court abused its discretion in disregarding it.

Because the trial court failed to properly consider these two statutory mitigating factors, Mr. Wells's death sentence violates his right to be free from cruel and unusual punishment under the Eighth Amendment and the Florida Constitution. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

III. Fundamental Error Occurred When the Court Failed to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances.

Any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the finder of fact. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490 (2000)). Under current Florida law, this includes the determination that the aggravating factors were sufficient to justify death. The trial court's failure to make this required finding beyond a reasonable doubt before considering a death sentence reduced the burden of proof on the State and thus denied Mr. Wells due process of law, creating fundamental error.[3] Fundamental error "goes to the foundation of the case…and is equivalent to a denial of due process." *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) (citation omitted). Fundamental error "is not subject to harmless error review." *Ramroop v. State*, 214 So.3d 657, 665

[3] *But see, e.g.*, *Craft v. State*, 312 So. 3d 45 (Fla. 2020) (rejecting the argument that the identical omission created fundamental error), rehearing denied (Fla. Mar. 4, 2021), and petition for certiorari denied, 142 S. Ct. 490 (2021).

(Fla. 2017) ("By its very nature, fundamental error has to be considered harmful.").

This Court held in *Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019), cert. denied, 141 S. Ct. 284 (2020), that the findings that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances, are not "elements" that can be subjected to the standard of proof beyond a reasonable doubt. In so holding, the Court receded from language in *Perry v. State*, 210 So. 3d 610, 640 (2016), indicating that these findings had to be made unanimously and beyond a reasonable doubt. The Court also held in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), cert. denied, 141 S. Ct. 1051 (2021), that any determinations beyond the existence of one or more aggravating factors were not "elements" that had to be proven beyond a reasonable doubt, explicitly receding from *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (requiring unanimous jury findings that aggravating factors were sufficient to justify imposing death and that aggravating factors outweighed mitigating circumstances before a death sentence could be considered).

However, United States Supreme Court jurisprudence is clear that any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the factfinder, whether it is called an element or something else. *Alleyne*, 570 U.S. at 104 (citing *Apprendi*, 530 U.S. at 483 n.10, 490). For the reasons set forth below, *Rogers* and *Poole* are incompatible with Supreme Court precedent.

A. Required findings increasing the penalty for a crime, including findings required to authorize the death penalty after a guilty verdict on the underlying offense, require the same degree of proof as the elements of the underlying offense — i.e., proof beyond a reasonable doubt.

If the "required finding expose[s] the defendant to a greater verdict than that authorized by the [verdict]," the Sixth Amendment and Due Process clauses of the federal constitution require that the finding be subject to the standard of proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). That issue is "one not of form, but of effect." *Id.*; *cf. also Jones v. United States*, 526 U.S. 227, 232-33 (1999) (noting, in the context of a federal carjacking statute, "[t]he "look" of the statute, then, is not a reliable guide to congressional intentions").

The functional elements of a crime for sentencing purposes are not limited to the defined elements required for conviction. *See Apprendi*, 530 U.S. at 495-96. In addition, the distinction between conviction and sentencing is not what determines the burden of proof in a criminal trial. The legally significant distinction is whether a particular determination increases the available penalty for a crime. *Id.* (holding the placement of a hate crime sentence "enhancer" within the sentencing provisions of a criminal statute did not prevent the enhancer from functioning as an element). In the context of capital sentencing, any factor that must be found before the death penalty can be selected for a particular defendant is the "functional equivalent" of an element of the charged offense, at least for sentencing purposes. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citing *Apprendi*, 530 U. S. at 494 n. 19). This does not prevent legislatures from creating sentencing "factors" or "considerations" to guide the exercise of a trial court's discretion in sentencing within an available range. *Alleyne*, 570 U.S. at 116.

The principles set out in *Apprendi* were applied in *Ring v. Arizona* to invalidate a state statute allowing a trial judge to determine the existence of aggravating factors so as to justify

imposition of the death penalty. 536 U.S. at 589 (overruling *Walton v. Arizona*, 497 U. S. 639 (1990)). Under the statute at issue in *Ring*, the maximum punishment the defendant could have received based on the jury's verdict of guilt on a charge of first-degree murder was life in prison. *Id.* at 597. The Supreme Court considered, but rejected, an argument that "death or life imprisonment" were both sentencing options for first-degree murder under Arizona law, and that the defendant "was therefore sentenced within the range of punishment authorized by the jury verdict." *Id.* at 603-04. Because an aggravating circumstance had to be found before death could be imposed, the death penalty was authorized "only in a formal sense." *Id.* at 604 (citations omitted). The Court reiterated *Apprendi*'s reasoning that the additional finding was the "functional equivalent" of an element of the offense. *Ring*, 536 U.S. at 609.

The central holding of *Apprendi* was reaffirmed in *Blakely v. Washington*, 542 U.S. 296, 305 (2004), which held a state statute allowing a trial court to impose an "exceptional" sentence in excess of a defined statutory range, and without a jury finding regarding

the reasons justifying the exceptional sentence, violated the defendant's right to a trial by jury.

Similarly, in *Alleyne*, the Court held unconstitutional a statute imposing a mandatory minimum sentence on the basis of judicial fact-finding. 570 U.S. at 103 (overruling *Harris v. United States*, 536 U.S. 545 (2002)). As it had done before, the Court rejected the argument that the sentence actually imposed in that case could have been imposed in theory even without additional fact-finding. *Id.* at 112-15. And in *United States v. Haymond*, 139 S. Ct. 2369, 2373-74 (2019), the Court held a statute violated the Sixth Amendment and Due Process clause where it authorized a mandatory minimum sentence for a violation of supervised release without requiring jury findings or proof of the violation beyond a reasonable doubt. The Court held that subjecting the defendant to an increased sentencing range based on the trial court's fact-finding violated the Fifth and Sixth Amendments. *Id.* at 2378-79. The plurality rejected an argument that the Sixth Amendment does not apply to post-judgment sentencing proceedings, saying "any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable

doubt 'no matter' what the government chooses to call the exercise." *Id.* at 2379 (citing *Ring*, 536 U.S. at 602).

B. Due process requires proof beyond a reasonable doubt of any determination that must be made before the death penalty can be imposed in a specific case.

Due Process requires proof beyond a reasonable doubt to convict an individual of a crime. *E.g.*, *In re Winship*, 397 U.S. 358, 362 (1970). This means "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. The reasonable doubt standard "reflects a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (citation omitted). The requirement of proof beyond a reasonable doubt stands between the accused and a conviction based on factual error. *See id.* at 363. It "provides concrete substance for the presumption of innocence." *Id.* (citation omitted). In addition, the reasonable doubt standard has a vital role in maintaining public confidence in the court system. *Id.* at 364.

Society's interest in the reliability of the verdict is even stronger in capital cases than in other criminal cases because of the

"qualitative difference between death and other penalties." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (reversing a conviction where the jury was improperly instructed on the meaning of "reasonable doubt"). Therefore, as a matter of due process, required findings that expose the defendant to a greater punishment than that authorized by the conviction on the underlying offense must be proved beyond a reasonable doubt.

C. Florida's capital sentencing scheme requires a finding that aggravating factors are sufficient to justify the death penalty before the finder of fact reaches the ultimate decision of whether a death sentence can be imposed.

Under Florida's capital sentencing scheme, the determinations that *the aggravating factors in a particular case are sufficient to justify death* and *the aggravating factors outweigh the mitigating circumstances* increase the maximum authorized penalty from life in prison to death. *See* § 921.141(2)-(3), Fla. Stat. The existence of one or more aggravators in Florida does not allow a death sentence to be imposed *until* other findings are made.

First-degree murder is a "capital felony" under section 782.04(1)(a), Florida Statutes. Obtaining a conviction for first-degree murder based on premeditation requires the State to establish the following elements: (1) a victim is dead; (2) the death was caused by the criminal act of the defendant; and (3) the killing was premeditated. *See* Fla. Std. Jury Instr. (Crim.) 7.2 (2019). Despite the statutory "capital felony" label, under Florida's capital sentencing scheme, the findings necessary to convict a defendant of first-degree premeditated murder are insufficient to sentence the defendant to death. *See* § 782.04(1)(b). A separate proceeding must be held, as provided in sections 775.082 and 921.141, Florida Statutes.

The provisions of section 921.141 create a system in which the jury (or court, in a bench trial) makes findings allowing the death penalty to be imposed. Only then does the jury make a recommendation about the sentence. Only then does the trial court exercise its discretion to choose between a life sentence and a death sentence. *See* § 921.141(2)-(3). Section 921.141(2)(b) sets out the specific findings required before a death sentence can be considered:

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

§ 921.141(2)(b).

The "eligibility" referred to in section 921.141(2)(b) is not dispositive of the available sentencing range, because section 921.141(2) must be read in its entirety, as well as together with section 921.141(3). Under the remaining language in section 921.141(2)(b), the court must make a recommendation by weighing additional factors, and those factors include two additional findings: whether sufficient aggravating factors exist, and whether aggravating factors outweigh the mitigating circumstances.

What this means is that a capital defendant in Florida is not "exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," *see Apprendi*, 530 U.S. at 483, merely because the finder of fact has determined beyond a reasonable doubt that at least one aggravating factor exists, even though that aggravating factor makes the defendant "eligible" for death. Without additional findings, the jury cannot make its recommendation, and the court has no discretion to impose the death penalty.

In this case, because Mr. Wells waived his right to a jury determination of the facts allowing a death sentence to be imposed, the Court must also apply section 921.141(3)(b) and (4), requiring the trial court to make the same findings the jury would have made: "whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence." § 921.141(4).

In summary, absent the further proceedings and findings defined in section 921.141, the maximum available sentence for first-degree murder is Florida is life in prison. *See* § 775.082(1)(a);

§ 921.141(3)(a). Therefore, for purposes of the burden of proof, these additional findings are treated as elements of the crime, whether they are called "elements" or something else, and require proof beyond a reasonable doubt.

D. The trial court's sentencing order failed to make required findings before imposing the death penalty.

The court's sentencing order found that the State had proved the existence of four alleged aggravating circumstances beyond a reasonable doubt. (R. 1667-74.) The court also found no statutory mitigators had been proved. (R. 1674-78.) Finally, the court found seven nonstatutory mitigators had been established, and one partially established. (R. 1678-83.) The court concluded the aggravating circumstances "far outweigh[ed]" the mitigating circumstances. (R. 1683, 1684.) The court did not specifically find that the aggravating factors were sufficient to justify death and that they outweighed the mitigating factors using the standard of proof beyond a reasonable doubt. Without those express findings, subject to proof beyond a reasonable doubt, the death sentence in this case is constitutionally deficient under Amendments V, VI, and XIV to

the U.S. Constitution, as well as Article I, section 9, of the Florida Constitution.

IV. Florida's Capital Sentencing Scheme Violates the Eighth Amendment to the United States Constitution and Its State Counterpart, Article I, Section 17 of the Florida Constitution Because It Does Not Meaningfully Limit the Class of Defendants Eligible for the Death Penalty.

This Court's elimination of proportionality review, combined with the breadth and increasing number of available aggravating factors, renders Florida's capital sentencing scheme constitutionally deficient. Therefore, Mr. Wells's death sentence violates his constitutional right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

A. Florida's sentencing scheme does not meaningfully limit the number of offenses eligible for a death sentence and, in fact, has expanded significantly since the post-*Furman* scheme was enacted.

Despite myriad variations in the state laws that still provide for capital punishment, a constant theme in Supreme Court jurisprudence has been that "channeling and limiting of the sentencer's discretion is imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). This requires meaningful

narrowing of the class of individuals subject to capital punishment. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987) ("a State must 'narrow the class of murderers subject to capital punishment' by providing 'specific and detailed guidance' to the sentencer.") (citations omitted). An aggravating circumstance making a defendant eligible for the death penalty "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). An aggravating circumstance is constitutionally deficient when it does not provide a "principled way" to distinguish cases in which death is an appropriate penalty from those in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 428, 433 (1980) (holding nothing in the phrase "outrageously or wantonly vile, horrible and inhuman" implied "any inherent restraint on the arbitrary and capricious infliction of the death sentence").

Under the current capital sentencing statute, as interpreted by this Court, there is virtually no narrowing of death eligibility before the conclusion of a capital trial, as aggravating circumstances do

not need to be alleged in an indictment. *E.g.*, *Pham v. State*, 70 So. 3d 485, 496 (Fla. 2011). Although this Court briefly interpreted the sentencing statute to require a finding of "sufficient" aggravating circumstances to justify a death sentence, *see Hurst v. State*, 202 So. 3d 40, 57-58 (Fla. 2016), this Court then receded from *Hurst* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *State v. Poole*, 297 So. 3d 487, 507 (2020).

Moreover, when Florida's first post-*Furman* sentencing statute was enacted, it included eight statutory aggravating factors. *See State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). Florida's current capital sentencing scheme makes a defendant eligible for a death sentence if any one of 16 statutory aggravators is found. § 921.141(6)(a)-(p), Fla. Stat. (2021). Beyond the addition of eight statutory aggravating factors, two factors have been amended to expand their scope since the original eight were enacted. Subsection (6)(a), which referred to "a person under sentence of imprisonment" when *Dixon* was decided, now encompasses "a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation." Subsection (6)(d), the prior

violent felony aggravator, has been amended since *Dixon* was decided to include additional felonies. *See* 273 So. 2d at 5. Since *Dixon*, cases applying that aggravator have upheld the use of convictions that were pending on appeal as "prior violent felonies." *E.g.*, *Peek v. State*, 395 So. 2d 492, 499 (Fla. 1981) (superseded by statute on other grounds as stated in *Merck v. State*, 763 So. 2d 295, 299 (Fla. 2000)). An offense occurring contemporaneously with the charged capital offense can be treated as a "prior violent felony" as long as it occurs before sentencing — which, by definition, it must. *See Lucas v. State*, 376 So. 2d 1149, 1153 (Fla. 1979).

This steady expansion of the number and scope of aggravating factors may be typical of states still maintaining the death penalty, but that does not make it any less problematic:

> In most states, a defendant cannot be eligible for the death penalty unless a jury finds that a statutorily enumerated aggravating factor applies to the defendant's case. However, the number and breadth of these aggravating factors have expanded over the last few decades, with most states listing more than ten factors, such that more than 90% of murderers are death eligible in many states. Thus, although most states sentence a small number of individuals to death each year, their death penalty statutes make it possible for

> nearly every murderer to be eligible for this penalty.
>
> When only a handful of offenders are sentenced to death despite expansive statutes that render most murderers eligible for the death penalty, it becomes more likely that those selected for death are being chosen arbitrarily.

Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv. C.R.-C.L.L. Rev. 223, 223–24 (2011) (footnotes omitted).

Given the breadth of the myriad statutory aggravators in Florida's death penalty statute, *see, e.g.*, *Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992), it is impossible to say they "channel the sentencer's discretion by clear and objective standards" as required by, inter alia, *Godfrey*, 446 U.S. at 428. Moreover, the sheer number of aggravating factors in Florida's scheme serve a broadening, not a narrowing, function, resulting in nearly all first-degree murder cases being death-eligible. *See generally* Stephen K. Harper, *The False Promise of Proffitt*, 67 U. Miami L. Rev. 413, 417-23 (2013).

B. The elimination of proportionality review has removed a necessary safeguard against arbitrary and inconsistent capital sentencing.

This Court originally established comparative proportionality review in Florida's post-*Furman* sentencing scheme "to ensure that the statute would be implemented in a way that would avoid the constitutional concerns articulated in *Furman*." *See Lawrence v. State*, 308 So. 3d 544, 549 (Fla. 2020) (citing *State v. Dixon*, 283 So. 2d 1 (Fla. 1973)). The United States Supreme Court cited Florida's practice of reviewing the proportionality of death sentences favorably in its decision upholding Florida's post-*Furman* capital sentencing scheme. *See Proffit v. Florida*, 428 U.S. 242, 251 (1976).

The, the Court held in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), that comparative proportionality analysis is not the only way to limit the sentencer's discretion in imposing the death penalty. More than 35 years later, this Court relied on *Pulley* and the state's conformity clause when overruling *Dixon*, 283 So. 2d at 1, which had required comparative proportionality review since 1973. *See Lawrence*, 308 So. 3d at 548.

Abandoning proportionality review is a misapplication of *Pulley*. In *Pulley*, the Supreme Court approved of a California statute that did not require the California Supreme Court to compare the defendant's sentence with sentences imposed in similar cases. 465 U.S. at 44. The statute at issue required the finding of at least one special circumstance before the death penalty could be considered, limited the jury's sentencing discretion with a list of seven statutory factors, and required review by the California Supreme Court. *See id.* at 53. The Court held this was adequate to limit the death penalty to a small sub-class of capital-eligible cases and prevent the danger of arbitrary results. *Id.*

In reaching its conclusion, the Court reviewed three cases in which it had upheld state statutes both with and without a mandate to review proportionality. *See id.* at 45-48 (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976)). In each case, the applicable statute limited the sentencer's discretion through bifurcated proceedings, the requirement of aggravating circumstances, and the consideration of mitigating circumstances; proportionality review was an additional safeguard, but not a

constitutionally required one. Nevertheless, the Court cited the Georgia and Florida practices of appellate review approvingly. 465 U.S. at 45-48; *see also Gregg*, 428 U.S. at 198 ("Moreover, to guard further against a situation comparable to that present in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate."); *Proffitt*, 428 U.S. at 259-60 (noting the reasons for imposing a death sentence "are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law.").

In discussing the Texas sentencing scheme, which lacked a statutory or judicially created requirement of comparative proportionality review, the Court noted the "prompt judicial review of the jury's decision in a court with statewide jurisdiction." 465 U.S. at 48-49 (quoting *Jurek v. Texas*, 428 U.S. at 276). The Court further noted that the Texas statute at issue effectively limited the sentencer's discretion by requiring the finding of one of five statutory aggravators to make a defendant eligible for a death

sentence. *Id.* at 48 n.9. By narrowing its definition of capital murder, the Texas statute limited the death penalty to a "narrowly defined group of the most brutal crimes and aim[ed] at limiting its imposition to similar offenses under similar circumstances." *Id.* at 50 n.10 (quoting *Jurek*, 428 U.S. at 278-79).

In contrast, as noted above, Florida's capital sentencing scheme now makes a defendant eligible for a death sentence if any one of 16 statutory aggravators is found. § 921.141(6)(a)-(p). The Florida statute does not, on its face, meaningfully limit the number of persons who are subject to the death penalty or provide a meaningful basis for ensuring that death is imposed only for similar offenses occurring under similar circumstances. Florida's long-standing practice of comparative proportionality review did that that. *See Lawrence*, 308 So. 3d at 544-55 (Labarga, J., dissenting); *see also Yacob v. State*,136 So. 3d 539, 546-47 (Fla. 2014) (receded from in *Lawrence*).

For example, in *Johnson v. State*, 720 So. 2d 232, 238 (Fla. 1998), this Court invalidated a death sentence on proportionality grounds where the aggravating circumstances included a prior aggravated assault the defendant committed against his brother;

his brother was not injured and testified the incident was a misunderstanding. The Court noted that the aggravating circumstance, "although properly found to be present, is not strong when the facts are considered." *Id.* Presumably, under *Lawrence*, Mr. Johnson's death sentence would be affirmed today despite the nature of the aggravating circumstance upon which it rested.

A meaningful narrowing of the group of defendants who may face execution must involve more than a mechanical verification of whether the State proved a particular aggravator. Without viewing the nature and proof of aggravating circumstances in an individual case within the context of the body of decisions in which death sentences have been upheld, there is no limit on the sentencer's discretion. This renders the Florida sentencing scheme unconstitutional.

V. The Eighth Amendment Precludes Execution of the Seriously Mentally Ill.

Despite its rejection of mental health evidence as supporting statutory mitigating factors, the trial court found Mr. Wells suffers from serious mental illness and neurocognitive issues. This presents the issue of whether the Eighth Amendment (and, though the Conformity Clause, the Florida Constitution) precludes the execution of the seriously mentally ill.

The Eighth Amendment guarantees the right not to be subjected to punishment that is so excessive as to be cruel and unusual. *See Roper v. Simmons*, 543 U.S. 551, 560-61 (2005); *see also Hall v. Florida*, 572 U.S. 701, 707-08 (2014). The United States Supreme Court has explained:

> [T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

Roper, 543 U.S. at 560-61.

In some situations, categorical restrictions implement the principle that punishment should be proportioned to the offense. *See Graham v. Florida*, 560 U.S. 48, 59 (2010). Thus, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held the Eighth and Fourteenth Amendments precluded execution of defendants with intellectual disabilities:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.

536 U.S. at 306. The Court reiterated that the intellectually disabled are categorically less culpable in *Hall*, which held Florida could not use a bright-line rule based on IQ to exclude a defendant from the category of intellectually disabled. See 572 U.S. at 709 ("The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.").

And in *Roper*, the Court determined that juveniles under 18 could not be placed within the "narrow category of crimes and

offenders" for whom the death penalty was appropriate because of qualitative differences between the thought processes of juveniles and those of adults. 543 U.S. at 569-70.

When considering whether a categorical restriction on execution is appropriate, the court should first consider "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Graham*, 560 U.S. at 61. Additional measures of society's standards can come from the views of medical and other experts. Id. at 62. The court should then consider whether, under controlling precedent, punishing the class of defendants in question exceeds constitutional limits. *See id.* at 61. The culpability of offenders should be considered in light of their characteristics. *See id.* at 67.

A. Objective indicia of society's standards demonstrate that sentencing the severely mentally ill to death violates the state and federal constitutions.

In 2006, the American Bar Association took the position that some defendants with severe mental disorders should not be executed:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.

American Bar Association, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, at 1 (2006) ("ABA Recommendation") (available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/dp-policy/2006_am_122a.pdf). This recommendation was also adopted by the American Psychiatric Association, the American Psychological Association, and the National Alliance of the Mentally Ill. Special Feature, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Phys. Disability L. Rep. 668, 668 (2006).

In 2014, a nationwide poll found a solid majority of Americans were opposed to executing the mentally ill. See Death Penalty Information Center, *Americans Oppose Death Penalty for Mentally Ill by 2-1* (Dec. 1, 2014) (available at https://deathpenaltyinfo.org/

news/poll-americans-oppose-death-penalty-for-mentally-ill-by-2-1). In 2015, a separate nationwide poll found that 66% of registered voters in the United States supported a severe mental health exemption from the death penalty. *See* ABA Death Penalty Due Process Review Project, *Severe Mental Illness and the Death Penalty*, at 36 (2016) ("ABA White Paper").

In 2016 the ABA reiterated its earlier position, stating:

> Executing people whose disorders or disabilities significantly impair their ability to appreciate the nature of their conduct, exercise rational judgment, or conform their behavior to the requirements of the law is fundamentally inconsistent with the retributive and deterrent goals of the death penalty.

ABA White Paper, supra, at 6; *see also* Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (adopted 2016) ("Mental Health America (MHA) calls upon federal and state governments not to threaten or use the death penalty for any accused who suffered from mental illness at the time of the crime, trial, sentencing, or execution.") (available at https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses).

The same year, the Idaho Medical Association adopted a resolution sponsored by the Idaho Psychiatric Association opposing the imposition of the death penalty on individuals determined to have suffered from "severe and persistent mental illness" at the time of their crimes. Idaho Medical Assocation, Resolution 207(16) (available at https://www.idmed.org/idaho/assets/files/AM2016/201-211.pdf).

In 2020, the American Psychiatric Association (APA) adopted the following position regarding execution of the mentally ill:

> Defendants charged with capital crimes should not be sentenced to death or executed if, at the time of the offense, they had:
>
> a. a mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law, or
>
> b. significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from intellectual disability (intellectual developmental disorder) or neurocognitive disorder.

APA, *Position Statement on Issues Pertaining to Capital Sentencing and the Death Penalty* (approved 2020) (available at https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-Capital-Sentencing-Death-Penalty.pdf).

These expert sources demonstrate that, as with youth and the intellectually disabled, there is strong societal support for the premise that the seriously mentally ill are not among the most culpable for whom the death penalty should be reserved.

B. In addition, standards set out in controlling precedent demonstrate that executing the severely mentally ill violates the state and federal constitution.

In holding the intellectually disabled could not constitutionally be executed, the Supreme Court explained their deficits did not excuse them from punishment for crimes, but diminished their culpability:

> [Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistake and learn from experience, to engage in logical reasoning, to

> control impulses, and to understand the reactions of others. [...] Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318 (citations omitted).

The Court also explained that executing the intellectually disabled often did not serve legitimate penological goals:

> *Gregg v. Georgia* identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. [...] With respect to retribution — the interest in seeing that the offender gets his "just deserts" — the severity of the appropriate punishment necessarily depends on the culpability of the offender. [..] If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution. [...]
>
> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make [intellectually disabled] defendants less morally culpable — for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses — that also make it less likely that

> they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information. […] Thus, executing the [intellectually disabled] will not measurably further the goal of deterrence.

Id. at 319-20 (citations omitted).

All these observations apply equally to those who suffer from severe mental illness as to those with intellectual disabilities. *Cf. Indiana v. Edwards*, 554 U.S. 164, 174-76 (2008) (holding a defendant may be competent to stand trial, yet unable to make the myriad decisions inherent in self-representation because of mental illness that impairs judgment and reasoning).

As experts explained with respect to Mr. Wells, it is possible for an individual to have the ability to act knowingly and yet to also have mental health diagnoses and/or cognitive impairments stemming from childhood abuse and neglect, disease, injury, or alcohol exposure, among other things, which profoundly impact that individual's capacity to process information, control conduct, and regulate impulses. Executing the mentally ill does not serve the goal of deterrence. Moreover, because of diminished capacity to

regulate conduct, execution is a form of retribution disproportionate to their diminished culpability.

Mr. Wells acknowledges that this Court has previously rejected the argument that the Eighth Amendment precludes imposing death sentences on the severely mentally ill. *See, e.g.*, *McCoy v. State*, 132 So. 3d 756, 775 (Fla. 2013). However, for the reasons set forth above, and in the interest of justice, the Court can, and should, revisit this issue and reexamine its prior holdings. In light of his persistent and severe mental health diagnoses and neurocognitive disorder, Mr. Wells's sentence violates his right to be free from cruel and unusual punishment under the Eighth Amendment and the Florida Constitution. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

CONCLUSION

Mr. Wells requests that his sentence of death be vacated as unconstitutional; alternatively, he requests a new penalty phase trial.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Janine D. Robinson, Assistant Attorney General, Capital Appeals Division, on December 30, 2021. I certify that this brief complies with the word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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