

IN THE SUPREME COURT OF FLORIDA

REYNALDO  
FIGUEROA-SANABRIA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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Case No. SC21-1070

APPEAL FROM THE CIRCUIT COURT  
IN AND FOR PINELLAS COUNTY  
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

Appellant, REYNALDO FIGUEROA-SANABRIA, is referred to in this brief as Figueroa, his preferred surname (see R2701,3402,3427, 3449-50).

All emphasis is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

Figueroa was charged with two counts of first-degree murder in the deaths of John Travlos and Germana Morin (R59), who died from multiple sharp force injuries on their houseboat in Pinellas County in the early morning hours of April 12, 2013. In a series of pretrial hearings Figueroa sought unsuccessfully to replace his court-appointed first-phase attorney Keith Hammond [Issue One]. Just prior to trial in October 2019, Figueroa objected to the state's warrantless acquisition of cell-site location information (CSLI). The trial court, after assuring Figueroa that his objection was preserved, allowed the state to introduce that evidence [Issue Two]. The case proceeded to trial before Judge Pat Siracusa and a jury, and resulted in verdicts of guilty as charged on both counts (R651-52; T3058-59).

The state's evidence was circumstantial, and, as defense counsel pointed out to the jury, largely undisputed (see T2957). The prosecution theory was that Figueroa committed the murders to steal the victims' jewelry, while the defense theory - - at least by implication - - was that Figueroa's girlfriend Tessa Cooper (an admitted drug addict), alone or with the assistance of one or more others (but not Figueroa)

committed the murders and stole the jewelry. As defense counsel put it it came down to “So who was sleeping that night and who was out that night” (T2947).

Figueroa and Cooper were alone in their apartment in the vicinity of the marina where the killings occurred. According to Cooper, she remained in the apartment all night; she fell asleep next to Figueroa around 1:00 a.m. and the next thing she remembered was receiving a phone call from Figueroa (around 4:30 a.m.) frantically asking her to pick him up near the marina (T2952-55). According to Figueroa, it was he who remained in the apartment all night; when he awoke around 4:00 a.m. to take his medications Cooper was gone, his wallet was open on the counter and his debit card was missing. He called her about this (it was not the first time it happened), and she said she’d gone for gas and cigarettes and she’d be right back (T2756-57).

The state introduced cell-site location information (T2438-2502,2515-16, R2128,2160-83), and argued it extensively in its opening and closing statements (T1006,1013-15,2881-86,2890,2903-09,2997-3002), for the purposes of placing Figueroa near the crime

scene, branding him a liar, and corroborating Tessa Cooper [Issue Two].

Other key pieces of circumstantial evidence presented by the state included Figueroa's and/or Tessa Cooper's possession of numerous items of the victims' expensive jewelry (some of which was pawned by Figueroa that morning, and most of which was mailed by him that day from a Pak'n Post store in Palm Coast, Florida to his brother in Utica, New York)<sup>1</sup>; bloodstain DNA matching both victims on clothing found in a dumpster at a 711 on Roosevelt Blvd. near the airport<sup>2</sup>; and touch DNA matching Figueroa on a duct-tape roll and on a wadded-up piece of duct tape in the victims' bedroom.<sup>3</sup> (Both victims had been bound with duct tape; there was no DNA evidence obtained from any of the numerous pieces of tape on the victims' bodies). (Figueroa had worked for Travlos on the boat, as a detailer

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<sup>1</sup> See T1262-80,1298-1314,1333-60,1376-99,1466-80,2075-80,2248-50,2766-70,2800-01.

<sup>2</sup> See T1174-77,1209-19,1247-50,2204,2367-68,2540-69.

<sup>3</sup> See T1719-23,1778,2320,2354-55,2583-92,2610.

and handyman, on numerous occasions, and he often used duct tape).<sup>4</sup>

Tessa Cooper testified that when they pulled into the 711, as she was vacuuming the van, she saw Figueroa open the dumpster and throw away some Publix bags. She did not know what was in the bags (T2069-70). At trial she identified the clothing items which were later recovered from the dumpster as Figueroa's (T2119-24). Figueroa testified that it was Cooper who told him to stop at the 711 to vacuum the van. She handed him a Publix bag and asked him to throw it in the dumpster (T2761-62,2795). Figueroa testified that the articles of clothing which were later recovered from the dumpster were not his (T2796-97).

At the outset of the jury penalty phase, when Judge Siracusa informed Figueroa that he was going to allow his attorney Daniel Hernandez to present mitigating evidence even though Figueroa had directed him not to, Figueroa waived his right to counsel [Issues Three, Four, and Five], and presented no mitigation. The jury came

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<sup>4</sup> See T2748,2799; and 1104-06,1125-26,1135-37,1153-55,1160,1440-43,1449,1616-17,2001-02,2024-25,2735-51,2786.

back with a three-part question during its deliberations in which they indicated confusion over the verdict form. Prior to the judge's response, attorney Hernandez, with Figueroa's consent, was reinstated as counsel. Judge Siracusa made a few changes and provided the jury with a new verdict form. After resuming deliberations, the jury returned a unanimous death verdict which found - - three times - - that the aggravating factors were sufficient, and contained no findings regarding mitigating factors, or weighing aggravators against mitigators [Issues Six and Seven].

A four-part Spencer hearing was held in which the defense presented two mental health experts (Drs. Eisenstein and Wu) in support of the two statutory mental mitigating factors and brain injury (R3703-3809,3823-3931), and the state presented three rebuttal experts (Drs. Holder, Gamache, and Lazarou)(R3967-4046, 4053-4117,4118-4203).

On July 2, 2021, Judge Siracusa imposed the death penalty on

each count, finding five aggravating factors<sup>5</sup>; eight nonstatutory mitigating factors<sup>6</sup>, and apparently rejecting - - yet according some weight to - - the two statutory mental mitigators<sup>7</sup> (R2614-41).

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<sup>5</sup> Avoid arrest; financial gain; HAC; CCP; and victims vulnerable due to advanced age and disabilities.

<sup>6</sup> Brain injury; upbringing in poor drug-infested neighborhood; emotional and physical abuse by father; mother's extreme mental health problems and her abandonment of family (resulting in increased abuse by father); employment history; medical ailments; loving relationships with some family members; and low risk of future dangerousness if sentenced to life in prison.

<sup>7</sup> Extreme mental or emotional disturbance; and impaired capacity.

## SUMMARY OF ARGUMENT

[Issue One] As demonstrated not only by Figueroa's complaints but also by attorney Hammond's own statements during a series of pretrial hearings over a nearly six-year period, the attorney-client relationship had completely broken down, to the point where it was an abuse of discretion and a Sixth Amendment violation for the trial judges to refuse to appoint substitute counsel.

[Issue Two] The state's warrantless acquisition of cell-site location information, and its introduction and argumentative use of that evidence to place Figueroa near the crime scene, to brand him a liar, and to corroborate the state's key witness (and the defense's alternative suspect) Tessa Cooper, violated the Fourth Amendment.

[Issue Three] Figueroa's waiver of his right to counsel in the jury penalty phase was invalid, because it was procured as a result of the trial court's refusal to allow Figueroa to exercise his right under Florida law to direct his penalty phase attorney not to present mitigating evidence.

[Issue Four] The trial court compounded his waiver of counsel error by failing to explain to Figueroa that presenting mitigating evidence to the jury would not delay his appeal.

[Issue Five] The trial court abused his discretion by failing to appoint independent counsel to present mitigating evidence to the jury during the penalty phase because (1) it is clear from the record that he thought it was important that the jury should hear the mitigating as well as the aggravating evidence before making its decision, and (2) it is clear from his statements prior to the Spencer hearing that he didn't realize that he had discretion to appoint independent counsel for the jury penalty phase.

[Issue Six] Figueroa's death sentence was unlawfully imposed because no valid jury verdict was returned. The nonstandard verdict form which the trial court provided to the jury was noncompliant with the requirements of Florida's death penalty statute and was inconsistent with the jury instructions. As a result the jury returned a "verdict" which made essentially the same finding - - that "the aggravating factors are sufficient" to warrant a sentence and verdict of death - - three times, and contained no findings whatsoever as to whether any juror or jurors found any mitigating factors, or whether the aggravating factors outweighed the mitigating factors. This non-verdict amounts to fundamental and structural error. Moreover, even if the DiGuilio standard could apply, the improper verdict form

obviously affected the jury's deliberations (especially in light of the fact that they brought their confusion to the trial court's attention, and the new verdict form could only have perpetuated their confusion), and the error obviously affected the verdict because the error is the verdict.

[Issue Seven] In light of the foregoing, the judge erred in according great weight to the jury's non-verdict.

[Issue Eight] By abandoning proportionality review during roughly the same time period as it has serially discarded other protections designed to ensure that the death penalty is not applied in an arbitrary, capricious, or discriminatory manner, this Court has misconstrued the United States Supreme Court's decision in Pulley v. Harris, 465 U.S. 37 (1984) and rendered Florida's capital sentencing scheme unconstitutional.

[Issue Nine] The death penalty is reserved for first-degree murders which are among both the most aggravated and least mitigated. This case does not satisfy the second prong of that test.

## ISSUE ONE

BECAUSE THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN FIGUEROA AND HIS FIRST-PHASE DEFENSE ATTORNEY KEITH HAMMOND HAD COMPLETELY BROKEN DOWN, THE TRIAL JUDGES - - IN A SERIES OF PRETRIAL HEARINGS - - ABUSED THEIR DISCRETION AND VIOLATED FIGUEROA'S SIXTH AMENDMENT RIGHTS BY REFUSING TO APPOINT SUBSTITUTE COUNSEL

Although a defendant is not necessarily entitled to a particular lawyer with whom he can have a “meaningful relationship”, when the attorney-client relationship completely collapses, a trial court’s refusal to substitute new counsel violates the Sixth Amendment. See, e.g., United States v. Moore, 159 F.3d 1154 (9<sup>th</sup> Cir. 1998); State v. Hendershot, 153 P.3d 619,623-25 (Mont.2007); Young v. State, 102 P.2d 572 (Nev.2004); State v. Cromwell, 856 P.2d 1299,1304 (Kans.1993). In the instant case the record shows that the attorney-client relationship between Figueroa and his first-phase defense attorney Keith Hammond went bad from the very beginning and continued to deteriorate over a five year period, resulting in a series of Nelson<sup>8</sup> hearings in which Figueroa tried in vain to have Hammond replaced; asserting

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<sup>8</sup> Nelson v. State, 274 So.2d 256 (Fla. 4<sup>th</sup> DCA 1973).

that the lawyer was not communicating with him or keeping him informed, and was not properly investigating and preparing his defense. These hearings, for the most part, resulted in kicking the can down the road. For a brief period of time in 2016, due to his frustration with Hammond, Figueroa reluctantly invoked his right to self-representation, but relented because of his inability to adequately participate in the discovery process or prepare his case from his jail cell (R3004-3243). The record does not suggest that Figueroa's dissatisfaction was a pretext to delay the trial, and in fact the trial date was continued on several occasions due to the uncertainty in the law following the Hurst<sup>9</sup> decisions; the fact that the original prosecutors kept getting appointed to the bench; and the uncooperative behavior of the state's medical examiner (R2996-3004;3043-46,3057-60,3069, 3082,3098-99,3250-52,3258-59,3289-95,3301,3307-13,3327,3497).

Keith Hammond was appointed after the Public Defender, who had previously represented a potential witness against Figueroa, withdrew due to that conflict of interest (R112-115). The attorney-

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<sup>9</sup> Hurst v. Florida, 577 U.S. 92(2016); Hurst v. State, 202 So.3d 40 (Fla. 2016).

client relationship quickly went south from there. On September 12, 2014 - - before Figueroa ever moved to replace the attorney - - Judge Ley opened the status hearing “So where are we today?”, and Hammond volunteered “Judge, at this point and I explained briefly to the client where I have an ethical problem” (R2794). Hammond explained that he has a small firm and one of his two critical employees was in the hospital for an undetermined time period, and it was putting pressure on him. “I’m in the office at night. I’m making copies. I’m answering phones.” In all his other cases “there’s no problem . . . we’re getting it done.” But in Figueroa’s capital case “it doesn’t feel like we’re treading water. That caused a problem for the client because this case is different. Honestly, I don’t know what’s going to happen next week when we have a staff meeting. I just don’t know. So we’ve got a trial date pending in February. That was, you know, assuming that everything would be done” (R2794-95). Hammond stated that he needed to bring this to the court’s attention, and that under the circumstances “the client would probably rather have. . . other [c]ounsel appointed at this point.” Judge Ley replied “Well, I think that’s for you and [then-Chief] Judge McGrady probably” (R2796). She told Hammond he’d done the right thing by putting it on the record, and a de-

fendant's "wishes are to be respected to some extent, but they never get to pick their appointed lawyer"(R2797).

After that hearing, Figueroa filed his initial pro se motion to dismiss counsel, based in part on Hammond's statements in open court (R160-62). At a hearing before Judge Ley on October 17, 2014, Hammond stated that his secretary was back part-time and things were starting to get back on track. Asked if he was now in a position to keep the case, he replied "We can", but he knew his client had been unhappy from day one. "[I]t doesn't matter to me personally, Judge." "So I serve at the pleasure of the Court. If between the client and yourself you want me on the case, that's fine. If you want to put another attorney on there, that's fine." Judge Ley replied "Why would I want to put another attorney on it?" (R2817-18).

When the judge questioned Figueroa about his concerns, he made it clear (as he did throughout all the pretrial proceedings) that he had no problem with his penalty phase attorney Danny Hernandez (R2823,2826; see R2818-19,2970,3010-11,3043-44,3457). Figueroa stated that Hammond, his first-phase lawyer, had been to see him for a total of three hours (all but one of those visits lasting only 10-15 minutes) during the ten months he'd been on the case. Hammond

didn't respond to his phone calls or letters, and "the communication between me and him is not even good from the beginning" (R2827-28,2837-38). When the judge asked "Why?", Figueroa said "You should ask him, not me. He don't answer me" (R2828). Judge Ley observed that she found it "ironic" that Figueroa would have had much more access to his lawyers when he was represented by public defenders and regional counsel. Figueroa replied that he had no problem with those lawyers, they withdrew because of conflict of interest (R2829-32). Judge Ley explained that in order to replace Hammond it would not do to complain about insufficient hand-holding; Figueroa would have to show that he was not providing effective assistance (R2832-33). Figueroa stated that Hammond's investigator had lied to him about a DVD, and that he'd sent Hammond a letter about that, to which he didn't respond (R2840-41). The judge urged Figueroa, who was reluctant, to speak with Hammond now, and after a brief off-the-record conversation between the two of them Hammond told the judge "[A]t this point I see it as a working relationship between himself and myself and the investigator. I think, Judge, it is at such a point where you're going to have to seriously consider appointing somebody else" (R2847).

Judge Ley commented that “if you fail to give him effective assistance of [c]ounsel, then he would be entitled to a new lawyer”, but she hadn’t heard anything like that today (R2848-49). On the record before her she denied the motion to discharge counsel, but - - recognizing that “[t]his is obviously a very serious case” - - Figueroa could bring the matter up again before herself or a successor judge if there were issues in the future (R2849-50,2856-57).

Nine months later the impasse continued. In a hearing before Judge Ley’s successor, Judge Covert, Mr. Hammond said he’d received a message from co-counsel Hernandez that the client was unhappy with him. “I don’t have a schedule to see him until next week”, and (almost word-for-word what he’d said to Judge Ley nine months earlier) “So, you know, if there’s a problem, if the Court wanted me off the case, that’s fine. If you want me to continue on the case, that’s fine. I serve at the Court’s pleasure” (R2913). Asked by the judge if he had anything he wanted to discuss, Figueroa said it had been almost a year since Hammond had been to see him, and he [Figueroa] didn’t know what was going on with his case (R2913). Hammond replied “I don’t have my list on what - - for visits, but I’ve got him scheduled for next week.” It is easier for him to visit “when I’m down doing the dep-

ositions and things like that” (R2913). Judge Covert told Figueroa that “[j]ust because he hasn’t visited, it’s not cause for me to discharge him” but “I am concerned about your concerns.” He would reset the matter in a couple of weeks to see if things were changing (R2914). At a hearing two weeks later Figueroa told the judge that Hammond had visited him and they talked and they were okay (R2926-27). The judge assured him that if he were to again become dissatisfied with Hammond’s representation “I can consider replacing counsel depending upon what the issue is” (R2927-28).

The rapprochement was short-lived. On November 5, 2015, Figueroa filed a motion to dismiss Hammond as counsel, asserting that he was not providing effective representation required by the Sixth and Fourteenth Amendments, and specifically that he had failed to provide him with essential discovery materials including police reports, lab reports, and witness depositions (R173-75). At the ensuing hearing, Figueroa told the Judge Covert he was facing the death penalty and “at this point he’s been representing me for 22 months, and I don’t know what’s going on whatsoever in my case.” He was unable to contact Mr. Hammond, and “I don’t even trust him” (R2968-69). Hammond said “as far as what’s in the motion, technically it’s not

sufficient”, but he also stated that sometimes attorneys and clients just don’t get along and “I think that this is going to cause a problem for the next 20 years.” “And I have to admit that sometimes it’s a source of irritation to me that every time I turn around I’m getting another motion from him. I have to admit that that sometimes does affect me because I have the responsibility of his life in my hands.” There was a problem with their working relationship from day one. “We’ve both tried. We both tried. And it’s not - - he gets on fine with Mr. Hernandez. So it just must be - - I don’t know if it’s me. I have my way of doing things. All my other clients love me. I’ve had two or three in the past that we just didn’t get along. We went separate ways.” Hammond pointed out that this was not only a potential death case, it was one where the state was seriously seeking death. There was “a problem that the client and I have not been able to resolve from day one”, and it was “actually getting worse” (R2969-70).

Judge Covert told Hammond, “You don’t have to sit there and be his best friend. You have to advise him of what the law is and do your best job. You’re an excellent attorney” (R2970-71).

After some discussion about what discovery materials had been provided or would be provided (R2971-79), Judge Covert denied

Figueroa's motion, saying "you don't have grounds. This isn't reasons. You need to get along with him, and he's doing a good job for you, and he's doing everything he can to share the information. But he doesn't have the information to give you sometimes, plus you are his dilemma. You're on death. He has to print them out. His staff is not there. So what more do you expect?" (R2978-79). Figueroa reiterated that he was not getting any information from Hammond; no paperwork, police report, any of that (R2979).

On January 26, 2016, Figueroa filed a pro se motion to discharge counsel in which he invoked his right to self-representation (for the first phase only) (R206-08; see R3004-11). After a Faretta<sup>10</sup> inquiry, Judge Covert allowed him to represent himself, and appointed Hammond as standby counsel (R3011-45). [As far as keeping Danny Hernandez as counsel for a potential penalty phase, the judge clarified that Figueroa only wanted to make his own decisions for the guilt phase, and he was okay with counsel making the penalty phase decisions. See Issue III, infra].

Unsurprisingly, the next six months were beset with frustration for all concerned - - especially Figueroa - - due to his lack of expertise

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<sup>10</sup> Faretta v. California, 422 U.S. 806 (1975).

and due to the practical impossibility of preparing a first-phase defense, in a complex circumstantial-evidence capital trial, from the confines of a jail cell (R3004-3245,3332). On August 19, 2016, Figueroa acknowledged that he was unable to represent himself and asked for a first-phase attorney, whereupon Judge Covert said, “Mr. Hammond, you’re it” (R3245, see R3323).

On August 29, 2017, Figueroa again moved to dismiss Hammond, asserting ineffective assistance, lack of preparation, and failure to provide discovery information (R302-05). The hearing was held a month later before Judge Pat Siracusa (who ultimately presided over Figueroa’s trial and penalty proceedings). Figueroa began to recount the three-year history of his representation by Hammond, pointing out the attorney’s statements before Judge Ley expressing doubt that he had the time to work on Figueroa’s case. Judge Siracusa asked Hammond point blank, “[D]o you have the time to handle Mr. [Figueroa’s] case?”, and the lawyer initially replied “It’s borderline, Judge. I know that on - - I have taken - - I have suspended my name off the list for death cases because my other practice is so heavy. It’s borderline” (R3318-19). Then he backpedaled and answered affirmatively

when the judge asked him again if he had time to do this case (R3319).

Figueroa told the judge he had filed a complaint with the Florida Bar concerning Hammond's failure to communicate with him or keep him informed about his case. Hammond's eight visits over the three-year period typically lasted only 5 to 7 minutes apiece. [Judge Siracusa thought that seemed improbable]. When Figueroa learned the trial was set for March he sent Hammond a letter asking him to "bring me everything that you have so we can see where we stand for it." When Hammond came to see him on August 21 (eight days before Figueroa filed the motion to dismiss him as counsel), "he directly tell me he didn't work on my case. He didn't have time to work on my case. There was no deposition, that he didn't do anything" except for background checks on four witnesses (R3320-21,3324-25).

Judge Siracusa asked Hammond if he'd done any depositions, and the lawyer replied "I thought we did some depositions." He pointed out that for "a long period of time" [which was actually about five-and-a-half months out of more than three years] he was just standby counsel (R3321). After some back-and-forth between Figueroa and the judge concerning what Hammond had or had not done (R3329-

34), the judge told him to write down very specific things which he needed addressed in December “so when I ask you one through ten or one through a hundred or however many there are what is it you’re concerned that hasn’t been done, if it hasn’t been done and we can’t get it done, I’ll give you a new attorney. If it can be done, there’s no reason for me to replace Mr. Hammond right now” (R3334). Hammond assured the judge that if there was something he hadn’t done he would bring it to the court’s attention because death is different (R3335). The prosecutor asked the judge to clarify whether Figueroa was invoking his right to self-representation, whereupon the judge explained, “There is no downside to giving Mr. Hammond a chance to get it done. And if he’s not able to get these things done or put them on a schedule to be done, then I’ll give you a new attorney” (R3336). Figueroa was resigned: “Well, I really understand that the way he’s representing me is not the right way. Like I say, there is nothing that I could say. I don’t want to represent myself because I don’t have the way to get a motion granted. I went through JAC. I mean, I did everything like it was supposed to do and it was everything denied. Like you say, you cannot fire him. He’s going to keep representing me.

Like I say, I feel this is not a fair trial, but there is nothing I can do.

Let's see what happens in December" (R3337).

In December, Hammond advised the judge he was working on everything that was on the list (R3353). In January 2018, in a status hearing in which Figueroa was apparently not present, the prosecutor said to Judge Siracusa, "I don't know if you recall. . . . [H]e's kind of teetered back and forth on the pro se stuff, and he had some things he wanted Mr. Hammond to do. And we wanted to go through it just to kind of pacify him." The judge said "How about can we pacify him on next Thursday?" (R3358).

Then the trial date was rescheduled at Mr. Hammond's request and without objection by the state until October 2018 and then March 2019 (R3369-76,3381-88,3403-04,3410-15).

Meanwhile, in February 2018 Figueroa wrote to Chief Judge Rondolino saying "my lawyer do not come and see me it's been almost year and half so I don't have any knowledge of what he's doing. . . ." (R350). In August he wrote to Judge Siracusa, mentioning the list he'd sent to Hammond at the judge's suggestion. "[I] have try to contact Mr. Hammond in different way's and i didn't have luck, Your Honor"; it had been more than a year since Hammond came to talk to

him about his case. Figueroa was begging for a hearing in which the lawyer could explain in front of the judge what he's been doing with the list and the rest of his case "so the court don't think I'm lying" (R359-60). Another letter followed in which Figueroa thanked the judge for setting a hearing, and he attached a copy of the list of witness depositions he wanted counsel to take and potential evidence to be investigated (R362-66). Figueroa also stated that the trial was then scheduled for October 29, 2018 "and the last time Mr. Hammond came to Jail and see me was August 21, 2017" (more than a year earlier) and "he told me he did not have work in my case" (R362).

At the outset of a November 9, 2018 hearing, Hammond said "I always tell you I would not be offended if you take me off the case". "We're still - - I drive him crazy, and he drives me crazy" (R3426). That said, Hammond added that he was making progress; he got a lot of depositions done this week and he targeted more that still needed to be done (R3426,3429). Figueroa stated that he and Hammond had spoken briefly right before today's hearing; for the first time in 15 months (R3428). Hammond acknowledged that he was "behind on my visits", having missed two or three appointments "because of court calendars changing on me" (R3430-31). He was planning to use part of Monday

to come down and speak with Figueroa (R3433). Hammond explained what he was doing and what still needed to be done. Judge Siracusa told him he wanted to make sure that everything on the list - - especially the most important things - - would be accomplished (R3429-33).

In the next several hearings Figueroa continued to express the belief that he could not get a fair trial with Hammond as his attorney, and that the lawyer's pattern of failing to consult or communicate with him was ongoing (R3453-54,3457-58,3550-53,3558-59,3574-75). The judge said the list was now down to a video and the DNA, and "we've got a trial on the horizon" (R3553-54). In a July 2019 letter to Judge Siracusa, in a more desperate tone than his previous letters and in-court statements, Figueroa compiled the nearly five-year chronicle of lack of communication and failure to keep him informed:

. . . the court know i try to dismiss this Counsel for multiple reason that could been colaborated to the court even in the hearing for the motion for dismiss Mr. Hammond even say he don't got time or he got to many cases is for me outrageous how this court allow this Counsel represent me in a Capital Felony i'm clearly know this is a violation of the rule 3.112 i'm keep trying to work with Mr. Hammond but please tell me how your Honor want i try to mail multiple letters send people to his call office never there my family try to call never answer and in the last past 5 years i got 1 visit a year if i'm lucky i get 2 a year then i try to tell him what i need to get done and nothing i even send letters

asking begging to see me before he do depo on some witness nothing your Honor. . .

(R468)

On September 26, 2019, five days before jury selection for his trial finally began, Figueroa filed with the clerk of court a written 21-paragraph document styled “Letter to be Put on Record in my File.” Copies may have been sent (it says “re” instead of “cc”) to the Department of Justice, the Innocence Project, the Attorney General, the Florida Supreme Court, the Second DCA, and Colleen Quin (investigator)/Daniel Hernandez (R566). In that letter, Figueroa made numerous specific allegations regarding Mr. Hammond’s lack of preparation, investigation, and communication (R567-72). Examples are:

(viii) Hammond never checked whether the state had obtained a warrant for Figueroa’s records from his phone or phone tower locations; “[I] told him all that in 2014 lack of interest.” [See Issue II, infra].

(ix) Hammond never investigated anything from Figueroa’s jail stay in North Carolina; “I talk to him about if cameras work in confinement to verify time and date they put jail-house snitch in there.”

(x) Hammond never investigated whether the clothes they found in the dumpster fit him, or whether the DNA was his.

(xi) Hammond never investigated whether the victims’ wounds were consistent with the box cutter they found in Figueroa’s apartment.

(xii) Hammond never confronted the state's key witness Tessa Cooper during her deposition with statements she made in a civil lawsuit that she didn't know what happened because she was a drug user. [See T229-36].

In the same letter Figueroa recounted the now-five-year history of Hammond's failure to communicate with him or to keep him informed about his capital case (R570-72). Figueroa cited Fla.R.Crim.P. 3.112 (minimum standards for attorneys in capital cases) and the Florida Bar's Rules of Professional Conduct 4-1.3 (diligence), as well as a probable mis-cite to 4-4.2 (limiting communication by a lawyer with a person he knows to be represented by another lawyer). [He likely meant 4-1.4 (communication), which requires a lawyer to reasonably consult with his client and to comply with reasonable requests for information] (R570-72).

For the sake of clarity, undersigned counsel needs to specify what he is not arguing in this direct appeal. He is not raising - - nor can he raise - - an issue of ineffective assistance of trial counsel. See Blanco v. Wainwright, 507 So.2d 1377,1384 (Fla. 1987); Steiger v. State, 328 So.3d 926 (Fla. 2021). [Figueroa reserves the right, in the event that his conviction is affirmed on appeal, to raise claims of ineffective assistance by means of postconviction motion as prescribed in

Blanco and Steiger]. Nor is this issue premised on a claim of failure to conduct Nelson inquiries, since a long series of Nelson inquiries occurred in this case. Instead, Figueroa's contention in this Point on Appeal is simply that during the more than five year time frame before the trial finally took place it became glaringly apparent that the attorney-client relationship between Figueroa and Hammond had completely collapsed, and therefore the Sixth Amendment required that Hammond be replaced by another appointed attorney. Hammond's own statements in open court during multiple hearings amply demonstrate why Figueroa lost all trust and confidence in him. Hammond, who set the entire chain of deteriorating events in motion by telling Figueroa and then advising the court that he had an "ethical problem", made it as clear as he could (but without actually moving to withdraw) that he would prefer to be anywhere else. He made frequent excuses about how the press of other work in his small (apparently solo) practice impaired his ability to find the time to work on Figueroa's case; even stating that he had suspended his name off the appointment list for death cases because his practice was so heavy. Asked point blank (in Figueroa's presence) if he had time to work on this case, Hammond twice said it was "borderline", before backpedal-

ing. Also noteworthy is the fact that Hammond rarely if ever disputed the factual accuracy of Figueroa's assertions regarding lack of communication. Instead he often attributed it to how busy he was in managing his practice. Not surprisingly, an intractable personal antagonism developed, and Hammond was candid enough to make it clear to the trial judges that it was mutual. On several occasions he advised the court that the working relationship had deteriorated to the point where it would be better for all concerned if the court appointed other counsel, especially considering that Figueroa was facing the death penalty. However, the ultimate outcome of the series of Nelson hearings is that the can kept getting kicked down the road, and Hammond ended up representing his disconsolate client at trial.

Granted a defendant is not entitled to choose his appointed lawyer, or to have one with whom he can have a cordial relationship. That, however, doesn't mean that the relationship can be toxic and adversarial, especially when the record shows that the attorney's own statements, his patterns of behavior toward the client, and his unwillingness or inability to maintain a reasonable level of communication was at least equally responsible, if not more so, for the breakdown of trust. When the attorney-client relationship completely collapses a

trial court's refusal to substitute new counsel violates the Sixth Amendment. Moore, 159 F.3d at 1158-60; Hendershot, 153 P.3d at 623-25; Young, 102 P.2d at 576-78; Cromwell, 856 P.2d at 499-500.

Because it is so fact-specific, a trial court's decision regarding discharge or substitution of counsel is reviewable under an abuse of discretion standard. Guardado v. State, 965 So.2d 108,113 (Fla. 2007); Martel v. Clair, 565 U.S. 648,663 (2012); see also Wilson v. State, 753 So.2d 683,688-89 (Fla. 3d DCA 2000). When a breakdown of the attorney-client relationship has occurred, a trial court may discharge and replace appointed counsel. See Curtis v. State, 32 So.3d 759,760 (Fla. 2d DCA 2010) Various state and federal appellate courts have established basically similar three-or-four-part tests for the exercise of discretion on a motion to substitute counsel<sup>11</sup>. These factors include (1) the timeliness (or lack thereof) of the defendant's request; (2) the adequacy of the trial court's inquiry; (3) the extent of the conflict or breakdown in communication between the lawyer and client, and whether it was so great as to prevent an adequate defense, and (in some jurisdictions) (4) the client's responsibility, if any, for

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<sup>11</sup> See Martel, at 663, noting that the factors "may vary a bit from circuit to circuit."

that conflict. Decisions from the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh federal circuits<sup>12</sup>, and from state appellate courts in Connecticut, New Hampshire, Colorado, Pennsylvania, Ohio, Nevada, South Carolina, and Wisconsin<sup>13</sup>, illustrate this approach. The Kansas Supreme Court expressly prefers a somewhat different test: “Justifiable dissatisfaction . . . includes a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between the attorney and the defendant” and may, under certain circumstances, require the appointment of substitute counsel in order to protect the defendant’s Sixth Amendment rights.<sup>14</sup>

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<sup>12</sup> United States v. Allen, 789 F.2d 90,92 (1<sup>st</sup> Cir. 1986); United States v. John Doe No. 1, 272 F.3d 116,122-23 (2<sup>nd</sup> Cir.2001); United States v. Savage, 970 F.3d 217,249 (3<sup>rd</sup> Cir. 2020); United States v. Horton, 693 F.3d 463,466-67 (4<sup>th</sup> Cir. 2012); United States v. Powell, 847 F.3d 760,778 (6<sup>th</sup> Cir. 2017); United States v. Vizcarra-Millan, 15 F.4<sup>th</sup> 473,496 (7<sup>th</sup> Cir. 2021); United States v. Moore; supra [9<sup>th</sup> Cir.], United States v. Lott, 310 F.3d 1231,1250 (10<sup>th</sup> Cir. 2002); United States v. Calderon, 127 F.3d 1314,1343 (11<sup>th</sup> Cir. 1997).

<sup>13</sup> State v. Kerlyn T., 215 A.3d 1248,1258 (Conn.App. 2019); State v. Moussa, 53 A.3d 630,635 (N.H. 2012); People v. Bergerud, 223 P.3d 686,695 (Colo.2010); Commonwealth v. Cook, 952 A.2d 594,613 (Pa. 2008); State. v. Holin, 880 N.E. 2d 515,520 (Ohio App. 2007); Young v. State, supra, 102 P.3d at 574 [Nevada]; State v. Sims, 405 S.E.2d 377,380 (S.C. 1991); State v. Lomax, 432 N.W. 2d 89,90-91 (Wis. 1988)

<sup>14</sup> State v. Jasper, 8 P.3d 708,711 (Kans. 2000).

In the instant case, Figueroa's assertions of a breakdown in the attorney-client relationship were timely and consistent, and spanned three presiding judges and a succession of prosecutors. His initial motion to dismiss counsel was filed in October 2014 - - five years before the trial commenced - - and was preceded by attorney Hammond's statement in open court that he had an "ethical problem" in representing Figueroa due to law office management issues. Figueroa re-raised his increasing frustrations and concerns on numerous occasions, culminating in a five-and-a-half month period when he felt he had no alternative but to self-represent. When Figueroa was stymied by the practical impossibility of preparing a capital trial defense from a jail cell, Judge Covert (Judge Siracusa's predecessor) - - knowing the adversarial relationship between Hammond and Figueroa - - could easily have appointed substitute counsel, instead of prolonging everyone's agony and reinstating the Sixth Amendment conflict by reflexively saying "Mr. Hammond, you're it." None of Figueroa's motions to discharge Hammond were filed on the eve of trial, and the series of continuances were mostly attributable to the replacement of prosecutors, the recalcitrant medical examiner, the Hurst decisions, or the

discovery process. There was no judicial finding, and no evidence, that Figueroa's efforts to discharge Hammond were motivated to delay the trial. See Tennis v. State, 997 So.2d 375,379 (Fla. 2008) and Fleck v. State, 956 So.2d 548,550 (Fla. 2d DCA 2007)(trial court made no findings that defendants were improperly attempting to delay the proceedings), and see United States v. Moore, 159 F.3d. at 1159 ("In consistent, persistent representations to the [trial] court, Moore presented strong evidence of an irreconcilable conflict"); Hendershot, 153 P.2d at 624-25 (" . . . Hendershot made repeated complaints about the relationship between him and his counsel [dating] back to the day following his probation revocation hearing, and [they] were made well in advance of trial"); Young, 102 P.2d at 577. In the last-named case:

Young made multiple motions for substitute counsel. Notably, Young made his first motion to substitute counsel on May 12, 1999, over three and one-half months before his trial started. While it is true that Young's last attempt for substitution of counsel was made on the first day of trial, we note that this was not the first time that Young attempted to have his counsel replaced. Additionally, it was the district court's repeated continuance of Young's motion that created the need for Young to argue his motion on the eve of trial. There is no proof in the record that Young filed his motions for dilatory tactics of bad-faith interference with the administration of justice. Also, had the district court initially granted Young's motion, the extent of resulting inconvenience or delay in his trial would have been

minimal, if at all. Thus, we conclude Young's motions were timely.

As far as the trial judges' inquiries, frequency should not be confused with adequacy. They largely consisted of efforts to "pacify" Figueroa, or, alternatively, to face him with the Hobson's choice of Hammond or DIY. At the risk of overusing the phrase, each hearing resulted in kicking the can down the road until the next hearing. Figueroa's very specific complaints regarding Hammond's failure to maintain reasonable communication with him were rarely if ever disputed by Hammond, who instead made excuses related to the pressures of his law practice, and were not resolved in the series of hearings. And the situation never got any better.

In any criminal or civil case, and especially in a case in which the state is seeking to put the client to death, lawyer-client communication is a necessity, not a luxury. It certainly encompasses much more than mere "hand-holding", which is how the judges in Figueroa's case were inclined to dismiss it. Attorney Hammond himself - - in repeatedly making it clear to the trial judges in Figueroa's presence that he wouldn't be heartbroken to be relieved of this case - - pointed out that "death is different" (R3335, see 2970), but he never

seemed to apply that principle to communicating with his client or keeping him informed.

Hammond's earliest representation to Judge Ley that he had an ethical problem proved over the years to be correct, though it was not because his employee was in the hospital. Rule of Professional Conduct 4-1.3 requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Rule 4-1.4 requires that a lawyer shall "(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; [and] (4) promptly comply with reasonable requests for information."

The importance of adhering to these ethical standards is magnified in death penalty cases. Because death is different Florida Rule of Criminal Procedure 3.112 (Minimum Standards for Attorneys in Capital Cases) provides in its Statement of Purpose that "[m]inimum standards that have been promulgated concerning representation for defendants in criminal cases generally and the level of adherence to such standards required for noncapital cases should not be adopted as sufficient for death penalty cases. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably

skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.” Rule 3.112(j) provides that no court-appointment in a capital case “should be made to an attorney who may be unable to provide effective legal representation as a result of an unrealistically high caseload.”<sup>15</sup>

Here, attorney Hammond established an ongoing pattern of responding to Figueroa’s complaints with - - and even occasionally volunteering - - statements in open court to the effect that his caseload and law office management issues were hampering his ability to visit Figueroa in the jail or to otherwise maintain the lines of communication. At one point after he’d already been on the case for more than three years, when asked by the second of three judges who presided over the pretrial hearings whether he had the time to handle Figueroa’s case, he (twice) said it was “borderline”, and he saw fit to mention that he’d taken his name off the capital case appointment list

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<sup>15</sup> Similarly, a privately retained attorney “should not undertake the representation of a defendant in a capital case if [his or her] caseload is high enough that it might impair the quality of legal representation provided to the defendant.”

“because my other practice is so heavy.” When, in another hearing, Figueroa complained that it had been almost a year since his attorney had been to see him and he [Figueroa] didn’t know what was going on in his case, Hammond did not dispute the accuracy of his client’s claims but merely extenuated “I don’t have my list on what - - for visits, but I’ve got him scheduled for next week”, and “It’s easier for me to visit when I’m down doing the depositions and things like that” (R2913). [Those comments, which were made on July 30, 2015, likely referred to depositions in other cases, since in late September 2017 Hammond was unsure if he’d done any depositions in Figueroa’s case (R3321), and as of November 9, 2018 “[w]e got a lot of the depos done this week, but I targeted more that need to be done” (R3426, see 3429)]. Three-plus years later the pattern persisted; when Figueroa said it had been 15 months since he and Hammond had spoken, Hammond acknowledged that he was “behind on my visits”, having missed two or three appointments “because of court calendars changing on me” (R3428-31). [Jail visits can be rescheduled, but apparently that wasn’t happening].

As far as zealous commitment to the capital case [Rule 3.112(a)] - - and as far as Figueroa’s entirely understandable perception that he

wasn't being zealously represented - - it is important to note that Hammond himself recognized that the interpersonal conflict between himself and Figueroa was far from one-sided. Hammond never asserted that Figueroa was refusing to cooperate with him. [If anything - - reading between the lines - - he appears to have been frustrated by Figueroa's wanting to be too involved in the preparation of his case]. Hammond told Judge Covert, "We've both tried. We both tried", and "I don't know if it's me. I have my way of doing things" (R2970). Later - - to Judge Siracusa - - "I drive him crazy and he drives me crazy" (R3426). Hammond acknowledged that the problems in their working relationship and the resulting motions "sometimes does affect me" (R2969-70). On several occasions he told the trial judge (Ley and Covert) that it was "fine" if the court wanted him to stay on the case and "fine" if the court wanted to replace him; "I serve at the pleasure of the Court." On several occasions he asserted that the impasse had reached the point where the court should seriously consider appointing someone else.

Thus the third and fourth factors recognized in the nationwide case law - - the extent of the conflict and breakdown in communication, and the defendant's responsibility (or lack thereof) for causing

the problem - - both weigh heavily against the trial courts' refusal to appoint substitute counsel. As the Nevada Supreme Court observed in Young v. State, 102 P.3d at 578, a defendant may not create a conflict requiring substitution of counsel. That is emphatically not what happened in Figueroa's case. As the Young court continued, "Rather, we place the onus upon defense counsel to establish and attempt in good faith to maintain the attorney-client relationship." Id., at 578. Here, for more than half a decade, Hammond failed to do so. As a result Figueroa was unable to trust him, and the attorney-client relationship completely collapsed. Therefore the trial courts' refusal to replace Hammond amounted to an abuse of discretion and a violation of Figueroa's Sixth Amendment rights. Moore; Young, Hendershot.

The question may arise as to exactly when was the tipping point in the five year ordeal, when it became an abuse of discretion and a Sixth Amendment violation for Judge Ley and then Judge Covert and then Judge Siracusa to refuse to appoint substitute counsel. If it had been done early it would have protected Figueroa's rights with little or no downside. See Young, at 577 ("had the [trial] court initially granted Young's motion, the extent of resulting inconvenience or delay . . . would have been minimal, if at all"). As the situation wore on without

improvement, there was increasing disincentive to remedy it. The judges' comments seemed to express reluctance to start over with a new attorney (even though until very late in the time frame it didn't appear that Hammond had done much work on the case), and there was an element of "If we let you have a new attorney everyone will want one." But this was a death penalty case; the adversarial lawyer-client relationship was extraordinarily toxic; and Hammond's own persistent comments showed that he didn't want to be there any more than Figueroa wanted him there. Consequently, the observations of the Montana Supreme Court in Hendershot are germane. There the attorney acknowledged to the trial court that communications between himself and his client (on trial for aggravated assault) had reached "an irreparable state", and he actively joined in Hendershot's request that the attorney-client relationship be severed. The trial court denied the request. On appeal, the reviewing court emphasized that the issue was not whether the defendant received effective assistance at a subsequent trial under the Strickland<sup>16</sup> standard, but whether the attorney-client conflict had reached the point where "it

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<sup>16</sup> Strickland v. Washington, 466 U.S. 668 (1984).

required substitution of counsel at the time the request was made.”  
153 P.3d at 624.

In Figueroa’s case, the attorney-client relationship started off bad and got progressively worse. The attorney repeatedly made excuses - - in his client’s presence - - that the pressures of his small law practice and his other caseload was hampering his preparation and communication. While Hammond never expressly joined in any of Figueroa’s requests to discharge him, as the lawyer did in Hender-shot, he did tell Judge Ley early on that the animosity was “at such a point where you’re going to have to seriously consider appointing somebody else”; he told Judge Covert “I think that this is going to cause a problem for the next 20 years”; and even after three-and-a-half years on the case he told Judge Siracusa that he’d suspended his name from the capital appointment list because his other practice was so heavy, and - - asked if he had time to handle Figueroa’s case - - said “It’s borderline.” All of these comments were made in Figueroa’s presence; so it’s no wonder that any trust or confidence he might have had in Hammond’s ability to represent him was destroyed. And Hammond’s apparent indifference to client communication only exacerbated the problem.

At every time when Mr. Hammond made these statements to the three judges, he would not have been eligible to be initially appointed under the standards of Rule 3.112 and especially subsection (j). Therefore, in light of the facts that he was not maintaining adequate communication with his client, and that he appeared to have done relatively little work on the case until shortly before the trial finally took place, it was an abuse of discretion to refuse to appoint an attorney who did have the time and inclination to provide Figueroa with zealous representation.

So the best answer to the “tipping point” question is this: the earliest rulings denying substitution of counsel without prejudice to revisit the issue arguably did not reach the level of an abuse of discretion. The lawyer-client relationship might have improved. But it didn’t; it got progressively worse. By the time of the later rulings - - especially after Figueroa’s futile attempt to represent himself - - Judge Covert’s reflexive reappointment of Hammond and his and Judge Siracusa’s refusal to appoint substitute counsel clearly amounted to an abuse of discretion and resulted in a Sixth Amendment violation.

For all of the foregoing reasons, Figueroa’s two murder convictions and death sentences should be reversed for a new trial.

## ISSUE TWO

THE STATE OBTAINED (AND SUBSEQUENTLY INTRODUCED) EXTENSIVE CELL SITE LOCATION INFORMATION (CSLI) WITHOUT A WARRANT, IN VIOLATION OF THE FOURTH AMENDMENT

A person maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through cell site location information (CSLI), and the government must obtain a search warrant supported by probable cause before acquiring historical CSLI from a wireless carrier. Carpenter v. United States, 138 S.Ct 2206 (2018). While Carpenter left open the question of whether the Fourth Amendment requires a search warrant for real-time cell site location monitoring, this Court has held that it does. Tracey v. State, 152 So.3d 504,525-26 (Fla. 2014); see Martin v. State, 287 So.3d 645,647 (Fla. 4<sup>th</sup> DCA 2019). So, under Florida law, now and at the time of Figueroa's trial, both historical and real-time CSLI are subject to Fourth Amendment protection. See also Ferrari v. State, 260 So.3d 295,306-07 (Fla. 4<sup>th</sup> DCA 2018). In the instant case, the state introduced voluminous historical CSLI, and the prosecutor argued it extensively in his opening and closing statements to the jury. The way the issue came

up at Figueroa's trial, like many other issues addressed in this brief, was odd.

Shortly before trial attorney Hammond filed what seems to be a conditional motion to suppress any information obtained from Figueroa's actual cell phone which may have been obtained prior [emphasis in motion] to the September 13, 2019 search warrant (R564; T13). When that motion was heard on the morning jury selection commenced, the prosecutor assured the court that the phone was not searched at any time before the warrant was obtained (T15-18). Asked if he had any response, Hammond said no, but "[M]y client had something he wants to ask me" (T18-19). Judge Siracusa denied the motion to suppress, since "according to all the information I have" "[t]hey didn't open the phone until after I signed the warrant", and "You [Mr. Hammond] had no information to the contrary" (T19-20). The prosecutor asked Hammond "do you need me to put on Detective Miller, Coffin, and the troopers to substantiate what I just stated?", and Hammond answered "No" (T20).

Later that morning Judge Siracusa asked Figueroa if he had any questions or concerns the court could address, and Hammond interjected, "He did have one question which I was bothering him about

(sic). I think with the cell phones with the - - I see the difference, but it may help if he understands it. The state obtained the records through a subpoena that is separate from the search warrant where they went into his cell phone. I know that was concerning him, that it would help alleviate if you could explain that (T225).

Judge Siracusa then sought to educate Figueroa about the difference between a warrant, which requires judicial approval and probable cause, and a subpoena, which is “routinely issued” without prior judicial approval. The carrier whose records are being subpoenaed can object and request a hearing, but “I’ve been doing this a long time. I don’t think I’ve ever see AT&T or a company like that actually object to subpoena records” (T225-27). Asked if that explanation helped, Figueroa said he understood what the judge was saying, “but in 2017, I mean, in here, it was a case that I was seeing, and the Supreme Court ruled that they need a search warrant for cellular call logs, towers, and everything” (T227).

The judge didn’t know “what process they went through to get the records” or what affidavits or warrants were filed, so he asked the prosecutor, who replied “I have all of that” and “It was subpoenaed.” A Mr. Ross from the state attorney’s office “went through all the normal

procedures that we do. We have subpoenas in our records for the phone records that we've obtained from the phone company" (T228).

Judge Siracusa then said to Figueroa:

I'll tell you what, if it helps, if they don't have these records and they're able to convict you, then it will certainly be part of the appellate issues that you would be contesting if they unlawfully obtained these records.

Just so that you understand, there's an actual special division that does this for the State Attorney's Office in the Sixth Judicial Circuit, and they routinely come to the judge in order to attempt to obtain these records.

I can't tell you off the top of my head, in this case, who came and who attempted to get these records and when, because I may not have even been involved in the process. There are a number of different judges that handle it.

But if they do have the records, the only way they could have gotten those records is by providing to me service providers either the search warrant or an affidavit or subpoena.

So I'm not sure which one of the three they provided, but the custodian of record and/or the provider of the documents would not have given them up without the appropriate documentation. Their corporate headquarters would not allow them to surrender those documents without the appropriate documentation.

However, if a mistake was made, if that's the case, then certainly your appellate lawyer will look into it because Mr. Hammond has preserved that for appeal.

(T228-29)

Figueroa said “That is what I was bringing the point that it was a Supreme Court rule . . . “ (T229).

[The 2017 Supreme Court ruling to which Figueroa was referring to was obviously Carpenter v. United States].<sup>17</sup>

The next morning the prosecutor put on the record that he’d gone back to the file and “[i]t looks like we sent a letter on April 18, 2013, and a subpoena to Metro PCS” seeking, inter alia, the cell tower information as to “what antenna. . . he may have been bouncing off of”, and he submitted the subpoena as Court Exhibit 2 “ to show that we complied with the law” (T243-45, R713-16). Subsequently, testimony from several law enforcement officers, including Michael Celona, the cell data and mapping analyst, further confirmed that the cell site location information for Figueroa’s phone was obtained by means of subpoena (T1986,2243-45,2375,2439-40,2445-48).

So it appears that only Figueroa was aware of the applicable Fourth Amendment law (although he didn’t recall the name of the case), while Judge Siracusa, prosecutor Ripplinger, and defense attorney Hammond were not. Ordinarily this might seem to fall into

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<sup>17</sup> The published Carpenter decision, 138 S.Ct 2206, indicates that it was argued on November 29, 2017 and decided on June 22, 2018.

the category of ineffective assistance of counsel - - either on the face of the record or subject to evidentiary development in a postconviction motion - - neither of which can be raised on direct appeal. Steiger; Blanco. However, here Judge Siracusa expressly assured Figueroa that the issue was preserved and would be reviewed on appeal. The two-fold rationale for application of the contemporaneous objection rule is to (1) place the trial court on notice that an error may have been committed, and provide him or her with an opportunity to correct it at an early stage of the proceedings; and (2) to prevent litigants from allowing an error to go unchallenged so it may be used for tactical advantage later (sandbagging). See, e.g. Castor v. State, 365 So.2d 701,703 (Fla. 1978); Daniels v. State, 121 So.3d 409,417 (Fla. 2013); Fountain v. State, 318 So.3d 626, 630 (Fla. 2d DCA 2021); State v. Hampton, 44 So.3d 661, 665 (Fla. 2d DCA 2010); Crumbley v. State, 876 So.2d 599, 601 (Fla. 5<sup>th</sup> DCA 2004). Here, the trial court had the opportunity to correct the error; he just didn't know the applicable and controlling law. [Nor, apparently, did the prosecutor and the defense attorney]. Nor was Figueroa attempting to sandbag; to the contrary he affirmatively asserted that the state needed a warrant to obtain his cell tower information, and he was

erroneously told that he was wrong by the trial judge, at the urging of his own attorney. Under these egregious circumstances, the judge should be taken at his word when he assured Figueroa that the issue was preserved for appeal.

Although the state's subpoena was issued before Carpenter was decided, the question of whether historical and/or real-time CSLI was protected by the Fourth Amendment was at best unsettled at that time, and the state's decision not to seek a warrant was not made in reliance on binding precedent. Accordingly the "good faith exception" does not apply. See Tracey v. State, 152 So.3d at 526; Ferrari v. State, 260 So.3d at 306-07; see also Carpenter v. State, 228 So.3d 535, 541-42 (Fla. 2017). "The rule on searches in questionable areas of law is simple and unequivocal: Get a warrant." Carpenter v. State, at 542; see Ferrari, at 307.

There were no exigent circumstances which might have justified the warrantless acquisition of historical CSLI. See Carpenter, 138 S.Ct at 2223 (fact-specific urgent situations, such as bomb threats, active shootings, or child abductions, will likely justify warrantless access to CSLI; "[w]hile police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set

forth does not limit their ability to respond to an ongoing emergency"). In the instant case, Figueroa was arrested in North Carolina on April 13, 2013 (T1539, 1575) and the state-issued subpoena requesting the CSLI was not sent until five days later. Nor can the Fourth Amendment violation be obviated by the "mosaic theory" - - a concept this Court rejected in Tracey, 152 So.3d at 520-21 - - regarding the longer or shorter time frame covered by the state's warrantless acquisition of CSLI. See also State v. Muhammad, 451 P.3d 1060,1072-74 (Wash. 2019).

The state introduced voluminous CSLI evidence, including records, maps, and a PowerPoint presentation, through the St. Petersburg Police Department's intelligence and cellular analyst Michael Celona (T2438-2502,2515-16; R2128-54,2160-83). Both prosecutors argued it extensively in their opening and closing statements (T1006, 1013-15,2881-86,2890,2903-09,2997-3002). Their most devastating use of the CSLI from Figueroa's phone records was to contrast it with the CSLI from his girlfriend Tessa Cooper's phone records.<sup>18</sup> The state's theory of the case, supported by Cooper's testimony, was that

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<sup>18</sup> Figueroa is not contending that Tessa Cooper's CSLI was unlawfully obtained, as he has no standing to assert her Fourth Amendment rights.

she remained all night in the apartment she shared with Figueroa while Figueroa was out committing the robbery-murders. The defense's theory of the case, supported by Figueroa's testimony, is that he was the one who remained in the apartment all night, and Tessa Cooper showed up with the victims' jewelry; the implication being that she, alone or with assistance, committed the robbery-murders. In his rebuttal argument the prosecutor said to the jury:

And he - - and he says he's - - he slept through the whole night and Tessa's out there doing this grisly double murder (T2997-98).

. . . Now, what you've got to consider - - now, he says he was asleep back in the apartment. That's what he wants you to - - and she's supposedly out doing the dirty deed with her van when the call is made. He got these calls, 4:16 and 4:15, between them (T2998).

. . . Analyst Celona told you, again, how these cellular antennas work with your phones is they're designed to go to the strongest signal. . . So the strongest signal at 4:15 for him was this tower down at the foot of the Sunshine Skyway. That is the strongest signal for him, not one of these other towers closer to, you know, the apartments (T2998-99).

So at 4:15 he is - - his phone is registering on a section from this cellular tower down south of him, and what he's - - and that's - - and that's tower 156. These two calls between him and her on the blue arrows, that's 156 hitting on the sector south of the marina. And he's in bed supposedly at his apartment. And yet there's other towers closer to him. So he's not home asleep. He's down south towards the marina as we would expect (T2999).

The next several calls, according to the prosecutor, showed movement “heading closer to the highway.” “So if he’s just staying, I submit to you, in the apartment, he’s going to be regularly registering off of a tower further up this way” (T2999-3000). So, he told the jury:

So what I believe you can tell from this is at 4:15 a.m. he’s down here south of the apartments. If he was back at the apartments he would be going off tower 631. So he’s not asleep. He’s lying to you again.

(T3000).

In light of the state’s extensive use of the CSLI unlawfully obtained from Figueroa’s phone records to (1) place him near the crime scene; (2) corroborate the key prosecution witness (and the defense’s alternative suspect); and (3) brand him as a liar, the state cannot plausibly claim that this evidence could not have affected the jurors’ deliberations and could not have contributed to their verdict. Therefore it cannot meet its heavy burden of showing beyond a reasonable doubt that the Fourth Amendment violation was “harmless.” See Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

### ISSUE THREE

BECAUSE THE TRIAL COURT ERRONEOUSLY REFUSED TO ALLOW FIGUEROA TO EXERCISE HIS RIGHT TO WAIVE PRESENTATION OF MITIGATING EVIDENCE (A DECISION WHICH WAS HIS TO MAKE UNDER FLORIDA LAW) UNLESS AND UNTIL HE ALSO WAIVED HIS RIGHT TO COUNSEL, FIGUEROA'S ENSUING WAIVER OF HIS RIGHT TO COUNSEL WAS INVALID AND IN VIOLATION OF THE SIXTH AMENDMENT.

A defendant's waiver of his right to counsel must be knowing and intelligent and - - perhaps most importantly - - uncoerced. Godinez v. Moran, 509 U.S. 389, 400-01 and n.12 (1993); Noetzel v. State, 328 So.3d 933, 948 (Fla. 2021). "[A] defective waiver waives nothing." Cordova v. Baca, 346 F.3d 924,926 (9<sup>th</sup> Cir. 2003), citing Johnson v. Zerbst, 304 U.S. 458, 468 (1938). A defendant's waiver of his right to counsel which is made as a result of misadvice by the trial judge is neither voluntary nor valid. See State v. Brown, 330 So.3d 199, 211 and 216-230 (La. 2021)<sup>19</sup> and Deno v. Commonwealth, 177 S.W. 3d 753, 757-59 (Ky. 2005), discussed infra.

Florida law has "long recognized that a competent [capital] defendant may waive the right to present all mitigating evidence [and] . . . [t]his right is not altered when the defendant has counsel." Boyd

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<sup>19</sup> A petition for certiorari to the United States Supreme Court filed by the State of Louisiana was docketed on December 13, 2021 in Louisiana v. Brown, case no. 21-871.

v. State, 910 So.2d 167, 189 (Fla. 2005); accord Hojan v. State, 3 So.3d 1204, 1211 (Fla. 2009); Bell v. State, \_\_ So.3d\_\_ (Fla. 2022) [2022 WL 324821, p.5]. For purposes of deciding what, if any, mitigating evidence is to be presented in the penalty phase, “[t]he defendant, not the attorney, is the captain of the ship.” Grim v. State, 841 So.2d 455, 461-62 (Fla. 2003); see Boyd, at 190; Hojan, at 211.

In the instant case, although Figueroa had a disastrous relationship with his first-phase lawyer Hammond, he never had any problem with his penalty phase attorney Daniel Hernandez (see R2823,2826, 2970,3010-11,3043-44,3457). Figueroa cooperated with the defense’s mental health expert, Dr. Eisenstein, who met with him 15 times (about 30 hours total) over a five-year span for clinical interviews and neuropsychological testing (R3716), and he cooperated with the PET scan and MRI which were subsequently interpreted by Dr. Wu. Immediately after the jury’s first-phase guilty verdicts, penalty counsel Hernandez told the court he expected to proceed on Monday with those two experts, and he also had some lay witnesses, either live or via Skype (T3063-64). However, when Monday morning rolled around, Hernandez informed Judge Siracusa that Figueroa had refused to submit to an evaluation by Dr. Lazarou (one of the state’s

experts), and also that “Mr. [Figueroa] does not wish mitigation to be presented. I told him that we have our witnesses lined up and prepared to proceed but that obviously I was not seeking to do something against his wishes. But I suspected that the Court would require me to do do.” (T3072).

The judge asked Figueroa, “What’s this all about. You don’t want mitigation presented?” and Figueroa replied that he didn’t want to put his family or the lady from the church through it; he didn’t want them to beg for his life when he didn’t do the crime (T3073). Judge Siracusa encouraged him to change his mind but Figueroa was adamant, saying “If the jury decide to give me the death, that’s their decision” (T3073-75). The judge replied, “I agree that’s their decision, but their decision should be made with full information after having the opportunity to hear from the people that are closest to you. And your reasoning is flawed.” (T3075). All he would be accomplishing would be to cause his family and friends greater heartache (T3073-75). “So if Mr. Hernandez wants to call them, I’m going to let him call them so they can do what’s necessary” (T3075).

Figueroa responded to this by saying, “I mean, I - - I - - I just - - I mean, I don’t want to go through the mitigation. Then if you’re

going to let him do it, then I would like to dismiss Mr. [Hernandez].  
And I would represent myself, and I don't want no mitigation, Your  
Honor (T3075).

The judge asked attorney Hernandez for his input. Hernandez said he was prepared to call two mental health experts to address the two statutory mental mitigators as well as Figueroa's brain abnormalities. He also had family members who would testify regarding Figueroa's difficult childhood; his mother abandoned him when he was eight, his father was abusive, and he was raised in an impoverished, crime-ridden, drug-infested neighborhood. There was also a lady who conducted religious services for Hispanic jail inmates who would testify that Figueroa has grown spiritually as a person. "So everything is designed to present mitigation to combat the State's argument that he should be put to death. But I did tell him that I didn't want to do something against his wishes, but if certainly ordered to do so I - - I would do it. I'm prepared to do it (T3075-76).

Asked to weigh in, the prosecutor stated that even though Figueroa had declined to be interviewed by the state's expert Dr. Lazarou, the state was not seeking to exclude the defense's expert Dr. Eisenstein, "and I am prepared to proceed" (T3077-78). Figueroa

clarified that he did not want the defense's doctors to testify either (T3079). Judge Siracusa said:

Now you're saying you're willing to represent yourself. If I'm going to order Mr. Hernandez to present things on your behalf, you'll represent yourself so that you won't have to present anything because I may have to order Mr. Hernandez to present things on your behalf?

FIGUEROA: That's what I say, Your Honor, yes.  
(T3080).

After a brief recess, Judge Siracusa again tried to persuade Figueroa to present mitigation, or at least allow the medical experts to testify, and Figueroa reiterated that he didn't want to put his family members in this situation, and that even putting on the doctors would be like begging to the jury "when I didn't do what I've been accused" (T3080-82). When the judge asked him if he was hoping or volunteering for a jury death verdict, he replied, "They can make whatever decision they want to make. . . If they think that I deserve this, that's them." "I will appeal everything" (T3082-83).

Next the judge twice asked Figueroa if he wanted to waive the jury, or did he still want the jury to determine this? Figueroa answered that he didn't know how the procedure works; he was just

not going to present any mitigation (T3083-84). So the judge presented him two alternatives:

Okay. If - - if you tell me that you don't want any mitigation presented, I can't have Mr. Hernandez go forward representing you not presenting any - - any mitigation. He has mitigation. . . ready to begin being presented including the doctors, including your family members. So if he represents you, he's going to present mitigation on your behalf.

(T3084).

On the other hand, "If you wish to represent yourself, I have to have you talk to Dr. Poorman first to make sure that you're still competent to represent yourself" (T3084). Subject to that competency determination:

Do you wish to represent yourself understanding if I allow Mr. Hernandez to continue to be your attorney that I'm going to direct him to do his best to prevent you from getting the death penalty, which is going to require that he put on mitigation? And also just to make sure we're 100 percent clear, if you wanted, I could order him not to put on your family members if you want to spare them, but he would still put on the doctors to testify on your behalf. Do you understand that?

FIGUEROA: I understand.

THE COURT: With that in mind do you want to represent yourself or do you want to let Mr. Hernandez present the mitigation against your wishes?

FIGUEROA: I don't want no mitigation.

THE COURT: Okay. So you want to represent yourself and not put on any mitigation?

FIGUEROA: Yes, your Honor.

(T3085)

To make it “100 percent clear as to what you’re seeking today”, the judge asked Figueroa, “You still want the jury to decide this, correct? You don’t want a - - you don’t want to leave it up to me. You don’t want a judge to decide. You want a jury to decide whether or not to give you the death penalty, correct?” Figueroa answered “Yes.” (T3086, see 3106). Asked whether he wanted the jury to recommend life, Figueroa said “Whatever they decide”, and when the judge indicated he was still suspicious that Figueroa might be wanting to the jury to recommend death, Figueroa repeated that it made no difference to him what they decide; “I just like to finish with this so I can go with my appeals and everything” (T3086-88).

After Dr. Poorman concluded, and the court found, that Figueroa was competent (T3088-93), the court conducted a Faretta hearing and allowed Figueroa to represent himself (T3093-3106). At the prosecutor’s suggestion and the court’s direction, defense attorney Hernandez elaborated in greater detail the mitigating evidence he would have presented (T3107-10).

In the ensuing penalty trial, Figueroa made no opening nor closing statement and presented no evidence (T3123,3150-51,3163, 3191). The jurors retired to deliberate, and came back with a question indicating that they were confused about the verdict form (T2425; T3207-08). [The botched verdict form and the invalidity of the verdict itself is the subject of Issue Six, infra, and the pertinent facts are set forth therein]. When the possible responses were being discussed, attorney Hernandez asked the judge, “[M]ay I put my two cents in?”, and judge told him Figueroa “doesn’t want you to represent him”; then asked Figueroa if he now wanted Hernandez to be reinstated at this point. Figueroa asked “That would not interfere in my - - “ whereupon Judge Siracusa interjected “It wouldn’t change the mitigation issue, no, and it won’t interfere with the appellate process.” Figueroa then agreed to have Hernandez reinstated as counsel (T3211-12).

After the jury’s verdict, such as it was, was returned, Judge Siracusa told Figueroa “there are some steps that we’re going to have to go through before I do the final adjudications and begin your appellate process.” A presentence investigation would have to be ordered, and there might be a Spencer hearing. Figueroa could reflect

on this before the upcoming status check, and “if you don’t want the Spencer hearing, and you don’t want Mr. Hernandez to present any mitigation, I’ll talk to you about the legal ramifications of that. Either way, I still have to do the PSI” (which would take eight weeks). “So that means that your actual ultimate sentencing, the fastest that it could get done, even if you present no mitigation, and even if you refuse to have what’s called a Spencer hearing, will still be eight weeks from now (T3242-45).

In scheduling the status check, the judge asked the attorneys to research whether a Spencer hearing is mandatory; “I believe it is. But, if it’s not” (T3247). The judge also thought that recent Florida Supreme Court case law established a procedure - - in the event Figueroa refused to allow defense counsel Hernandez to present mitigation at a Spencer hearing - - for the court to appoint “special counsel” for that purpose (T3247-48). “And so, I want to take a week to review those cases, to make sure that I protect all of the constitutional rights that Mr. [Figueroa] has, and to follow the process that the Supreme Court has instructed me to follow” (T3247-48). Both the prosecutor (in Figueroa’s presence) and the judge (directly to Figueroa) suggested that he would be able to begin the appellate

process sooner if he allowed Mr. Hernandez - - rather than independent counsel - - to present mitigation in the Spencer hearing (T3248-49).

In the November 8, 2019 status hearing, Mr. Hernandez stated that Figueroa's preference would be to be sentenced today and begin the appeal process, but given the choice between appointment of independent counsel - - which would delay the proceedings further - - or having Hernandez present mitigation in the Spencer hearing he would accept counsel. The judge confirmed that Figueroa was now willing to allow Hernandez to present mitigation in the Spencer hearing (R3622-23).

On January 8, 2020, defense counsel submitted an 83-page mitigation report from Colleen Quinn Investigations containing detailed information about Figueroa's life history (R4276-4358; see R2626-27,2632-38).

Recurring themes were addressed in a March 2, 2020 hearing in which Figueroa initially refused to be interviewed by the state's experts, but relented ("Okay. Let's just get done with it") when Judge Siracusa - - repeatedly - - assured him that his goal of trying to get the entire first-phase trial overturned would get underway faster "if

you would just talk to the state's doctors" (R3641-51). Attorney Hernandez represented that Figueroa was now allowing him to present the testimony of Doctors Eisenstein and Wu for the same reason; i.e., because he was "faced with the prospect of if he was going to continue representing himself at that stage, that the Court would probably appoint independent counsel to present mitigation against his will and it would just further delay the matter even further" (R3646-47,3643).

Delay happened anyway, in part because of COVID. The quad-furcated Spencer hearing took place on September 22, 2020 (Dr. Eisenstein); September 29, 2020 (Dr. Wu); April 7, 2021 (state's rebuttal experts); and May 13, 2021 (arguments), and Judge Siracusa imposed the death penalty on July 2, 2021 (T4236; R2614-41).

Because Judge Siracusa, in violation of Florida law [Grim; Boyd; Hojan; Bell], refused to allow Figueroa to waive the presentation of mitigating evidence to the jury if he was represented by counsel, Figueroa was confronted with a false Hobson's choice. The judge repeatedly made it clear to Figueroa that if attorney Hernandez continued to represent him he was going to require Hernandez to put on the mitigating evidence, especially the mental health experts, and

Hernandez made it equally clear that he would comply with such an order. Figueroa never indicated - - equivocally or unequivocally - - that he wanted to represent himself until the judge failed to persuade him that he should allow Hernandez to present his mitigating evidence, and then informed him that the mitigation would be presented even against his wishes (“[I]f Mr. Hernandez wants to call them, I’m going to let him call them so they can do what’s necessary”). Only then did Figueroa respond to his erroneously limited options: “Then if you’re going to let him do it, then I would like to dismiss Mr. [Hernandez]. And I would represent myself and I don’t want no mitigation, Your Honor (T3075).

As if Judge Siracusa hadn’t already made it clear enough to Figueroa that he could not waive his right to forgo the presentation of mitigating evidence unless he also waived his right to counsel, the judge hammered the point home several more times: “I can’t have Mr. Hernandez go forward representing you not presenting. . . any mitigation” (T3084); “So if he represents you, he’s going to present mitigation on your behalf (T3084); “Do you wish to represent yourself understanding if I allow Mr. Hernandez to continue to be your attorney that I’m going to direct him to do his best to prevent you

from getting the death penalty which is going to require that he put on mitigation” (T3085); and the clincher, “With that in mind do you wish to represent yourself or do you want to let Mr. Hernandez present the mitigation against your wishes?” (T3085).

Accordingly, Figueroa’s waiver of his right to counsel was not freely and voluntarily made because it was made in response to the trial court’s erroneous limitation of his options. “A botched waiver does not diminish or alter the right [to counsel]” [Cordova v. Baca, supra, 346 F.3d at 926] and Judge Siracusa botched Figueroa’s waiver beyond all repair. The Kentucky Supreme Court’s decision in Deno v. Commonwealth, 177 S.W. 3d 753, 757-59 (Ky. 2005) is instructive, and the Louisiana Supreme Court’s decision in State v. Brown, 330 So.3d 199, 211 and 216-230 (La. 2021) is remarkably close to being on all fours.

In Deno, a defendant on trial for rape and failing to register was dissatisfied with his appointed attorney, and he requested to act as co-counsel (a right available to him under Kentucky law).<sup>20</sup> However,

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<sup>20</sup> In Kentucky, unlike Florida and most other jurisdictions, a criminal defendant is guaranteed the right to be heard by himself and counsel.” Deno, 177 S.W. 3d at 757; see Johnson v. Premo, 333 P.3d 288, 292, n.1 (Or. 2014).

the trial judge twice misinformed him that he had only two options:

“You either represent yourself or [your attorney] represents you.”

Confronted with this faulty Hobson’s choice, Deno reluctantly withdrew his request to act as co-counsel. After his request for a substitute attorney was also denied, he proceeded to trial with his appointed counsel and was convicted. On appeal his convictions were reversed because of the trial court’s error in misinforming him regarding hybrid representation, 177 S.W. 3d at 757-59 and 763.

What happened in the instant case is even worse than Deno, because there the trial judge’s misinformation caused Deno to withdraw his request for hybrid representation, while here the judge’s misinformation caused Figueroa to waive his right to counsel. In State v. Brown, a death penalty case, the defendant raised 82 assignments of error; the Louisiana Supreme Court affirmed his convictions but reversed his death sentence for a new jury penalty phase because “In sum, defendant’s waiver of counsel was not, and could not have been, knowing, intelligent, or voluntary” [330 So.3d at 229-30] because the trial court misinformed Brown during the Faretta hearing that he could not waive or limit the presentation of mitigating evidence if he was represented by counsel.

A dispute arose between Brown and his defense attorney as a result of Brown's insistence that the attorney not call his mother and his uncle as penalty phase witnesses. 330 So.3d at 218-20. As in the instant case, Brown made it clear that he was not waiving the jury proceeding, nor was he a death volunteer; his understanding was that "the jurors have to consider both sides regardless if I produce any evidence." The attorney, on the other hand, felt a moral obligation to put up the best defense, which would include calling Brown's mother and his Uncle Calvin. 330 So.3d at 219-20. The judge told Brown "It's actually a professional obligation on his part", and "Because if he's representing you, he's calling them." As in the instant case, Brown's response to the erroneously limited options given him by the court was to waive his right to counsel. After a Faretta hearing, Brown represented himself in the penalty phase, he made no opening or closing statements, and he presented no evidence. 330 So.3d at 216-17.

In reversing Brown's death sentence, the Louisiana Supreme Court recognized, "In order for such waiver to be knowing and intelligent, the trial court must necessarily provide an accurate description of the defendant's right to counsel that he or she is

relinquishing. [Citation omitted]. In this case, however, the trial court erroneously advised defendant he could not direct his counsel to limit the mitigation presented during the penalty phase". 330 So.3d at 223.

Contrary to the trial court's misadvice to Brown, Louisiana law (like Florida law) does allow a defendant who is represented by counsel to forgo or limit the presentation of mitigating evidence. 330 So.3d at 224-26. The Brown court also cited case law from other jurisdictions (including Florida, as well as Alabama, Ohio, Arizona, California, Utah, and the federal Fifth Circuit) recognizing that right. 330 So.3d at 226-28. Quoting the Florida Supreme Court's decision in Boyd v. State, supra, 910 So.2d at 189-90, the Brown court said:

[A] defendant possesses great control over the objectives and content of his mitigation. Whether a defendant is represented by counsel or is proceeding pro se, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase. . . . Boyd was exercising his right to be the "captain of the ship" in determining what would be presented during the penalty phase.

330 So.3d at 226.

The Louisiana Supreme Court held, on facts remarkably similar to Figueroa's case, that "[b]ecause the trial court erroneously informed defendant that he was not entitled to limit his counsel's presentation of mitigating evidence during the penalty phase, we find

defendant's waiver [of counsel] unknowing and unintelligent in violation of his Sixth Amendment rights." 330 So.3d at 228. The trial court's misadvice placed Brown in the "untenable position" of being 'forced to make a choice between representation that would compromise his autonomy or no representation at all." 330 So.3d at 229. The Louisiana Supreme Court noted that it was not mandating that in every case a defendant must be specifically advised of his right to forgo or limit mitigation, but where a defendant is affirmatively misinformed by the trial court his or her waiver of counsel cannot be deemed constitutionally valid. 330 So.3d at 228 n. 17 (emphasis in opinion).

Consistently with numerous state and federal jurisdictions, the Louisiana Supreme Court determined that Brown's invalid waiver of counsel amounted to "structural error not subject to harmless error review." 330 So.3d at 229. Accordingly, Brown's death sentences were reversed and remanded to the trial court for a new jury penalty phase. Id., at 230.

See, e.g., State v. Young, 626 So.2d 655, 656-57 (Fla. 1993)(where record did not establish that Young had knowingly and intelligently waived his right to counsel, harmless error rule does not

apply); Gettis v. State, 892 So.2d 1217 (Fla. 1<sup>st</sup> DCA 2005)(while a defendant has a right to elect pro se status, a proper waiver must be secured, and failure to do so necessitates reversal); Smith v. State, 956 So.2d 1288, 1290 (Fla. 4<sup>th</sup> DCA 2007)(harmless error analysis does not apply when Faretta inquiry fails to ensure that the defendant's waiver of counsel was knowing and voluntary); Cordova v. Baca, supra 346 F.3d at 930 ("if a criminal defendant is put on trial without counsel, and his right to counsel has not been effectively waived . . . [a]utomatic reversal of the conviction is the only lawful remedy"); United States v. Goldberg, 67 F.3d 1092, 1103 (3<sup>rd</sup> Cir. 1995)("It is well settled that the erroneous deprivation of a criminal defendant's fundamental right to the assistance of counsel is per se reversible error"); United States v. Welty, 674 F.2d 185, 194 n.6 (3<sup>rd</sup> Cir. 1982)(because the "record does not disclose that Welty effectively waived his right to counsel" - - which is among those "constitutional rights (which are) so basic to a fair trial that their infraction can never be treated as harmless error" - - "we are obliged to reverse his conviction"); United States v. Allen, 895 F.2d 1577, 1579 and 1580 (10<sup>th</sup> Cir. 1990)(finding that the Supreme Court's Penson<sup>21</sup> decision

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<sup>21</sup> Penson v. Ohio, 488 U.S. 75 (1988).

precluded “the application of harmless error analysis to invalid waivers of counsel”); Strozier v. Newsome, 871 F.2d 995, 997 (11<sup>th</sup> Cir. 1989)(“This tension [between the right to counsel and the right to proceed pro se] is doubly problematic because the violation of both rights is not subject to harmless error analysis”); United States v. Brown, 393 Fed. App’x 686, 701 (11<sup>th</sup> Cir. 2010)(“The importance of the defendant’s intelligent, knowing, and voluntary waiver removes the review from a harmless error analysis”); Hooks v. State, 176 P.3d 1081, 1086-87 (Nev. 2008)(“harmless-error analysis does not apply to an invalid waiver of the right to counsel”; Patton v. State, 34 So.3d 563, 565 and 569 (Miss. 2010)(“[I]t is not enough to say the defendant waived the right to counsel – the waiver must be knowingly and intelligently made”; and where the trial judge failed to obtain a proper waiver the error is structural and cannot be deemed harmless); State v. Martin, 608 N.W. 2d 445, 453 (Iowa 2000)(harmless error analysis is not applicable to Sixth Amendment right to representation questions; moreover, the harmless error doctrine presupposes that a defendant is represented by counsel).

Here, the problem is not that the trial court’s colloquy with Figueroa was merely insufficient; it was affirmatively misleading and

coercive and it resulted in an invalid waiver just as in State v. Brown.

Reversal of Figueroa's death sentences for a new jury penalty phase is constitutionally required.

## ISSUE FOUR

THE TRIAL COURT COMPOUNDED HIS ERROR (OF REFUSING TO ALLOW FIGUEROA TO EXERCISE HIS RIGHT TO WAIVE PRESENTATION OF MITIGATING EVIDENCE UNLESS AND UNTIL HE WAIVED HIS RIGHT TO COUNSEL) BY FAILING TO EXPLAIN THAT PRESENTING THE MITIGATING EVIDENCE WOULD NOT DELAY HIS APPEAL.

In response to Judge Siracusa's questioning, Figueroa made it clear that he was not waiving the penalty jury, nor was he volunteering for a death sentence: "If they think I deserve this, that's them. . . .I will appeal everything." (T3082-84). When the judge expressed his suspicion that Figueroa might be wanting the jury to recommend death, Figueroa reiterated that it made no difference to him what they decide; "I just like to finish with this so I can go with my appeals and everything" (T3086-88).

The judge never explained at that critical point that allowing attorney Hernandez to present mitigating evidence would not delay the appeal. [In fact - - as the judge did explain but too late<sup>22</sup> - - not presenting mitigating evidence was what would likely delay the appeal because that would require the preparation of a PSI].

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<sup>22</sup> See T3242-45. Ultimately, there were multiple reasons, mainly COVID, why the sentencing process took as long as it did.

When, in the midst of deliberations, the jurors indicated that they were confused about the verdict form and standby counsel Hernandez wanted to put his “two cents” in, Judge Siracusa asked Figueroa if he wanted Hernandez reinstated. When Figueroa started to ask, “That would not interfere in my - -”, the judge interjected, “It wouldn’t change the mitigation issue, no, and it won’t interfere with the appellate process.” With that assurance, Figueroa agreed to have Hernandez return as counsel (T3211-12)(whereupon the newly reinstated attorney - - like the prosecutor and the trial judge - - failed to notice or correct the most egregious omissions in the verdict form which had caused the jury’s confusion in the first place; see Issue Six, infra).

During a status check shortly after the penalty phase, Judge Siracusa indicated that he thought the Florida Supreme Court had established a procedure which would allow him to appoint “special counsel” to present mitigating evidence in the Spencer hearing, in the event Figueroa persisted in his refusal to allow his own attorney Hernandez to do it (T3247-48). Both the prosecutor (in Figueroa’s presence) and the judge (directly to Figueroa) suggested that he would be able to begin the appellate process sooner if he allowed Hernandez,

rather than independent counsel, to present the mitigation in the Spencer hearing (T3248-49). For that reason - - even though he would have preferred to be sentenced right away and begin the appeal process - - Figueroa relented and allowed Hernandez to present the Spencer hearing mitigation (R3622-23,3643,3646-47). And when Figueroa initially refused to be interviewed by the state's doctors, he was again persuaded to cooperate by the judge's repeated assurances that his goal of trying to get the first-phase trial overturned would get underway faster if he complied (R641-51).

Judge Siracusa was aware at the time Figueroa waived his right to counsel that he was under the misimpression that presenting mitigating evidence would delay his appeal. The judge did nothing to correct that misimpression when it would have done the most to protect Figueroa's Sixth Amendment rights; i.e., at the time he waived his right to counsel in the jury penalty phase. After the real damage was done - - in the midst of the jury's deliberations and again before the Spencer hearing - - the judge did address Figueroa's concern about delay, and each time Figueroa relented and allowed his attorney to present the mitigating evidence.

Figueroa's waiver of counsel was invalid as a result of the trial court's repeated statements to him - - wrong as a matter of law - - that he could not forgo the presentation of mitigating evidence as long as he was represented by counsel. Figueroa's waiver was therefore effectively compelled by Judge Siracusa insistence that he was going to allow and even order attorney Hernandez to present the mitigation over Figueroa's objection. State v. Brown, supra. The involuntary nature of the waiver was compounded by the judge's failure to dispel - - when it counted - - Figueroa's misconception that presenting mitigation would delay his appeal.

## ISSUE FIVE

THE TRIAL COURT'S LACK OF AWARENESS THAT HE HAD DISCRETIONARY AUTHORITY TO APPOINT INDEPENDENT COUNSEL TO PRESENT MITIGATING EVIDENCE IN THE JURY PENALTY PHASE IMPAIRED THE RELIABILITY OF THAT PROCEEDING, AND REQUIRES REVERSAL OF FIGUEROA'S DEATH SENTENCES.

Because this Court affords capital defendants the right to choose what evidence, if any, the defense will present during the penalty phase [Grim; Boyd; Hojan; Bell], defense counsel may not present mitigating evidence against his client's will. Nor may the trial judge order defense counsel to do so, as Judge Siracusa repeatedly said he intended to do in the instant case, this coercing Figueroa to waive his right to counsel. See Issue Three, supra. Judge Siracusa's motives - - if not his understanding of the applicable law - - were sound. When Figueroa said if the jury decided to give him death, that's their decision, the judge replied "I agree that that's their decision, but their decision should be made with full information after having the opportunity to hear from the people that are closest to you" (T3074-75). Judge Siracusa had the authority to make that happen - - without violating Figueroa's autonomy - - by calling the doctors and family members and the religious advisor (who were

present and ready to testify)<sup>23</sup> as court witnesses or by appointing independent counsel - - but he didn't know it. It was only after the jury had returned what was treated as a death verdict [Issue Six] that the judge, in setting a status check, wondered aloud whether the law would permit him to appoint independent counsel to present mitigation in a Spencer hearing:

. . .for everybody to let me know whether or not - - and after they've done research - - that a Spencer hearing is mandatory. I believe it is. But, if it's not.

And then also, if a special - - special counsel has to be appointed, if Mr. [Figueroa] refuses to allow Mr. Hernandez to present the mitigation at a Spencer hearing, then I think there's some procedures for a special - - a special counsel to be appointed. So, we'll have to - - we'll have to read all the decisions on that.

. . .

. . .

There's a couple of cases out there, from the Supreme Court, recently though, on the process that we're going to have to go through. And so, I want to take a week to review those cases, to make sure that I protect all of the constitutional rights that Mr. [Figueroa] has, and to follow the process that the Supreme Court has instructed me to follow.

(T3247-48)

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<sup>23</sup> (T3063-64,3072,3075-76,3107-10)

In fact, it was the prospect of the court appointing independent counsel for the Spencer hearing that caused Figueroa to relent and allow Hernandez to represent him and present the mitigating evidence in that hearing (R3622-23,2646-47). [See Issue Four].

Florida law allows, but ordinarily does not require, a trial judge to appoint independent counsel to present mitigating evidence when a capital defendant chooses not to present mitigation through his own attorney or pro se. Farr v. State, 656 So.2d 448,450 (Fla. 1995); Marquardt v. State, 156 So.3d 464,469-70 and 490 (Fla. 2015); Craft v. State, 312 So.3d 45,54 (Fla. 2020); Woodbury v. State, 320 So.3d 631,651-52 (Fla. 2021); Bell v. State, \_\_ So.3d\_\_ (Fla. 2022)[2022 WL 324821]. Alternatively, “the trial court has the discretion to call persons with mitigating evidence as its own witness.” Muhammad v. State, 782 So.2d 343,364 (Fla. 2001); Craft, 312 So.3d at 54. This procedure avoids the ethical dilemma which confronts an attorney (like Mr. Hernandez in the instant case) whose professional judgment is in conflict with his client’s wishes, since independent counsel does not purport to represent the defendant but instead “represent[s] the public interest in bringing forth all available mitigation.” Bell, 2022 WL 324821, p.4 n.8; see Grim v. State, 971 So.2d 85,102 (Fla. 2007)

("because special counsel solely represents the public interest, no attorney-client relationship is established between special counsel and the defendant"). As this Court stated in Marquardt, 156 So.2d at 490:

Rather than utilizing standby counsel to present mitigation, the trial court should appoint an independent, special counsel to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court in order to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases.

In the instant case, Judge Siracusa made clear his belief that the jury's decision should be made with full information after hearing from witnesses with mitigating evidence, but the possibility - - indeed the strong likelihood - - that he would appoint independent counsel was never mentioned until after the jury's decision (tainted by a confusing and legally inadequate verdict form) was already made. Only then did the judge bring up that he thought there was some recent case law which would allow him to appoint independent counsel to present the mitigation in the Spencer hearing, and he now wanted to research that question and have the attorneys research it. "So we'll have to - - we'll have to read all the decisions on that" (T3247-48).

Granted a trial court's decision on whether to appoint independent counsel is - - under current Florida law<sup>24</sup> - - discretionary, but discretion can be abused, and one obvious way for a judge to abuse his discretion is when he doesn't realize he has it. See, e.g., Eustache v. State, 248 So.3d 1097, 1102 (Fla. 2018); Williams v. State, 283 So.3d 920 (Fla. 2d DCA 2019); Williams v. State, 249 So.3d 721, 723 (Fla. 5<sup>th</sup> DCA 2018); Broadway v. State, 179 So.3d 560, 562-63 (Fla. 4<sup>th</sup> DCA 2015); Goldwire v. State, 73 So.3d 844, 844 and 846-47 (Fla. 4<sup>th</sup> DCA 2011); Wells Fargo Financial System Florida, Inc. v. GRP Financial Services Corp., 890 So.2d 383 (Fla. 2d DCA 2004); Hood v. Marvin and Kay Lichtman Foundation, 832 So.2d 941 (Fla. 3d DCA 2002); Munnerlyn v. State, 795 So.2d 171 (Fla. 4<sup>th</sup> DCA 2001); Brinson v. State, 697 So.2d 976 (Fla. 3d DCA 1997); Doe v. State, 499 So.2d 13 (Fla. 3d DCA 1986).

Judge Siracusa's statements before and after Figueroa's shipwreck of a penalty phase strongly indicate that he would have appointed independent counsel to present the mitigating evidence to

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<sup>24</sup> Figueroa, through undersigned counsel, requests that this Court consider receding from Hamblen v. State, 527 So.2d 800 (Fla. 1988), and its progeny, and instead adopt the dissenting opinions of Justices Ehrlich and Barkett which would require the appointment of independent counsel.

the jury so they could make an informed decision if he understood that it was within his discretion to do so. The mitigation witnesses were present and prepared to testify, so the independent attorney would not have had to investigate, or order testing, or do any extensive preparation, and there would have been no significant delay. One mental health expert (Dr. Eisenstein) would have testified that both statutory mental mitigating factors apply, and another (Dr. Wu) would have testified that Figueroa has significant brain abnormalities. While the state would have countered this with the three rebuttal experts it called in the Spencer hearing, one or more of the jurors could have found the defense experts more credible, and it would have taken only a single juror to preclude a death sentence. Moreover, the family witnesses could have informed the jury about Figueroa's nightmarish childhood and adolescence in an impoverished, crime-ridden, drug-infested Puerto Rican neighborhood, where he was abandoned by his mother and subjected to horrific abuse by his alcoholic, mentally disturbed father. See R4278-4344). Judge Siracusa's failure to appoint independent counsel to present these witnesses to the jury (or to call them as court witnesses) - - because he didn't know he had discretion to do so - - impaired the

reliability of the jury's life-or-death decision (which was then further compromised, beyond all repair, by their uncorrected confusion caused by the verdict form), which resulted in a "verdict" noncompliant with Florida capital sentencing law and the Eighth Amendment.

## ISSUE SIX

FIGUEROA'S DEATH SENTENCE WAS UNLAWFULLY IMPOSED BECAUSE NO VALID JURY PENALTY VERDICT WAS RETURNED.

### A. REQUIRED FINDINGS FOR A DEATH PENALTY VERDICT UNDER FLORIDA'S CAPITAL SENTENCING LAW

This Court “has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives.” Doty v. State, 170 So.3d 731, 733 (Fla. 2015). “The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law”. Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988). Strict application of Florida’s death penalty statute is necessary. Miller v. State, 373 So.2d 882, 885 (Fla. 1979).

Subsection (2) of Florida’s death penalty statute (§921.141), entitled “Findings and recommended sentence by the jury”, specifies “This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.” [Figueroa explicitly did not waive that right (T3083-84,3086,3106)]. If the jury unanimously

finds at least one aggravating factor, the defendant is eligible for a death sentence, whereupon the jury shall make a recommendation whether he or she should be sentenced to death or life imprisonment without parole. “The recommendation shall be based on a weighing of all of the following”:

- a. Whether sufficient aggravating factors exist.
- b. Whether aggravating factors exist which outweigh the mitigating favors found to exist.
- c. Based on the considerations in sub-paragraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

A recommendation of death must be unanimous; otherwise the result is a life recommendation. §921.141(2)(c). And despite its being called a “recommendation” a life verdict is binding upon the trial court. §921.141(3)(a)1.

Florida has adopted standard jury instructions and a standard verdict form for the purpose of guiding the jurors’ penalty deliberations and ensuring that they understand the statutorily required process. The verdict form carefully lays out five steps (A,B,C,D, and E). If the jury’s finding as to A,B, and D is YES they proceed to the next step. If they jury’s finding is NO as to A or B or D they are directed not to proceed any further and their penalty

deliberations come to a halt; the defendant will receive a life sentence.

The standard verdict form reads as follows:

### **3.12(e) JURY VERDICT FORM – DEATH PENALTY**

We the jury find as follows as to (Defendant) in this case:

#### **A. Aggravating Factors as to Count\_\_\_:**

We the jury unanimously find that the State has established beyond a reasonable doubt the existence of (aggravating factor).

YES\_\_\_

NO\_\_\_

*Repeat this step for each statutory aggravating factor submitted to the jury.*

**If you answer YES to at least one of the aggravating factors listed, please proceed to Section B. If you answered No to every aggravating factor listed, do not proceed to Section B; (Defendant) is not eligible for the death sentence and will be sentenced to life in prison without the possibility of parole.**

#### **B. Sufficiency of the Aggravating Factors as to Count\_\_\_:**

Reviewing the aggravating factors that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find the aggravating factors are sufficient to warrant a possible sentence of death.

YES\_\_\_

NO\_\_\_

**If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed**

**to Section C; (Defendant) will be sentenced to life in prison without the possibility of parole.**

**C. Mitigating Circumstances:**

One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence.

YES \_\_\_\_\_

NO \_\_\_\_\_

**Please proceed to Section D, regardless of your findings in Section C.**

**D. Eligibility for the Death Penalty for Count \_\_\_\_:**

We the jury unanimously find that the aggravating factors that were proven beyond a reasonable doubt (Section A) outweigh the mitigating circumstances established (Section C above) as to Count \_\_\_\_.

YES \_\_\_\_\_

NO \_\_\_\_\_

**If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; (Defendant) will be sentenced to life in prison without the possibility of parole.**

**E. Jury Verdict as to Death Penalty**

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt (Section A), that the aggravating [factor] [factors] [is] [are] sufficient to warrant a sentence of death (Section B), and the aggravating [factor] [factors] outweigh the mitigating circumstances (Section D), we the jury unanimously find that (Defendant) should be sentenced to death.

YES \_\_\_\_\_

NO \_\_\_\_\_

**If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole.**

Dated this \_\_\_\_ day of \_\_\_\_ 20\_\_, in \_\_\_\_ County, Florida.

\_\_\_\_\_  
(Signature of foreperson) Juror identification number

Use of a special verdict form which conflicts with Florida's capital sentencing statute and jury instructions is not only error, it amounts to a departure from the essential requirements of law. State v. Steele, 921 So.2d 538, 544-48 (Fla.2005); Poole v. State, 997 So.2d 382, 396 (Fla. 2008). And fundamental error is that which "reach[es] down to the validity of the verdict itself." Wimberly v. State, 41 So.3d 298, 301 (Fla. 4<sup>th</sup> DCA 2010). See also Phillips v. State, 316 So.3d 779, 782 (Fla. 1<sup>st</sup> DCA 2021)(to be fundamental error "[t]he error must be entwined so clearly with the verdict that one is forced to conclude that the verdict could not have been obtained without the assistance of the error"). In the instant jury death penalty trial the error is the verdict itself, and the trial court's imposition of a death sentence based on that non-verdict is legally invalid.

B. VERDICT FORM, JURY CONFUSION, AND THE NON-VERDICT IN FIGUEROA'S CASE

In the penalty phase charge conference, Judge Siracusa told Figueroa (who was still representing himself at that point):

The next one, it's - - the next one's about mitigating circumstances. And even though you didn't put on any mitigating circumstances, I'm going to still instruct them on mitigating circumstances, and that if they find any mitigating circumstances, without even the presentation of evidence, it will give them the opportunity to consider it. So, even if you don't produce any mitigating evidence, they can still - - if they made observations during the trial, they can consider it mitigating, and they can decide to weigh it in your favor.

Then, they're going to be provided with a jury form, and I will have these shown to you. I'm going to show you the forms that we're going to use. It's different than a verdict form in a regular jury verdict.

So now, for each Count - - so one for Mr. Travlos and one for Ms. Morin - - there's a verdict form. And it has, on the first page, all the aggravating factors that the State believes that they have established.

And then, on the second page, it has a question regarding the sufficiency of the aggravating factors, and "C" is going to be eligibility for the death penalty. And then, finally, "D" is going to be the verdict as to the death penalty, and it gives an option for numbers on there. It's all pretty self-explanatory.

(T3160-61).

From Judge Siracusa's description it appears that the irregular verdict form he provided to the jury when it began its penalty deliberations omitted step C (in which the jury is to indicate whether one or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence), and relabeled D and E (from the standard verdict form) as C and D. [As it turns out, the content of the verdict form as to "eligibility for the death penalty" was also altered, although that cannot be discerned from the Judge's comments in the charge conference, but it became apparent when the jury submitted questions during deliberations].

When the judge instructed the jury he informed them that "the verdict form in this one is a little bit more complicated than the [first-phase] verdict form, the last time. There will be two of them, one for each victim. And it has one category for each of the aggravating factors, and it's clearly spelled out. And then it has a series of questionnaires that you just need to follow through to the end. And it's pretty clearly and well-written, so it should be easy to follow" (T3195-96).

The judge then instructed the jury correctly and in conformity with the standard jury instructions on finding and weighing aggravating and mitigating factors (T3194-99).

About an hour into its deliberations the jury submitted the following written note:

Judge,

We have some confusion on page 2 Section “D”. Can you please re-explain this point to us. It appears to us that section B and D state the same thing. Are we making a recommendation? Why does it say a possible recommendation to death.

(R2425; T3207-08).

Judge Siracusa interpreted the first part of the jury’s question “So I guess they don’t understand that if you don’t have B, then you don’t go to C. And if you don’t have C, then you don’t go to D” (T3209). The prosecutor and Figueroa (still pro se) agreed that that would be a simple enough explanation (T3209-10). While they were discussing the questions about a “recommendation” attorney Hernandez asked if he could put in his “two cents”, and (after he was assured it would neither interfere with his waiver of mitigation or his appellate process) Figueroa agreed to his reinstatement as counsel (T3209-12). It was then agreed to change the wording in two places on the verdict form; “recommendation” would be changed to “verdict”

and - - in section D (corresponding to section E on the standard verdict form)(“Jury Verdict as to Death Penalty”) sufficient “to warrant a possible death sentence” would be changed to “sufficient to warrant a verdict of death” (T3219; see 3212-18).

When the jurors were brought in, Judge Siracusa read the first question expressing their confusion because “it appears that section B and D state the same thing.” “I can understand how, in your first reading of it, it would seem that way.” However:

it’s quite simply, if the answer is yes to B, then you proceed to C. If the answer is no, then you can go down to D, and the answer is no.

If the answer is yes to C, then you can go to D, and make your decision.

And then, if the answer is yes to D, then your verdict is for death.

So, it’s kind of a - - you have to stop; if your answer becomes no, at any point, then your answer is no.

So it’s kind of a - - it’s kind of a - - you know the really simple computer programs, where, if it’s “yes,” continue to the next step. If the answer is “no,” you don’t have to continue to the next step, you’re done, you’re out of the loop. All right?

I hope that is a better explanation. It didn’t sound as great, when it came out, as it did in my head. I’m sorry about that.

(T3220)

On the second and third questions, he explained that it was a verdict not a recommendation, and he was deleting the word “possible”. “So I appreciate your question. It helped the court to reflect better on the verdict form, than it provided to you” (T3220-21). Tomorrow he would give them a fresh verdict form which would have the changed language on it (T3223).

Next morning the judge gave the jury clean copies of the two (one for each count) verdict forms. He also gave them back the original verdict forms because “as I was getting ready to take them and discard them, I saw that you had already written things on them, so I didn’t want to interfere with anything you had already written” (T3230)<sup>25</sup>.

Later that morning the jury returned verdicts on each count

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<sup>25</sup> Undersigned appellate counsel has confirmed with the Pinellas County deputy clerk that the original verdict forms are not in the trial court file, nor would he expect them to be. In all likelihood they were discarded or destroyed. Undersigned counsel does not believe there is any need to reconstruct the record, because (1) we know from the penalty phase transcript exactly what changes were made, and (2) it is the actual verdict returned by the jury which is noncompliant with the law.

finding in Part A five of the six aggravating factors. As to Part B (Sufficiency of the Aggravating Factors) the jury answered YES to the following: “Reviewing the aggravating factors that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find that the aggravating factors are sufficient to warrant a sentence of death”. As to Part C (Eligibility for the Death Penalty) the jury answered YES to the following: “We the jury unanimously find that the aggravating factors that were proven beyond a reasonable doubt (Section A) we the jury unanimously find that the aggravating factors are sufficient to warrant a sentence of death.” And as to Part D (Jury Verdict as to Death Penalty) the jury answered YES to the following: “Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt (Section A), that the aggravating factors are sufficient to warrant a sentence of death (Section B), we the jury unanimously find that the aggravating factors are sufficient to warrant a verdict of death” (R2429-32) (see T3233-36, and the reading of the verdict in open court).

C. THE PURPORTED VERDICT DOES NOT CONFORM TO THE JURY INSTRUCTIONS AND IS NONCOMPLIANT WITH FLORIDA'S STATUTORY REQUIREMENTS

As can readily be seen, the “verdict” contains no mention whatsoever of mitigating circumstances or any sort of weighing process. Entirely omitted was Section C of the Florida Standard Verdict Form for death penalty cases: “Mitigating Circumstances: One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence. YES\_\_\_NO\_\_\_.” And while the verdict form used in this case did contain a section labeled “Eligibility for the Death Penalty”, that section bore no resemblance to what Florida law requires and the Standard Verdict Form asks, which is “We the jury unanimously find that the aggravating factors that were proven beyond a reasonable doubt (Section A) outweigh the mitigating circumstances established (Section C above) as to Count\_\_\_. YES\_\_\_NO\_\_\_.” Similarly, the final section of the jury’s findings labeled “Jury Verdict as to Death Penalty” omitted a critical portion of the Standard Verdict Form specifying that the jurors unanimously found that “the aggravating [factor or factors] outweigh the mitigating circumstances.”

This was a non-verdict which entirely failed to comply with Florida's death penalty law. The jury merely found a single aspect of the required findings three times, and returned a death verdict solely upon unanimously finding that the aggravators were sufficient to warrant a sentence of death (Parts B and C) and to warrant a verdict of death (Part D). That is simply not a legally valid verdict, and therefore it amounts to fundamental and structural error.

“A verdict that is not in conformance with the jury instructions is clearly defective.” Wilson v State, 566 So.2d 36 (Fla. 4<sup>th</sup> DCA 1990); see Moore v. State, 496 So.2d 255 (Fla. 5<sup>th</sup> DCA 1986). Here, the jurors expressed that they were confused by the verdict form, and instead of dispelling their confusion the judge's attempted explanation could only have perpetuated it. As recognized in Firmani v. Grant, 681 So.2d 869, 870 (Fla. 5<sup>th</sup> DCA 1996) and Triple R Paving, Inc. v. Broward County, 774 So.2d 50, 57 (Fla. 4<sup>th</sup> DCA 2000), “[t]here is great potential for the jury to be misled into following the verdict form rather than following the jury instructions.” “Hence, reversal is required where the jury could have been misled or confused by a verdict form which is inconsistent with the jury instructions.” Triple R Paving, 774 So.2d at 57. See also Acensio v. State, 497

So.2d 640, 641-42 (Fla. 1986)(rejecting state’s harmless error argument “because the verdict forms submitted to the jury did not correspond to the jury instructions”); Destefano v. Adventist Health System Sunbelt, 973 So.2d 492, 494 (Fla. 5<sup>th</sup> DCA 2008)(“The special verdict form was at best confusing and, at worst, erroneous); Warth v. State Farm Fire and Casualty Co., 695 So.2d 906 (Fla. 2d DCA 1997)(“We reverse because the verdict form submitted to the jury was confusing and misleading”; while the jury instruction was accurate “[u]nfortunately, the verdict form did not contain this clarification”).

“Where there is a critical deficiency in the verdict process, a court cannot infer or assume the jury’s interpretation.” Hills v. State, 994 So.2d 412 (Fla. 3d DCA 2008); Mantilla v. State, 38 So.3d 196, 200 (Fla. 3d DCA 2010).

Not surprisingly, there is no Florida death penalty case law which addresses a verdict form anywhere near as bollixed as this one. Snelgrove v. State, 921 So.2d 560, 562, 565, 570-72 (Fla. 2005), and Pangburn v. State, 661 So.2d 1182, 1184-85, 1188 (Fla. 1995) each reversed for a new jury penalty phase where the jury received and returned a single undifferentiated penalty verdict form for

two counts (two victims) of first-degree murder. Snelgrove (expressly) and Pangburn (implicitly) rejected the state's "harmless error" argument, which was predicated in Snelgrove on the assertion that "all of the aggravating and mitigating factors found by the jury and submitted to the judge applied equally to both. . . counts." This Court pointed out that Florida's capital sentencing statute "clearly addresses [the jury's] advisory sentence as it pertains to a single murder", and to allow a single verdict on two counts "would undermine our sentencing procedure." 921 So.2d at 570-71 and n.18; 661 So.2d at 1188. As stated in Snelgrove, at 571, "Because the potential for unreliability is so great in general recommendations for the imposition of the death penalty, we hold that a Pangburn violation is not subject to a harmless-error test. Rather, such an error requires per se reversal." The potential for unreliability in a verdict which omits every required finding regarding mitigating circumstances and weighing is, if anything, greater.

The Supreme Courts of New Jersey, Virginia, and Arkansas have addressed questions involving defective and confusing death penalty verdicts. See State v. Nelson, 803 A.2d 1, 26 (N.J. 2002)("Because our confidence that the jury correctly understood

the governing law has been undermined by the verdict sheet and the jurors' responses, and because we cannot rest a death sentence on the jury's answers to the special verdict section, we vacate Nelson's death sentence"). In criminal trials and especially in capital cases it is materially vital that the jury have a proper verdict form, and "[t]hat rationale may be extended to the provision of jury verdict forms with sentencing options that accurately and expressly correspond to the trial court's sentencing instruction." Powell v. Commonwealth, 552 S.E.2d 344, 363 (Va. 2001); Prieto v. Commonwealth, 682 S.E.2d 910, 931-32 (Va. 2009). As stated in Prieto, "The Commonwealth's argument that any error in the verdict form is cured by the jury instructions is without merit." Noting that it had previously set aside a death sentence and ordered a new penalty trial because "[t]he jury was presented with a confusing situation in which the trial court's instructions and the form the jury was given to use in discharging its obligations were in conflict"<sup>26</sup>, the Virginia Supreme Court said "No jury instruction can overcome a verdict form in a capital murder sentencing proceeding which is defective for

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<sup>26</sup> Atkins v Commonwealth, 510 S.E.2d 445, 457(Va. 1999).

lack of a sentencing option to impose life imprisonment even if one or both aggravators are found.” 682 S.E.2d at 931-32.

In the instant case, not only did the defective verdict form present the jury with a confusing “situation”, we know that the jurors were in fact confused, because they said so. Their question presented the trial judge with a golden opportunity to cure this egregious error by providing a new verdict form which corresponded to the instructions he had given them, and which included such basic and statutorily required steps as whether individual jurors found one or more mitigating circumstances, and whether the jury unanimously found that the aggravating factors outweighed the mitigating factors. Instead - - after making a couple of other changes - - he merely explained that if you say yes to B you go to C, and if you say yes to C you go to D, and if you say yes to D it’s a death verdict. But on this woefully inadequate verdict form, B, C, and D all pretty much said the same thing: “the aggravating factors are sufficient.”

The state might suggest that if the jurors were still confused they could have said so again, or submitted another question. However, Judge Siracusa’s comments in answering their question - - to the effect that he could understand how on first reading it might

seem confusing but it was really a quite simple progression from B to C to D, like a really simple computer program - - could easily have discouraged or intimidated the jurors from telling him they still didn't get it, and that B and D (as well as C) still all looked like the same thing.

Even more on point is a line of case law from Arkansas. In Hill v. State, 713 S.W.2d 233, 238 (Ark. 1986), that state's Supreme Court recognized that "[a] jury cannot impose a sentence of death unless it specifically finds that all three parts of the statute apply." In Camargo v. State, 940 S.W.2d 464, 469-71 (Ark. 1997):

the jury, after finding two aggravating circumstances and one mitigating circumstance, recommended a death sentence for appellant. The aggravating circumstances were his prior felony, which involved physical violence, and the fact that during the commission of these offenses, he put another person in danger. The mitigating circumstance was that he adjusted well to confinement.

The verdict forms (two counts) in Camargo correctly included the three required findings ((a) that one or more aggravating circumstances existed; (b) that the aggravating circumstances outweighed the mitigating circumstances; and (c) that the aggravating circum-

stances justified a death sentence)<sup>27</sup>, and properly directed the jurors that if it did not unanimously find (a) to skip (b) and (c), and if it did not unanimously find (b) to skip (c). Only if the jury checked all three findings could it recommend a death sentence; otherwise the sentence would be life without parole. 940 S.W.2d at 470.

The jury in Camargo returned what purported to be a death verdict, but only checked (b). When the trial judge noticed this he asked both attorneys if there was any question and they both answered no. After polling the jurors the judge entered sentences of death. Id., at 470.

The Arkansas Supreme Court reversed for a new penalty trial, concluding that the verdict's noncompliance with the statutory requirements to impose a death sentence was properly before the appellate court for review despite the lack of an objection below, because the error was "essential to the jury's imposition of the death penalty itself." Id., at 469-70. The jury's failure to make the written findings required by the statute precluded any application of a

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<sup>27</sup> Under Arkansas law those three findings must be made beyond a reasonable doubt.

“harmless error” analysis. Id., at 471.

In Jackson v. State, 105 S.W.2d 352, 358 (Ark. 2003) the Arkansas Supreme Court cogently distinguished Camargo from Jones v. State, 947 S.W.2d at 339, 341-43 (Ark. 1997), on the basis that “In Camargo, the jury did not comply with the requirements of Ark. Code Ann. §5-4-603, whereas in Jones, supra, and the instant case, the statutory requirements were satisfied.” See also Smith v. State, 555 S.W.2d 881, 887 (Ark. 2018), a more recent Arkansas Supreme Court decision citing Camargo for the proposition that a jury’s failure to make the necessary written findings was essential to the imposition of the death penalty (and therefore would fall under the Arkansas equivalent of fundamental error).

Figueroa’s death verdict is different from - - and even worse than - - Camargo’s in several key aspects. First of all, the jury in Camargo was given proper verdict forms; they simply failed to explicitly make the required findings. The judge’s error was in accepting the non-verdict and imposing a death sentence based thereon. In Figueroa’s case the jury never even had an opportunity to return a proper verdict. Instead, the jury’s return of a non-verdict was set in motion by the preparation of a fatally defective non-standard verdict

form by either the prosecution (most likely) or the judge himself (less likely)<sup>28</sup>. When the jurors realized that something seemed wrong and confusing, their question afforded Judge Siracusa the opportunity to prepare a lawful verdict form but he (and the prosecutors and Figueroa and - - when reinstated - - defense attorney Hernandez) all inexplicably and inexcusably dropped the ball. See State v. Maske, 591 S.E.2d 521, 535 (N.C. 2004), in which Justice Brady, concurring, wrote:

I agree with the majority that defendant's sentence of death should be reversed and that his case should be remanded to the trial court for a new sentencing proceeding.

I write separately to emphasize that this Court has, in the present case, been confronted with and remedied what I believe to be a serious error in a capital proceeding. This Court guards fair play and the integrity of our justice system, even amid a furor of criticism regarding purported problems with our system of capital punishment. Our decision today reflects that our judicial system is capable of correcting itself and will, in fact, do so.

...

...

... [I]nadvertent mistakes requiring this Court to reverse a defendant's death sentence should rarely occur. In this case, all relevant parties literally "dropped the ball." The trial judge neither gave the requested instructions to the jury panel nor allowed the parties an opportunity to object. The State was clearly not attentive to the contents of

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<sup>28</sup> It is clear from the record that the verdict form was not prepared by Figueroa pro se (see T3161), and attorney Hernandez was not representing him at that time.

the instructions when they were presented in open court, and the defense attorney did not, as he ideally should have, contemporaneously object to the instructions. These critical omissions are unacceptable given the gravity of the setting, the dwindling resources available to our judiciary, and the expanding caseload of the judiciary.

Similarly in Figueroa's case everyone dropped the ball - - dropped it more than once - - and the error resulted in a non-verdict and an unlawful death sentence; by definition fundamental error. It is unclear whether providing the jury with verdict forms which failed to comply with Florida's capital sentencing law was an inadvertent mistake, or whether it was a deliberate alteration made because of Figueroa's decision not to present any mitigating evidence in the penalty phase. The latter possibility would appear inconsistent and irreconcilable with Judge Siracusa's comment to Figueroa that "even though you didn't put on any mitigating circumstances, I'm still going to instruct them on mitigating circumstances, and that if they find any mitigating circumstances without even the presentation of evidence, it will give them the opportunity to consider it. So even if you don't produce any mitigating evidence, they can still - - if they made observations during the trial, they can consider it mitigating, and they can decide to weigh that in your favor" (T3160-61).

[In fact, there was evidence in the first phase which one or more jurors could have found and weighed in mitigation. There was testimony, both from Figueroa himself, and from several state witnesses, that he was a hard worker throughout his adult life. Figueroa testified, and it was admitted by his girlfriend Tessa Cooper, that she was a drug addict and Figueroa tried over a long period of time to help her recover from her addiction. Cooper also admitted that she was cheating on Figueroa sexually with Sam Alkass and she was secretly obtaining drugs from Tom “Catfish” Crawford. And according to Cooper, when Figueroa and John Travlos had a dispute, about a month before the murders, about payment for work done on Travlos’ boat, Travlos had made a comment “Well, we feed you all the time.” Figueroa became enraged and obsessed. He would continue ranting to Cooper “I won’t be disrespected”, “Who does he think I am”, “I don’t work for food.” He went on and on and couldn’t let it go (T2035-38). One or more jurors certainly could have concluded that Figueroa’s simmering rage over this perceived slight may have motivated both the robbery and the murders, and that his mental or emotional disturbance overcame any rational judgment].

In any event, whether it was an inadvertent mistake or a deliberate alteration of the standard verdict form, it afforded the jury no opportunity to make the findings required by law in order to return a death verdict.

D. THE VERDICT FORM AND THE VERDICT ITSELF ALSO VIOLATE THE CONSTITUTIONAL PRINCIPLE THAT THE SENTENCER MUST NOT BE PRECLUDED FROM CONSIDERING AND GIVING EFFECT TO MITIGATING CIRCUMSTANCES.

In addition to violating Florida law, the non-verdict returned in the instant case violates the constitutional principle - - designed to ensure reliability in capital sentencing - - that the sentencer must not be precluded from considering and giving effect to all relevant mitigating factors. See, e.g., Lockett v. Ohio, 438 U.S. 586, 605 (1978); Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982); Penry v. Lynaugh, 492 U.S. 302, 315-28 (1989); Penry v. Johnson, 532 U.S. 782, 786-804 (1989); Smith v. Texas, 543 U.S. 37, 45-48 (1989); McKoy v. North Carolina, 494 U.S. 433, 442-43 (1990); Mills v. Maryland, 486 U.S. 367, 374-75 (1988); Tennard v. Dretke, 542 U.S. 274, 284 (2004); Abdul-Kabir v. Quarterman, 550 U.S. 233, 260 (2007). Each individual juror must “be permitted to consider and give effect to mitigating evidence when deciding the ultimate ques-

tion of whether to vote for a sentence of death.” McKoy, 494 U.S. at 442-43; citing Mills. Jury instructions which tell jurors they may find and weigh mitigating factors - - when contradicted by a verdict form which affords them no meaningful opportunity to do so - - are constitutionally insufficient. This is amply illustrated by Penry v. Johnson, supra, [Penry II] and Smith v. Texas, supra.

In Penry’s first penalty trial the Texas jury was instructed to answer three statutorily mandated “special issues”:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

The jury answered “yes” to each question and, as required by that state’s statute, the trial court sentenced Penry to death. The Texas Court of Criminal Appeals affirmed, and the lower federal courts denied habeas relief. In Penry v. Lynaugh [Penry I], the United States Supreme Court overturned the death sentence because the jury had not been adequately instructed with respect to the mitigat-

ing evidence. At Penry's second penalty trial, the jury was again instructed to answer the same three "special issues", but this time the jury was given the following supplemental instruction:

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

A copy of the instructions was attached to the verdict form, but the verdict form itself only provided "Yes" or "No" options for the three special issues, and contained no reference to mitigating circumstances, so the signed verdict of death confirmed only that the jury had unanimously agreed that the answer to each special issue was "Yes." Once again, the trial court imposed a death sentence, and

the state's highest criminal court and the lower federal courts upheld it. See Penry v. Johnson, *supra*, 532 So.2d at 786-92 (Penry II).

The United States Supreme Court disagreed, concluding that the supplemental instruction that the jury could find and weigh mitigating circumstances was constitutionally insufficient to overcome the limited verdict options the jury was given:

Penry I did not hold that the mere mention of “mitigating circumstances” to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may “consider” mitigating circumstances in deciding the appropriate sentence. Rather, the key under Penry I is that the jury be able to “consider and give effect to [a defendant’s mitigating] evidence in imposing sentence.” 492 U.S. at 319, 109 S.Ct 2934 (emphasis added). See also Johnson v. Texas, 509 U.S. 350, 381, 113 S.Ct 2658, 125 L.Ed 290 (1993)(O’CONNOR, J. dissenting)(“[A] sentence [must] be allowed to give full consideration and full effect to mitigating circumstances”. . . For it is only when the jury is given a “vehicle for expressing its ‘reasoned moral response’ to that evidence in rendering its sentencing decision,” Penry I, 492 U.S., at 328, 109 S.Ct 2934, that we can be sure that the jury “has treated the defendant as a ‘uniquely individual human bein[g]’ and has made a reliable determination that death is the appropriate sentence.” Id, at 319, 109 S.Ct 2934 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 305, 96 S.Ct 2928, 49 L.Ed2d 944 (1976)).

532 U.S. at 797(emphasis in opinion); see also Smith v. Texas, *supra*, 543 U.S. at 46.

As in Penry II, Figueroa’s jurors received “mixed signals” [Id, at 802], with the jury instructions telling them they could find and weigh mitigation, but the verdict form providing no effective way to do so. In Figueroa’s case we know the mixed signals confused the jurors because they said so, and the trial judge’s response and the new verdict form not only clarified nothing; they actually perpetuated the original error. The result was a verdict - - if it can even be called that - - which complies with neither the Florida capital sentencing statute nor the Eighth Amendment.

E. THE LOCKETT-EDDINGS-PENRY LINE OF EIGHTH AMENDMENT CASE LAW STILL APPLIES TO CAPITAL SENTENCING IN FLORIDA.

The state may contend that the Eighth Amendment case law discussed above no longer applies in Florida because of this Court’s conclusion in State v. Poole, 297 So.3d 487 (Fla. 2020) that neither the Sixth nor the Eighth Amendments require a unanimous jury death verdict, and that the Sixth Amendment is satisfied by a unanimous jury finding of a single aggravating factor to establish death eligibility. Assuming without conceding that Poole was correctly decided, that might open the door for the Florida legislature to enact a

capital sentencing scheme which would only require a jury to make the threshold eligibility determination, while the selection decision (including the findings and weighing of mitigating factors) would be assigned to the trial judge. But - - importantly - - as this Court also recognized in Poole [297 So.3d at 507] the Florida legislature has not enacted such a scheme. Figueroa's penalty trial was governed by the current statute, which accords the jury a critical role (and, in the event a single juror votes for life, a dispositive role) in the life-or-death selection decision. The jury must make unanimous findings on whether (1) one or more aggravating factors exist; (2) whether the aggravating factors are sufficient; (3) whether the aggravating factors outweigh the mitigating factors; and (4) whether based on those considerations, the defendant should be sentenced to life imprisonment without parole or death.

Even under Florida's 1972 death penalty statute, which did not require unanimity, the jury and the trial judge were co-sentencers. Snelgrove v. State, 921 So.2d 560, 571 (Fla. 2005); Kormondy v. State, 845 So.2d 41, 54 (Fla. 2003); Lambrix v. Singletary, 520 U.S. 518, 528 (1997). In Espinosa v. Florida, 505 U.S. 1079, 1082 (1992), the U.S. Supreme Court said "there are many constitutionally per-

missible ways in which States may choose to allocate capital sentencing authority”, and “Florida has essentially split the weighing process in two.” The holding in Espinosa is that “if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating factors.”

That Florida continues to be a weighing state is clear from the text of §921.141(2)(b)2 (the jury’s “recommendation shall be based on a weighing of all of the following. . .); (2)(b)2.b (“[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist”; and (2)(b)2.c (based on those considerations whether the defendant should be sentenced to death or life imprisonment). That the critical role of the jury in the selection decision is significantly enhanced compared to the former statute is clear from §921.141(2)(c) (requiring the trial judge to sentence the defendant to life unless the jury - - based on the above-described weighing process - - unanimously recommends the death penalty).

In State v. Poole, supra, 297 So.2d at 495, this Court recognized that the U.S. Supreme Court has “fleshed out” the constitutional principle of Furman v. Georgia, 408 U.S. 238 (1972) “by re-

quiring states to narrow the class of death-eligible murders” [see Issue Eight, infra] and “by mandating individualized sentencing that considers offender-specific mitigating circumstances.” While, arguably, a state could place the latter mandatory consideration in the hands of the trial judge alone, Florida has not done so. Therefore, to paraphrase Espinosa, when a weighing state places capital sentencing authority - - and especially the weighing process itself and the ultimate selection decision - - in two actors rather than one, neither actor may reach its decision without making the required findings. The Lockett-Eddings-Penry line of constitutional case law recognizes that the sentencer must not be precluded from considering and giving effect to mitigating circumstances, and in Florida - - except in the rare instance of a judge overriding a death recommendation - - the jury is for all practical purposes the sentencer. The weighing process is a “complex moral judgment” and “‘the lens through which the jury must focus the facts that it has found’ to reach its individualized determination.” United States v. Runyon, 707 F.3d 475, 516 (4<sup>th</sup> Cir. 2013); United States v. Sampson, 486 F.3d 13, 32 (1<sup>st</sup> Cir. 2007), quoting United States v. Purkey, 428 F.3d 738, 750 (8<sup>th</sup> Cir. 2005); see also State v. Poole, supra, 297 So.3d at 503; United

States v. Gabrion, 719 F.3d 511, 532-33 (6<sup>th</sup> Cir. 2013). The verdict in the instant case, in contrast, reflected only a finding, repeated three times, that “the aggravating factors are sufficient” to warrant a sentence and verdict of death. Accordingly - - in addition to being noncompliant with Florida capital sentencing law - - the “verdict” also fails to comport with the requirements of the Eighth Amendment. Penry v. Johnson, supra; Smith v. Texas, supra.

F. THE JURY’S NON-VERDICT, AND THE DEATH SENTENCE IMPOSED BY THE JUDGE PURSUANT TO IT, CONSTITUTE FUNDAMENTAL AND STRUCTURAL ERROR.

In criminal cases, a judge’s authority to sentence derives from the jury’s verdict [Blakely v. Washington, 542 U.S. 296, 306(2004)], and (except in cases where the jury penalty proceeding is waived) this is manifestly true of a Florida judge’s authority to impose a death sentence. Absent a unanimous and legally valid verdict determining that the defendant should be sentenced to death, the trial judge must impose a sentence of life imprisonment without parole. The egregious error in Figueroa’s case not only affected the (admittedly confused) jury’s deliberations and contributed to their verdict, the error is the verdict, and - - as discussed in Camargo v. State,

supra, at 940 S.W..2d at 469-70, is “essential to the jury’s imposition of the death penalty itself.” Therefore the invalid verdict is both fundamental and structural error, as well as harmful error under the DiGuilio standard.<sup>29</sup>

Fundamental error has been described as error which reaches down to the validity of the verdict itself [Wimberly, 41 So.3d at 301] or which is very closely entwined with the verdict [Phillips, 316 So.3d at 782]. In the instant case, where the error is the verdict itself, it is self-evident that that verdict could not have been obtained without the “assistance” of the error. The most that the state can say would be to conjecture that if the jury had been given a proper verdict form they would have made the required findings. And such an argument would necessarily have to be premised on Figueroa’s decision to waive the presentation of mitigating evidence. But as Judge Siracusa himself recognized, that waiver does not mean that jurors could not consider, find, and weigh mitigating circumstances (T3160-61). Even when a defendant is actively seeking a death sentence - - which Figueroa did not - - this Court has an obligation to ensure that the death penalty is imposed in accordance with all constitutional and

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<sup>29</sup> State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)

statutory directives. Doty, 170 So.3d at 733; Hamblen, 527 So.2d at 804.

The invalid verdict upon which Figueroa's death sentence is based is structural error for the same reason it is fundamental error. As Justice Scalia wrote in the opinion of the Court in Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) "Harmless-error review looks, as we have said, to the basis on which 'the jury actually rested its verdict'"<sup>30</sup> (emphasis in Sullivan opinion).

The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered - - no matter how inescapable the findings to support that verdict might be - - would violate the jury-trial guarantee.

Id., at 279 (emphasis in opinion)

Absent a valid verdict, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt - - not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been

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<sup>30</sup> Citing Yates v. Evatt, 500 U.S. 391, 404 (1991).

different absent the constitutional error. That is not enough.” Sullivan, 508 U.S. at 279 (emphasis in opinion). Appellate speculation about a hypothetical jury’s action cannot be sufficient; otherwise directed verdicts for the State would be sustainable on appeal. Id., at 279.

Figueroa’s unlawful death verdict is more similar to Sullivan (where the jury received a constitutionally deficient reasonable doubt instruction) than to cases such as Neder v. United States, 527 U.S. 1 (1999) or Washington v. Recuenco, 548 U.S. 212 (2006)(failure to submit one element of a criminal offense or an Apprendi<sup>31</sup> “sentencing factor” to a jury is not structural error, and may be evaluated to determine harm or harmlessness). The jury’s weighing of aggravating and mitigating circumstances is integral to Florida’s entire capital sentencing scheme. A proper verdict form would have directed the jury that unless they unanimously agreed to a finding that the aggravators outweigh the mitigators they should not even proceed to Section E (Jury Verdict as to Death Penalty); the sentence is life imprisonment without possibility of parole. No less than three of the five required steps (C, D, and E) refer to the individual jurors’ find-

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<sup>31</sup> Apprendi v. New Jersey, 530 U.S. 466 (2000).

ings and the jury's weighing of mitigating factors, but in this case any mention of mitigators or a weighing process was entirely omitted from the verdict form and the verdict itself. The standard verdict form is, of course, based on the Florida capital sentencing statute, which provides that the jury's decision between life or death must be based on all of the relevant considerations, including the weighing of aggravating and mitigating factors. These critical omissions amount to an extreme violation of Florida law, and - - because the jury is the primary sentencer - - the Eighth Amendment. This is Sullivan-level error or worse; not merely Neder-Recuenco.

See also People v. Smith, 906 N.E.2d 529, 542-43 (Ill. 2009) and People v. Mack, 658 N.E.2d 437, 444 (Ill. 1995)(harmless-error analysis "presupposes an actual verdict")(emphasis in opinions); People v. Collie, 995 P.2d 765, 769 (Colo. 1999)(errors so prejudicial "as to render the verdict in essence no verdict at all" are structural defects mandating reversal).

Finally, even assuming for the sake of argument that the DiGuilio test could apply, the state's anticipated harmless-error argument would not even pass that test.

Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the

evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986).

Here, we know the jurors were confused. And we can be confident that after Judge Siracusa's explanation, and his giving them a new verdict form which merely repeated three times the question of whether "the aggravating factors are sufficient" and omitted any mention of mitigating factors or weighing, they remained confused. The misleading, confusing, and legally incorrect verdict form necessarily played a role the jury's deliberations [see DiGuilio, at 1136] as well as the non-verdict they ultimately returned. Whether another jury unaffected by this egregious error would have returned a proper verdict of death can and should be determined after a new penalty trial.

In the alternative, Figueroa's death sentences should be reduced to life imprisonment.

## ISSUE SEVEN

### THE TRIAL COURT ERRONEOUSLY ACCORDED GREAT WEIGHT TO THE JURY'S NON-VERDICT.

In Muhammad v. State, 782 So.2d 343, 363 (Fla. 2001), this Court found that the trial judge reversibly erred by according “great weight” to the jury’s death recommendation when no mitigating evidence had been presented to the jury. Subsequent decisions such as Grim v. State, 841 So.2d 455, 460-61 (Fla. 2003) and Kaczmar v. State, 228 So.3d 1, 10-11 (Fla. 2017) have chipped away at the core holding in Muhammad, and its continued vitality was called into question, though not decided, in Reynolds v. State, 251 So.3d 811, 814 n.3 (Fla. 2018). Regardless of whether or not Muhammad remains good law, the trial judge in Figueroa’s case gave “great weight” [R2640] to a jury “verdict” which - - as a result of his own error - - was noncompliant with Florida’s capital sentencing statute, and contained none of the required findings regarding mitigating circumstances, or weighing aggravators against mitigators. By doing so, he compounded his own egregious error discussed in Issue Six.

## ISSUE EIGHT

BY ABANDONING PROPORTIONALITY REVIEW IN LAWRENCE V. STATE, 308 So.3D 544 (Fla. 2020), THIS COURT HAS MISCONSTRUED THE UNITED STATES SUPREME COURT’S DECISION IN PULLEY V. HARRIS, 465 U.S. 37(1984) AND RENDERED FLORIDA’S CAPITAL SENTENCING SYSTEM ARBITRARY, CAPRICIOUS, AND UNCONSTITUTIONAL.

[At the outset, Figueroa through his undersigned counsel recognizes that this Court has summarily rejected an abbreviated version of this constitutional argument in Joseph v. State, 2022 WL 405557, p.4 n.5 (Fla. 2022). The full argument is also before the Court in Gordon v. State, case no. SC20-284. In Joseph, the Court’s sole response to the contention that the abandonment of proportionality review in Lawrence has rendered Florida’s capital sentencing scheme arbitrary, capricious, and unconstitutional was circular: “[W]e do not review the proportionality of Joseph’s sentence of death.” That, Figueroa submits, is the problem in a nutshell].

### A. RISE AND FALL OF PROPORTIONALITY REVIEW – FURMAN TO LAWRENCE

It has been recognized since 1972 that the death penalty cannot be imposed under sentencing procedures which create a substantial risk that it will be inflicted in an arbitrary and capricious

manner. Furman v. Georgia, 408 U.S. 238(1972). There must be a meaningful basis for distinguishing the few cases in which capital punishment is imposed from the many in which it is not. Gregg v. Georgia, 428 U.S. 153,188 (1976), citing Justice White’s concurring opinion in Furman. Accordingly, when this Court first upheld the constitutional validity of Florida’s post-Furman capital sentencing statute it recognized that “[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation”; therefore the Florida legislature properly chose to reserve its application to only the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So.2d 1,7 (Fla. 1973).

For nearly five decades, this Court has considered proportionality review to be “a unique and highly serious function of [the] Court, the purpose of which is to foster uniformity in death-penalty law.” Crook v. State, 908 So.2d 350,356 (Fla. 2005); Urbini v. State, 714 So.2d 411,417 (Fla. 1998). “The inquiry is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. . . so as to justify the imposition of death as the penalty.” Crook, 908 So.2d at 357 (emphasis in opinion). Thus, even

when the aggravation prong is satisfied, imposition of the death penalty is unwarranted when there is compelling mitigating evidence.

Crook, at 357-58; see also Cooper v. State, 739 So.2d 82,83-86 (Fla. 1999); Davis v. State, 121 So.3d 462,499-502 (Fla. 2013).

In Urbin, 714 So.2d at 416, this Court recognized that “[t]he requirement that death be administered proportionately has a variety of sources in Florida law”, one of which was the state constitution’s prohibition against unusual punishments. Another source, however, is legislative intent to comply with Furman’s prohibition of the arbitrary imposition of death:

In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So.2d 1,7 (Fla. 1973). See also Jones v. State, 705 So.2d 1364,1366 (Fla. 1998)(reasoning that “[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions ‘the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes’”)(footnote omitted).

Urbin, at 416.

When the United States Supreme Court upheld the constitutionality of Florida’s post-Furman death penalty law in 1976, it emphasized that any risk of arbitrary or capricious imposition is mini-

mized by Florida's system of appellate review, to determine whether the ultimate penalty is or is not warranted. Proffitt v. Florida, 428 U.S. 242,252-53 (1976). Trial judges' decisions to impose death "are reviewed to ensure that that they are consistent with other sentences imposed in similar circumstances", and thus in Florida it is no longer true that there is "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." Proffitt, 428 U.S. at 253. The Court found it noteworthy that the Florida Supreme Court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed", having vacated 8 of the 21 death sentences it had reviewed to date. Proffitt, 428 U.S. at 253 [See Olsen v. State, 67 P.3d 536,610 (Wyo.2003)("As seen in Pulley [v. Harris, 465 U.S. 37 (1984)], the Court continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective").

In 1983, the U.S. Supreme Court granted certiorari on the question of whether California's 1977 capital punishment statute was constitutionally invalid because it failed to require that state's

supreme court to conduct comparative proportionality review. Pulley v. Harris, 460 U.S. 1036 (1983); Pulley v. Harris, 465 U.S. 37,38-41 (1984). The Florida Supreme Court - - well aware of the pending issue regarding the California death penalty scheme - - stated in Booker v. State, 441 So.2d 148,153 (Fla. 1983) that Pulley v. Harris “is of no significance to the instant case. The United States Supreme Court has stated that the issue will not apply to states which are already conducting proportionality review. The United States Supreme Court has already approved of this Court’s method of review in a specific statement in Proffit and this Court has repeatedly stated that we conduct proportionality review in all cases” (emphasis supplied).

The U.S. Supreme Court subsequently decided in Pulley v. Harris that comparative proportionality review was not required in California, because that state’s 1977 statutory scheme provided adequate safeguards to prevent arbitrary and capricious imposition of the death penalty. 465 U.S. at 51-54. Pulley v. Harris does not categorically hold that proportionality review is never constitutionally required; it depends on the presence or absence of sufficient other “checks on arbitrariness.” See also State v. Welcome, 458 So.2d

1235, 1249 (La. 1984)(emphasis supplied)(in Pulley v. Harris the Supreme Court held that the Eighth Amendment does not necessarily require proportionality review; “[t]he principal constitutional consideration is that the overall system contain sufficient checks and safeguards against the arbitrary imposition of capital punishment”); Walker v. Georgia, 555 U.S. 979 (2008) (statement of Justice Stevens respecting the denial of the petition for writ of certiorari)(Pulley v. Harris’ statement that the Eighth Amendment does not require proportionality review of every capital sentence “was intended to convey our recognition of differences among the States’ capital schemes and the fact that we consider statutes as we find them”).

In 2002, the Florida Constitution was amended to provide that the state’s prohibition against cruel and unusual punishment shall be construed in conformity with decisions of the U.S. Supreme Court which interpret the Eighth Amendment’s prohibition against cruel and unusual punishment. Art. 1, §17, Fla. Const.; see Lightbourne v. McCollum, 969 So.2d 326,334-35 (2007). Florida has a similar conformity clause regarding search and seizure law. Art. 1, §12, Fla. Const. The question of whether a U.S. Supreme Court decision automatically modifies Florida law depends on whether the Supreme

Court decision “is both factually and legally on point” and “whether it is controlling.” Smallwood v. State, 113 So.3d 724, 730 (Fla. 2013); see also State v. Michel, 257 So.3d 3, 12 (Fla. 2018) (Pariente, J., dissenting).

Since Pulley v. Harris expressly decides only the question of whether California’s 1977 capital sentencing scheme - - a very different system than Florida’s - - provides sufficient safeguards against arbitrary imposition of the death penalty even without mandatory proportionality review, it is neither controlling in Florida nor is it factually and legally on point.

For years after the adoption of the conformity clause, this Court continued to conduct proportionality review - - whether or not raised by the capital defendant on appeal<sup>32</sup> - - in order to limit imposition of the death penalty to the most aggravated and least mitigated first degree murders, as the legislature intended. Then, in 2014, Justices Canady and Polston announced their conclusion that proportionality review is prohibited in this state by the (then twelve years old) conformity clause, coupled with the (then thirty years old) Pulley v. Harris decision. Yacob v. State, 136 So.3d 539,557-63 (Fla. 2014)(Can-

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<sup>32</sup> See, e.g., Kaczmar v. State, 104 So.3d 990,1007 (Fla. 2012)

ady J., joined by Polston, C.J., concurring in part and dissenting in part). Based on that legal analysis, Justices Canady and Polston would have refused to set aside Yacob's death sentence even though they agreed with the plurality and concurring Justices that death was a disproportionate punishment "under this Court's comparative proportionality jurisprudence" in Yacob's case [136 So.3d at 557 and 562].

The plurality opinion in Yacob and the concurring opinion of Justice Labarga each emphasized that proportionality review arises from a variety of sources in Florida and federal law - - not solely from the prohibition against cruel and unusual punishment - - and (with the plurality citing Furman, Proffitt, Gregg, and Dixon) it is essential to guard against the arbitrary imposition of the death penalty. 136 So.3d at 546-550, 552-57. The plurality opinion specifically points out another fatal flaw in the dissent's conformity clause analysis, i.e., its implicit assumption that what the U.S. Supreme Court said about California's 1977 capital sentencing scheme necessarily applies to Florida's very different scheme. 136 So.3d at 549 n.2.

Six days after the Yacob opinions were issued, another capital defendant who was challenging the proportionality of his death sen-

tence, Humberto Delgado, filed motions to disqualify Justices Canady and Polston on the ground that they would decline to engage in the Court's mandatory proportionality review. The two Justices denied the motions for disqualification. In 2015, Delgado's death sentence was reduced to life imprisonment on proportionality grounds, largely based on compelling mental health mitigation. Delgado v. State, 162 So.3d 971,982-83 (Fla. 2015). Once again, Justices Canady and Polston agreed with the majority's conclusion that Delgado's death sentence "cannot withstand scrutiny under this Court's comparative proportionality jurisprudence." Justice Canady wrote:

[In Yacob] I expressed the view that the exercise of proportionality review by this Court is inconsistent with the conformity clause of article 1, section 17, of the Florida Constitution. My view on the subject was however, expressly rejected by the Court majority. Until the State presents an argument justifying receding from our precedent on the subject that was clearly established in Yacob, I will follow that precedent. Accordingly, I agree with the decision to overturn the sentence of death imposed in this case.

Delgado, 162 So.3d at 983 (Canady, J. concurring).

Thus, by dint of fortunate timing, Michael Yacob (whose crime was a single aggravator "robbery gone bad", with a spur-of-the-moment shooting precipitated by the store clerk's sudden movement) and Humberto Delgado (who suffered from a serious, longstanding,

and well-documented mental illness, and where the shooting of the police officer also occurred on the spur of the moment after Delgado was tasered) were spared the death penalty because it was proportionally unwarranted. [If their cases were before the Florida Supreme Court now their death sentences would presumably be upheld, on the flawed theory that the Court's hands are tied by the conformity clause, since Yacob and five decades of sound precedent have been overturned by Lawrence, infra].

In January 2019, Justices Lewis, Quince, and Pariente, having reached the mandatory retirement age of seventy (since amended to seventy-five) retired from the Court.

On October 29, 2020, in Lawrence v. State, 308 So.3d 544 (Fla. 2020), this Court receded from Yacob and adopted the position advocated by Justices Canady and Polston in their dissent in that case. Justice Labarga, who had written a strong concurring opinion in Yacob, now found himself the lone dissenter in Lawrence. Characterizing the majority decision as its “most consequential step yet in dismantling the reasonable safeguards” in Florida’s capital sentencing system, Justice Labarga sought to place the majority’s recent (i.e.,

since the changes in membership beginning in January 2019) decisions in context:

I cannot overstate how quickly and consequentially the majority's decisions have impacted death penalty law in Florida. On January 23, 2020, this Court decided *State v. Poole*, 297 So.3d 487 (Fla. 2020). As I noted in my dissent in *Poole*, despite the clearly defined historical basis for requiring unanimous jury verdicts in Florida, this Court receded from the requirement that juries must unanimously recommend that a defendant be sentenced to death. *Poole*, 297 So.3d at 513 (Labarga, J. dissenting). After 2016, only the state of Alabama permitted a nonunanimous (10-2) jury recommendation. [Footnote omitted]. *Poole* paved the way for Florida to return to an absolute outlier status of being one of the only two states that does not require unanimity.

On May 14, 2020, this Court decided *Bush v. State*, 295 So.3d 179 (Fla. 2020). In that case, this Court uprooted the long applied heightened standard of review in cases that are wholly based on circumstantial evidence. Under the heightened standard “[e]vidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof of sufficient to convict.” *Davis v. State*, 90 So.2d 629, 631-32 (Fla. 1956). This standard, applied for more than one hundred years, served as an important check on circumstantial evidence cases. As I noted in my dissent in *Bush*, while circumstantial evidence is a vital evidentiary tool in meeting the State’s burden of proof, “circumstantial evidence is inherently different from direct evidence in a manner that warrants heightened consideration on appellate review.” *Bush*, 295 So.3d at 216 (Fla. 2020)(Labarga, J., concurring in part and dissenting in part). “The solemn duty imposed upon this Court in re-

viewing death cases more than justifies the stringent review that has historically been applied in cases based solely on circumstantial evidence.” *Id.* at 217.

On May 21, 2020, this Court decided *Phillips v. State*, 299 So.3d 1013 (Fla. 2020). In *Phillips*, this Court receded from *Walls v. State*, 213 So.3d 340 (Fla. 2016) (holding that *Hall v. Florida*, 572 U.S. 701, 134 S.Ct 1986, 188 L.Ed.2d 1007 (2014), is to be retroactively applied). The United States Supreme Court’s decision in *Hall* held that Florida law, which barred individuals with an IQ score above 70 from demonstrating that they were intellectually disabled, “creates an unacceptable risk that persons with intellectual disability will be executed, and this is unconstitutional.” *Id.* at 704, 134 S.Ct 1986. The Supreme Court concluded: “This Court agrees with the medical experts that when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” *Id.* at 723, 134 S.Ct 1986. In *Walls*, this Court held that *Hall* is to be retroactively applied. The majority’s recent decision in *Phillips* subsequently receded from *Walls*.

As expressed in my dissent in *Phillips*, in light of the majority’s decision to recede from *Walls*, “an individual with significant deficits in adaptive functioning, and who under a holistic consideration of the three criteria for intellectual disability could be found intellectually disabled, is completely barred from proving such because of the timing of his legal process. This arbitrary result undermines the prohibition of executing the intellectually disabled.” *Phillips*, 299 So.3d at 1025 (Labarga, J. dissenting).

In each of these cases, I dissented, and I lamented the erosion of our death penalty jurisprudence. Now today, the majority jettisons a nearly fifty-year-old pillar of our mandatory review in direct appeal cases. As a result, no longer is this Court required to review death sentences for

proportionality. I could not dissent more strongly to this decision, one that severely undermines the reliability of this Court's decisions on direct appeal, and more broadly, Florida's death penalty jurisprudence.

Lawrence v. State, 308 So.3d at 553-54 (Labarga, J. dissenting).

B. BECAUSE FLORIDA'S CAPITAL SENTENCING SCHEME (ESPECIALLY AS CONSTRUED BY THIS COURT SINCE 2019) - - IN CONTRAST TO THE 1977 CALIFORNIA SCHEME WHICH WAS AT ISSUE IN PULLEY V. HARRIS - - DOES NOT PROVIDE ADEQUATE SAFEGUARDS AGAINST ARBITRARY INFLICTION OF THE DEATH PENALTY, THIS COURT'S ABANDONMENT OF PROPORTIONALITY REVIEW RENDERS FLORIDA'S SYSTEM UNCONSTITUTIONAL

In Pulley v. Harris, 465 U.S. at 879-80, the Supreme Court did not address Florida's system, and did not hold that proportionality review is never required by the Eighth Amendment. [And that, in and of itself, is a fatal flaw in the Lawrence majority's conformity clause analysis]. The Supreme Court simply said, "Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without proportionality review, the 1977 California statute is not of that sort" (emphasis supplied).

First of all, we do know that there could be capital sentencing systems lacking sufficient safeguards against arbitrariness, because all of the various states' pre-Furman systems were of that sort. So

the question is whether Florida's system - - especially as construed by this Court since 2019, and now in the absence of appellate review designed to ensure that the death penalty is narrowed to only the most aggravated and least mitigated of first-degree murders - - is of that sort.

Under the 1977 California scheme, a conviction of first-degree murder resulted in a sentence of life imprisonment, unless the state alleged one or more "special circumstances" in the charging document. There were, at the time, only seven of these special circumstances, and they were tried, along with the issues of guilt or innocence, at the initial phase of the trial. Only if the jury found the defendant guilty of first degree murder and found beyond a reasonable doubt the existence of one or more special circumstances would the trial then proceed to a second phase to determine whether death or life imprisonment was the appropriate penalty. In the second phase, additional evidence could be presented, and the jury was given a list of additional factors it could consider. Pulley v. Harris, 465 U.S. at 880. California's 1977 system, the Supreme Court concluded, was sufficient to limit the death sentence "to a small sub-class of capital-eligible cases." 465 U.S at 831.

In Florida, in contrast, this Court has repeatedly rejected the argument that one or more aggravating circumstances must be alleged in the indictment [see, e.g., Lott v. State, 303 So.3d 165 (Fla. 2020); Pham v. State, 70 So.3d 485,496 (Fla. 2011)], nor are any findings required in the first phase of the trial to narrow the class of death-eligible defendants. Moreover, while under Florida’s earlier (i.e., pre-Hurst) incarnation of its capital sentencing system a defendant became death-eligible only upon (inter alia) findings by the co-sentencers of sufficient aggravating circumstances [Hurst v. Florida, 577 U.S. 92, 99-100 (2016)], the post-Hurst 2019 statute explicitly provides that if the jury unanimously “finds at least one aggravating factor, the defendant is eligible for a sentence of death.” Fla. Stat. §921.141(2)(b)2 (emphasis supplied).

Is such a system sufficient, without at least some form of proportionality review, to limit imposition of the death penalty to a small sub-class of first degree murder defendants? In 1972, when Florida’s post-Furman death penalty law was enacted, there were eight statutory aggravating factors. State v. Dixon, 283 So.2d at 5-6. That number has since doubled to sixteen. §921.141 (6)(a through

p). This results in what has been described as “aggravator creep”<sup>33</sup>, and it undermines the safeguards required by Furman against arbitrary imposition of the death penalty. As discussed in 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 (Winter, 2011):

Aggravating factors frequently fail to perform this constitutionally required function designated for them by Furman and its progeny. Rather than confining death eligibility to the worst offenders, most state death penalty statutes list a litany of aggravating factors that apply to nearly every first-degree murder and are motivated more by political exigency than careful efforts to identify those who are most culpable.

. . . . .

In their efforts to draft death penalty statutes that complied with Furman, most state legislatures adopted the Model Penal Code’s guided discretion model, which specified eight aggravating factors and required the jury to find at least one such factor before a defendant could be death eligible. However, since the initial drafting of post-Furman

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<sup>33</sup> See, e.g., Shatz, The American Death Penalty: Past, Present, and Future, 53 Tulsa L.Rev. 349,355-56 (2018). Retired Circuit Judge O.H. Eaton, Jr. one of Florida’s most experienced trial judges in death penalty cases, speaking before a Senate Criminal Justice Committee workshop on January 27, 2016, referred to “aggravator creep” and said it would be hard to imagine a Florida first degree murder case without at least one aggravator. Judge Eaton was engaging in slight hyperbole; you can imagine such a case and if you look hard enough you can find some. But they are few and far between.

statutes, aggravating factors “have been added to capital statutes . . . like Christmas tree ornaments”, rendering more and more offenders eligible for the death penalty.

46 Harv. C.R.-C.L. L.Rev. at 232-33 (footnotes omitted).

Professors Carol and Jordan Steiker, in Courting Death: The Supreme Court and Capital Punishment, 160-62 (2016), noted (in the context of Arizona’s system) that the enumeration of numerous and broad aggravating factors in combination with that state’s Supreme Court’s minimalist policing, subverted Furman’s requirement of adequate safeguards against arbitrary imposition of the death penalty.

Florida’s current system of sixteen aggravators is very different from the 1977 California system which was upheld in Pulley v. Harris. Until the Lawrence decision jettisoned five decades of sound precedent, and dispensed with meaningful review of whether the death penalty was appropriate under the totality of circumstances of the particular case, it is possible that this Court’s proportionality review may have saved the continued viability of Florida’s system. See Jones v. State, 705 So.2d 1364, 1366 (Fla. 1998). But now that this Court has abandoned proportionality review in favor of minimalist policing (or no policing) based on a flawed conformity clause analysis

and on a 38 year old U.S. Supreme Court decision which addressed a very dissimilar state capital sentencing scheme, whatever meaningful safeguards Florida may once have had in order to comply with Furman have been eviscerated.

The core purposes of proportionality review include minimizing the risk of arbitrariness and ameliorating the danger that racial prejudice - - whether based on the race of the defendant or that of the victim[s] - - will infect the capital sentencing decision. In the early post-Furman case of State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), and later in Offord v. State, 959 So.2d 187, 188 (Fla. 2007), this Court said:

Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

(emphasis in Offord opinion).

See Turner v. Murray, 476 U.S. 28, 35 (1986) (“The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence”); Robinson v. State, 520 So.2d 1, 7-8 (Fla. 1988) (“Racial prejudice has no place

in our system of justice and has long been condemned by this Court” and “the risk that the factor of race may enter the criminal justice process has required. . . increasing attention”, especially in “the context of a capital sentencing proceeding”); State v. Benn, 845 P.2d 289, 317 (Wash. 1993)(proportionality review addresses two systemic problems: random arbitrariness and death sentences based on race); Ronk v. State, 172 So.3d 1112, 1147 (Miss. 2015)(state’s sentencing scheme includes numerous safeguards to ensure that the death penalty is not imposed arbitrarily or in a discriminatory manner); State v. Cooper, 731 A.2d 1000, 1007-08 (N.J. 1999)(one of the objectives of proportionality review is to ensure that death penalty decisions are free from discrimination based on race, gender, socioeconomic status, or other impermissible factors).

The federal Second Circuit Court of Appeals has recognized that under Pulley v. Harris “comparative proportionality review may be constitutionally required only when a capital sentencing system lacks. . . adequate checks on arbitrariness.” United States v. Aquart, 912 F.3d 1, 52 (2d Cir. 2016). The federal death penalty statute, however, contains an important provision which Florida’s lacks:

The FDPA further channels a capital jury’s discretion to impose the death penalty by prohibiting it from consider-

ing race, color, religious beliefs, national origin, or sex in its sentencing decision and, indeed, requiring each juror to sign a certificate that such factors did not inform his or her sentencing decision. See 18 U.S.C. §3593(f).

Aquart, 912 F.3d at 52

See, e.g., United States v. Runyon, 707 F.3d 475, 497 (4<sup>th</sup> Cir. 2013); United States v. Taveras, 585 F.Supp.2d 327, 339 (E.D.N.Y. 2008); United States v. Haynes, 269 F.Supp.2d 970, 976-77 (W.D. Tenn. 2003). “. . . [T]he FDPA explicitly provides that a jury may not consider information regarding the defendant for the kind of inadmissible purposes that were at the heart of the [Supreme] Court’s concerns in *Furman*.” United States v. Frank, 8 F.Supp.2d 253, 265 (S.D.N.Y. 1998).

18 U.S.C. §3593(f) provides as follows:

**Special precaution to ensure against discrimination.** -  
- In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not in-

volved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

Florida's death penalty statute contains no equivalent provision. While there is a very generic standard jury instruction (which was given in this case)(T3203) that "Your decisions should not be influenced by feelings of racial or ethnic bias", that pales in comparison with the emphasis conveyed to the jurors by the federal statute and jury instruction. The Florida instruction says nothing about religious or gender discrimination, nor does it make it clear that it applies to the victim[s] as well as the defendant. The Florida instruction does not direct the jurors that they cannot recommend a death sentence unless each of them conclude that they would have made the same recommendation no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim might be. Nor does the Florida instruction require that each juror take individual responsibility by returning a signed certificate that he or she has complied with the non-discrimination directive.

There are two more points which should be made here, and which may become even clearer by the time the issue of whether

Florida may constitutionally dispense with proportionality review is ultimately resolved. First, with regard to minimalist policing, and the Wyoming Supreme Court’s recognition in Olsen v. State, 67 P.3d at 610, that “the [U.S. Supreme] Court continues to consider a state supreme court’s willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective”, this Court since the retirement of Justices Lewis, Quince, and Pariente has reviewed on direct appeal 24 death sentences and affirmed 23 of them<sup>34</sup>. [Contrast Proffitt v. Flor-

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<sup>34</sup> Joseph v. State, 2022 WL 405557 (Fla. 2022); McKenzie v. State, 2022 WL 405038 (Fla. 2022); Bell v. State, 2022 WL 324821 (Fla. 2022); Noetzel v. State, 328 So.3d 933 (Fla. 2021); Alcegaire v. State, 326 So.3d 656 (Fla. 2021); Davidson v. State, 323 So.3d 1241 (Fla. 2021); Bargo v. State, 331 So.3d 653 (Fla. 2021); Allen v. State, 322 So.3d 589 (Fla. 2021); Deviney v. State, 322 So.3d 563 (Fla. 2021); Smith v. State, 320 So.3d 20 (Fla. 2021); Woodbury v. State, 320 So.3d 631 (Fla. 2021); Hojan v. State, 307 So.3d 618 (Fla. 2020); Colley v. State, 310 So.3d 2 (Fla. 2020); Craft v. State, 312 So.3d 45 (Fla. 2020); Lawrence v. State, 308 So.3d 544 (Fla. 2020); Craven v. State, 310 So.3d 891 (Fla. 2020); Santiago-Gonzalez v. State, 301 So.3d 157 (Fla. 2020); Bush v. State, 295 So.3d 179 (Fla. 2020); Smiley v. State, 295 So.3d 156 (Fla. 2020); Bright v. State, 299 So.3d 985 (Fla. 2020); Doty v. State, 313 So.3d 573 (Fla. 2020); Newberry v. State, 288 So.3d 1040 (Fla. 2019); Rogers v. State, 285 So.3d 872 (Fla. 2019). The sole reversal - - which was “for the limited purpose” of a new evaluation and sentencing order by the trial judge alone - - was Cruz v. State, 320 So.3d 695, 725, 731-32 (Fla. 2021). [Avsenew v. State, 2022 WL 120598 (Fla. 2022) reversed a murder conviction and did not reach any of the death penalty issues].

ida, 428 U.S. at 253, finding it significant that this Court in the mid-1970s had not hesitated to vacate death sentences (8 of 21) when it determined that that sentence should not have been imposed).

Another potential complication down the road is the question of jury unanimity. At the time Justices Canady and Polston first proposed in Yacob the theory that the conformity clause precluded this Court from reviewing whether death sentences are proportionally warranted there was yet another significant difference between the safeguards provided by the California system and those available in Florida, in that Florida was an outlier jurisdiction which did not require a unanimous jury verdict to find an aggravating circumstance or to return a verdict (or recommendation) for the death penalty. See State v. Steele, 921 So.2d 538, 550 (Fla. 2005). However, to comply with Hurst v. Florida, 517 U.S. 92 (2016) and Hurst v. State, 202 So.2d 40 (Fla. 2016) the Florida Legislature reluctantly amended the statute to require jury unanimity. Then in 2020, after the shift in membership, this Court in State v. Poole receded from Hurst v. State (except to the extent that it requires a unanimous verdict of one aggravating factor). The Poole majority “acknowledge[d] that the Legislature has changed our state’s capital sentencing law in response to

Hurst v. State. Our decision today is not a comment on the merits of those changes or whether they should be retained. We have simply restored discretion that Hurst v. State wrongly took from the political branches.” 297 So.3d at 507.

As a consequence of the overturning of Hurst v. State in Poole, there is a substantial risk during every legislative session that the political branches will choose to return Florida to its outlier status by removing the current statutory requirements that each aggravating factor be found by an unanimous jury, and that a jury verdict for the death penalty must be unanimous. In fact, under the Poole majority’s view of the Sixth and Eighth Amendment requirements, while a jury must determine death eligibility by unanimously finding a single aggravator, there need not be any jury participation at all on the issue of death selection. If a spur-of-the-moment fatal shooting occurred during a “robbery gone bad” (as in Yacob), the jury’s first-phase verdicts of murder and robbery would suffice, and there would be no constitutional impediment to a judge-only penalty phase. Similarly, in cases involving two or more victims - - for example a murder and an attempted murder - - first phase convictions of the contemporaneous crimes would suffice. In addition, many of Flori-

da's proliferation of aggravating factors would require only a pro forma jury finding. If the defendant had a ten year old conviction of strong arm robbery, or if he was on felony probation, or if the victim was a law enforcement officer or a child under twelve, death-eligibility would be virtually automatic, and there would be no constitutional requirement that the jury even hear mitigating evidence, much less weigh the aggravating and mitigating factors or reach a verdict (unanimous or otherwise) on whether the death penalty or life imprisonment is the appropriate punishment.

Having said all this, Figueroa recognizes that since he was tried under the current statute the constitutional question of whether it was Poole or Hurst v. State which correctly applied Hurst v. Florida is not at issue in this appeal<sup>35</sup>. However, what is at issue is whether this Court's jettisoning of proportionality review renders Florida's capital sentencing scheme arbitrary, capricious, and unconstitutional. Figueroa submits that without proportionality review Florida's

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<sup>35</sup> In the event that the Florida legislature sees fit to dismantle safeguards even further by dispensing with jury unanimity requirements, the absence of proportionality review will become (if there is such a concept) even more unconstitutional.

system, especially as administered by this Court since 2019, lacks the safeguards against arbitrariness that were present in California's 1977 statute and are required by Furman, and therefore neither the non-controlling 38 year old decision in Pulley v. Harris nor the conformity clause can save it.

## ISSUE NINE

### FIGUEROA'S DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE THIS IS NOT AMONG THE LEAST MITIGATED FIRST DEGREE MURDERS

Under this Court's proportionality review - - which is necessary to safeguard against arbitrary imposition of the death penalty and to preserve the constitutionality of Florida's capital sentencing system [Issue Eight, supra] - - this Court conducts a two-pronged inquiry to "determine whether the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders." Davis v. State, 121 So.3d 462,499 (Fla. 2018); Crook v. State, 908 So.2d 350,357 (Fla. 2005); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999); Almeida v. State, 748 So.3d 922,933 (Fla. 1999)(emphasis in opinions)l see also Delgado v. State, 162 So.3d 971,982 (Fla. 2015). Thus, even in cases where the "most aggravated" prong is satisfied, "we are next required to determine whether [the] case also falls within the category of the least mitigated of murders for which the death penalty is reserved." Crook, 908 So.2d at 357 (emphasis in opinion); see also Cooper, 739 So.2d at 85-86.

While the aggravation prong is satisfied in the instant case, the "least mitigated" prong is not. Based on the comprehensive mitiga-

tion report, which recounted Figueroa's nightmarish childhood and adolescence, being raised in an impoverished, drug-infested, and crime-ridden Puerto Rico neighborhood by a mentally-ill, alcoholic, abusive father (R4276-4358), the trial court found eight non-statutory mitigating factors, giving five of them moderate weight and three "some" weight (R2631-39). As for the two statutory mental mitigating circumstances, the trial court's sentencing order is confused and confusing. See Morgan v. State, 639 So.2d 6,13(Fla. 1994); Crump v. State, 622 So.2d 963,973(Fla. 1993). As to "extreme mental or emotional disturbance", the judge stated that "[t]he evidence does not show that. . . the Defendant did not know right from wrong" [the insanity standard, which does not preclude the mitigator, Morgan], and he found the state's rebuttal experts more credible than the defense experts; yet he assigned "some weight" to this mental mitigator. As to "impaired capacity", he found that "this mitigation factor has not been established", yet in the very next sentence he "assigns some weight to this mitigating circumstance" (R2627-31). This Court should either consider the two mental mitigators in its proportionality analysis, or remand to the trial court to clarify whether or not he found and/or weighed them.

## CONCLUSION

Figueroa requests this Court to reverse his convictions for a new trial, and/or reverse his death sentences for a new jury penalty phase or for reduction to life imprisonment.

## CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Assistant Attorney General Timothy Freeland at [timothy.freeland@myfloridalegal.com](mailto:timothy.freeland@myfloridalegal.com) and [CrimappTPA@myfloridalegal.com](mailto:CrimappTPA@myfloridalegal.com), on this \_8th\_ day of April, 2022.

Respectfully submitted,

/s/ Steven L. Bolotin

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CERTIFICATION

I certify that this document contains 31,205 words (excluding the portions exempted by Fla.R.App.P. 9.045(e), and that it complies with the applicable font requirements. A motion for leave to file a brief exceeding the word limit pursuant to Fla.R.App.P. 9.210(a)(2)(E) is being filed with this brief.

/s/ Steven L. Bolotin

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SLB/kas