

IN THE SUPREME COURT OF FLORIDA

REYNALDO :  
FIGUEROA-SANABRIA, :

Appellant, :

Case No. SC21-1070

vs. :

STATE OF FLORIDA, :

Appellee. :

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

REPLY BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN  
Assistant Public Defender  
FLORIDA BAR NUMBER O236365

Public Defender's Office  
Polk County Courthouse  
P. O. Box 9000--Drawer PD  
Bartow, FL 33831  
(863) 534-4200

ATTORNEYS FOR APPELLANT

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TOPICAL INDEX TO BRIEF

PAGE NO.

TABLE OF CITATIONS ..... iii

ISSUE ONE [SUBSTITUTION OF COUNSEL] ..... 1

ISSUE TWO [CSLI].....18

ISSUE THREE [INVALID WAIVER OF COUNSEL] ..... 23

ISSUE FIVE [DISCRETION TO APPOINT INDEPENDENT  
COUNSEL]..... 39

ISSUE SIX [NON-VERDICT] ..... 41

ISSUE EIGHT [FLORIDA’S DEATH PENALTY SCHEME IS  
UNCONSTITUTIONAL DUE TO RECENT JETTISONING OF  
SAFEGUARDS INCLUDING PROPORTIONALITY REVIEW]..... 48

CONCLUSION..... 48

CERTIFICATE OF SERVICE ..... 49

CERTIFICATION OF COMPLIANCE ..... 49

TABLE OF CITATIONS

PAGE NO.

CASES

<u>Acensio v. State</u> , 497 So.2d 640 (Fla. 1986) .....	45
<u>Arizona v. Fulminante</u> , 499 U.S. 279 (1991) .....	31, 47
<u>Avsenew v. State</u> , 334 So.3d 590 (Fla. 2022) .....	19
<u>Ayalavillamizar v. State</u> , 134 So.3d 492 (Fla. 4th DCA 2014) .....	22
<u>Batten v. State</u> , 895 So.2d 490 (Fla. 2d DCA 2005) .....	21
<u>Bell v. State</u> , 336 So.3d 211 (Fla. 2022) .....	23-24, 35, 38
<u>Blackburn v. Snow</u> , 771 F.2d 556 (1st Cir. 1988) .....	24
<u>Bowden v. State</u> , 150 So.3d 264 (Fla. 1st DCA 2014) .....	29
<u>Boyd v. State</u> , 910 So.2d 167 (Fla. 2005) .....	23-24, 35
<u>Bozeman v. State</u> , 698 So.2d 629 (Fla. 4th DCA 1997) .....	21
<u>Brady v. State</u> , 910 So.2d 388 (Fla. 2d DCA 2005) .....	29

<u>Burton v. State,</u> 237 So.3d 488 (Fla. 5th DCA 2018) .....	18
<u>Camargo v. State,</u> 940 S.W.2d 464 (Ark. 1997) .....	43, 46
<u>Carpenter v. State,</u> 228 So.3d (Fla. 2017) .....	18
<u>Carpenter v. United States,</u> 138 S.Ct 2206 (2018) .....	15-16, 19
<u>Clark v. State,</u> 690 So.2d 1280 (Fla. 1997) .....	37-38
<u>Cooper v. State,</u> 43 So.3d 42 (Fla. 2010) .....	19
<u>Crain v. State,</u> 894 So.2d 59 (Fla. 2004) .....	43, 44
<u>Cruz v. State,</u> 320 So.3d 695 (Fla. 2021) .....	43, 47
<u>Curtis v. State,</u> 32 So.3d 759 (Fla. 2d DCA 2010) .....	29
<u>Davis v. United States,</u> 564 U.S. 229 (2011) .....	18
<u>Deno v. Commonwealth,</u> 177 S.W. 3d 753 (Ky. 2005).....	29
<u>Destefano v. Adventist Health System Sunbelt,</u> 973 So.2d 492 (Fla. 5th DCA 2008) .....	45
<u>Ferrari v. State,</u> 260 So.3d 295 (Fla. 4th DCA 2018) .....	18
<u>Firmani v. Grant,</u> 681 So.2d 869 (Fla. 5th DCA 1996) .....	45

<u>Flanagan v. State</u> , 625 So.2d 827 (Fla. 1993) .....	21-22
<u>Garrity v. New Jersey</u> , 385 U.S. 493 (1967) .....	23-24, 35
<u>Gore v. State</u> , 451 S.W. 3d 182 (Tex. App-Houston (1 <sup>st</sup> Dist 2014)).....	24
<u>Grim v. State</u> , 841 So.2d 455 (Fla. 2003) .....	23
<u>Hamblen v. State</u> , 527 So.2d 800 (Fla. 1988) .....	25, 26, 41-42
<u>Hills v. State</u> , 994 So.2d 412 (Fla. 3d DCA 2008) .....	44
<u>Hojan v. State</u> , 3 So.3d 1204 (Fla. 2009) .....	23-24, 35
<u>Hunter v. Delo</u> , 62 F.3d 271 (8th Cir. 1995).....	10
<u>Jackson v. State</u> , 983 So.2d 562 (Fla. 2008) .....	26-30
<u>Johnson v. State</u> , 110 So.3d 954 (Fla. 4th DCA 2013).....	18
<u>Keen v. State</u> , 775 So.2d 263 (Fla. 2000) .....	20
<u>Lowe v. State</u> , 259 So.3d 23 (Fla. 2018) .....	37
<u>Mantilla v. State</u> , 38 So.3d 196 (Fla. 3d DCA 2010) .....	44

<u>Marquardt v. State</u> , 156 So.3d 464 (Fla. 2015) .....	36, 40
<u>Martel v. Clair</u> , 565 U.S. 648 (2012) .....	9-10
<u>Mitchell v. State</u> , 25 So.3d 632 (Fla. 4th DCA 2009).....	18
<u>Moore v. State</u> , 496 So.2d 255 (Fla. 5th DCA 1986).....	44
<u>Morton v. State</u> , 789 So.2d 324 (Fla. 2001) .....	37
<u>Nix v. Whiteside</u> , 475 U.S. 157 (1986) .....	6-7
<u>Olden v. United States</u> , 224 F.3d 561 (6th Cir. 2000).....	30
<u>Pangburn v. State</u> , 661 So.2d 1182 (Fla. 1995) .....	42
<u>Penry v. Johnson</u> , 532 U.S. 782 (1989) .....	44, 46
<u>Phillips v. State</u> , 316 So.3d 779 (Fla. 1st DCA 2021) .....	46
<u>Preston v. State</u> , 607 So.2d 404 (Fla. 1992) .....	37
<u>Robinson v. State</u> , 982 So.2d 1260 (Fla. 1st DCA 2008) .....	21
<u>Robles v. State</u> , 336 So.3d 370 (Fla. 2d DCA 2022) .....	29
<u>Rodriguez v. State</u> , 248 So.3d 1085 (Fla. 2018) .....	19

<u>Satterwhite v. Texas</u> , 486 U.S. 249 (1988) .....	30-31
<u>Schoenwetter v. State</u> , 931 So.2d 857 (Fla. 2006) .....	13
<u>Smithberg v. Jacobson</u> , 939 N.W. 2d 405 (N.D. 2020) .....	36
<u>Snelgrove v. State</u> , 921 So.2d 560 (Fla. 2005) .....	42
<u>State v. Brown</u> , 330 So.3d 199 (La. 2021) .....	25, 29
<u>State v. Collins</u> , 985 So.2d 985 (Fla. 2008) .....	37
<u>State v. DiGuilio</u> , 491 So.2d 1129 (Fla. 1986) .....	19, 21
<u>State v. Fleming</u> , 61 So.3d 399 (Fla. 2011) .....	37-38
<u>State v. Hendershot</u> , 153 P.3d 619 (Mont. 2007) .....	8-9
<u>State v. Maestas</u> , 299 P.3d 892 (Utah 2012) .....	23
<u>State v. McCoy</u> , 963 N.W.2d 472 (Minn.2021) .....	24
<u>State v. Montes</u> , 442 P.3d 1247 (Utah App. 2019) .....	30-31
<u>State v. Muhammad</u> , 451 P.3d 1060 (Wash.2019) .....	19

<u>State v. Socarras</u> , 272 So.3d 488 (Fla. 3d DCA 2019) .....	24
<u>Stoll v. State</u> , 762 So.2d 870 (Fla. 2000) .....	20-21
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984) .....	6
<u>Sullivan v. Louisiana</u> , 508 U.S. 275 (1993) .....	47
<u>Teffeteller v. State</u> , 495 So.2d 744 (Fla. 1986) .....	37
<u>Thomas v. State</u> , 993 So.2d 105 (Fla. 1st DCA 2008) .....	21
<u>Tracey v. State</u> , 152 So.3d 504 (Fla. 2014) .....	18-19
<u>Triple R Paving, Inc. v. Broward County</u> , 774 So.2d 50 (Fla. 4th DCA 2000) .....	45
<u>Turner v. State</u> , 851 So.3d 276 (Fla. 4th DCA 2003) .....	24
<u>Tyler v. State</u> , 710 So.2d 645 (Fla. 4th DCA 1998) .....	29
<u>United States v. Erskine</u> , 355 F.3d 1161 (9th Cir. 2004) .....	36
<u>United States v. Hakim</u> , 30 F.4th 1310 (11th Cir. 2022) .....	35-36
<u>United States v. John Doe No. 1</u> , 272 F.3d 116 (2nd Cir. 2001) .....	10-12
<u>United States v. Johnson</u> , 24 F.4th 590 (6th Cir. 2022) .....	36

<u>United States v. Margarita Garcia,</u> 906 F.3d 1255 (11th Cir. 2018) .....	30
<u>United States v. Moore,</u> 159 F.3d 1154 (9th Cir. 1998) .....	8-9
<u>United States v. Prime,</u> 431 F.3d 1147 (9th Cir. 2005) .....	10-11
<u>United States v. Roy,</u> 855 F.3d 1133 (11th Cir. 2017) .....	30
<u>United States v. Russell,</u> 205 F.3d 768 (5th Cir. 2000) .....	30
<u>United States v. Welty,</u> 674 F.2d 185 (3rd Cir. 1982) .....	10
<u>Warth v. State Farm Fire and Casualty Co.,</u> 695 So.2d 906 (Fla. 2d DCA 1997) .....	45-46
<u>Wike v. State,</u> 698 So.2d 817 (Fla. 1997) .....	37
<u>Wilcox v. State,</u> 143 So.3d 359 (Fla. 2014) .....	35
<u>Wilson v. State,</u> 12 So.3d 292 (Fla. 4th DCA 2009) .....	24
<u>Wilson v. State,</u> 566 So.2d 36 (Fla. 4th DCA 1990) .....	44
<u>Wimberly v. State,</u> 41 So.3d 298 (Fla. 4th DCA 2010) .....	46
<u>Young v. State,</u> 102 P.3d 572 (Nev. 2004) .....	8

OTHER AUTHORITIES

United States Constitution, Fourth Amendment.....15-16, 18-20

United States Constitution, Sixth Amendment .....6-10, 17, 23

United States Constitution, Eighth Amendment ..... 41, 48

Florida Rules of Criminal Procedure 3.112 .....5, 12-13

Florida Rules of Professional Conduct 4-1.3 ..... 5, 12

Florida Rules of Professional Conduct 4-1.4 ..... 5, 12

18 U.S.C.A. §3006A..... 9

18 U.S.C.A. §3599..... 9

This reply brief is directed to Issues One, Two, Three, Five, Six, and Eight. As to Issues Four, Seven, and Nine, Figueroa will rely on his initial brief.

All emphasis is supplied unless the contrary is indicated.

[ISSUE ONE] [SUBSTITUTION OF COUNSEL] The state, in misapprehending the issue, correctly states that “[g]eneralized allegations of dissatisfaction with appointed counsel, including lack of communication, are insufficient to merit relief, and a trial court is acting within its discretion in declining to appoint new counsel when confronted with such a complaint” (SB 43-44). The state belittles Figueroa’s ongoing efforts before three successive trial judges over a more than five year period before trial, to replace a lawyer whose private caseload was so heavy and distracting that he took his name off of the death penalty appointment list, and who - - when asked by Judge Siracusa if he had time to handle Mr. Figueroa’s case - - twice described it as “borderline”. Perhaps not wanting to displease the judges, the lawyer never actually moved to withdraw, but he repeatedly made it clear in Figueroa’s presence that he’d rather be anywhere else. Until very late in the five-plus year time frame (and only then under Judge Siracusa’s prodding (the “list”)) it was also clear

from the lawyer's own statements that he'd done little or no preparation or investigation, so replacing him would have caused no undue delay. [Contrary to any implication which might be drawn from the state's "slippery slope" argument, there was no finding and no evidence that Figueroa was trying to delay his trial, and most of the delays which did occur were attributable to the state (prosecutors kept getting appointed to the bench; recalcitrant medical examiner) or to volatility in the law (Hurst)]. Nor was there any evidence that Figueroa was just being difficult, nor that he was ever disruptive or threatening in or out of the courtroom. It was the lawyer who repeatedly acknowledged that the breakdown in the attorney-client relationship was mutual, and he stated that it was likely to cause a problem for the next 20 years. While it is certainly true that some past or future defendants might have sought or might seek substitution of counsel as a manipulative tactic, that is no reason to penalize this defendant in the absence of evidence of manipulation, and in the face of the lawyer's own repeated awareness that (1) the attorney-client relationship had become toxic and unsustainable; (2) the fault was at least as much the lawyer's as the client's; and (3) the

pressure of his private practice was negatively impacting his ability to represent this client.

The state instead chooses to downplay Figueroa's complaints by mischaracterizing them as nothing more than "counsel did not visit as often as Appellant might have preferred" (SB 43); "the quality of communication is not to the defendant's liking" (SB 47); and "the real question. . . is not whether attorney Hammond was able to keep his client happy by visiting with him more frequently" (SB 48). To be sure, Figueroa was concerned and upset - - as well he should have been - - about Hammond's ongoing failure to communicate with him about his capital case (a failure which Hammond rarely if ever denied, attributing it to his private caseload), but Figueroa's complaints about Hammond's apparent lack of interest and effort in his case were much more specific than the state is willing to acknowledge. Similarly, the state avers that Figueroa's "claim is mere speculation with no record support" (SB 43). No record support? To the contrary, Figueroa's initial brief, p.12-27, presents in painful and painstaking detail - - replete with citations to the record - - his assertions that Hammond was not only failing to consult with him, but that he was doing virtually nothing to investigate or prepare his defense. Ham-

mond rarely disputed the accuracy of Figueroa's assertions; instead he mostly pled the time crunch, he had his own way of doing things, and (to paraphrase) he'd get to it when he'd get to it. In hearing after hearing the can got kicked down the road. So to the extent that the state may be implying that Figueroa was merely a difficult client or a chronic complainer, there is no record support for that. It is just as likely, or more so, that the multiplicity of Figueroa's complaints about Hammond's evident inability or disinterest in representing him was the inevitable result of the trial judges' failure to adequately address the earlier complaints by appointing an attorney whose ability to handle this capital case was not "borderline." See Young v. State, 102, P.3d 572 (Nev. 2004)<sup>1</sup>.

The deterioration and breakdown of the attorney-client relationship - - a breakdown which was largely the result of attorney Hammond's personal situation with his private practice - - amounted to a due process violation, and the judges' failure to appoint substitute counsel (when there was plenty of time to do so) was an abuse of discretion. See the case law cited at P.11, 30-31, 33, 39 of Figueroa's initial brief. That - - not ineffective assistance as the state

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<sup>1</sup> Young is mis-cited in Figueroa's initial brief as P.2d.

would prefer to reframe it (SB 48) - - is the constitutional issue which is properly raised in this direct appeal.

In his initial brief (p.35-36) Figueroa cited Florida Rules of Professional Conduct 4-1.3 (“[a] lawyer shall act with reasonable diligence and promptness in representing a client”) and 4-1.4 (lawyer shall reasonably consult with client about the means by which client’s objectives are to be accomplished; shall keep the client reasonably informed; shall promptly comply with reasonable requests for information) and Florida Rule of Criminal Procedure 3.112 (minimum standards for attorneys in capital cases, including zealous commitment to the case and adequate time and resources for preparation, and no appointment shall be made to an attorney who may be unable to provide effective representation due to an unrealistically high caseload). Attorney Hammond’s repeated comments to three successive judges (one of whom reflexively reappointed him after Figueroa’s desperate attempt at self-representation crashed and burned) amply demonstrate his noncompliance with the rules and his inability to zealously represent Figueroa while juggling his private caseload; and the state in its brief does not claim otherwise. Rather,

the state seems to believe it doesn't matter: "And while the State agrees that the rules governing attorney behavior in Florida provide certain mandates regarding communication between attorney and client, it is important to remember that the standard of effective representation is not and never has been measured in terms of whether counsel has complied with what is required by a bar association's rules of conduct. Breach of an ethical standard, the United States Supreme Court has said, does not necessarily rise to the level of a Strickland<sup>2</sup> violation. Nix v. Whiteside, 475 U.S. 157,165 (1986)" (SB 46-47).

Nix v. Whiteside, unlike the instant case, involved a post-trial ineffective assistance claim, governed by the Strickland standard. And, importantly, the Court there held that no ethical standard was breached and no Sixth Amendment violation was shown where Whiteside's attorney refused to cooperate in presenting perjured testimony. Moreover, once again the state is conflating the issue it pretends Figueroa is raising (a premature ineffective assistance claim) with the issue Figueroa is actually raising (a long sequence of pre-trial requests for substitution of counsel). And most significantly, even

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<sup>2</sup> Strickland v. Washington, 466 U.S. 668 (1984).

in the dicta relied on by the state, the Nix v. Whiteside Court did not categorically dismiss the importance of state standards of ethics and professional conduct (much less a state's minimum requirements for capital trial attorneys). While the Court did indeed caution against wholesale constitutionalization of such rules and standards (SB 47), the state omits the very next sentence which reads: "In some future case challenging attorney conduct in the course of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment in defining the scope and limits on that conduct." 475 U.S. at 165-66. In the context of refusal to present perjured testimony, the Court did not need to face that question "since virtually all of the sources speak with one voice." Id., at 166.

Plainly then Nix v. Whiteside does not preclude this Court from according significant weight to attorney Hammond's repeated and prolonged failure to consult with his capital client, to keep him informed about the status of his case, and to comply with reasonable requests for information. Nor is this Court precluded from according significant weight to Hammond's repeated protestations that his

noncompliance with those standards was the result of the pressure and time-constraints of his private practice; a situation which rendered his ability to represent Figueroa “borderline”. He would not have been eligible for an initial capital appointment, nor - - as indicated by his taking his name off of the appointment list - - did he want one. His behavior and his comments in Figueroa’s presence make it pretty clear he didn’t particularly want to continue with this appointment either. It was both an abuse of discretion and a Sixth Amendment violation for the judges to continually deny Figueroa’s reasonable and timely requests for substitute counsel.

In his initial brief, in the absence of Florida case law directly addressing the factors to be considered in determining whether a breakdown in the attorney-client relationship results in a Sixth Amendment violation, Figueroa cited decisions from ten other states, nine federal circuits, and one from the U.S. Supreme Court [Initial Brief, p.11,30-31,33-34,39-41]. Figueroa specifically discussed and compared three of those decisions: United States v. Moore, 159 F.3d 1154 (9<sup>th</sup>. Cir. 1998); State v. Hendershot, 153 P.3d 619 (Mont. 2007); and Young v. State, 102 P.3d 572 (Nev. 2004). The state addresses none of these, but instead focuses on a distinction without a

difference from Martel v. Clair, 565 U.S. 648 (2012), which is cited at p. 30 and n. 11 of Figueroa’s initial brief for the proposition that the factors “may vary a bit from circuit to circuit”. The state correctly points out that Martel “was interpreting a specific federal statute governing appointment of postconviction counsel to state habeas litigants in capital cases, which the Court noted was not governed by the Sixth Amendment” (SB 44-45). Because it arose “in the postconviction federal habeas context” this, according to the state, “places Martel well outside of the constitutional framework governing the trial court in Appellant’s case” (SB 45).

Be that as it may, the other 23 decisions cited along with Martel at p. 11 and 30-31 of Figueroa’s initial brief, including Moore, Hendershot, and Young, all involve requests for substitution of trial counsel, not postconviction counsel, and are all governed by the Sixth Amendment rather than 18 U.S.C.A. §§3006A and 3599. If anything, a defendant’s right to substitution of counsel when a breakdown of the attorney-client relationship with his initially appointed lawyer has occurred would appear to be greater, not lesser, in trials governed by the Sixth Amendment as opposed to postcon-

viction proceedings. Martel simply holds that the same factors apply in both situations.

One of the four federal appellate cases cited in Martel, 565 U.S. at 663 - - Hunter v. Delo, 62 F.3d 271, 274 (8<sup>th</sup> Cir. 1995) - - also involves a federal habeas corpus proceeding, and (consistently with the U.S. Supreme Court's subsequent holding) concludes "that substitution-of-counsel standards applied in cases in which the Sixth Amendment is implicated should apply here as well." The other three - - United States v. Prime, 431 F.3d 1147, 1154-55 (9<sup>th</sup> Cir. 2005); United States v. John Doe No. 1, 272 F.3d 116, 122-23 (2<sup>nd</sup> Cir. 2001); and United States v. Welty, 674 F.2d 185, 188 (3<sup>rd</sup> Cir. 1982) - - all involved trials. In Prime, substitution was properly denied where the attorney Covell represented that he had no difficulties communicating with Prime and they had a good rapport and working relationship. The defendant Prime did not dispute that; his concern - - based on advice he'd received from his parents - - was that the attorney was insufficiently prepared. Because the attorney stated that he was prepared, the trial court determined that Prime had "failed to demonstrate any breakdown in the attorney-client relationship". 431 F.3d at 1155.

The contrast between Prime and the instant case is stark. Here it is not even necessary to rely on Figueroa's statements to establish the extent of the breakdown, because attorney Hammond's own statements - - made over a period of years - - amply reveal that the attorney-client relationship was irreparably broken. Then there is the contrast with John Doe No. 1 (272 F.3 at 124-25):

Finally we turn to whether [defendant] Findley himself "substantially and unjustifiably contributed to the breakdown in communication" between him and [attorney] Stapleton and whether the alleged irreconcilable differences can be largely attributed to Findley. [Citation omitted]. A review of the record clearly indicates that Findley created most, if not all, of the problems with Stapleton by refusing to cooperate with him, acting aggressively, and making threatening gestures and remarks towards Stapleton. According to Stapleton, whom the district court credited, Findley's refusal to listen to Stapleton's reasoning concerning Findley's defense and his continuing violent behavior caused Stapleton to question whether he could work with Findley and to fear for his and his family's safety. Additionally, Findley's second attorney, who had been retained by Findley, requested and was permitted to withdraw, alleging that Findley had accused him of colluding with the Government and failing to communicate with Findley. Based on the representations of his attorney and Stapleton, it was eminently reasonable for the district court to conclude that Findley was the source of the breakdown in communications between Findley and Stapleton and therefore that substitution of new counsel was unlikely to solve the problem.

Thus, we conclude that the district court's denial was not an abuse of discretion, particularly in light of our examination of the fourth factor and our conclusion, based on

the record, that Findley substantially and unjustifiably contributed to the conflict between himself and Stapleton. [Footnote omitted].

The instant case presents the polar opposite situation. The record, encompassing a period of over five years, is devoid of any indication of misbehavior by Figueroa inside or outside of the courtroom. The substance of most of Figueroa's complaints were either acknowledged (with excuses) by attorney Hammond, or at least not denied. Hammond made numerous comments in open court, in Figueroa's presence, which would give anyone facing a criminal trial - - especially one which could (and did) result in a death sentence - - serious concern about whether this attorney was willing and able to zealously prepare and present his defense. Many of Figueroa's concerns involved Hammond's persistent failure to communicate with him - - at one point for nearly a year (R 2913) - - and those concerns are neither trivial nor unreasonable. Hammond was obviously prioritizing his private practice, and maybe he needed to do that to put food on the table, but he fell far short of his professional and ethical responsibilities to zealously commit to Figueroa's capital case, and to consult with his client, answer his questions and keep him informed. Florida Rules of Professional Conduct 4-1.3 and 4-1.4; Florida Rule

of Criminal Procedure 3.112. He would not have been eligible for an initial appointment, he knew it, and he should have withdrawn; and - - failing to do so - - Judge Ley or Judge Covert or Judge Siracusa should have replaced him.

The state cites Schoenwetter v. State, 931 So.2d 857, 870 (Fla. 2006) for the proposition that general loss of confidence or trust standing alone is insufficient (SB 46). Again, it's one thing for a defendant to say "I don't trust my lawyer", and a whole other thing when the lawyer makes repeated statements in court amply demonstrating that the defendant has good reason not to trust him. And in Figueroa's case, his justified complaints were far more specific and substantive than stand-alone loss of confidence and trust. Figueroa asserted that Hammond was not investigating or preparing a defense, was not providing discovery materials, and was not taking depositions. When - - three years after he was initially appointed, and during the same hearing when he told Judge Siracusa he took his name off the list for death cases "because my other practice is so heavy" and his ability to handle Figueroa's case was borderline - - the judge asked him if he'd done any depositions, Hammond's response was "I thought we did some depositions" (R3318-25). He ac-

tually didn't know. This is where the judge came up with the idea that something needed to be done to supervise Hammond, and he suggested a to-do list (see R3334-36). He assured Figueroa that if Hammond was unable "to get these things done or put them on a schedule to be done, then I'll give you a new attorney" (R3334-36). Figueroa replied, "Like I say, I feel this is not a fair trial, but there is nothing I can do" (R3337). In a subsequent status hearing in Figueroa's absence, the prosecutor noted that Figueroa had some things he wanted Hammond to do, "[a]nd we wanted to go through it to kind of pacify him." Judge Siracusa said, "How about can we pacify him on next Thursday?" (R3358). This flippant comment reveals in a nutshell how Figueroa's efforts to obtain a lawyer who could and would zealously represent him were misperceived by the other participants in the pretrial proceedings.

The extent to which the attorney-client relationship was irretrievably broken by July 2019 (a couple of months before trial) is shown by Figueroa's anguished letter to Judge Siracusa:

. . . 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 vio-

lation 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)

Plainly, nothing had changed.

Then five days before jury selection Figueroa filed with the clerk one last letter recounting the now-five-year history of Hammond's failure to communicate with him or keep him informed about his capital case, and making specific assertions regarding Hammond's lack of preparation, investigation, and communication. See Initial Brief, p.26-27. [One of these assertions is that Hammond never checked whether the state had obtained a warrant for the cell tower location information (CSLI), and that when Figueroa brought up the subject in 2014 Hammond displayed a lack of interest. As discussed in Issue Two, infra, the United States Supreme Court decision holding that a record of a person's physical movements as captured through CSLI is subject to Fourth Amendment protection, and the government must obtain a warrant before obtaining such records from a wireless carrier - - Carpenter v. United States, 138 S.Ct. 2206

(2018) - - was issued more than a year before trial. Figueroa was aware of that decision, though he didn't know its name, while the judge, the prosecutor, and defense attorney Hammond were evidently not aware of the applicable law. Not only did attorney Hammond fail to make the appropriate Fourth Amendment objection to the state's introduction (and its extensive emphasis in closing argument) of the CSLI evidence, Hammond affirmatively undercut Figueroa's well-founded pro se objection (which Judge Siracusa assured Figueroa was preserved) by urging the judge to explain to him that he was mistaken and that all the state needed to do was subpoena those records]. Judge Siracusa referenced Figueroa's letter to the clerk early on the first day of jury selection and indicated he would address it at lunchtime (T27), but the record does not indicate that any further inquiry took place.

So while it would be hard to dispute, it is also unnecessary to dispute, the state's mantra that generalized complaints about lack of communication or loss of confidence standing alone are insufficient to require substitution of counsel, because that is nowhere close to being the circumstances of this case. Especially in light of attorney Hammond's own statements and admissions throughout the course

of the pretrial proceedings, it was both an abuse of discretion and a Sixth Amendment violation to refuse to provide Figueroa a different lawyer; one whose private practice didn't take precedence over his responsibility to zealously represent his capital client.

[ISSUE TWO] [CSLI] Without calling it by its name the state makes a “good faith exception” argument, saying that obtaining cell site location information by means of subpoena instead of getting a warrant was “considered standard procedure at the time”, and that “the prevailing theory of the day” was that no legitimate privacy interests were implicated (SB 55). Note that the state merely relies on two Fourth DCA decisions (SB 55-56)<sup>3</sup>, and nowhere claims - - nor could it claim in light of Carpenter v. State, 228 So.3d 533 (Fla. 2017) - - that the prosecution in this Pinellas County (located within Second DCA boundaries) case relied on binding and longstanding precedent. See Tracey v. State, 152 So.3d 504, 526 (Fla. 2014); Ferrari v. State, 260 So.3d 295, 305-07 (Fla. 4<sup>th</sup> DCA 2018). See also Burton v. State, 237 So.3d 488 (Fla. 5<sup>th</sup> DCA 2018), citing Carpenter and Davis v. United States, 564 U.S. 229 (2011). So its veiled good faith exception argument fails.

The state next contends that it is the length of time the CSLI tracking occurs that determines whether or not the Fourth Amendment’s protections attach (SB 56-57). This has been referred to as

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<sup>3</sup> Mitchell v. State, 25 So.3d 632 (Fla. 4<sup>th</sup> DCA 2009) and Johnson v. State, 110 So.3d 954 (Fla. 4<sup>th</sup> DCA 2013).

the “mosaic theory”, and while it is true that Carpenter v. United States, 138 S.Ct 2206, 2217 n.3 (2018) did not decide that specific question, this Court in Tracey deemed it arbitrary and unworkable (in the context of real-time CSLI tracking) to require “case-by-case, after-the-fact, ad hoc determinations whether the length of the monitoring crossed the threshold of the Fourth Amendment. . . .” 152 So.3d at 520-21. See also State v. Muhammad, 451 P.3d 1060, 1071-73 (Wash.2019) (rejecting “mosaic theory”, explaining “There is no rational point to draw the line; it is arbitrary and unrelated to a reasonable expectation of privacy”).

The state’s “harmless error” argument rests on its misunderstanding of its burden to show beyond a reasonable doubt that the constitutionally erroneous introduction of the CSLI evidence had no impact on the jury’s deliberations and did not contribute to their verdict. See, e.g. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Cooper v. State, 43 So.3d 42 (Fla. 2010); Rodriguez v. State, 248 So.3d 1085 (Fla. 2018); Avsenew v. State, 334 So.3d 590, 595-96 (Fla. 2022). Despite the fact that this trial was not only a circumstantial evidence case but also a stark credibility contest between Figueroa and Tessa Cooper, turning on which one remained in their

apartment all night and which one left (and returned with the victims' jewelry), the state relies on its own characterization of its own circumstantial evidence as "quite strong" and Figueroa's defense as "weak" (SB 63). That was for the jury to decide, and its evaluation of the evidence should not have been skewed by the state's introduction, and its devastating use in closing argument, of CSLI evidence obtained in violation of the Fourth Amendment. The state introduced voluminous CSLI evidence and then used it extensively in its rebuttal argument - - its last word to the jury - - to place Figueroa near the crime scene, to corroborate Tessa Cooper (the state's key witness and the defense's alternative suspect), and to brand Figueroa as a liar. See initial brief, p. 50-52.

The state, unsurprisingly, ignores the prosecution's use of the impermissible evidence and its potentially powerful influence on the jurors. This Court should not do the same. See, e.g., Keen v. State, 775 So.2d 263, 276 (Fla. 2000)(state's closing argument "related to the same highly prejudicial elements placed before the jury by Amabile's testimony"); Stoll v. State, 762 So.2d 870, 878 (Fla. 2000)(the prejudice Stoll suffered as a result of the improperly admitted evidence "was exacerbated by the State's reliance on this evidence dur-

ing closing arguments”; prosecutor interwove victim’s hearsay statements and her handwritten statement “into significant corroborating evidence of guilt”); Thomas v. State, 993 So.2d 105, 109 (Fla. 1<sup>st</sup> DCA 2008)(state’s harmless error argument on appeal “rings hollow” in view of the emphasis placed on the inadmissible hearsay statement in the prosecution’s closing argument); Robinson v. State, 982 So.2d 1260, 1262-63 (Fla. 1<sup>st</sup> DCA 2008)(emphasis on erroneously admitted evidence in opening statement and closing argument “bespeaks ‘a reasonable possibility that the error affected the verdict’ ”); Batten v. State, 895 So.2d 490, 494 (Fla. 2<sup>d</sup> DCA 2005)(in considering and rejecting the state’s claim of harmless error “we have paid particular attention to the State’s closing arguments”); Bozeman v. State, 698 So.2d 629, 631 (Fla. 4<sup>th</sup> DCA 1997)(Although the defendant and his witness “may not have been long on credibility, in light of the prosecutor’s use of the improper comments during his closing argument, we cannot say that the error was harmless under [DiGuilio]”).

Consider by way of contrast Flanagan v. State, 625 So.2d 827, 830 (Fla. 1993)(prosecutor made “absolutely no mention” of improper profile testimony in his closing argument; “[in light of the brevity

of the improper testimony and the lack of emphasis placed on [it] by the State, as well as the overwhelming evidence of Flanagan’s guilt, we find the admission of this testimony to be harmless error beyond a reasonable doubt”); Ayalavillamizar v. State, 134 So.3d 492, 497 (Fla. 4<sup>th</sup> DCA 2014)(any error in admitting challenged testimony was harmless because “the testimony was brief, isolated, and never repeated or commented upon in the state’s closing argument”).

The CSLI evidence in the instant case was far from brief and far from isolated. It included records, maps, and a Power Point presentation within the testimony of the Police Department’s intelligence and cellular analyst Celona. Both prosecutors argued it extensively in their opening and closing statements, culminating in a devastating rebuttal of Figueroa’s testimony that he remained in the apartment all night. His convictions and death sentences should be reversed for a new trial.

[ISSUE THREE] [INVALID WAIVER OF COUNSEL] The state, obfuscating, focuses its superficial two-page argument on the trial court’s refusal to allow Figueroa to waive the presentation of mitigating evidence, while virtually ignoring the Sixth Amendment violation which occurred as a consequence of the trial court’s erroneous refusal to allow Figueroa to waive the presentation of mitigating evidence while represented by counsel. Judge Siracusa improperly conditioned Figueroa’s ability to exercise a right provided by Florida law<sup>4</sup> and the Sixth Amendment<sup>5</sup> upon his waiver of another - - even more fundamental - - right guaranteed by the United States and Florida Constitutions: the right to counsel.

As recognized in Garrity v. New Jersey, 385 U.S. 493, 498-500 (1967), a state may not condition a person’s exercise of a constitutional right “by the exaction of a price”, and “[w]here the choice is ‘between the rock and the whirlpool’, duress is inherent in deciding to ‘waive’ one or the other.”

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<sup>4</sup> Grim v. State, 841 So.2d 455, 461-62 (Fla. 2003); Boyd v. State, 910 So.2d 167, 189 (Fla. 2005); Hojan v. State, 3 So.3d 1204, 1211 (Fla. 2009); Bell v. State, 336 So.3d 211, 217 (Fla. 2022).

<sup>5</sup> See State v. Maestas, 299 P.3d 892, 958-60 (Utah 2012).

See also State v. Socarras, 272 So.3d 488, 494 (Fla. 3d DCA 2019)(discussing Garrity's rock vs. whirlpool analogy); Wilson v. State, 12 So.3d 292, 296 (Fla. 4<sup>th</sup> DCA 2009)(trial court erred by forcing Wilson to choose between right to testify and right to counsel); Turner v. State, 851 So.3d 276, 279 (Fla. 4<sup>th</sup> DCA 2003) (defendant was denied a fair trial where he was forced to choose between two equally important constitutional rights); Blackburn v. Snow, 771 F.2d 556, 568 (1<sup>st</sup> Cir. 1988)(citing Garrity and discussing "doctrine of unconstitutional conditions"); State v. McCoy, 963 N.W.2d 472, 479 (Minn.2021)(discussing Garrity); and Gore v. State, 451 S.W. 3d 182, 193 (Tex. App.-Houston(1<sup>st</sup> Dist 2014)) ("the State cannot condition the exercise of a privilege granted by the State upon the waiver of constitutional rights").

That is exactly what Judge Siracusa did at the outset of Figueroa's penalty phase, resulting in a waiver of his right to counsel made under the duress of being confronted with a coercive Hobson's choice. Figueroa was afforded only a pick-one-or-the-other "option", when the law clearly allows him to exercise both rights: to waive the presentation of mitigating evidence and continue to be represented by counsel. Boyd; Hojan; Bell. That is the identical dilemma which

was addressed in State v. Brown, 330 So.3d 199, 211 and 216-230 (La. 2021). Brown's waiver of counsel was found to be invalid because it resulted from the trial judge's erroneous insistence that if Brown continued to be represented by counsel he was going to allow the attorney to present mitigating evidence over Brown's objection. The constitutional error was fundamental and structural. Brown is, if not on all fours with Figueroa's case, is at least on all 3.997s, and it was argued extensively in his initial brief (p.53,65-69,71-72). Yet the state has this to say about Brown: nothing (SB 64-65). No attempt to distinguish it; no challenge to its reasoning or constitutional analysis; no suggestion of any contrary case law from Florida or anywhere else. The state is apparently just wishing it away.

The state's reliance on Hamblen v. State, 527 So.2d 800 (Fla. 1988) - - in which, as the state says, "the defendant opted to waive mitigation as well as counsel" - - is entirely misplaced. Hamblen opted to waive two rights; he was not presented with an either-or. The first thing Hamblen asked for, after he was indicted and found competent to stand trial, was "to revoke the appointment of the public defender and allow him to represent himself. He simultaneously announced his intention to plead guilty." After a Faretta hearing he

was allowed to proceed pro se, whereupon he entered a guilty plea and waived a penalty phase jury. Hamblen presented no mitigation and he told the judge he agreed with the state that the death penalty was appropriate. He then tried unsuccessfully to waive his direct appeal. 527 So.2d at 801-02.

In obvious contrast with what happened in Figueroa's case, Hamblen unequivocally chose to represent himself from the outset. Hamblen's decision to waive counsel was not the product of misinformation from or an erroneous ruling by the judge. Hamblen was never told that mitigating evidence would be presented against his will unless he waived his right to counsel.

Moreover, Figueroa, unlike Hamblen, was not a death volunteer (see T3080-88).

The state, still focusing on the waiver of mitigation error in isolation in order to obscure the even more egregious waiver of counsel error, says "While the State acknowledges a defendant's right to waive mitigation, no objection to this ruling was made below. Jackson v. State, 983 So.2d 562 (Fla. 2008). The error is clearly not fundamental because, in the end, Appellant got what he asked for - -

the defense presented no mitigation to the penalty phase jury” (SB 64).

But only at the price of foregoing his right to counsel. Jackson specifically recognizes that the right to counsel is a fundamental right, and that deprivation of that right ordinarily constitutes both fundamental error and structural error. 983 So.2d at 575-77. The facts of Jackson illustrate an exception. After Jackson was found guilty of aggravated battery, sentencing was set for four weeks later. The victim, who resided in North Carolina, had traveled to Florida for the trial, and the judge decided he was not going to make her make the trip again to give a victim impact statement; she could speak telephonically. After a lunch recess defense counsel did not return on time, and when the judge was initially unable to reach him by phone he reluctantly allowed the victim to address the court in counsel’s absence. At some point during the victim’s statement, defense counsel called in and was placed on speakerphone in the courtroom. The judge summarized for him what the victim had said so far, and counsel was able to listen to the rest and to participate in the sentencing hearing which followed. In arguing for a sentence at the low end of the guidelines, counsel noted that the victim herself was “op-

posed to a draconian sentence.” (The victim had opined that she didn’t think three years was enough but she thought thirty years was too much). The judge imposed a five year sentence. 983 So.2d at 566-67 and 577. “Under these facts”, this Court said on review, “the failure to provide defense counsel for Jackson during part of the victim’s statement does not ‘go[] to the foundation of the case or . . . the merits of the cause of action’ ”, and therefore did not rise to the level of fundamental error. 983 So.2d at 577.

One obvious difference between Jackson and Figueroa’s case is that the former involved the lawyer’s own inadvertent or negligent momentary absence from a portion of a portion of a noncapital sentencing proceeding, while the latter involves an invalid waiver of the right to counsel triggered by an erroneous ruling by the trial judge. Another obvious difference is that Jackson’s counsel was present and actively participating throughout the sentencing proceeding except for a few minutes during a victim statement (which the judge summarized for him at a point in time when counsel still had the opportunity to question the victim who was still on the stand, 983 So.2d at 577), while Figueroa was deprived of his right to counsel

from the outset of the penalty phase until the midst of the jury's deliberations.

Deprivation of the right to counsel, as a result of the trial court's failure to secure an informed waiver, is fundamental error. See, e.g., Robles v. State, 336 So.3d 370, 384-87 (Fla. 2d DCA 2022); Bowden v. State, 150 So.3d 264, 266 (Fla. 1<sup>st</sup> DCA 2014); Curtis v. State, 32 So.3d 759, 761 (Fla. 2d DCA 2010); Brady v. State, 910 So.2d 388, 390 (Fla. 2d DCA 2005); Tyler v. State, 710 So.2d 645, 646 (Fla. 4<sup>th</sup> DCA 1998). In the instant case what Judge Siracusa secured from Figueroa was a misinformed waiver of counsel, as well as a coerced waiver of counsel as a result of the judge wrongly and repeatedly telling him he could not prevent the introduction of mitigating evidence unless he waived counsel. That was the constitutional error which compelled reversal in State v. Brown, *supra*. [See also Deno v. Commonwealth, 177 S.W. 3d 753, 757-59 (Ky. 2005), also reversing due to a misinformed waiver of counsel].

While the state has not even attempted to argue that the reinstatement of Daniel Hernandez as counsel during jury deliberations makes this a "partial deprivation" instead of a "complete deprivation" case, their citation of Jackson suggests that that dichotomy should

be addressed. Jackson, at 576-77, discusses Satterwhite v. Texas, 486 U.S. 249, 257 (1988), which makes the distinction between cases where the deprivation of the right to counsel pervades the entire proceeding (structural error), and cases where the effect of the deprivation of counsel is limited to the erroneous admission of particular evidence at trial (harmless error review permitted). 488 U.S. at 254-57. So, for example, in United States v. Roy, 855 F.3d 1133, 1135-44 (11<sup>th</sup> Cir. 2017)(en banc) and United States v. Margarita Garcia, 906 F.3d 1255, 1263-64 (11<sup>th</sup> Cir. 2018) - - both of which, like Jackson, involved inadvertent or negligent absence of counsel instead of an invalid waiver of counsel - - the brevity of counsel's absence (7 minutes out of a 31.4 hour trial in Roy; 3 minutes out of a 49.7 hour trial in Margarita Garcia) persuaded the appellate court that automatic reversal was not required. In Roy, the court distinguished two decisions - - United States v. Russell, 205 F.3d 768 (5<sup>th</sup> Cir. 2000) and Olden v. United States, 224 F.3d 561 (6<sup>th</sup> Cir. 2000) - - where counsel was absent during significant portions of the trial. 855 F.3d at 1153-54.

In State v. Montes, 442 P.3d 1247, 1251 (Utah App. 2019) "Christopher Montes had already been held in contempt of court

three times when he asked his appointed counsel ‘Do I need to headbutt you so that the judge will give me a new lawyer’. Based on this statement and other actions of Montes, the trial court ruled that Montes had impliedly waived or forfeited his right to counsel and would be required to represent himself. Montes soon repented and his lawyer represented him for the rest of the trial, but not before opening statements and two significant witnesses had testified.” The appellate court concluded (1) that the trial judge erroneously determined that Montes had forfeited or waived his right to counsel, and (2) that the error was structural. Citing Satterwhite v. Texas, *supra*, and Arizona v. Fulminante, 499 U.S. 279, 310 (1991), the court stated that a deprivation of counsel during a critical stage of a trial – - and for more than one-third of the trial - - constitutes structural error because it pervades the entire proceeding and determines the framework in which the trial proceeds. 442 P.3d at 1261.

In the instant case, as a consequence of a series of erroneous and coercive statements by Judge Siracusa, Figueroa was without counsel for the entire jury penalty trial up until the moment when the jury, in the midst of deliberations, submitted its question expressing confusion over the verdict form. Since Figueroa had made it

clear that he was not volunteering for a death sentence, nor did he wish to waive the jury, it is impossible to quantify the impact of counsel's absence throughout this extremely critical stage of a capital trial. While it is true that if the judge had ruled correctly attorney Hernandez would have been bound by Figueroa's instruction not to present any mitigating evidence, he still could have raised objections or suggested redactions to the victim impact testimony; he could have cross-examined Dr. Lazarou; he could have challenged some of the aggravating factors or the weight the jury should accord them; he could have made a closing argument; he could have argued that mitigating factors were established during the first phase; he could have participated in the charge conference (and perhaps picked up on the fact that the verdict form did not conform to the instructions and was noncompliant with Florida's capital sentencing statute and the Eighth Amendment). A defendant's waiver of mitigation does not and cannot equate to an automatic death sentence, especially under the current statutory scheme in which a single juror's vote for life results in a life sentence. Jurors are never required to vote for the death penalty.

Figueroa's waiver of counsel was invalid, misinformed, and coerced by the binary "choice" - - present mitigation or represent yourself - - which Judge Siracusa erroneously presented to him; the error is fundamental and structural.

But even if preservation were necessary, the issue was fairly raised before Judge Siracusa and he had every opportunity to rule correctly; he simply didn't know the applicable law. [A recurring theme, see also Issues Two and Five]. Attorney Hernandez laid it out for him at the outset of the penalty phase: the mitigation witnesses were "lined up and prepared to proceed"; Hernandez wanted to present their testimony but now Figueroa had decided he didn't want them to testify. Hernandez believed the judge would require him to put on the mitigation, but he didn't want to do something against his client's wishes. Judge Siracusa encouraged Figueroa to change his mind, and told him his reasoning was flawed. Then, confirming that the lawyer's prediction was right, the judge said "So if Mr. Hernandez wants to call them, I'm going to let him call them so they can do what's necessary" (T3072-75).

At that point, Figueroa responded the only way he could if he was adamant that he did not want mitigation testimony. "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).

Prior to the judge's statement, Figueroa never indicated any desire to represent himself in the penalty phase. Even after the judge's statement, he didn't say that self-representation is what he actually wanted; he just said that is what he would do if the alternative was that the lawyer would present mitigation against his wishes.

As if the binary forced choice wasn't clear enough from the beginning, Judge Siracusa repeated it three times more; each time emphasizing it was an either/or decision for Figueroa to make. "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. . . ." (T3080); "[I]f you tell me that you don't want any mitigation presented, I can't have Mr. Hernandez go forward representing you not presenting any mitigation. . . . So if he represents you, he's going to present mitigation in 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? . . . With that in mind do you want to represent yourself or do you want to let Mr. Hernandez present the mitigation against your wishes? (T3085).

So who exactly does the state think should have made a further objection? (See SB 64). The judge’s ruling was precisely what attorney Hernandez wanted and expected. And if Judge Siracusa was unaware of the Boyd-Hojan-Bell case law that it is the defendant, not the lawyer, who gets to make the decision whether to present or waive mitigating evidence, it would be unreasonable to expect Figueroa (who was not even pro se yet) to be aware of that case law. See Wilcox v. State, 143 So.3d 359, 372-73 (Fla. 2014). Judge Siracusa was made thoroughly aware that there was a disagreement between the attorney and the defendant on whether to present mitigating evidence, and he made a wrong ruling. That ruling put Figueroa “between the rock and the whirlpool” [Garrity], and a defendant is not obligated to object to the invalidity of his own waiver of counsel. United States v. Hakim, 30 F.4<sup>th</sup> 1310, 1319-20 (11<sup>th</sup> Cir. 2022). The reviewing court “cannot expect defendants to recognize that they have not been correctly and fully advised, let alone to point out the

[trial] court's errors." Hakim, 30 F.4<sup>th</sup> at 1319; United States v. Johnson, 24 F.4<sup>th</sup> 590, 601 (6<sup>th</sup> Cir. 2022); United States v. Erskine, 355 F.3d 1161, 1166 (9<sup>th</sup> Cir. 2004).

Finally, the state's reliance on dicta<sup>6</sup> from Marquardt v. State, 156 So.3d 464, 490 (Fla. 2015) to argue that "[g]ranting relief would not benefit Appellant in any conceivable way" (SB 65) is misplaced. The fact that Figueroa - - who had cooperated with the mental health experts and the mitigation investigation throughout the pretrial proceedings, and who had just been found guilty after a trial in which he was represented by an attorney with whom he had an irreconcilable conflict - - decided to present no mitigating evidence in the ensuing jury penalty phase does not result in a waiver of mitigation until the end of time<sup>7</sup>. [In fact, Figueroa did - - however reluctantly - - allow the mitigating evidence to be presented in the Spencer hearing].

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<sup>6</sup> Any speculation about what might have happened if Marquardt received a new penalty phase is dicta, because the Court concluded that no error occurred. 156 So.2d at 490.

<sup>7</sup> By way of analogy, a defendant's waiver of a jury, in a trial in which he is convicted but the conviction is reversed on appeal, is not binding for the retrial. See Smithberg v. Jacobson, 939 N.W. 2d 405, 409-11 (N.D. 2020), and cases cited therein.

Under established Florida law, when the reversal of a death sentence leads to a new penalty proceeding, the “clean slate” rule applies. Lowe v. State, 259 So.3d 23, 61 (Fla. 2018); State v. Fleming, 61 So.3d 399, 406 (Fla. 2011); Preston v. State, 607 So.2d 404, 407-08 (Fla. 1992). See also State v. Collins, 985 So.2d 985, 989 (Fla. 2008)(“In both capital and noncapital cases, we have held that resentencing is an entirely new proceeding”). The original death sentence is a nullity. Morton v. State, 789 So.2d 324, 334 (Fla. 2001); Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986). As recognized in Wike v. State, 698 So.2d 817, 821 (Fla. 1997), the basic premise of capital sentencing is that the sentencer<sup>8</sup> “is to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine appropriate punishment. . . This can be accomplished only by allowing a resentencing to proceed in every respect as an entirely new proceeding.” See also Lowe, at 61; Preston, at 409; and Clark v. State, 690 So.2d 1280, 1283 (Fla. 1997)(upon

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<sup>8</sup> In Florida, the jury and the judge are co-sentencers, and under the current statutory scheme a jury verdict for life precludes the judge from imposing a death sentence. See Figueroa’s initial brief, p. 112-14.

remand for a full resentencing proceeding before a jury, “Clark will begin the resentencing proceeding with a clean slate. We direct the trial court to allow Clark to present any relevant evidence in mitigation. . .”).

In a “clean slate” penalty retrial all constitutional requirements and due process protections attach. State v. Fleming, 61 So.3d at 406. Figueroa must be accorded the options of (1) presenting to the new jury all of the mitigating evidence (including any discovered after the original penalty phase and Spencer hearing); (2) presenting some but not all of the mitigating evidence<sup>9</sup>; (3) presenting no mitigating evidence while still being represented by counsel; or (4) voluntarily waiving his right to counsel (which he did not do in his original penalty trial due to Judge Siracusa’s erroneous and coercive limitation of his options).

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<sup>9</sup> See, e.g., Bell v. State, 336 So.3d at 217.

[ISSUE FIVE] [DISCRETION TO APPOINT INDEPENDENT COUNSEL] The state, once again misperceiving the issue, correctly states “Appointment of independent counsel for the purpose of presenting mitigation is discretionary with the court.” (SB 68). Agreed. The problem is that Judge Siracusa’s own statements made after the jury penalty phase but before the Spencer hearing conclusively show (not “speculation” as the state would have it (SB68)) that he didn’t know whether or not he had discretion to appoint independent counsel, or even whether he was required to have a Spencer hearing at all. He thought there were “a couple of cases out there” but it was something that he and the attorneys would have to research (T3247-48).

Since Judge Siracusa’s own earlier statements also show (1) that he believed it was important that the jury’s life-or-death decision should be made with full information after hearing the mitigating as well as the aggravating evidence (in fact, so important that that is why he insisted that attorney Hernandez must present the mitigation unless Figueroa waived his right to counsel), (2) the expert and lay witnesses were present and ready to go, and (3) the judge, once he learned the applicable law, did decide to appoint independ-

ent counsel for the Spencer hearing unless Figueroa agreed to allow Mr. Hernandez to do it, it is reasonable to believe that Judge Siracusa would have appointed independent counsel to present the mitigating evidence to the jury if he understood that he had discretion to do so. See Marquardt v. State, 156 So.3d 464, 470 (Fla. 2015)(trial courts “should utilize an independent, special counsel – rather than standby counsel – to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court”).

[ISSUE SIX] [NON-VERDICT] The death verdict in this case is noncompliant with Florida’s capital sentencing statute as well as incurably deficient under the Eighth Amendment. The state either has almost nothing to say in response (SB 69-70), or - - more likely - - has made a strategic decision to say almost nothing. If this verdict isn’t fundamental and structural error, it is hard to imagine what would be, and if the State of Florida succeeds in executing Mr. Figueroa based on this verdict it will be a thumb in the eye of Florida law and the other thumb in the other eye of the United States Constitution.

The state says, “Here, Appellant directs our attention to what he perceives as various errors in the verdict form. . .” (SB 69). Does the state not “perceive” those errors? This verdict wholly omits several critical and statutorily mandated findings which the jury must make in order to return a valid death verdict.

This Court has recognized - - in an early decision which established a capital defendant’s right in Florida to decline to present mitigating evidence - - that the courts of this state cannot administer the death penalty by default, and “[t]he 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).

Here, Figueroa’s death verdict is flagrantly noncompliant with the bedrock requirements of Florida law. Moreover, in response to Judge Siracusa’s questioning, Figueroa made it abundantly clear that he was not a death-volunteer, and that he wanted the jury, not the judge, to make the decision. He simply wanted to get on with his appeal, he did not want to beg for his life, and he did not want to put his family members through the ordeal of testifying. All he waived was the presentation of mitigating evidence (voluntarily) and his right to counsel (based on erroneously limited options). He did not waive a lawful jury verdict.

In fact, this death penalty verdict was so defective as to be nearly unprecedented. The closest Florida case law which undersigned appellate counsel could find is Pangburn v. State, 661 So.2d 1182, 1188 (Fla. 1995) and Snelgrove v. State, 921 So.2d 560, 570-72 (Fla. 2005), each reversing two death sentences based on a single undifferentiated jury recommendation because Florida’s capital sen-

tencing scheme requires a separate jury verdict for each count of first-degree murder. The closest case law from another jurisdiction appears to be Camargo v. State, 940 S.W.2d 464, 469-71 (Ark. 1997), holding that the jury's failure in its verdict to make the necessary written findings as required by statute is an error essential to the imposition of the death penalty itself, and therefore requires reversal even in the absence of an objection below.

The state, in its answer brief, offers no contrary case law from anywhere, nor does it offer any precedent or legal analysis involving verdicts, much less death penalty verdicts. Nor does it address Camargo, or any of the other case law discussed in Figueroa's initial brief. The state cites only two factually inapposite decisions: Crain v. State, 894 So.2d 59, 70 (Fla. 2004) for the general proposition that jurors are presumed to have followed their instructions, and Cruz v. State, 320 So.3d 695, 722 (Fla. 2021) which - - according to the state - - supports its contention that "the error is not fundamental" (SB 70).

In Crain, the judge gave divergent instructions on (1) the offense of kidnapping as the underlying felony for felony-murder, and (2) the separate count of kidnapping. "The jury did not request clari-

fication of the felony-murder or kidnapping instructions. Accordingly, we assume that the jury understood and properly applied the instructions, and independently assessed Crain's guilt on each count." 894 So.2d at 70. Crain is not a case where the verdict itself was noncompliant with the law. Therefore, the Court's conclusion in Crain that the instructions there did not rise to the level of fundamental error has no bearing on Figueroa's very different issue.

First of all, the state's assumption that a noncompliant and constitutionally defective death penalty verdict can be saved by jury instructions was emphatically rejected in Penry v. Johnson, 532 U.S. 782, 786-804 (1989). Second, "[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). "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. 3<sup>d</sup> DCA 2008); Mantilla v. State, 38 So.3d 196, 200 (Fla. 3<sup>d</sup> DCA 2010). Third, in sharp contrast to Crain where this Court presumed that the jury understood its responsibilities because it not ask for clarification, here the jurors expressed their confusion because the verdict form appeared to say the

same thing twice (actually three times), but they never received a proper clarification on this point, and they were merely provided with a substitute verdict form which perpetuated the same egregious error of omitting all required findings pertaining to mitigating factors or weighing.

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”; and while the jury instruction was accurate “[u]nfortunately, the verdict form did not contain this clarification”).

All of the above, including Penry v. Johnson, is among the case law which the state chooses not to address or acknowledge. Crain in no way holds or even suggests that a verdict which fails to comply with statutory and constitutional law can be saved by jury instructions.

As for fundamental error, it 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”). See also Camargo (error was essential to the imposition of the death penalty itself). Where the error is the verdict, and where the verdict does not comply with the statutory and constitutional requirements - - as opposed to a mere technical defect - - it is self-evident that the verdict could not have been obtained without the “assistance” of the error. And because the error is the actual verdict itself it is structural as well as fundamental, for

the reasons explained by Justice Scalia in Sullivan v. Louisiana, 508 U.S. 275, 279-82 (1993). Whether a hypothetical jury, if given the opportunity to make the required findings to permit a death verdict, would have made those findings is not the proper inquiry, because, inter alia, that would amount to a directed verdict of death. See Sullivan, at 280.

The state's sole reliance on Cruz, 320 So.3d at 722, is entirely misplaced, as it concerns an evidentiary issue. Those - - unlike an invalid verdict - - are rarely fundamental and almost never structural. See Arizona v. Fulminante. Cruz involved a single comment by the state's penalty-phase expert that Cruz told him he committed the robbery-kidnap-murder because he needed money for drugs, and that he'd previously robbed a drug dealer in a similar manner. This Court concluded that the doctor's testimony was relevant to the issue of motive, but even if erroneous it did not reach the level of fundamental error. There is a vast difference between an isolated unobjected-to remark and an unlawful verdict. Figueroa's death sentence is based on a non-verdict which omits essential findings required by law, and it must be reversed.

[ISSUE EIGHT] [FLORIDA’S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL DUE TO RECENT JETTISONING OF SAFEGUARDS INCLUDING PROPORTIONALITY REVIEW]

The state's argument (styled “FLORIDA NO LONGER CONDUCTS PROPORTIONALITY REVIEW”) is non-responsive and circular. Figueroa is all too well aware that Florida no longer conducts proportionality review, and that fact - - in combination with (1) the proliferation of aggravating circumstances resulting in nearly every first-degree murder being death-eligible and (2) the recent elimination of other safeguards as well - - is WHY this state's scheme no longer comports with Eighth Amendment standards<sup>10</sup>.

CONCLUSION

Figueroa respectfully requests that his convictions and death sentences be reversed.

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<sup>10</sup> The same constitutional issue is before the Court in the pending appeal in Michael Gordon v. State, case no. SC20-284, initial brief p.68-86.

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 \_\_26th\_\_ day of July, 2022.

Respectfully submitted,

/s/ Steven L. Bolotin

HOWARD L. "REX" DIMMIG, II  
Public Defender  
Tenth Judicial Circuit  
(863) 534-4200

\_\_\_\_\_  
STEVEN L. BOLOTIN  
Assistant Public Defender  
Florida Bar Number O236365  
P. O. Box 9000 - Drawer PD  
Bartow, FL 33831  
[appealfilings@pd10.org](mailto:appealfilings@pd10.org)  
[sbolotin@pd10.org](mailto:sbolotin@pd10.org)  
[kstockman@pd10.org](mailto:kstockman@pd10.org)

CERTIFICATION OF COMPLIANCE

I certify that this document contains 9,772 words (excluding the portions exempted by Fla.R.App.P. 9.045(e)), and that it complies with the applicable font requirements.

/s/ Steven L. Bolotin

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STEVEN L. BOLOTIN  
Assistant Public Defender

SLB/kas