

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC22-210
DEATH PENALTY CASE**

THOMAS BEVEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

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TABLE OF CONTENTS

CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
FACTS AND PROCEDURAL HISTORY	1
PRETRIAL MOTION	12
PENALTY PHASE/ <i>SPENCER</i> HEARING	12
SUMMARY OF THE ARGUMENT	21
ARGUMENT	23
ISSUE I: THE STATUTORY MITIGATOR REGARDING EXTREME MENTAL OR EMOTIONAL DISTURBANCE WAS PROPERLY REJECTED BY THE TRIAL COURT.	23
ISSUE II: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING APPELLANT’S PROPOSED JURY INSTRUCTIONS ON MERCY.	34
ISSUE III: THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR BY READING THE STANDARD JURY INSTRUCTIONS DURING THE PENALTY PHASE.	37
ISSUE IV: FLORIDA’S CAPITAL SENTENCING SCHEME DOES NOT VIOLATE THE UNITED STATES OR FLORIDA STATE CONSTITUTIONS.	44
ISSUE V: THE TRIAL COURT PROPERLY GRANTED THE STATE’S MOTION IN LIMINE PRECLUDING ANY ARGUMENT TO THE JURY ABOUT THE PROPORTIONALITY OF BEVEL’S POSSIBLE SENTENCE.	51
CONCLUSION	55
CERTIFICATE OF SERVICE	57
CERTIFICATE OF COMPLIANCE	57

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985).....	9
<i>Allen v. State</i> , 137 So.3d 946 (Fla. 2013).....	31
<i>Alleyne v. United States</i> , 570 U.S. 99 (2013).....	40
<i>Almeida v. State</i> , 748 So. 2d 922 (Fla. 1999).....	49
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	40
<i>Ault v. State</i> , 53 So.3d 175 (Fla. 2000).....	23, 27
<i>Bargo v. State</i> , 331 So.3d 653 (Fla. 2021).....	30
<i>Bell v. State</i> , 336 So.3d 211 (Fla. 2022).....	45
<i>Bevel v. State</i> , 221 So.3d 1168 (Fla. 2017).....	9, 10, 11
<i>Bevel v. State</i> , 983 So. 2d 505 (Fla. 2008).....	8, 9, 51
<i>Braddy v. State</i> , 219 So.3d 803 (Fla. 2017).....	44
<i>Bradwell v. State</i> , 300 So.3d 325 (Fla. 1st DCA 2020).....	45
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	9
<i>Bright v. State</i> , 299 So.3d 985 (Fla. 2020).....	30
<i>Bryant v. State</i> , 785 So. 2d 422 (Fla. 2001).....	23
<i>Bush v. State</i> , 295 So.3d 179 (Fla. 2020).....	37, 45

<i>Coday v. State</i> ,	
946 So. 2d 988 (Fla. 2006).....	27, 36
<i>Colley v. State</i> ,	
310 So.3d 2 (Fla. 2020).....	45, 47
<i>Cox v. State</i> ,	
819 So. 2d 705 (Fla. 2002)	24
<i>Craft v. State</i> ,	
312 So.3d 45 (Fla. 2020).....	38, 47
<i>Cruz v. State</i> ,	
320 So.3d 695 (Fla. 2021).....	47
<i>Davidson v. State</i> ,	
323 So.3d 1241 (Fla. 2021).....	45
<i>Diaz v. State</i> ,	
945 So. 2d 1136 (Fla. 2006).....	25
<i>Downs v. Moore</i> ,	
801 So. 2d 906 (Fla. 2001).....	37
<i>Duncan v. State</i> ,	
619 So. 2d 279 (Fla. 1993).....	25, 26, 49
<i>Ferrell v. State</i> ,	
653 So. 2d 367 (Fla. 1995).....	37
<i>Ferrell v. State</i> ,	
680 So. 2d 390 (Fla.1996).....	49, 50
<i>Finney v. State</i> ,	
660 So. 2d 674 (Fla. 1995).....	41
<i>Fletcher v. State</i> ,	
168 So.3d 186 (Fla. 2015).....	24, 25
<i>Fletcher v. State</i> ,	
343 So.3d 55 (Fla. 2022).....	38
<i>Floyd v. State</i> ,	
497 So. 2d 1211 (Fla. 1986).....	41
<i>Gamble v. State</i> ,	
659 So. 2d 242 (Fla. 1995).....	37
<i>Guzman v. State</i> ,	
721 So. 2d 1155 (Fla. 1998).....	26
<i>Harper ex rel. Daley v. Toler</i> ,	
884 So. 2d 1124 (Fla. 2d DCA 2004).....	53
<i>Hawk v. State</i> ,	
718 So. 2d 159 (Fla. 1998).....	48

<i>Herring vs State</i> ,	
446 So. 2d 1049 (Fla. 1984).....	52, 54
<i>Hess v. State</i> ,	
794 So. 2d 1249 (Fla. 2001).....	54
<i>Hobart v. State</i> ,	
175 So.3d 191 (Fla. 2015).....	30
<i>Hooper v. State</i> ,	
703 So. 2d 1143 (Fla. 4th DCA 1997).....	54
<i>Hoskins v. State</i> ,	
965 So. 2d 1 (Fla. 2007).....	24, 26, 30
<i>Hudson v. State</i> ,	
992 So. 2d 96 (Fla. 2008).....	35, 38
<i>Huff v. State</i> ,	
622 So. 2d 982 (Fla. 1993).....	10
<i>Hunter v. State</i> ,	
660 So. 2d 244 (Fla. 1995).....	37
<i>Hurst v. State</i> ,	
202 So.3d 40 (Fla. 2016).....	11
<i>In re Standard Criminal Jury Instructions in Capital Cases</i> ,	
214 So.3d 1236 (Fla. 2017).....	35
<i>Jackson v. State</i> ,	
881 So. 2d 711 (Fla. 3d DCA 2004).....	54, 55
<i>Johnson v. State</i> ,	
608 So. 2d 4 (Fla. 1992).....	32
<i>Johnson v. State</i> ,	
720 So. 2d 232 (Fla. 1998).....	48
<i>Johnston v. State</i> ,	
27 So.3d 11 (Fla. 2011).....	25
<i>Jones v. State</i> ,	
705 So. 2d 1364 (Fla.1998).....	49
<i>Joseph v. State</i> ,	
336 So.3d 218 (Fla. 2022).....	45
<i>Kansas v. Carr</i> ,	
136 S. Ct. 633 (2016).....	43
<i>Kansas v. Marsh</i> ,	
548 U.S. 163 (2006).....	42
<i>Kilgore v. State</i> ,	
688 So. 2d 895 (Fla. 1996).....	37

<i>Knight v. State</i> , 225 So.3d 661 (Fla. 2017).....	47
<i>LaMarca v. State</i> , 785 So. 2d 1209 (Fla. 2001).....	50
<i>Lawrence v. State</i> , 308 So.3d 544 (Fla. 2020).....	45
<i>Lawrence v. State</i> , 960 So. 2d (Fla. 2007).....	25
<i>Lindsey v. State</i> , 636 So. 2d 1327 (Fla. 1994).....	49
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	54
<i>Lugo v. State</i> , 845 So. 2d 74 (Fla. 2003).....	47
<i>Martin v. State</i> , 107 So.3d 281 (Fla. 2012).....	24
<i>McKenzie v. State</i> , 333 So.3d 1098 (Fla. 2022).....	38
<i>McKinney v. Arizona</i> , 140 S. Ct. 702 (2020).....	39, 46
<i>Miller v. State</i> , 926 So. 2d 1243 (Fla. 2006).....	47
<i>Moore v. State</i> , 820 So. 2d 199 (Fla. 2002).....	37
<i>Nelson v. State</i> , 850 So. 2d 514 (Fla. 2003).....	34
<i>Newberry v. State</i> , 288 So.3d 1040 (Fla. 2019).....	38
<i>Nibert v. State</i> , 574 So. 2d 1059 (Fla. 1990).....	23
<i>Offord v. State</i> , 959 So. 2d 187 (Fla. 2007).....	49
<i>Porter v. State</i> , 564 So. 2d 1060 (Fla. 1990).....	50
<i>Reaves v. State</i> , 639 So. 2d 1 (Fla. 1994).....	51
<i>Reynolds v. State</i> , 251 So.3d 811 (Fla. 2018).....	37

<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	40
<i>Rodriguez v. State</i> , 335 So.3d 168 (Fla. 3d DCA 2021).....	45
<i>Rogers v. State</i> , 285 So.3d 872 (Fla. 2019).....	38
<i>Rogers v. State</i> , 511 So. 2d 526 (Fla. 1987).....	54
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	40
<i>San Martin v. State</i> , 705 So. 2d 1337 (Fla. 1997)	32
<i>Santiago-Gonzalez v. State</i> , 301 So.3d 157 (Fla. 2020).....	38
<i>Scott v. State</i> , 331 So.3d 297 (Fla. 2d DCA 2021).....	53
<i>Sheffield v. Superior Ins. Co.</i> , 800 So. 2d 197 (Fla. 2001).....	39
<i>Sireci v. Moore</i> , 825 So. 2d 882 (Fla. 2002).....	49
<i>Smith v. State</i> , 170 So.3d 745 (Fla. 2015).....	32
<i>Sparre v. State</i> , 164 So.3d 1183 (Fla. 2015).....	32
<i>Spencer v. State</i> , 615 So. 2d 688 (Fla. 1993).....	19
<i>State v. Garcia</i> , 338 So.3d 847 (Fla. 2022).....	45
<i>State v. Mason</i> , 108 N.E.3d 56 (Ohio 2018)	44
<i>State v. Poole</i> , 297 So.3d 487 (Fla. 2020).....	39, 46
<i>Stephens v. State</i> , 787 So. 2d 747 (Fla. 2001).....	36
<i>Stewart v. State</i> , 872 So. 2d 226 (Fla. 2003).....	33
<i>Universal Ins. Co. of North America v. Warfel</i> , 82 So.3d 47 (Fla. 2012).....	39

<i>Woodbury v. State</i> , 320 So.3d 631 (Fla. 2021).....	36
<i>Zack v. State</i> , 753 So. 2d 9 (Fla. 2000).....	37
<i>Zeigler v. State</i> , 580 So. 2d 127 (Fla. 1991).....	41

STATUTES

Florida State Stat. § 921.137	12
Florida State Stat. § 921.141(2)(a) or (3)(b) (2019).....	41
Florida State Stat. § 921.141(2)(b)(2019)	46
Florida State Stat. § 921.141(3)(2019)	46
Florida State Stat. § 921.141(5)(b)	39
Florida State Stat. § 921.141(5)(d)	39
Florida State Stat. § 921.141(6)	40
Florida State Stat. § 921.141(7) (2017)	25
Florida State Stat. § 921.141(7)(b)(2017)	25

RULES

Fla. R. App. P. 9.210 and 9.045.....	57
Fla. R. Crim. P. 3.203.....	12
Fla. R. Crim. P. 3.851.....	9

PRELIMINARY STATEMENT

This is an appeal in a capital case from the resentencing of Appellant to death for the 2005 first-degree murders of Phillip Sims and Garrick Stringfield. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., “Bevel”. Appellee, the State of Florida, was the prosecution below; this brief will refer to Appellee as such, the prosecution, or the “State”. The record below will be referred to as “R” and then the page number, i.e., “(R 1).” The trial transcript will be referred to as “TT” and then the page number, i.e., “(TT 1).” Appellant’s brief shall be referred to as “IB” followed by the page number.

STATEMENT OF THE CASE AND FACTS

Initial Trial and Appeal

The relevant facts concerning the 2005 first-degree murders of Phillip Sims and Garrick Stringfield, as well as the attempted murder of Feletta Smith are recited in this Court’s opinion in the direct appeal:

FACTS AND PROCEDURAL HISTORY

Thomas Bevel was charged with the February 2004 first-degree murders of Garrick Stringfield and his son Phillip Sims and attempted first-degree murder of Feletta Smith.

The key events of February 28, 2004, which ended in two murders and one attempted murder, established the following. Thomas Bevel, who was twenty-two years old at the time of the crime, resided with Garrick Stringfield, who was thirty. The two were close friends, such that Stringfield referred to Bevel as “nephew” or “Tom Tom” and Bevel referred to Stringfield as “Unc.” On February 28, 2004, both men were at a street parade in Jacksonville where they ran into Feletta Smith, whom they both knew from their childhood. Smith exchanged telephone numbers with Stringfield and made plans to meet later that evening.

After leaving the parade, Bevel and Stringfield purchased a bottle of gin and went back to Stringfield's house later in the evening. Because Stringfield was going out, he asked Bevel to wait for his thirteen-year-old son, Phillip Sims, who was being dropped off by his mother, Sojourner Parker. Although Parker noticed that Stringfield's car was not in the driveway when she arrived at the house, she was unconcerned because Bevel, a person she considered Stringfield's roommate, answered the door and let her son inside.

Around 9 p.m., Stringfield met Smith at a Walgreens store and she followed him back to his house. When they arrived at Stringfield's house, Bevel and Sims were playing video games in the living room where Smith and Stringfield joined them. Although no illegal drugs were being consumed, Smith stated that Bevel and Stringfield were drinking gin out of the bottle and she had a half cup of gin and grapefruit juice. At some point, Smith and Stringfield went into his bedroom to watch television. Stringfield showed Smith an AK-47 rifle that he kept under his bed and, because Smith was scared of it, he handed the gun to Bevel who removed it from the room. Stringfield and Smith remained in the bedroom with the door closed. Smith said that she last saw Sims playing video games in the living room.

Bevel then drove Stringfield's car to a BP gas station to meet his girlfriend, Rohnicka Dumas, took her to a bar where he purchased another bottle of gin, and brought her back to the house. When they returned, Stringfield and Bevel went into the backyard, Dumas went inside, Smith remained in Stringfield's bedroom, and Sims continued to play video games in the living room. Stringfield and Bevel then came back into the house and each had a gun in his possession; Stringfield was carrying a smaller handgun and Bevel had the AK-47 rifle that Stringfield had handed to him earlier in the evening. Bevel and Dumas went into the other bedroom, located across the hall from Stringfield's room, and talked.

Bevel then left the bedroom with the AK-47 rifle in his hand. He went to Stringfield's bedroom, where Smith and Stringfield were lying in bed nearly asleep, knocked on the door and said, "Unc, open the door." Stringfield got up from the bed, unarmed, and opened the door in his pajamas. Bevel immediately shot Stringfield in the head and he instantly fell to the floor in the doorway. Smith began screaming and Bevel yelled, "Bitch, shut up" while he shot her several times as she lay in the bed. Smith became quiet and pretended to be dead. She testified that there was "no doubt in [her] mind" that Bevel was the shooter. Rohnicka Dumas corroborated Smith's testimony. She observed Bevel pick up the rifle, go out into the hallway, knock on Stringfield's bedroom door and say, "Unc, look here." She testified that multiple shots were fired, during which she heard both the woman in the other room screaming and Bevel yell, "Bitch, shut up."

Bevel then went into the living room where Sims was still sitting on the sofa with the television remote in his hand and shot him twice, once grazing his arm and chest and once in the face. Subsequently, Bevel returned to the bedroom where Dumas had been and they walked out the front door. Bevel locked the burglar bar door, a barred security gate located on the outside of the front door to the

house, and drove away in Stringfield's car with Dumas sitting in the passenger seat. While driving to Dumas's house, Bevel held the AK-47 rifle under his chin and stated that he did not mean to kill the boy (Sims), but had to because he was going to be a witness. Bevel abandoned Stringfield's car near Dumas's house.

Smith was eventually able to reach 911 by using Stringfield's cell phone. Because Smith was unable to give the police an exact address, it took some time for the police and rescue to find the house. Ultimately, rescuers were able to transport her to the hospital where she stayed for almost a month while undergoing multiple surgeries for various gunshot wounds to her pelvis and upper legs.

After hiding for almost a month, Bevel was finally found by officers from the Jacksonville Sheriff's Office on March 27, 2004. Bevel was informed of his constitutional rights and indicated his understanding of each right by signing the rights form. The police questioned Bevel on two occasions over the course of twenty-four hours. During these two interviews, Bevel gave four different versions of the story but ultimately confessed to the murders.

Although Bevel confessed to murdering Stringfield and Sims, his version of events was contrary to the testimony of both Smith and Dumas. Bevel stated that he and Stringfield had been fighting recently about money that Stringfield believed he was owed and that Bevel feared that Stringfield was going to try and kill him. He said that when he brought Dumas back to the house that night, Stringfield began to get angry, saying that he should have killed Bevel a long time ago. While Dumas and Smith were in opposite bedrooms, the fight escalated until Stringfield was pointing the handgun at Bevel and Bevel had picked up the AK-47 rifle. Then, Stringfield went into his bedroom and, when Bevel heard a clicking noise that sounded like a magazine being loaded into the handgun, Bevel moved towards the room and shot Stringfield when he reached

the door. Bevel said the gun went off several times but he did not mean to shoot Smith.

At trial, the State presented the testimony of several forensic and medical experts, who testified regarding the causes of death of Stringfield and Sims and the extensive injuries suffered by Smith. Dr. Jesse Giles, who performed the autopsy of Sims, testified that Sims received a gunshot wound that grazed his chest and exited his arm but that he died as a result of massive trauma due to a gunshot wound to the head. Dr. Aurelian Nicolaescu, who performed the autopsy of Stringfield, testified that he died as a result of a gunshot wound to the head. Both doctors testified that each victim had stippling injuries, which is indicative of being shot at close to intermediate range. The State also presented evidence technicians and crime-scene analysts who discussed bullet fragments, casings, and fingerprints lifted from the scene. In addition, the State introduced the two videotaped interviews with Bevel and letters that Bevel wrote to Dumas from prison, in which he attempted to convince her to change her testimony and lie at trial to save his life.

In his defense, Bevel presented testimony to contradict Smith's version of events. Officer Kenneth Bowen, one of the first officers to arrive at the crime scene, stated that Smith told him that two black males with ski masks committed the crimes. Francis Smith, Smith's mother, stated that she overheard her daughter tell Bevel's brother and his friend in the hospital that the man who committed the murder had on a mask. Finally, Ketrina Bronner, a neighbor of Stringfield, stated that she had a conversation with Smith at a federal courthouse in which Smith said that she did not see who committed the murder.

After the guilt-phase portion of the trial, the jury found Bevel guilty of first-degree murder of Stringfield by discharging a firearm, first-degree murder of Sims by discharging a firearm, and attempted first-degree murder

of Smith by discharging a firearm. During the penalty phase, the State presented the testimony of Detective Kuczkowski, who investigated a previous armed robbery charge involving Bevel,

FN[1] In 2003, Bevel was formally charged with armed robbery with a firearm and attempted armed robbery and ultimately pled guilty to the lesser included offense of attempted unarmed robbery. Bevel was sentenced to one year in county jail and committed the murders in this case within a year after being released.

and Detective Dingee, who recounted Bevel's confession that he killed Sims because he would have been a witness. Additionally, the State played the portion of the videotape in which Bevel stated that he killed Sims because he knew who Bevel was and would tell Stringfield's brother that he killed Stringfield. The State also presented three victim impact statements.

FN[2] The following family members presented victim impact statements: (1) Prescilla Frink, Stringfield's mother; (2) Florence Sims, Sims' paternal grandmother; and (3) Sojourner Parker, Sims' mother.

In defense, Bevel presented the testimony of several family members who described Bevel's poor childhood, the physical abuse he suffered and witnessed at the hands of his mother's boyfriend, the bond he held with his mother and how her death affected him at the age of twelve, his poor relationship with his father who was a heroin addict, and his positive relationships with his extended family.

FN[3] These witnesses were: (1) Barbara Fisher, Bevel's aunt; (2) Donna Sapp, Bevel's aunt; (3) Donella McCray, Bevel's grandmother; and (4) Theondra Bevel, Bevel's sister, who testified about their years growing up and how their

mother's boyfriend, William McKinney, was verbally and physically abusive to her, Bevel, and their mother.

Bevel also presented the testimony of Dr. Harry Krop, a psychologist, who conducted neuropsychological evaluations and other personality tests to evaluate Bevel for competency to stand trial and his mental state at the time of the crimes, and to explore his psychological status and background to prepare to possibly testify during the penalty phase.

Among other things, Dr. Krop testified about Bevel's low full-scale IQ of 65, which placed him in the range of mild mental retardation; however, he stated that Bevel could not be diagnosed as mentally retarded because, based on Bevel's letters and writings from prison, he believed Bevel "had a lot of street sense and ... clearly has a higher level of adaptive functioning." Dr. Krop stated that Bevel's mental age is somewhere around that of a fourteen- or fifteen-year-old and that he would function well in a structured environment such as the general population at prison. However, on cross-examination, Dr. Krop admitted that Bevel was clearly responsible for the crimes he committed; he also appreciated the criminality of the conduct, had no organic brain damage or other serious mental infirmity, and was not suffering from any mental illness at the time of the crime.

The jury recommended the death penalty by a vote of eight to four as to the murder of Stringfield and twelve to zero as to the murder of Sims. The trial court found one aggravator applicable to both murder counts, namely, that the defendant was previously convicted of a capital offense or of a felony involving the use or threat of violence to some person. The trial court gave this aggravator "very great weight." As to the murder of Sims, the trial court found an additional aggravating circumstance, that the murder was committed for the purpose of avoiding a lawful arrest and

gave it “great weight.” As to mitigation, the trial court found that the age of the defendant statutory mitigator was not proven by a preponderance of the evidence because Bevel was twenty-two at the time of the murder and the trial court did not find that Bevel's mental age was significantly lower. However, the court found six nonstatutory mitigating circumstances applicable.

FN[4] The nonstatutory mitigators found were: (1) the defendant has religious faith and loves his family members (minimal weight); (2) defendant confessed to the crime (little weight); (3) defendant has exhibited good behavior in jail (very little weight); (4) defendant exhibited good behavior in court (little weight); (5) defendant has an IQ of 65 (little weight); and (6) defendant struggled with the death of his mother (very little weight).

The trial court concluded that the aggravating circumstances strongly outweighed the mitigating circumstances as to the murder of Stringfield and that the aggravators far outweighed the mitigators as to the murder of Sims. In fact, the trial court noted that either aggravator standing alone would outweigh the mitigators in the murder of Sims. Accordingly, the trial court followed the jury's recommendations and sentenced Bevel to death for both counts of first-degree murder.

Bevel v. State, 983 So. 2d 505, 510–13 (Fla. 2008). (R 793-796).

On appeal,¹ this Court unanimously rejected all of Bevel's claims and affirmed his murder convictions and death sentences. *Id.* at 526. (R 809).

¹ On appeal, Bevel raised nine issues for review (1) whether the trial court erred in failing to strike for cause a juror who favored law

Bevel subsequently filed an initial motion for postconviction relief, pursuant to Florida Rule of Criminal Procedure 3.851.² The

enforcement; (2) whether the trial court erred in finding that the aggravators outweighed the mitigators; (3) whether Bevel's death sentence is disproportionate; (4) whether the trial court erred in denying Bevel's motion that Florida's death penalty statute is unconstitutional because a jury, rather than a judge, must make a unanimous finding as to the aggravators; (5) whether the trial court erred in the weight assigned to the aggravators and mitigators; (6) whether the trial court abused its discretion in allowing photographic evidence which was gruesome and unduly prejudicial; (7) whether the trial court erred in admitting Bevel's confession; (8) whether the trial court erred in adopting verbatim the State's proposed findings of fact and conclusions of law; and (9) whether the death penalty is inappropriate because Bevel's mental age is under that of an eighteen-year-old. *Bevel v. State*, 983 So. 2d 505, 513 (Fla. 2008). (R 796-809).

² Appellant raised the following ten claims: (1) trial counsel was ineffective during the guilt and penalty phases of Bevel's trial; (2) Bevel was deprived of the right to the effective assistance of a mental health expert as required by *Ake v. Oklahoma*, 470 U.S. 68 (1985); (3) Bevel is ineligible for the death penalty because he is intellectually disabled; (4) the State improperly withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (5) Bevel was erroneously denied access to public records; (6) Bevel's death sentences are unconstitutional because the State does not have uniform standards for determining whether to seek the death penalty; (7) Bevel's death sentences are not proportionate; (8) cumulative error deprived Bevel of a fundamentally fair trial; (9) Florida's capital sentencing scheme is unconstitutional in violation of the Sixth and Eighth Amendments to the United States Constitution; and (10) execution by lethal injection is unconstitutional. *Bevel v. State*, 221 So. 3d 1168, 1176 (Fla. 2017). (R 727-752).

postconviction court held a *Huff*³ hearing and thereafter entered an order granting an evidentiary hearing as to three of Bevel's claims: claim 1, pertaining to ineffective assistance of counsel; claim 3, pertaining to intellectual disability; and claim 4, pertaining to *Brady*. The postconviction court determined that the remaining claims could be decided as a matter of law, with the exception of the cumulative error claim, which it would decide after the evidentiary hearing. *Bevel v. State*, 221 So.3d 1168, 1176 (Fla. 2017).

Following the evidentiary hearing, the postconviction court issued an order denying Bevel's motion for postconviction relief. In its order, the postconviction court determined, as a matter of law, that claims 2 (*Ake*), 5 (public records), 6 (lack of uniform standards), 7 (proportionality), 9 (constitutionality of death penalty statute), and 10 (constitutionality of lethal injection) were without merit. As to claims 1 and 4 (the ineffective assistance of counsel and *Brady* claims), the postconviction court concluded that Bevel had failed to demonstrate prejudice, and as to claim 3 (the intellectual disability claim), the postconviction court determined

³ *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993).

that “Bevel's adaptive functioning precludes a diagnosis of mental retardation.” Because the postconviction court found no individual error, it also denied claim 8 (the cumulative error claim). *Id.* at 1176–77. (R 753-766).

On appeal to this Court, Bevel argued that the postconviction court erred in denying the ineffective assistance of penalty phase counsel claim and that he was entitled to *Hurst*⁴ relief. This Court concluded that Bevel was entitled to *Hurst* relief for his death sentence imposed for the murder of Stringfield, which the penalty phase jury recommended by a vote of eight to four. However, Bevel was not entitled to *Hurst* relief for his death sentence imposed for the murder of Sims, which the penalty phase jury unanimously recommended. This Court also concluded that Bevel was entitled to a new penalty phase based on his ineffective assistance of counsel claim. Accordingly, Bevel's death sentences were vacated, and the case was remanded for a new penalty phase proceeding. *Bevel v. State*, 221 So.3d 1168, 1177, 1185 (Fla. 2017).

⁴ *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

PRETRIAL MOTION

On January 30, 2019, pursuant to section 921.137, Florida Statutes and Florida Rule of Criminal Procedure 3.203, Appellant filed Defendant's Notice to Bar Imposition of the Death Penalty Based on Intellectual Disability. (R 98-111). On November 15, 2019, the trial court held an evidentiary hearing on Appellant's motion, during which Dr. Ouaou testified that Appellant did not meet the criteria to be considered intellectually disabled. (R 1540-85). The court later entered an order denying the defense motion. (R. 127-31).

PENALTY PHASE/ SPENCER HEARING

On December 7, 2021, a new jury was selected and sworn for the Appellant's re-sentencing trial (TT 585-589) with opening arguments commencing on December 8, 2021. (TT 643-668).

The State presented the testimony of Sojourner Sims Parker, the mother of Phillip Sims (TT 668-80); Feletta Smith, Bevel's third shooting victim (TT 681-709); Dr. David Anthony Crumbie, an orthopedic surgeon, who provided medical treatment to Feletta Smith for the injuries caused by the gunshot wounds (TT 729-747); Dr. Jesse Giles, a forensic pathologist, who performed the autopsy on Phillip Sims (747-62); and, Dr. Aurelian Nicolaescu, an associate

medical examiner in Jacksonville, who performed an autopsy on Garrick Stringfield (TT 762-75). The previous testimony of Rohnika Dumas was read to the jury by LaTasha Campbell, an assistant state attorney (TT 776-837).

The State also presented the testimony of officers associated with the shootings. Sergeant Frederick Fillingham, a patrol officer in Jacksonville testified that he responded to Ms. Smith's 911 call (TT 714-26); Mark Doyle, a retired Jacksonville sheriff's deputy, testified about collecting evidence at Mr. Stringfield's house (TT 849-72); Thomas Pulley, a firearm's examiner with the Jacksonville Sheriff's Office, analyzed cartridge casings, bullets, and bullet fragments collected in the investigation (TT 874-77); Detective David Shawn Coarsey and Detective Mitchell Chizik , homicide detectives assigned to the case, testified to their investigation of the shootings. (TT 903-34; 938-1059)

Additionally, the State called two victim-impact witnesses Priscilla Frink (TT 1083-89) and Antonio Parker. (TT 1089-92). Sojourner Sims Parker returned to the stand to read a statement she had prepared, as well as a statement from her mother, Florence Sims. (TT 1093-98).

The defense proceeded with their case after they moved for a directed verdict on the grounds that the evidence was insufficient to support a death recommendation. (TT 1103). The court denied the motion. (TT 1104).

The jury was read back the former testimony of Antorio McCray, Bevel's half-brother (TT 1106-1174); Donella McCray, Bevel's grandmother (TT 1233-44); Carl Burden, a dental technician who had known Bevel since Bevel was a child (TT 1244-79); and Maria Sardinias, a foster parent for Bevel when he was about 14 or 15 years of age (TT 1334-61).

William Jerome Randall, Bevel's childhood friend (TT 1176-1225); Laurel French Wilson, Esq., an attorney who represented Bevel when he was a juvenile (TT 1279-1333); and Ronald McAndrew, a prison and jail consultant (TT 1457-1507) took the stand as character witnesses for Bevel.

The defense also presented expert testimony from Dr. Steven Gold, Ph.D., a psychologist specializing in trauma (TT 1599-1644); Dr. Robert Ouaou, Ph.D., a psychologist with a specialization in neuropsychology (TT 1521-97); and Dr. Geoffrey Negin, M.D., a diagnostic radiologist (TT 1599-1644).

As testified by Dr. Gold:

State: The bottom line is he had a bunch of prior crimes, correct?

Dr. Gold: Yes.

State: And are you saying that in all of those instances he, the defendant, would have been suffering from PTSD during that time?

Dr. Gold: I am not saying that Mr. Bevel's offenses are due to his PTSD.

State: Okay. Okay. I guess what I am trying to ask you, you may have said it already in direct, that the PTSD he suffers from you believe, correct?

Dr. Gold: Yes.

State: And that that is triggered on some occasions?

Dr. Gold: It's not-sometimes PTSD is triggered by --oh, triggered, you mean set off? Are we back to trying to explain the offense based on the fact he has PTSD because, sir, I am not saying that he committed offenses because of his PTSD.

State: Okay. Thank you very much for clarifying that.

(R 1406-07).

State: Now you made a decision not to ask the defendant about the murders of Mr. Stringfield or young boy Sims or the attempted murder of Feletta Smith, correct?

Dr. Gold: I wouldn't characterize it as making a decision. My purview, what I was assigned to do as part of this mitigation hearing was to assess Mr. Bevel for his personal

history, family history and possible history of trauma, not to do an assessment regarding the offense. His guilt has already been decided. That is not the matter that I am charged with addressing.

State: Yes, sir. So the bottom line is you did not interview him or ask him what happened regarding both of these murders and attempted murder, correct?

Dr. Gold: No, I did not.

State: Because it is conceivable that if he suffers from PTSD and if he is so paranoid maybe that's why he killed Mr. Stringfield?

Dr. Gold: That is conceivable but, sir, you are going back to suggesting that my testimony is saying the PTSD made him commit the offense. He has been found guilty of the offense. End of story. My testimony is not to explain away the offense. It's to provide the jury with issues to consider about given his life circumstances whether it's appropriate or whether they deem it appropriate to mitigate his sentence.

State: So you agree that the defendant, Mr. Bevel, was not under the influence of extreme mental or emotional disturbance at the time of the murders, correct?

Dr. Gold: No. I don't agree with that. I am simply not drawing a causal relationship between the two.

(R 1412-13).

As to Dr. Ouaou's testimony:

Dr. Ouaou: All I can tell you there is evidence of frontal lobe damage on neuro psych testing. How that affects his behavior I can't explain his day to day behavior then, now.

It's not-that's not possible. All I know is that these tests show he has damage in that part of his brain.

State: I think you anticipated one of the questions I was going to ask you, and I think you may have answered it, but let me make sure we are on the same page. So at the time of the murders you can't say that frontal lobe impairment that you diagnosed interfered or impaired his ability to commit the murders, correct?

Dr. Ouaou: Correct in a sense because I didn't discuss that with him. My opinion is that he they are—these deficits are present but the specifics on how it affected his behavior is unknown to me.

State: So because as you stated quite accurately you didn't evaluate him, you didn't interview him, you didn't know completely in terms of what occurred? In other words, your function was whether he suffered from it but whether it impacted him in terms of committing the murders you cannot say, correct?

Dr. Ouaou: That's correct. Yes.

(R 1560-61).

As to Dr. Negin's testimony:

State: All right. It is a fair statement that with all of your findings that you discussed today that you cannot date any of them as far as when they occurred beyond that they didn't occur within the last few weeks?

Dr. Negin: Only the one I told you the medial temporal sclerosis, the hippocampus, looks to be more likely birth related or something. All of the rest, the PET Scan findings, the DTI findings, the gliosis, that's correct. I can't date those.

State: And it's true again since you can't date the findings in any way you don't know whether these injuries, if they are injuries, occurred either before or after the defendant committed these murders?

Dr. Negin: That's correct. Not just based on looking at the images. Someone has to examine the patient, that's correct.

State: And again, just so we are clear, you cannot say that these would have been traumatic brain injuries, if they were injuries?

Dr. Negin: I can say the location of them is most suggestive of traumatic brain injury and be correlated findings.

State: And it would also be a fair statement that based on your review of the imaging that you have no idea whether anything you saw in all of the imaging has any effect at all on the defendant's behavior and the ability to conform his conduct to society?

Dr. Negin: No. That's not the whole—that's correct. I just review the brain and someone needs to examine the person and see if they can explain it.

State: And there is certainly nothing you saw in the imaging that would say hey, based on what I am seeing here of course the defendant committed two first degree murders and one attempted first-degree murder?

Dr. Negin: Well, it's a hard question to answer the way you posed it, but there are things that may have influenced had they been present at the time the crime was committed someone's ability to control their emotions, regulate their emotions and things like that being the temporal lobe, but I can't comment on what you just said. That is for the treating doctors to take this information and say whether or not it would be a cause of their explanation

of someone's behavior and understanding of the behavior.
That's not for me to do.

(R1640-41).

T.B., Bevel's 17-year-old daughter (TT 1645-48) was the final witness for the defense. Bevel did not to testify. (TT 1651-54).

On December 14, 2021, the jury unanimously determined it appropriate to sentence Appellant to death for each of Counts One and Two. (R 1261-75; TT 1874-81). The trial court requested and received sentencing memoranda from the State and Appellant as well as a Presentence Investigation Report (PSI Report) prepared by the Florida Department of Corrections. (R 1358-1391; 1401-14).

On January 7, 2022, the trial court held a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), during which the State and Appellant were permitted to present additional evidence to the trial court. Appellant presented transcripts of prior testimony from Theondra Bevel, Appellant's sister (R 1304-20), and Barbara Fisher, Appellant's maternal aunt. (R 1326-56).

On February 4, 2022, the trial court sentenced Appellant to death for the murders of Simms and Stringfield, with a written order entered on February 11, 2022. (TT 1905-1911; R 1433-65).

This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I. The trial court did not abuse its discretion when it determined that Appellant was not under the influence of extreme mental or emotional distress when he killed Garrick Stringfield and Phillip Simms.

Issue II. The standard penalty phase jury instructions, which included an instruction that the jury may consider "the existence of any other factors in [the defendant's] character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty," sufficiently obviated the need for a specific instruction regarding mercy or sympathy.

Issue III. There is no crime of "capital murder" in Florida. The jury need not determine the sufficiency and weight of aggravating factors and mitigating circumstances beyond a reasonable doubt. Appellant's argument that aggravating factors must outweigh mitigating circumstances beyond a reasonable doubt is incorrect. The findings regarding sufficiency and weighing are not subject to a beyond-a-reasonable-doubt standard because they are not elements of a crime and they do not increase the eligible penalty that can be applied in Appellant's case.

Issue IV. Appellant's constitutional challenges to Florida's capital sentencing process have been repeatedly rejected. Florida's capital punishment scheme is constitutional.

Issue V. The trial court did not commit error in granting the State's Motion in Limine which precluded any argument to the jury about the proportionality of Appellant's possible sentence as the use of sentences imposed on other defendants is not a matter for the jury deliberate.

ARGUMENT

ISSUE I: THE STATUTORY MITIGATOR REGARDING EXTREME MENTAL OR EMOTIONAL DISTURBANCE WAS PROPERLY REJECTED BY THE TRIAL COURT.

Standard of review. Appellant first argues that the trial court erred in failing to find the proposed mitigating circumstance that Appellant was under the influence of extreme emotional or mental distress. The rejection of a statutory mitigator is reviewed for abuse of discretion. *Ault v. State*, 53 So.3d 175, 187 (Fla. 2000).

A mitigating circumstance must be “reasonably established by the greater weight of the evidence.” *Nibert v. State*, 574 So. 2d 1059, 1061 (Fla. 1990). The decision as to whether a particular mitigating circumstance is established lies with the judge. After considering all the evidence and expert testimony, the trial court did not abuse its discretion in rejecting the proposed mitigator. *Hoskins v. State*, 965 So. 2d 1, 17 (Fla. 2007). The trial court, in its sentencing order, discussed the evidence that clearly refuted these allegations, along with the jury’s rejection of the mitigator as being proven by the greater weight of the evidence. (Sentencing Order at 15-18) (R 1447-50). Reversal is not warranted simply because an appellant draws a different conclusion. *Bryant v. State*, 785 So. 2d 422, 435 (Fla. 2001).

Bevel argues that because the trial court's sentencing order focused on causation, the court erred in rejecting this statutory mitigator. The State disagrees with Appellant's assertion. Bevel mistakenly relies on *Fletcher v. State*, 168 So.3d 186, 219 (Fla. 2015) which states that a trial court cannot require a nexus between the **non-statutory** mitigation and the charged offense.⁵ Such a causal connection is required to establish this statutory mitigator.

⁵ Although a trial court cannot require a nexus between the crime and mitigating evidence, the court may place mitigating evidence in context. See *Martin v. State*, 107 So.3d 281, 318 (Fla. 2012). This Court explained in *Cox* that although mitigating evidence cannot be dismissed, the trial court may assign weight based on the context of the mitigating circumstance. *Cox v. State*, 819 So. 2d 705, 723 (Fla. 2002). In *Cox*, the trial court gave no weight to the mitigating factor that the defendant suffered from heightened anxiety when interacting with other people because there was no evidence that this anxiety contributed to any decisions made by the defendant or the actions that led to the murder. *Id.* at 723 n. 15. This Court held that the assignment of no weight was not an abuse of discretion because the record contained no evidence that the mitigating circumstance was relevant to the case. *Id.* at 723. *Cox* establishes that the trial court may consider the connection or relationship between the mitigating circumstance and the murder. The challenged explanations given by the trial court in the sentencing order here are substantially similar to the explanation given in *Cox*—the trial court placed the mitigating circumstance in context and assigned weight on that basis. Accordingly, we hold that the trial court did not improperly require a nexus. *Fletcher v. State*, 168 So.3d 186, 219 (Fla. 2015).

Section 921.141(7), Florida Statutes (2017) lists the statutory mitigators that, if applicable, can weigh against imposition of the death penalty. One such statutory mitigator is when the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. See § 921.141(7)(b), Fla. Stat. (2017). To establish this mitigating circumstance, the Defendant must show by the greater weight of the evidence that the mental disturbance was one which “interferes with but does not obviate the defendant's knowledge of right and wrong.” *Duncan v. State*, 619 So. 2d 279, 283 (Fla. 1993). The standard the Defendant must meet is “less than insanity, but more than the emotions of an average man, however inflamed.” *Id.* Mental illness by itself is not a bar to the imposition of the death penalty. *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006). See also *Lawrence v. State*, 960 So. 2d 294 (Fla. 2007); *Johnston v. State*, 27 So.3d 11 (Fla. 2011). Perhaps more significantly, this Court has explained that this mitigating circumstance is not established when there is no expert testimony to suggest the defendant was under the influence of any mental or emotional disturbance *at the time of the murder*. *Hoskins v. State*, 965 So. 2d 1 (Fla. 2007) (emphasis added); See also *Duncan v. State*, 619

So. 2d 279 (Fla. 1993) (the defendant's statement that he “went nuts” is insufficient by itself to establish this mitigating circumstance).

A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection.⁶ Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case. Finally, even where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case. *Coday v. State*, 946 So. 2d 988, 1003 (Fla. 2006). See also *Ault v. State*, 53 So.3d 175 (Fla. 2010).

⁶ Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when the trial court's ruling is not supported by competent and substantial evidence. If there is any evidence to support those factual findings, the lower tribunal's findings will be affirmed. When it comes to facts, trial courts have an institutional advantage. Trial courts can observe witnesses, hear their testimony, and see and touch the physical evidence. *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla. 1998) (sitting as fact finder, the trial judge has the superior vantage point to see and hear the witnesses and judge their credibility). An appellate court's review of questions of fact is, therefore, very limited.

The analysis offered by the court in rejecting the statutory mitigation is supported by substantial, competent evidence. In rejecting this mitigator, the trial court relied on the expert opinions of Drs. Steven Gold, Robert Ouaou, and Geoffrey Negin and summarized their testimony as follows:

Dr. Gold diagnosed Defendant with Post-Traumatic Stress Disorder (PTSD) and major depression. Dr. Gold arrived at these diagnoses after evaluating Defendant for approximately five hours in 2013. Defendant reported feeling depressed throughout his life. When Defendant was twelve years old, his mother died in a car accident. This incident exacerbated Defendant's depression, but he never received grief counseling. Dr. Gold testified Defendant suffers from PTSD due to numerous traumatic events that occurred during his childhood. In addition to obtaining a personal history from Defendant, Dr. Gold employed the Adverse Childhood Experiences (ACE) study. The ACE study identifies ten factors in children that increase the likelihood an individual will manifest psychological or mental disorders as an adult. Dr. Gold determined Defendant had approximately seven or eight of the factors. Defendant reported numerous traumatic events during his life: his mother died in a car

accident when he was twelve years old; he was sexually and physically abused as a child; he was shot multiple times at the age of twenty; and he grew up in a violent neighborhood. Dr. Gold opined that Defendant likely developed PTSD as a child and that PTSD places an individual in a heightened state of alert and elevated stress. Dr. Gold emphasized during his testimony that Defendant's PTSD did not cause him to commit the offenses but increased the likelihood Defendant would engage in criminal behavior. (R 1448).

Dr. Ouaou, a licensed psychologist who specializes in neuropsychology, testified he met with Defendant in 2013 for several hours. Dr. Ouaou administered a battery of neurological tests during that meeting. Seven of the eight neurological tests indicated Defendant had significant impairment. Based on Defendant's performance, Dr. Ouaou determined Defendant likely had frontal lobe damage. Dr. Ouaou would expect to see physical deficits on the frontal lobe in a scan of Defendant's brain. Dr. Ouaou testified frontal lobe damage could affect Defendant's conduct because the frontal lobe moderates other parts of the brain related to impulse control, reasoning, and "fight or flight" responses. In novel or emotional situations, Defendant could make inappropriate decisions or become

impulsive. Dr. Ouaou testified Defendant reported multiple head injuries that could result in frontal lobe damage: his mother's boyfriend hit him in the head with a crystal ash tray; he participated in a street football league without helmets or pads and hit his head; and he was in a motorcycle accident during which he lost consciousness when his head hit the road. (R 1448-49).

Dr. Negin, a neuroradiologist, reviewed magnetic resonance imaging (MRI) and positron emission tomography (PET) scans of Defendant's brain from July 24, 2018. Dr. Negin testified the MRI indicated Defendant had damage to his frontal lobe likely caused by physical trauma. Dr. Negin noted the MRI indicated less nerve functioning in the frontal lobe than in other parts of Defendant's brain. He testified the frontal lobe affects emotion and impulsivity. The results of the PET scan were consistent with the results of the MRI. (R 1449).

The trial court, in rejecting the argument that Bevel was under extreme emotional or mental distress, stated:

This Court finds that defendant has not established this mitigating circumstance by the greater weight of the evidence. Although Dr. Gold opined that Defendant suffered from PTSD, no evidence exists that Defendant suffered from PTSD at the time of the murders or that the PTSD caused Defendant to commit the offenses while at that time suffering extreme mental or emotional distress.

Dr. Ouaou also determined Defendant had frontal lobe impairment; however, no evidence exists that such impairment caused Defendant to have extreme mental or emotional distress at the time of the murders. On cross-examination, Dr. Ouaou admitted he could not assess how frontal lobe damage would specifically affect Defendant's behavior at the time of the murders. Further, Defendant self-reported his personal and medical history when he met with both witnesses.

(Sentencing Order at 17-18) (R 1449-50).

The court correctly stated that there was no evidence to find Bevel was suffering an episode of PTSD when he carried out these murders. When the expert testimony does not establish the defendant was under the influence of any mental or emotional disturbance *at the time of the murder*, this mitigating evidence is not established. *Bargo v. State*, 331 So.3d 653, 661–62 (Fla. 2021), *citing Hoskins v. State*, 965 So. 2d 1, 17 (Fla. 2007); *Bright v. State*, 299 So.3d 985, 1005 (Fla. 2020); *Hobart v. State*, 175 So.3d 191, 202 (Fla. 2015) (the trial court analyzed the expert testimony elicited during trial, but expressly noted that “there was no testimony from anyone ... as to [Hobart's] mental or emotional condition on the day of the murders.”); *Allen v. State*, 137 So.3d 946 (Fla. 2013) (evidence was insufficient to show that murder was committed while defendant was under the influence of extreme mental or emotional disturbance;

neither of defendant's expert witnesses testified as to whether defendant's brain damage meant that she was operating under an extreme mental or emotional disturbance at the time of the murder).

The incontrovertible evidence refutes any argument that at the time Bevel murdered Stringfield or Sims he was under the influence of extreme mental or emotional disturbance. During the penalty phase trial Bevel presented the testimony of three experts: two psychologists Steven Gold and Robert Oauou; and Geoffrey Negin, a medical doctor specializing in neuroradiology. None of his experts ever unequivocally testified they would find applicable the statutory mental health mitigator of extreme mental or emotional disturbance. None of the experts opined whatsoever concerning Bevel's mental health at the time of the murders as none of them bothered to question Bevel about the actual murders. Only one, Dr. Gold, said this mitigator was established. Gold acknowledged he was not saying the murders were triggered by the PTSD or were due to the PTSD. Instead, this was based on his flawed opinion that the very fact Bevel suffers from PTSD, means he was under the influence of extreme mental or emotional disturbance.

The trial court also took into consideration evidence that Bevel engaged in purposeful conduct at the time of the murders in that he decided to kill Phillip Sims because he thought he would tell someone about the shooting and that Bevel secured the burglar bar door after he shot Garrick Stringfield and Phillip Sims. (R 1449-50). Evidence that a defendant engaged in purposeful conduct, such as taking actions to conceal the crime, provides support for the rejection of this statutory mitigator. *Sparre v. State*, 164 So.3d 1183, 1192-93 (Fla. 2015); *Smith v. State*, 170 So.3d 745, 764 (Fla. 2015). See also *San Martin v. State*, 705 So. 2d 1337, 1347-48 (Fla.1997) (affirming trial court's rejection of extreme emotional disturbance and substantially diminished capacity mitigator, despite expert testimony in support of such mitigation, where evidence in the record showed purposeful conduct which contradicted such mitigation); *Johnson v. State*, 608 So. 2d 4, 13 (Fla. 1992) (affirming rejection of extreme emotional disturbance and substantially diminished capacity mitigators where Court found there was “too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, self-imposed disability that the facts show not to have been a mitigator in this case”); and *Stewart v. State*, 872 So.2d 226

(Fla. 2003) (expert testimony alone does not require that the Court find either statutory mental mitigator, even when it is unrebutted by another expert. The Court can reject it when it is hard to reconcile with the other evidence in the case.)

The evidence is clear that Bevel was able to surprise and catch unarmed his first victim, Stringfield, knocking on the bedroom door and calling out his name, in a nonthreatening manner. Bevel then waited for Stringfield to open the door before shooting him in the head. Once Smith screamed, he continued shooting at her until she pretended to be dead. Bevel even attempted to shoot Stringfield a second time, but the rifle jammed. When Bevel went to the living room, he shot Sims twice. The second shot at closer range was to the head. Bevel made sure Sims would not be a witness. Bevel did not shoot Dumas because she was pregnant with his baby, and he knew he could obtain her silence by threats and pretending he was going to kill himself in the car. He also had the presence of mind to lock the burglar bars so that the bodies would not be discovered. He fled the scene, ditched Stringfield's car and attempted to establish an alibi.

Finally, in rejecting an expert's opinion, the court may also consider whether the source of the opinion stems from a defendant's

self-reports. *Nelson v. State*, 850 So. 2d 514, 530 (Fla. 2003). The trial court emphasized that Bevel self-reported his personal and medical history when he met with both witnesses. Neither Dr. Gold nor Dr. Ouaou discussed the murders with Bevel, and their evaluations of Bevel occurred approximately nine years after the murders.

The trial court clearly did not abuse its discretion in rejecting this statutory mitigator. While there was evidence that Appellant suffered from PTSD, there was no evidence that he was suffering an episode of PTSD when he carried out these murders.

As such, this claim should be denied.

ISSUE II: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING APPELLANT'S PROPOSED JURY INSTRUCTIONS ON MERCY.

Standard of review. Appellant argues the trial court erred in denying the defense's requested jury instruction on the role of mercy in capital sentencing. The trial court has wide discretion in instructing the jury, and the decision to give or refuse to give a special jury instruction is reviewed under the abuse of discretion standard. *See Hudson v. State*, 992 So. 2d 96, 112 (Fla. 2008). No relief is

warranted on this claim, which has been repeatedly rejected by this Court.

Standard Jury Instruction 7.11 (criminal), which the trial court read to the jury, informs jurors that “[r]egardless of the results of each juror’s individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.” *In re Standard Criminal Jury Instructions in Capital Cases*, 214 So.3d 1236, 1263 (Fla. 2017).

In addition to the standard jury instructions being offered by the court, Bevel proposed the following special instruction:

THE DEATH PENALTY IS NOT REQUIRED

You are never required to impose a death sentence. You have complete control and discretion in determining whether the circumstances of this case justify a sentence of death.

You must consider whether the aggravating factor or factors you have found to be established in this case sufficiently outweigh the mitigating factor or factors you have found to have been established before you may consider imposing a sentence of death. However, regardless of your findings as to aggravating and mitigating circumstances, you are neither compelled nor required to recommend a sentence of death. ***You may always consider mercy in making this determination.***

(R 247). The instruction was denied. (R 261)

The instruction proposed by Bevel was not required to ensure the consideration of mitigating factors. The “failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards.” *Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006) (quoting *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001)). As here, the standard penalty phase jury instructions sufficiently obviated the need for a specific instruction regarding mercy or sympathy. The jury was instructed that they may contemplate any information in front of them regarding whether the mitigators outweigh any aggravators that may or may not be proven. Essentially, when a juror votes for a life sentence despite finding that the aggravators outweighed the mitigators and were sufficient to impose death, this decision is often referred to as a mercy vote. In fact, this Court has referred to the relevant provision of Standard Instruction 7.11 as the “mercy instruction.” *Woodbury v. State*, 320 So.3d 631, 656 (Fla. 2021) citing *Reynolds v. State*, 251 So.3d 811, 816 n.5 (Fla. 2018).

Additionally, Appellant was able to argue mercy in closing argument, to wit:

It is a God-like decision, and I urge you that if you go back to that deliberation room and you are sitting on the fence as to what would truly be appropriate in this case for Thomas Bevel on this day I urge you to err on the side of mercy, and the law, of course, contemplates mercy because the law repeatedly tells you and His Honor will actually utter the words as he did in jury selection and before we even started this trial, the law neither requires nor compels.

(R 1800-01).

This Court has repeatedly ruled that the standard jury instructions are sufficient. The trial court acted within its discretion to deny Bevel's proposed special instruction. *E.g.*, *Bush v. State*, 295 So.3d 179, 210 (Fla. 2020); *Downs v. Moore*, 801 So. 2d 906, 913 (Fla. 2001); *Moore v. State*, 820 So. 2d 199, 210 (Fla. 2002); *Zack v. State*, 753 So. 2d 9, 23–24 (Fla. 2000); *Hunter v. State*, 660 So. 2d 244, 253 (Fla. 1995); *Kilgore v. State*, 688 So. 2d 895 (Fla. 1996); *Ferrell v. State*, 653 So. 2d 367, 370 (Fla. 1995); *Gamble v. State*, 659 So. 2d 242, 246 (Fla. 1995).

This claim should be denied.

ISSUE III: THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR BY READING THE STANDARD JURY INSTRUCTIONS DURING THE PENALTY PHASE.

Standard of review. The trial court has wide discretion in instructing the jury, and the decision to give or refuse to give a special

jury instruction is reviewed under the abuse of discretion standard. See *Hudson v. State*, 992 So. 2d 96, 112 (Fla. 2008).

Appellant contends that for a death sentence to be valid, the jury must find beyond a reasonable doubt that the aggravating factors were sufficient to impose the death penalty and that the aggravating factors outweighed the mitigating circumstances. There was no error at all, much less fundamental error, because these jury determinations are “not subject to the beyond a reasonable doubt standard of proof.” *Fletcher v. State*, 343 So.3d 55, 59 (Fla. 2022); *McKenzie v. State*, 333 So.3d 1098, 1105 (Fla. 2022), *Santiago-Gonzalez v. State*, 301 So.3d 157 (Fla. 2020); *Craft v. State*, 312 So.3d 45, 57 (Fla. 2020); *Newberry v. State*, 288 So.3d 1040, 1047 (Fla. 2019); *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019). Further, this claim was waived at trial because the defense affirmatively agreed to the jury instructions at issue. (R 625-26;1728-30)⁷

⁷ Appellant filed, and the court denied, the following Capital Motions: Motion to Declare Sections 921.141 and/or 921.141(5)(d) Florida Statutes and/or the (5)(d) Standard Instruction Unconstitutional Facially and As Applied (R. 206-11), denied (R. 260); Motion to Declare Sections 921.141 and/or 921.141(5)(b) Florida Statutes and/or the Standard (5)(b) Instruction Unconstitutional On Its Face and As Applied (R. 222-27), denied (R. 261); Defendant’s Motion for Requested Jury Instruction: Mercy (R. 247-48), denied (R. 261);

“Fundamental error is waived under the invited error doctrine because ‘a party may not make or invite error at trial and then take advantage of the error on appeal.’” *Universal Ins. Co. of North America v. Warfel*, 82 So.3d 47, 65 (Fla. 2012) (citing *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 202 (Fla. 2001)).

Contrary to Appellant’s suggestion, a defendant in Florida is eligible to receive a death sentence if the jury finds that the State proved at least one aggravator beyond a reasonable doubt. See *State v. Poole*, 297 So.3d 487, 503 (Fla. 2020), (“Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances.”); accord *McKinney v. Arizona*, 140 S. Ct. 702, 705 (2020) (“Under [the United States Supreme] Court’s precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found.”). The additional determinations are not elements under the text of the death penalty statute or under the constitutional definition

Defendant’s Requested Preliminary Instruction (R. 229-30), ruling reserved (R. 262); and Motion to Declare Florida Capital Sentencing Scheme Unconstitutional as Violative of the 8th Amendment and Evolving Standards of Decency, denied (R. 262). However, these are unrelated to his current argument.

of an element, as well as not being elements under this Court's recent precedent.

Under the Sixth⁸ Amendment, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490 (2000)). In capital sentencing schemes, aggravating factors are generally the only facts that increase the penalty. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (finding that because Arizona's aggravating factors operate as the "functional equivalent" of an element of a greater offense, the Sixth Amendment requires that they be found by a jury). Since the aggravating factors in Florida's

⁸ There are also no Eighth Amendment concerns. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citations omitted). Florida has a list of 16 aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, which they were in this case, any Eighth Amendment concerns have been satisfied.

sentence scheme also act as the “functional equivalent” of elements, they must be proven beyond a reasonable doubt.

In Florida, the only finding necessary to make a defendant eligible for the death penalty is a finding of one of the statutorily enumerated aggravating factors proven beyond a reasonable doubt. Fla. Stat. § 921.141(2)(a) or (3)(b) (2019) (the jury must “determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6)” or the court “may impose a sentence of death only if the court finds that at least one aggravating factor has been proven to exist beyond a reasonable doubt”). The standard of proof for proving aggravating factors in Florida is not a new occurrence but has long been beyond a reasonable doubt. See Fla. Std. Jury Instr. (Crim.) 7.11; *Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). The aggravating factors are “sufficient” to increase the penalty by virtue of their inclusion in the statute. Here, the jury found that the State had proven the existence of a prior violent felony aggravator beyond a reasonable doubt as to Mr. Stringfield and the existence of a prior violent felony and the “avoiding arrest” aggravators beyond a

reasonable doubt as to Mr. Sims. (R 1261-75; T 1874-81). Appellant was eligible for the death penalty and any *Apprendi* concerns were satisfied. The determination of whether sufficient aggravating factors exist in this case warrant the death penalty is an individualized sentencing determination which does not increase the penalty.

After the finding of one aggravating factor beyond a reasonable doubt, the remaining portion of Florida's death penalty statutory scheme includes sentencing determinations that do not increase the penalty and are not considered elements. The statute enumerates sentencing determinations through what is essentially a framework by which to guide the sentencing authority through the appropriate considerations for individualized sentencing. *See Kansas v. Marsh*, 548 U.S. 163, 177 (2006) (the "weighing equation. . . merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate"). Because none of the sentencing considerations in this guide increase a defendant's punitive exposure, none are functional equivalents of elements, and none require a burden of proof.

In determining which sentence is appropriate for individualized sentencing, using the guide that is laid out in the statute, the

sentencing authority must consider whether the aggravating factors in this case are sufficient to warrant the death penalty, as well as whether they outweigh the mitigating factors. Whether the sentencing authority thinks that the specific facts and circumstances surrounding the proven aggravating factor are sufficient to warrant the death penalty is, like weighing, a question of judgment or mercy. *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (“[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt.”). With the sufficiency and weighing sentencing determinations, the sentencing authority is essentially determining if the sentence should remain death or should be departed downward to the lesser sentence of life in prison. Sufficiency, like weighing, is a sentencing determination, not an element that increases the penalty. As such, a standard of proof, such as ‘beyond a reasonable doubt,’ is unwarranted. The trial court did not err in not assigning a standard of proof to sufficiency of the aggravating factors.

This Court is not alone in its holding. “Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender’s guilt of the principal offense and any aggravating circumstances.” *State v. Mason*, 108 N.E.3d 56, 64 (Ohio 2018) (citing the 1st, 4th, 5th, 6th, 8th, and 9th circuits and Indiana, Maryland, Pennsylvania, Nebraska, Nevada, and New Mexico).

Because a ‘beyond a reasonable doubt’ standard of proof is only required for proving aggravating factors and not for determining sufficiency of the aggravation, there was no error in this case. This claim should be denied.

ISSUE IV: FLORIDA’S CAPITAL SENTENCING SCHEME DOES NOT VIOLATE THE UNITED STATES OR FLORIDA STATE CONSTITUTIONS.

Standard of review. The appellant’s next challenge disputes the validity Florida’s capital sentencing scheme. This Court reviews constitutional challenges to statutes de novo. *Braddy v. State*, 219 So.3d 803, 819 (Fla. 2017). Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

Appellant asserts that Florida’s capital sentencing scheme does not limit the class of persons eligible for the death penalty and violates the Eighth Amendment due to elimination of proportionality review⁹ and an overprovision of aggravating factors. Bevel’s arguments are ones that this Court has consistently rejected or recently declined to reconsider. *Bush v. State*, 295 So.3d 179, 214 (Fla. 2020); *Colley v. State*, 310 So.3d 2 (Fla. 2020); *Davidson v. State*, 323 So.3d 1241 (Fla. 2021); *Bell v. State*, 336 So.3d 211 (Fla. 2022); *Joseph v. State*, 336 So.3d 218 (Fla. 2022); *State v. Garcia*, 338 So.3d 847, 848 (Fla. 2022); *Rodriguez v. State*, 335 So.3d 168, 172 (Fla. 3d DCA 2021); *Bradwell v. State*, 300 So.3d 325, 327-28 (Fla. 1st DCA 2020). Because Bevel offers no new or persuasive argument or specific claim of error in his sentencing, this facial challenge to Florida’s capital sentencing scheme is meritless and should be rejected.

The constitutional protections Florida capital defendants are afforded ensure “a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be

⁹ *Lawrence v. State*, 308 So.3d 544 (Fla. 2020).

suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” See *State v. Poole*, 297 So.3d 487, 495-96 (Fla. 2020). The existence of a statutory aggravating factor is but the first step in the sentencing process to narrow that class of persons eligible for the death penalty. It begins “with an evidentiary hearing before a jury and/or judge to hear evidence relevant to the nature of the crime and the character of the defendant, including statutory aggravating and mitigating circumstances.” *Poole*, 297 So.3d at 495. Whether the sentencing fact finder is a jury or judge, at least one aggravating factor must be proven beyond a reasonable doubt. *Id.* at 491; *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020). Only then is the sentencer able to proceed to the sufficiency and weighing stage. § 921.141(2)(b), Fla. Stat. (2019). In the event of unanimous jury aggravation findings and death sentence recommendation, the trial court may still nonetheless impose a life sentence. § 921.141(3), Fla. Stat. (2019).

The *Colley* Court succinctly rejected the claim that Florida’s “legislative enactments have expanded the number of aggravating factors to the point where every first-degree murder conviction is eligible for a death sentence, in violation of the Supreme Court’s

mandate” in *Furman. Colley v. State*, 310 So.3d 2, 15-16 (Fla. 2020), citing *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006). The argument that Florida’s capital sentencing scheme was unconstitutional and failed to limit the class of persons eligible for the death penalty was also made in *Cruz v. State*, 320 So.3d 695, 730 (Fla. 2021). This Court rejected Cruz’s claim, relying in part on *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) (the argument that Florida’s capital sentencing scheme “fails to limit the class of persons eligible for the death penalty” is meritless). Bevel ignores the undisputed fact that he became constitutionally eligible for the death penalty when the trial court found that Bevel had been previously convicted of a capital offense or prior violent felony involving the use or threat of violence as to the first-degree murder of Stringfield, and an additional aggravating circumstance, murder to avoid arrest, applicable to the murder of Sims. See, e.g., *Craft v. State*, 312 So.3d 45, 56 (Fla. 2020) and *Knight v. State*, 225 So.3d 661, 683 (Fla. 2017). Only after this process was Bevel placed within a narrow class of persons eligible for the death penalty. The number of aggravating factors enumerated in Florida Statutes had no impact on the individualized eligibility findings.

And while Bevel cites to *Johnson v. State*, 720 So. 2d 232, 238 (Fla. 1998), and *Hawk v. State*, 718 So. 2d 159, 163 (Fla. 1998) to argue that presumably, under *Lawrence*, both death sentences would be affirmed today despite the nature of the aggravating circumstances upon which they rested, his argument falls short as to the facts of his case. In fact, this Court performed a proportionality analysis prior to *Lawrence*:

III. Proportionality

Because the trial court sentenced Bevel to death on each count and found a different number of aggravators applicable to each death sentence, we address each sentence of death separately below. However, in looking at the totality of the circumstances in this case, we must consider the fact that Bevel was convicted of a double homicide and the attempted first-degree murder of a third victim, and that he committed a prior violent felony only one year before the murders. Thus, although the trial court found only one aggravating circumstance, the facts upon which the aggravator is based are critical to our analysis.

As to the first-degree murder of Stringfield, the trial court found one aggravating circumstance, that Bevel had been previously convicted of a capital offense or prior violent felony involving the use or threat of violence. The trial court found no statutory mitigators and only six nonstatutory mitigators, giving most little or very little weight. The jury recommended death by a vote of eight to four.

This Court has previously stated that “death is not indicated in a single-aggravator case where there is substantial mitigation.” *Almeida v. State*, 748 So. 2d 922, 933 (Fla.1999) (quoting *Jones v. State*, 705 So. 2d 1364, 1367 (Fla.1998)). However, where the mitigation is not substantial and a prior murder is involved, we have affirmed the death penalty even in a single-aggravator case. See, e.g., *Ferrell v. State*, 680 So. 2d 390 (Fla.1996); see also *Duncan v. State*, 619 So. 2d 279 (Fla.1993). Even though this is a single aggravator case, the aggravator was given “very great weight” because it was supported by Bevel's 2003 conviction for attempted robbery *and* his contemporaneous convictions for first-degree murder of Sims and attempted first-degree murder of Smith. Furthermore, the prior violent felony conviction aggravator is one of the “most weighty” in Florida's sentencing scheme. *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002). We therefore consider the “very great weight” of the prior violent felony aggravator in conducting our proportionality review. In addition, we must take into account the quality of the mitigation, see *Offord v. State*, 959 So. 2d 187, 191 (Fla. 2007), which in this case consists of nonstatutory mitigation that was insubstantial.

We have previously held the death penalty to be proportionate in cases involving multiple murders where the only aggravating circumstance was a prior violent or contemporaneous felony and the mitigation was minimal. See *Lindsey v. State*, 636 So. 2d 1327, 1329 (Fla. 1994) (finding death proportionate in a double homicide case, where the only aggravator was based on prior violent felony convictions, including a prior second-degree murder conviction for the first count and the contemporaneous first-degree murder conviction for the second count, and minimal nonstatutory mitigation including the defendant's poor health); see also *Porter v. State*, 564 So. 2d 1060, 1062 n. 2, 1064–65 (Fla. 1990) (finding death proportionate in a double homicide case, where two aggravators, prior violent felony and contemporaneous

felony, and no mitigation were found). In addition, the Court has held that the death penalty was proportionate in a single aggravator case, based on two prior violent felony convictions, attempted sexual battery and kidnapping, and minimal nonstatutory mitigation, including appropriate courtroom behavior (very little weight) and mental disorders (very little weight). See *LaMarca v. State*, 785 So. 2d 1209, 1216–17 & n. 4 (Fla. 2001) (noting that proportionality was supported by the fact that LaMarca committed the murder soon after being released from prison on the prior violent felony convictions); see also *Ferrell*, 680 So. 2d at 391 (finding death proportionate where the only aggravator was a prior violent felony conviction for second-degree murder (weighty) and a number of nonstatutory mitigating circumstances that were all assigned little weight). In light of the totality of the circumstances of this case, including a very weighty prior violent felony aggravator based on a first-degree murder conviction, an attempted first-degree murder conviction, and a prior robbery involving the use of a firearm occurring just one year before the murders, and minimal nonstatutory mitigation, we conclude that death is a proportionate punishment as to the murder of Stringfield.

If the death penalty is a proportionate punishment for the first-degree murder of Stringfield, then *a fortiori* death is a proportionate punishment for the first-degree murder of Sims. This is because the trial court found an additional aggravating circumstance, murder to avoid arrest, applicable to the murder of Sims. The trial court assigned the prior violent felony aggravator “very great weight” and assigned the avoid arrest aggravator “great weight.” As previously discussed, the trial court only found six nonstatutory mitigators applicable and most were given little or very little weight. The jury recommended death by a vote of twelve to zero. Based on the very strong aggravation and minimal nonstatutory mitigation in this case and the jury's unanimous recommendation, we

conclude that death is a proportionate punishment as to the murder of Sims. *See Reaves v. State*, 639 So. 2d 1, 6 & n. 11 (Fla.1994) (concluding that death is proportionate in a case involving two aggravating circumstances, prior violent felony for two armed robberies and avoid arrest, with no statutory mitigation and three nonstatutory mitigators).

Bevel v. State, 983 So. 2d 505, 523–25 (Fla. 2008).

Because this issue is well-settled at law, no relief is warranted.

ISSUE V: THE TRIAL COURT PROPERLY GRANTED THE STATE’S MOTION IN LIMINE PRECLUDING ANY ARGUMENT TO THE JURY ABOUT THE PROPORTIONALITY OF BEVEL’S POSSIBLE SENTENCE.

On August 30, 2021, the State filed State’s First Motion in Limine Regarding Death Sentences — Proportionality (R 351-52) which sought to preclude the defense from making any argument about the proportionality of the death sentence during voir dire or any other part of the trial, including stating the death penalty is reserved for the “worst of the worst.”

During the hearing on the State’s motion, the State objected to defense counsel asking the jury or implying to the jury, either in jury selection or through any witness or through closings, to perform a proportionality analysis. The State reasoned that under the law the

jury decides based on the case in front of it, and as reflected by case law the jury does not have an opportunity to weigh or determine one case versus another in terms of proportionality. (R 1682-83). In response, the defense conceded they were prohibited from asking the jury to perform a proportionality analysis:

MS. SCHLAX: Your Honor, as written the state's first Motion in Limine the largest concern is that it's essentially asking the Court to have a chilling effect on the argument of counsel as written. *I concede that it would be improper* as was requested in *Herring* and the actual issue in *Herring vs. State*, found at 446 So. 2d 1049, was the defense attempted to actually call in their penalty phase other lawyers that practiced in their jurisdiction and wanted them to testify to the facts of their particular cases and, you know, then ultimately argue those people received a life sentence.

THE COURT: Okay.

MS. SCHLAX: *That was prohibited obviously and I understand that ruling. I would not seek to do any such thing.*

THE COURT: Right.

MS. SCHLAX: I will tell the Court candidly that I do not anticipate asking any witness about any other facts of any other homicide and would obviously oblige the very particular ruling of *Herring* but to expand it to suggest that we are not even in questioning and it's difficult to anticipate every responsive a juror where you might give an example of a fellow murderer very popularly known. Like I have seen I have seen Adolf Hitler used as an

example. Those are examples. They are not in any way attempting to have the jury conduct a proportionality review so I would ask the Court to deny this Motion in Limine and put any restrictions on the record as the Court has absolute discretion to limit or guide against any misstatements of the law the Court is concerned that defense counsel may do.

THE COURT: So at this juncture the Court is going to grant the motion in limited part and deny it as to the remainder. It's granted in limited part as to there shall be no mention, argument or invitation for jurors to conduct any sort of comparative analysis or what I think the law would consider proportionality review in their own way in a layman non legal way such as comparison of Adolf Hitler and the like. It is denied as to the remainder.

(R 1684-86; 1688).

While Appellant argues that the trial court erred in granting the State's motion, defense conceded to the State's proportionality argument. It cannot now argue the contrary. *Scott v. State*, 331 So.3d 297, 299 (Fla. 2d DCA 2021), *citing Harper ex rel. Daley v. Toler*, 884 So. 2d 1124, 1135 (Fla. 2d DCA 2004) (“[A] party may not ordinarily take one position in proceedings at the trial level and then take an inconsistent position on appeal.”).

Regardless, the use of sentences imposed on other defendants is not a matter for the jury. In *Lockett v. Ohio*, 438 U.S. 586, (1978), the United States Supreme Court held that the sentencer must “not

be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Id.* at 604. This Court has held that *Lockett* requires the “admission of evidence that establishes facts *relevant* to the defendant's character, his prior record, and the circumstances of the offense in issue.” *Hess v. State*, 794 So. 2d 1249, 1269 (Fla. 2001) (emphasis added) (quoting *Herring v. State*, 446 So. 2d 1049, 1056 (Fla. 1984), receded from on other grounds by *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987)). “The trial judge has a duty to so direct the course of counsel's voir dire examination that the minds of the prospective jurors may not be infiltrated with ideas having no proper relation to the issues to be determined by them.” *Jackson v. State*, 881 So. 2d 711, 715 (Fla. 3d DCA 2004) (quoting *Hooper v. State*, 703 So. 2d 1143, 1145-46 (Fla. 4th DCA 1997)). In *Jackson*, the Third District Court of Appeal confronted a defendant's appeal of the trial court's refusal to permit defense counsel to ask jurors about “the River Cops Case and the O.J. Simpson case.” *Jackson*, 881 So. 2d at 714. The court noted the “so-called ‘River Cops’ case was a factually dissimilar local murder case and did not involve any of the officers

who testified in the instant case." *Id.* at 714-15. As here, the trial court had the discretion to preclude discussion of cases having no connection to the case being tried by the Court. *Id.* at 715.

Furthermore, the trial court's subsequent Order Granting in Part and Denying in part the State's First Motion in Limine ordered the defense to refrain from referencing, arguing, or inviting the jury to engage in a comparative proportionality analysis, but did not preclude using the phrase "worst of the worst." (R 360-62). As the trial judge noted, "the phraseology of the worst of the worst would be a reference to what lawyers and legalese may suggest would be reserved for those cases only when substantial aggravating factors exist and outweigh the mitigating factors that can be presented". (R 1686). Defense was free to argue whether the death sentence was justified in terms of aggravation and mitigation.

As such, this claim should be denied.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the new death sentence properly imposed under the law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLE'S ANSWER BRIEF has been furnished via e-portal to: **Barbara Busharis**, Assistant Public Defender, Leon County Courthouse, 301 S. Monroe St., Suite 401, Tallahassee, Florida 32301, barbara.busharis@flpd2.com; appeals@flpd2.com; appeals_support@flpd2.com, on this 12th day of December 2022.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Bookman Old Style, and word count is 12,485 in compliance with Fla. R. App. P. 9.210 and 9.045.

s/DORIS MEACHAM
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