IN THE SUPREME COURT OF FLORIDA

THOMAS BEVEL,

Appellant,

vs.

CASE No. SC22-210
L.T. No. 16-2004-CF-4525

STATE OF FLORIDA,

Appellee.

_____/

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final order of the circuit court for Duval County, Florida, sentencing Thomas Bevel to death for the killings of Garrick Stringfield and Phillip Sims, which occurred in 2004. (R. 1392-98.) This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

I. Previous proceedings.

Mr. Bevel was originally convicted of killing Garrick Stringfield and Phillip Sims, as well as the attempted murder of Feletta Smith, in 2005. Following a jury trial the jury recommended the death penalty by a vote of 8 to 4 regarding Mr. Stringfield, and unanimously regarding Phillip Sims. *See Bevel v. State*, 983 So. 2d 505, 513 (Fla. 2008). His convictions and death sentences were affirmed on direct appeal. *Id.* at 526.

In 2017, however, this Court reversed his death sentences in an appeal from a denial of postconviction relief based on constitutionally ineffective assistance of counsel. *See Bevel v. State*, 221 So. 3d 1168, 1172 (Fla. 2017). The Court remanded the case for a new penalty phase proceeding. *Id.* at 1185.

II. Pretrial issues.

On November 19, 2019, the trial court (Judge Bruce Anderson presiding) held an evidentiary hearing on a defense motion to bar the death penalty based on intellectual disability. (R. 98-111, 1540-85.) The only witness was Dr. Robert Ouaou. (R. 1544.) Dr. Ouaou had evaluated Mr. Bevel in 2013 and determined that Mr. Bevel's IQ was 71, which met the first requirement for intellectual disability. (R. 1547.) The second requirement, involving adaptive functioning, was not evaluated at that time. (R. 1548.) In 2018-19 Dr. Ouaou evaluated Mr. Bevel's adaptive functioning and initially concluded that Mr. Bevel met the criteria for intellectual disability. (R. 1552-53.) However, he testified that an adaptive behavior assessment from 2005 changed his mind, and that with that additional information, he concluded that Mr. Bevel did not meet the criteria to be considered intellectually disabled. (R. 1553-55.) He agreed that Mr. Bevel had deficits in adaptive functioning. (R. 1555.)

At the close of that hearing the defense conceded it would not be arguing Mr. Bevel had an intellectual disability as that is defined in the law, although the defense would still be making penalty phase arguments based on his IQ and upbringing. (R. 1575.) The

court later entered an order denying the defense motion. (R. 127-31.)

On February 28, 2020 the trial court (Judge Adrian Soud, presiding) held a motion hearing at which it heard pending defense motions. (R. 259, 1601-50.) The court later issued a written order ruling on 14 different motions. (R. 260-63.) These included a 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); 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).

Defendant's Requested Preliminary Instruction would have required the court, among other things, to inform the jury: "Regardless of your findings on aggravating factors, you are never compelled or required to find that a person should be sentenced to

death. You may always consider Mercy in making this determination." (R. 229-30.) Defendant's Motion for Requested Jury Instruction: Mercy, would have informed the jury "[R]egardless 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. 247-28.)

The State filed three motions in limine, which were argued on November 18 and December 8, 2021. (R. 1676-1755, 1945, 1954-80.) State's First Motion in Limine Regarding Death Sentences — Proportionality (R. 351-52) 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." 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.)

State's Second Motion in Limine and Objection to Defendant's Proposed Statement of Case (Facts) to be Read to Venire, seeking to

prevent the defense from mentioning that Defendant was previously found guilty of two counts of murder and one count of attempted first-degree murder, as well as certain other specific facts the defense wanted to share during voir dire. (R. 353-54.) The court granted the motion as to the ages of the victims or the fact Mr. Bevel had previously been sentenced to death, but allowed the defense to inform the venire "the surviving victim was shot multiple times; the deceased victims were killed from shots to their heads; and Defendant and one of the deceased victims lived together at the house where the homicide occurred." (R. 382-83.)

State's Third Motion in Limine Regarding Pre-Trying Case During Voie [sic] Dire — Hypotheticals, sought to preclude the use of hypothetical situations during jury selection. (R. 356-39.) The court granted the motion in part (R. 380-81):

> The Motion is granted to the extent that Defense Counsel may not present prospective jurors with a hypothetical scenario and then ask prospective jurors whether they believe the death penalty to be the appropriate sentence in that scenario. The Motion is denied such that Defense Counsel may ask prospective jurors whether the death penalty is the only appropriate sentence in a scenario.

(R. 380.)

III. Penalty phase/*Spencer* hearing.

Mr. Bevel appeared in court in his jail uniform and defense counsel noted that was a strategic decision. (T. 5-7.) The defense maintained its prior objections and requests. (T. 11-12.) A jury was agreed upon, including two alternates. (T. 585-89.) A summary of the testimony presented follows.

Sojourner Sims Parker. Ms. Parker was the mother of Phillip Sims, who would have been 31 at the time of the penalty phase. (T. 668-70.) She testified that she had two other children; Phillip was her oldest and was born of a teenage relationship with Garrick Stringfield. (T. 670-71.) In 2004 Mr. Stringfield was living with a roommate, Mr. Bevel, whom he called "Tom Tom" or referred to as his nephew. (T. 672, 674.) She had met Mr. Bevel when she returned in Jacksonville in 2003 because Phillip wanted to spend time with his father, and "Tom Tom" was usually with him. (T. 673.)

On the night of Saturday, February 28, 2004, Ms. Parker arranged for Phillip to spend the night at Mr. Stringfield's house; he told her he might step out, but if he was not there when she arrived, Mr. Bevel would be there. (T. 676.) When she arrived at Mr. Stringfield's house with Phillip, at around 7:30 or 8:00 PM, Mr. Bevel came out and waved at her. (T. 676.) She planned to pick her

son up the next morning at his great-grandmother's house, which was nearby. (T. 677.) However, she got a call from Mr. Stringfield's cousin asking her if Phillip was at Mr. Stringfield's house; when she said he was, the cousin told her she needed to come over. (T. 678.) When she arrived she couldn't get down the street because it was blocked off with police tape. (T. 678.) Later she found out what had happened to her son. (T. 679.)

Feletta Smith. Ms. Smith was the third shooting victim in the original incident. She testified that she knew Mr. Bevel "in passing" when they were growing up, but did not have a close relationship with him. (T. 682-84.) She also knew Mr. Stringfield "in passing." (T. 685.) She knew the two men were often together. (T. 686.) On February 28, 2004, Ms. Smith attended a parade and then ended up with a group of family members and friends at a park, where she encountered Mr. Stringfield. (T. 686-88.) They made plans to see each other later that evening. (T. 688.) They met at about 8:00 PM and she followed him to his house in her car. (T. 688-89.) When she arrived, Mr. Bevel and Phillip Sims were there, playing a video game. (T. 690-91.)

At one point Mr. Bevel left the house, saying he would return. (T. 692.) He returned with a woman he introduced as his girlfriend.

(T. 693.) Ms. Smith and Mr. Stringfield went into Mr. Stringfield's bedroom, and Mr. Bevel and his girlfriend went into a separate bedroom, leaving Phillip playing a video game. (T. 693-94.) When Ms. Smith first went into Mr. Stringfield's room she stepped on an AK-47 and was startled by it; Mr. Stringfield asked Mr. Bevel to take it out of the room for him. (T. 695.) At about 3:00 in the morning there was a knock on the bedroom door and she heard Mr. Bevel say "Unc look here." (T. 696.) When Mr. Stringfield opened the door Ms. Smith heard gunfire and saw Mr. Stringfield drop to the floor. Then Mr. Bevel said "bitch, shut up" and shot her. (T. 697.) She played dead and the shooting stopped for a moment. (T. 698.) Then she heard Phillip say "what did you do to my daddy?", and more gunfire. (T. 698.) She heard a woman screaming; Mr. Bevel told the woman to get her things and come with him. (T. 698.) Ms. Smith heard doors close and the sound of a car starting up. (T. 699.) She was able to call 911 and stayed on the phone until police were able to locate the house she was in. (T. 700-01.) She was taken to the hospital and underwent emergency surgery. (T. 701.)

Ms. Smith stated she was shot a total of seven times and spent a month in the hospital. (T. 702.) She had multiple surgeries after that, continuing through the year of the penalty phase trial. (T.

702.) She did not immediately identify Mr. Bevel as the shooter because she was afraid of him. (T. 703.) His brother, Antorio McCray, and a cousin, came to see her in the hospital, and she felt intimidated. (T. 703.) Eventually she identified Mr. Bevel to the police. (T 703.)

Sergeant Frederick Fillingham. At the time of the incident Sergeant Fillingham was a patrol officer in Jacksonville and responded to Ms. Smith's 911 call. (T. 714-17.) Jacksonville Fire Rescue had to assist in entering the house, where they found a young male on a couch in the living room. (T. 718-21.) Another officer checked and said the young man was unresponsive; the officers continued clearing the house, and found Ms. Smith in a bedroom. (T. 722-26.)

Dr. David Anthony Crumbie. Dr. Crumbie is an orthopedic surgeon who was training at Shands Hospital in Jacksonville in 2004. (T. 729-31.) He treated Ms. Smith for the injuries caused by the gunshot wounds, which included wounds to her lower back, pelvis, and both legs. (T. 731-32.) Had she not been treated, the wounds would have been fatal. (T. 733.)

Dr. Jesse Giles. Dr. Giles, a forensic pathologist, performed the autopsy on Phillip Sims. (T. 747, 751.) Phillip had two gunshot wounds, one to his head and one across his left arm and chest. (T. 752-53.) The wound to his head entered at the left temple at close range and was a fatal wound. (T. 755, 757.) The wounds were consistent with a high velocity rifle or firearm. (T. 760.)

Dr. Aurelian Nicolaescu. Dr. Nicolaescu, an associate medical examiner in Jacksonville, performed an autopsy on Mr. Stringfield. (T. 762, 765.) Mr. Stringfield was 32 when he died and was killed by a single gunshot wound to the head fired at close range. (T. 766-68.)

Rohnika Dumas. The previous testimony of Rohnika Duman was read to the jury by LaTesha Campbell, an assistant state attorney. (T. 776.) The State informed the court it had not been able to contact Ms. Dumas and she had an outstanding warrant for robbery. (T. 845.) At the time she testified in the earlier proceeding Ms. Dumas was the mother of three children, including a nine-month-old with Mr. Bevel who was born after the incident. (T. 778, 800.) She was involved with Mr. Bevel in February 2004 and went with him to Mr. Stringfield's house on the night of the shooting. (T.

779-83.) When they arrived a child was in the living room watching television. (T. 787.) At one point Mr. Bevel and Mr. Stringfield went outside and then returned, saying a neighbor heard noises. (T. 787, 789.) She was not immediately aware another woman was in the house. (T. 788.) Both men had guns; Mr. Bevel was carrying a rifle, and Mr. Stringfield was carrying a handgun. (T. 790-91.)

Later that night Mr. Bevel left the room they were in and she heard gunshots. (T. 792-93.) Then she heard Mr. Bevel say "bitch, shut up." (T. 793.) He came back for Ms. Dumas and they left by car to go to her house. (T. 793-94.) As they drove away Mr. Bevel asked her to hold the steering wheel, put the rifle to his own chin, and said he hadn't meant to kill the boy. (T. 794-95.) When confronted with an earlier statement she agreed she had said Mr. Bevel also said he killed the boy because he was going to be a witness. (T. 796-97.) He continued driving to a place her house, keeping the gun with him. (T. 797-98.) They spent the rest of that night together. (T. 799.) After his arrest he wrote to her and told her she could provide him with an alibi. (T. 802.) He also tried to get her to retract statements she had made to the police. (T. 806-08.)

Mark Doyle. Mr. Doyle, a retired Jacksonville sheriff's deputy, testified about collecting evidence at Mr. Stringfield's house. (T. 849-72.)

Thomas Pulley. Mr. Pulley, a firearm's examiner with the Jacksonville Sheriff's Office, analyzed some cartridge casings, bullets, and bullet fragments collected in the investigation. (T. 874-77.) Seven of eight cartridges were identified as having been fired from the same firearm, and the eighth had similar markings. (T. 886.) The cartridges were of a type typically used in AK-47 rifles. (T. 887.) The bullets he analyzed had also been fired from an AK-47 rifle. (T. 888-89.) Mr. Pulley tested a .45 caliber Smith and Wesson pistol collected in the investigation and determined it could not have fired any of the bullets. (T. 891-92.) The parties later stipulated that no latent prints of any value were found on either weapon. (T. 937-38.)

Detective David Shawn Coarsey. Detective Coarsey was assigned to the case as a homicide detective; he interviewed Mr. Bevel about a month after the shooting. (T. 903-04.) The interview took place at the Sheriff's office and Mr. Bevel was mirandized before they spoke. (T. 906-08.) At first Mr. Bevel told police he had

left the house with Ms. Dumas and did not hear about the murders until seeing the news the next day. (T. 910-18.) When the detective told him Ms. Smith had identified him he continued to deny involvement and told the detective to contact Ms. Dumas. (T. 918-24.) Detective Coarsey continued to question Mr. Bevel without obtaining a confession, and eventually turned the interview over to Detective Mitchell Chizik. (T. 924-28.) They continued to interview him over the course of a day, for 20 or 22 hours. (T. 932.)

Detective Mitchell Chizik. Officer Chizik was part of the homicide team that investigated the shooting and was partnered with Detective Coarsey. (T. 938-39.) At about 12:20 AM they decided Officer Chizik would interview Mr. Bevel alone because he seemed to have better rapport with Mr. Bevel. (T. 942-43.) Mr. Bevel told him "I hurt for that little boy," and then told him two unknown males had approached him, forced him to let them into the house, and shot Mr. Stringfield. (T. 943-45.) He initially denied hearing Phillip get shot or Ms. Smith screaming. (T. 948-49.) He gave Officer Chizik detailed descriptions of the two men. (T. 950.) Several hours later, after detectives had booked Mr. Bevel into the jail, interviewed Ms. Dumas, and then resumed the interview with Mr. Bevel (T. 1005), he told them he was scared of Mr. Stringfield because he had

been told Mr. Stringfield was going to kill him. (T. 1011.) Before the shooting Mr. Stringfield had been angry with him and threatened him. (T. 1012-13.) Things had calmed down, but then they argued about Ms. Dumas being at the house; Mr. Stringfield said he was going to get his clip and walked into his bedroom, and then Mr. Bevel heard the sound of a magazine being inserted into a handgun. (T. 1014-15.) He grabbed the AK-47, met Mr. Stringfield at his bedroom door, and shot Mr. Stringfield. (T. 1015.) Several bullets fired when he pulled the trigger. (T. 1015.) He said he did not mean to shoot Ms. Smith; he heard her screaming and then he thought she was dead. (T. 1016.) Then he walked into the living room and shot Phillip Smith because he was a witness. (T. 1017.) He persuaded Ms. Dumas to leave with him. (T. 1017.)

On cross-examination Officer Chizik said Mr. Bevel was treated as a danger to himself at the jail, and was put in an isolation unit with nothing but a mattress because it was feared he might harm himself, based in part on statements he made to the detectives as well as his admitting he had put the AK-47 to his own chin shortly after the incident. (T. 1057.) Ms. Dumas corroborated that he had threatened to shoot himself after the incident. (T. 1058.)

Larry Kuczkowski. Mr. Kuczkowski, a former deputy in the Jacksonville Sheriff's Office, testified about a robbery that took place on October 20, 2022. (T. 1059-61.) Mr. Bevel was arrested and charged with the robbery after being found in the yard of the home where it occurred. (T. 1061-64.) Mr. Kuczkowski said Mr. Bevel denied being the perpetrator, but other witnesses stated Mr. Bevel had come into the yard and tried to rob the victim with a handgun. (T. 1065-66.) Later Mr. Bevel pleaded guilty to a charge of attempted robbery. (T. 1067.) A copy of the judgment and sentence for that offense were entered into evidence. (T. 1078-79.)

The defense renewed its previous objections to victim impact testimony before the remaining State witnesses testified. (T. 1082.)

Priscilla Frink. Ms. Frink is the mother of Mr. Stringfield and grandmother of Phillip Sims. (T. 1083.) She stated she was employed by the Department of Homeland Security in Atlanta. (T. 1084.) She read a prepared statement about the impact the shooting of her son and grandson had on her. (T. 1085-86.)

Antonio Parker. Mr. Parker is the brother of Phillip Sims, and read a statement about losing his brother when Mr. Parker was only two years old. (T. 1090-92.)

Sojourner Sims Parker. Ms. Parker returned to the stand to read a statement she had prepared, as well as a statement from her mother, Florence Sims. (T. 1093-98.) As Ms. Parker left the stand, Mr. Bevel said to her "I am sorry for the pain I caused you." (T. 1101.) After the jury had been excused the judge admonished Mr. Bevel not to attempt to communicate with anyone in the courtroom, including the victims' family members. (T. 1102-03.)

The defense moved for a directed verdict on the grounds that the evidence was insufficient to support a death recommendation. (T. 1103.) The court denied the motion. (T. 1104.) The defense case began with a read-back of prior testimony of Antorio McCray.

Antorio McCray. Mr. McCray, Mr. Bevel's half-brother, stated he had four siblings, plus a fifth who died as an infant because of a physical attack on their mother. (T. 1107-08, 1112.) Mr. McCray and an older brother Mario were raised by their grandmother; Mr. Bevel, their sister Teandra, and brother Brandon were raised by their mother. (T. 1109.) Their mother worked as a dental assistant but at times needed public assistance. (T. 1110.) Mr. Bevel's father was a heroin addict who died of AIDS when Mr. Bevel was about 18. (T. 1110-12.) He had separated from Mr. Bevel's mother when Mr.

Bevel was six or seven years old. (T. 1112.) When their mother died suddenly in a car accident, Mr. Bevel and his other siblings came to live with their grandmother as well. (T. 1113-14.) Four cousins also came to live with them. (T. 1117.) Mr. McCray said Mr. Bevel did not see any kind of counselor after their mother died, but that he seemed depressed. (T. 1114.) He started spending more time on the streets. (T. 1137.) Even before his mother died, Mr. Bevel had been on the street selling drugs for an older man named Kenneth Glover. (T. 1137-38.) His mother tried to keep Mr. Glover away from him. (T. 1137-38.) That relationship ended when Mr. Glover was incarcerated. (T. 1139.)

Mr. McCray stated Mr. Bevel got into some trouble and missed a lot of school when he was a preteen. (T. 1116.) He was in special education (ESE) classes. (T. 1117.) Mr. Bevel was sometimes bullied when he was younger; Mr. McCray and their older brother would try to protect him. (T. 1118-19.) Mr. McCray said Mr. Bevel was "slow" and was "a follower." (T. 1119-20.) When he was about 10 years old Mr. Bevel hit his head on concrete while playing football and was knocked unconscious. (T. 1121, 1123.) When he was about 19 he was on a motorcycle and crashed into a pedestrian, which caused another blow to his head that knocked him unconscious. (T. 1121,

1123.) Mr. Bevel was also shot three times and had to be hospitalized for a week. (T. 1122.) Mr. McCray agreed that after being shot Mr. Bevel was "a little bit more paranoid than he used to be." (T. 1123.)

Mr. Bevel started spending time with Mr. Stringfield when he was about 18. (T. 1124.) Mr. Stringfield had a "bad reputation" for bullying and even shooting people. (T. 1124-25.) Mr. Bevel began selling drugs for Mr. Stringfield. (T. 1125, 1131.) Mr. McCray spent time with them and saw Mr. Stringfield hit Mr. Bevel in an argument about money. (T. 1126.) For a time Mr. Stringfield dated their younger sister; they did not like the relationship and Mr. McCray said Mr. Stringfield was "kind of abusive" to her. (T. 1127-28.) Mr. McCray also saw Mr. Stringfield threatening Mr. Bevel "all the time." (T. 1131.)

In about 2003 Mr. McCray and Mr. Stringfield had a falling out, and Mr. Stringfield threatened to kill him. (T. 1129.) After than Mr. McCray was shot in a drive-by shooting at which Mr. Stringfield was present; he said the shooters were "trying to get Mr. Stringfield." (T. 1129.)

Mr. McCray described the Florida Avenue neighborhood where he and Mr. Bevel lived as "a terrible neighborhood" where drive-by

shootings were common; he witnessed two in addition to the one where he was wounded himself. (T. 1131-32.) Drugs were sold throughout the neighborhood. (T. 1133.) Children under the age of 18 were often involved in selling drugs because the police wouldn't bother smaller children. (T. 1135.) Once Mr. McCray was robbed at gunpoint. (T. 1136.)

Mr. McCray said Mr. Bevel started drinking and smoking weed before he was a teenager. (T. 1136.) He drank heavily. (T. 1137.) Their grandmother did her best but was challenged raising eight children by herself. (T. 1174-75.)

William Jerome Randall. Mr. Randall testified in prison attire and said he was serving a life sentence for a murder committed in 2004, when he was 25 years old. (T. 1176-77.) He knew Mr. Bevel growing up; Mr. Bevel was about three or four years younger. (T. 1177-78.) The last time he had seen Mr. Bevel was when they were housed in jail together in 2004-05. (T. 1179.) Mr. Randall said his parents died when he was young and he was raised "by the streets." (T. 1179-80.) The neighborhood where he and Mr. Bevel grew up was referred to as "Terror Dome" because of the violence, drugs, and crime that prevailed there. (T. 1181.) After Mr. Bevel's mother died both Mr. Bevel and Mr. Randall started selling drugs for some

of the same people. (T. 1181-84.) Mr. Randall said he knew Mr. Bevel's family; a sister later died of AIDS, and two brothers died in a drug war. (T. 1183-84.) Mr. Bevel used the money he made from selling drugs to take care of his sister. (T. 1185.)

Mr. Randall described Mr. Bevel as "a loner" and said Mr. Bevel had been damaged by losing his mother. (T. 1186.) On cross-examination he agreed Mr. Bevel was "a pretty smart guy" because "anybody that survived what we survived I call them pretty smart." (T. 1215.)

Mr. Randall became familiar with Mr. Stringfield in 2003 or 2004 when he was released from prison. (T. 1188.) He came home to a "full-fledged" war. (T. 1189.) His cousin, Moony, was shot in front of their grandmother's house; Mr. Randall stated Mr. Stringfield was one of the people responsible. (T. 1190.) Guns were easily available. (T. 1191.) Mr. Randall knew Mr. Bevel had been shot when he was 20 and said it was "absolutely" drug-related. (T. 1192.) Mr. Randall also said he had heard that Mr. Stringfield planned to kill Mr. Bevel. (T. 1193.)

Donella McCray. Former testimony of Donella McCray, Mr. Bevel's grandmother, was read back. (T. 1234-35.) She stated she raised Mario and Antorio McCray "from babies" and took Thomas

and his siblings in when their mother died. (T. 1236.) She said Mr. Bevel "grieved constantly" about the loss of his mother but did not talk about it; she did not get him any counseling, but took him to church "all the time." (T. 1236-37.)

Ms. McCray said she visited Mr. Bevel in jail and he called her regularly. (T. 1240.) She said she would continue to visit him and other family members would do the same. (T. 1241.)

Carl Burden. Mr. Burden's former testimony was read back. He was a dental technician who had known Mr. Bevel since Mr. Bevel was a child because he worked with Mr. Bevel's mother. (T. 1245-46.) Mr. Bevel's mother would bring her kids to Mr. Burden's house to socialize. (T. 1247.) He was aware that Mr. Bevel's father was a heroin addict. (T. 1247-48.) He also knew about Mrs. Bevel being stabbed and losing a baby because of her injuries. (T. 1248-49.) She confided in him that Mr. Bevel had been sexually abused by a family member when he was younger and that she tried to deal with it herself rather than taking him for counseling. (T. 1250.)

Mr. Burden noticed a difference in Mr. Bevel after his mother died and he went to live with his grandmother. (T. 1252-53.) He knew Ms. McCray could not always keep the children from getting into trouble. (T. 1253.) The neighborhood where they lived was

"drug infested" and, before Mr. Bevel's mother died, she tried unsuccessfully to keep her older sons out of the drug scene. (T. 1254-57.) Mr. Burden said he lost touch with the family a few months after Ms. Bevel died and felt he let them down. (T. 1258.) He believed Ms. McCray loved them "with all of her heart and soul" but that the neighborhood and lack of supervision did not create a good environment. (T. 1259.)

Laurel French Wilson. Ms. Wilson is an attorney who represented Mr. Bevel when he was a juvenile. (T. 1280-81, 1283.) She described him as "quiet" and "cooperative." (T. 1284.) He was arrested again while she was representing him for possession of crack cocaine with intent to distribute. (T. 1286.) His grandmother seemed overwhelmed and unable to deal with him. (T. 1287.) Ms. Wilson tried to advise them to work within the juvenile system but Mr. Bevel, then 12 years old, and his grandmother both wanted him to return home as quickly as possible. (T. 1289-90.) Ms. Wilson tried to get Mr. Bevel some therapeutic help but once he pleaded guilty she was not able to seek therapeutic resources for him. (T. 1291-92.) She learned he was placed in a therapeutic placement, however, with the Sardinas family. (T. 1292.) Ms. Wilson stated she had immediately remembered Mr. Bevel when the charged offense

was reported in the news, and felt she hadn't done enough to help him. (T. 1292.)

Maria Sardinas. Ms. Sardinas was a foster parent for Mr. Bevel in 1995, along with her husband. (T. 1335.) He was about 14 or 15 and stayed with them for almost six months. (T. 1336.) He completed the program with them because his behavior was good while he was there. (T. 1336.) She did not remember anyone from his family contacting him while he was living in her home. (T. 1337.) He attended school regularly and made good grades. (T. 1337-38.) Their neighborhood was safe, quiet, and did not have crime or drug activity. (T. 1338.) She described him as quiet at first, but then opening up. (T. 1344.) She was not worried about him when he returned to his grandmother's house because he had done so well with them. (T. 1344.) On cross-examination she was shown progress reports indicating Mr. Bevel conduct at school was not good. (T. 1348-49, 1351.) She did not remember being contacted by the school about any issues. (T. 1349.) At home he never gave her any problems. (T. 1351.)

Dr. Steven Gold. Dr. Gold, a psychologist specializing in trauma, met with Mr. Bevel in 2014 and reviewed educational,

medical, and legal records. (T. 1364-67, 1375.) Mr. Bevel reported, and records corroborated, a history of depression. (T. 1377.) He repeatedly witnessed shootings and other forms of violence. (T. 1377.) Dr. Gold said records of Mr. Bevel's placement with the Sardinas family showed he responded to a "radically different environment" with an improvement in grades, behavior, and his general way of reacting to situations facing him. (T. 1378.) However, then he was returned to his original, very violent neighborhood with no follow-up services. (T. 1379.) Dr. Gold also learned Mr. Bevel was physically abused by his mother's boyfriend and that he was sexually abused when he was six years old. (T. 1379.) His father was a heroin addict who was rarely present. (T. 1380.)

Dr. Gold said when he met Mr. Bevel in person, Mr. Bevel was very intent on protecting his family and did not want to talk about his upbringing. (T. 1381.) Mr. Bevel was deeply affected by his mother's death. (T. 1382.) Dr. Gold said Mr. Bevel did not remember being sexually abused, but that it was not unusual for someone victimized at a young age to lack memories of the event; the traumatic event could still affect the victim psychologically. (T. 1383.) A police report regarding the sexual abuse indicated that, at the time, Mr. Bevel also reported witnessing the same individual

sexually abuse his sister. (T. 1392.) Records also indicated Mr. Stringfield physically abused Mr. Bevel on numerous occasions. (T. 1384.)

Dr. Gold explained that ten "adverse childhood experiences" have been identified that greatly increase the possibility of psychological difficulties later in life. (T. 1384-85.) Of these ten, Mr. Bevel had seven or eight. (T. 1387.) In addition, Mr. Bevel "unquestionably" suffered from post-traumatic stress disorder (PTSD). He said what many people described as "paranoia" in Mr. Bevel was "general arousal of emotion and physiology of being what's called in PTSD hypervigilance, constantly scanning for danger, being on edge, and […] feeling unsafe and […] looking for possible threats." (T. 1388-89.) Dr. Gold said Mr. Bevel's PTSD would have begun in childhood. (T. 1390-91.)

Dr. Gold found Mr. Bevel did not have antisocial personality disorder because, when he was living with the Sardinas family, his behavior and personality changed and his functioning improved. (T. 1393.)

On cross-examination Dr. Gold stated he was not attributing Mr. Bevel's offenses directly to his PTSD. (T. 1407-08.) However, he clarified "that Mr. Bevel's life circumstances and their impact on his

functioning are reasons for the jury to consider mitigating sentence. […] I am not saying that his PTSD was responsible for his offenses, but I am saying that it is unlikely that he would have the criminal record he has if he were not traumatized and grew up in markedly different circumstances." (T. 1408.) Dr. Gold disagreed that Mr. Bevel was not under the influence of extreme mental or emotional disturbance at the time of the murders, saying "I don't agree with that. I am simply not drawing a causal relationship between the two." (T. 1413.)

Dr. Gold then stated directly that Mr. Bevel "was under the influence of extreme mental or emotional disturbance. He had PTSD. He had depression." (T. 1414.) He reiterated this conclusion: "I believe that throughout his life he was under the influence of extreme mental or emotional disturbance. That would include the time of the murders." (T. 1414.) He noted that "PTSD doesn't come and go," nor does the "type of major depression that Mr. Bevel has had since he was a child." (T. 1414.) When the prosecutor asked "And are you saying that the capacity of the defendant to appreciate the criminality of his conduct or to confirm his conduct to the

requirements of the law was substantially impaired?" Dr. Gold answered, "Yes." (T. 1415.)[1]

Ronald McAndrew. Mr. McAndrew is a prison and jail consultant. (T. 1458.) The State objected to Mr. McAndrew potentially invading the province of the jury; the defense stated he would give the opinion that Mr. Bevel had skills that could be beneficial in the prison system and that he would be allowed to work if he were in the general population as opposed to death row. (T. 1464-65.) The court overruled the objection. (T. 1465.) Mr. McAndrew testified he had reviewed almost 1700 pages of prison and jail records pertaining to Mr. Bevel and they contained three disciplinary reports, which Mr. McAndrew descried as "minor." (T. 1470.) The reports were not for violent behavior. (T. 1471.) He described Mr. Bevel as "a model inmate, a compliant prisoner." (T. 1474.) Mr. Bevel also reported a strong desire to work along with an

[1] The defense statement of particulars of mental mitigation identified the statutory mitigating factor set out in § 921.141(7)(f), Florida Statutes, that the defendant's ability to conform his conduct to the requirements of the law was substantially impaired (R. 267, 270); the State's proposed jury instructions included that factor as well (R. 338-39). However, it was omitted from the final verdict form. (R. 1261-76.) The factor was not discussed at the charge conference and so the record does not explain the omission. (T. 1673-74.) The jury was not charged on this factor. (T. 1827.)

interest in learning welding or mechanics. (T. 1475.) Mr. McAndrew believed Mr. Bevel could contribute to the prison system through working. (T. 1476.) He noted that death row inmates were not allowed to work and spent most of their time sitting in a cell. (T. 1476.)

Before the State cross-examined Mr. McAndrew, the court heard argument outside the presence of the jury about whether the State could ask questions that would inform the jury Mr. Bevel was on death row. (T. 1478-92.) The cross-examination and redirect were proffered before testimony continued. (T. 1493-1505.) Mr. McAndrew then stated that, since 2005, Mr. Bevel had been in a cell by himself. (T. 1506.) During that time Mr. Bevel had received a single disciplinary report. (T. 1505.) On redirect, he agreed that being in a solitary cell did not eliminate a prisoner's ability to get a disciplinary report, that he was familiar with hundreds of incarcerated individuals who had earned multiple disciplinary reports. (T. 1507.)

Dr. Robert Ouaou. Dr. Ouaou, a psychologist with a specialization in neuropsychology, testified via Zoom by agreement. (T. 1521-22.) He spent several hours evaluating Mr. Bevel in 2013 to develop a "snapshot" of his brain functioning. (T. 1534.) He

personally administered a battery of psychological tests and took a medical and psychological history from Mr. Bevel. (T. 1535-36.) The tests are designed to identify people who are "malingering," or feigning the severity of their conditions; Mr. Bevel's scores indicated he was not malingering, but instead was giving maximum effort. (T. 1533, 1537, 1542.) Mr. Bevel's IQ was 71, in the third percentile or "impaired range." (T. 1537-38.) Mr. Bevel described several incidents where he had suffered head injuries, including when he was playing street football, a motorcycle accident, and an incident where his mother's boyfriend hit him in the head with a crystal ashtray. (T. 1540-41.) Dr. Ouaou stated the tests he administered demonstrated frontal lobe impairment consistent with having head injuries. (T. 1542-43.) Although his memory was good, Mr. Bevel was significantly impaired on seven of eight tests of executive function. (T. 1543-44.) He was slow to process information. (T. 1545.)

Dr. Ouaou stated frontal lobe impairment affects decision-making and can make people more impulsive based on the environment. (T. 1545.) Impairment is linked not just with physical injury, but also with early alcohol use as well as early physical or sexual trauma. (T. 1546-47.) Data indicate a high percentage of

those incarcerated have suffered head injuries. (T. 1549.) He concluded, "based on his history, the risk factors for brain damage and the testing itself[,] it was very clear — I mean it was very clear and as I said unequivocal that there is something wrong with that frontal part of his brain based on neuro psych testing so, yes, it's organic and biological." (T. 1550.)

On cross-examination Dr. Ouaou agreed he was describing Mr. Bevel generally but could not "explain his day to day behavior." (T. 1560.) He did not discuss the charged offenses with Mr. Bevel. (T. 1560.) The court overruled a defense objection when the State asked Dr. Ouaou a hypothetical about an individual who kills someone and then kills additional people so as not to leave witnesses. (T. 1564.) When the State asked, "Doesn't that show executive function?" Dr. Ouaou replied "Not very good executive function…." (T. 1565.) The court also overruled several defense objections to cross-examination asking Dr. Ouaou about documents he had not reviewed and that were not necessary for his neurological assessment of Mr. Bevel, including letters Mr. Bevel had written to Ms. Dumas, educational records, and juvenile criminal records. (T. 1566-74.) The court also overruled a defense

objection to asking Dr. Ouaou about two other experts who believed Mr. Bevel had antisocial personality disorder. (T.1575-78.)

On redirect Dr. Ouaou explained his change in opinion regarding Mr. Bevel being intellectually disabled, agreeing with the statement "he does not meet the full criteria but he certainly was borderline." (T. 1590-95, 1596.) He stated the documents referenced in the State's cross-examination would not affect his opinion about Mr. Bevel's neurological functioning, saying "The test data speaks for itself, right? It tells us that there is a problem with that part of the brain." (T. 1596.)

Dr. Jeffrey Negin. Dr. Negin, a diagnostic radiologist, reviewed MRI and PET scan images of Mr. Bevel's brain as well as neuropsychology records pertaining to Mr. Bevel. (T. 1599-1602, 1603, 1605.) The images were taken in 2018. (T. 1606.) He did not meet with Mr. Bevel or review other documents, saying that would not be necessary or appropriate in his role. (T. 1604.) The MRI showed abnormalities consistent with traumatic head injury affecting the temporal and frontal lobes. (T. 1611-13.) Both of those areas affect emotion and the ability to control behavior. (T. 1613.) Dr. Negin said the MRI was consistent with neurological testing showing frontal lobe deficits. (T. 1613.) On the PET scan, the areas

showing abnormalities on the MRI also showed significantly decreased activity. (T. 1615-16.) Dr. Negin concluded the scans showed damage to the brain in the areas involving "regulating emotion and control of behaviors." (T. 1620-21.)

T.B. (17-year old daughter of Mr. Bevel). T.B. testified that she was in the 11th grade and worked at a Starbucks. (T. 1646.) She talked with her father frequently and emailed "all the time." (T. 1647.) She stated she told him about her life, and he encouraged her to stay focused and stay in school. (T. 1648.) She planned to visit him when she turned 18. (T. 1648.) She added, "I love my dad a lot and I just know he will always be in my corner when I need him." (T. 1648.)

T.B.'s testimony concluded the defense case; Mr. Bevel elected not to testify. (T. 1651-54.) The court conducted a charge conference and agreed on the list of mitigating circumstances to be presented to the jury. (T. 1659-1719.) The defense maintained its request for a mercy instruction. (T. 1702.)

The jury was charged without additional objection. (R. 1280-1291; T. 1849.) During deliberations the jury sent out the following question: "if we find one count death and second count life in prison what would the final outcome be?" (R. 1292.) The court

conferred with the parties and agreed on a response. (T. 1856-65.) The jury was then informed:

> Ladies and gentlemen, the Court's response to you [as] contemplated by law is this: Counts one and two have been presented to you in this case for a verdict on each count. You are to make a decision as to a proper sentence for each count and provide that decision on each verdict form provided to you.

(T. 1866.)

The jury also asked, "Does the omission of part 2 letter P on the second count pose any concerns for the legality of the document?" (R. 1294.) The court reviewed the verdict form with the parties, ascertained that a line had been omitted, and provided the jury with a corrected form. (T. 1867-70.)

The jury found the prior violent felony aggravator was satisfied as to Mr. Stringfield, and found no mitigating circumstances. (R. 1261-68; T. 1874-77.) As to Phillip Sims, the jury found both the prior violent felony and the "avoiding arrest" aggravators were satisfied, and again found no mitigating circumstances. (R. 1269-75; T. 1878-81.) The jury voted unanimously to sentence Mr. Bevel to death on both charges. (R. 1268, 1276; T. 1877, 1881.)

The defense filed a Motion for New Penalty Phase Trial arguing, among other things, that the court erred in denying the

defense motion for directed verdict, in granting the State's motion preventing a proportionality argument, in limiting references to Defendant's prior death sentence, and in refusing the requested special jury instruction regarding mercy. (R. 1295-96.)

The court conducted a *Spencer* hearing on January 7, 2022. (R. 1652.) At the beginning of the hearing the court denied the Motion for New Penalty Phase Trial. (R. 1302, 1657.) The defense provided the court with two additional transcripts from prior proceedings: former testimony of Theondra Bevel from the original penalty phase proceeding in 2004 (R. 1304-20), and former testimony of Mr. Bevel's aunt, Barbara Jean Fisher, from a former post-conviction proceeding (R. 1326-56). (R. 1657-58.) The court noted it had ordered a presentence investigation report (PSI). (R. 1661-62.) The defense and State agreed a PSI was not required. (R. 1662-63.) The court stated it would provide the PSI to the parties but would schedule the sentencing hearing without further delay, with the understanding that the parties could request additional time on the court's calendar once the PSI was received. (R. 1663-64.) Mr. Bevel did not testify. (R. 1665.)

IV. Sentencing.

Sentencing took place on February 4, 2022. (T. 1905.) The court noted it had considered the PSI as well as sentencing memoranda from the State and defense. (T. 1905-06.) The court then imposed a death sentence for both charges, designating them consecutive to each other as well as to the sentence already imposed for attempted murder. (T. 1910-11.)

The written order was entered February 11, 2022. (R. 1433-.) The court found the State had proven the violent felony aggravator as to both Mr. Stringfield and Phillip Sims beyond a reasonable doubt based on the contemporaneous nature of the charged offenses and a prior conviction for attempted robbery, and gave it very great weight. (R. 1440-42.) As to Phillip Sims, the court also found the State had proven the "avoid arrest" aggravator beyond a reasonable doubt and gave it very great weight. (R. 1442-45.) The court found the aggravating factors "sufficient — individually and collectively — to warrant a sentence of death." (R. 1445-46.)

As to the mitigating factors, the court agreed with the jury that Mr. Bevel had not established that he committed the murders while under the influence of extreme mental or emotional distress. (R. 1450.) The court also agreed Mr. Bevel's age at the time of the

offenses — 22 years old — was not a mitigating circumstance. (R. 1452.)

Under the heading of the "catch-all" mitigating provision, section 921.141(7)(h), Florida Statutes, the court either rejected most of Mr. Bevel's proposed mitigation or gave it little weight:[2]

- Mr. Bevel's IQ of 71 was found to be established by the greater weight of the evidence, but given little weight;
- The trauma of Mr. Bevel losing his mother at the age of 12 was established by the greater weight of the evidence, but given little weight;
- The absence of Mr. Bevel's father and his later death from heroin use was established by the greater weight of evidence, but the court found it not mitigating in nature and gave it no weight;
- Mr. Bevel's repeatedly witnessing acts of violence and substance abuse during his childhood and teenage years was established by the greater weight of the evidence, but

[2] As to each rejected mitigating circumstance, the court noted that if the circumstances were found to be mitigating, it would accord them very slight weight.

the court found it was not mitigating in nature and gave it no weight;

- Mr. Bevel's being raised by a grandmother who was trying to raise multiple grandchildren with few financial or emotional resources was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's growing up in an area where drug sales, gunfire, violence, and substance abuse were common was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's being brought into a criminal lifestyle at a very young age was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel being heavily influenced by the older Garrick Stringfield, who sold drugs and had a reputation for violence, was not established by the greater weight of the evidence and was given no weight;

- Mr. Bevel's being shot in 2001, when he was 20 years old, was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel having the capacity for love and kindness, in spite of his traumatic childhood, was established by the greater weight of the evidence but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's good behavior in jail and in court was established by the greater weight of the evidence but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel responding well to structured environments was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's confession and remorse were not established by the greater weight of the evidence and were given no weight;

- Mr. Bevel's continued involvement with his family and nurturing relationship with his daughter was established by the greater weight of the evidence, but the court found it was not mitigating in nature and gave it no weight;
- Mr. Bevel's suffering from brain damage that affected his decision-making was established by the greater weight of the evidence, and afforded little weight;
- Mr. Bevel's being raised in a strong religious faith was established by the greater weight of the evidence, but the trial court did not consider it mitigating in nature and gave it no weight.

(R. 1453-63.)

The court concluded that "the aggravating factors heavily outweigh the mitigating factors, and that death is the only proper penalty for the murders of Garrick Stringfield and Phillip Sims…." (R. 1464.)

SUMMARY OF THE ARGUMENT

Issue I. The trial court abused its discretion in disregarding the uncontroverted expert testimony of Dr. Gold that Mr. Bevel was under the influence of extreme mental and emotional distress, caused by persistent PTSD and depression, at the time of the offenses. The court appears to have disregarded that conclusion because, among other things, Dr. Gold acknowledged that Mr. Bevel's PTSD did not cause the offenses. That is not what the statutory mitigator requires.

Issue II. The court abused its discretion in denying the defense's requested jury instructions on the role of mercy in capital sentencing. The requested instruction was a correct statement of the law and would have eliminated the potential for the jury to be confused about whether it was permissible to extend mercy even if it determined that aggravators outweighed mitigating circumstances.

Issue III. Fundamental error occurred when the court failed to instruct the jury that its determinations regarding the sufficiency and weight of aggravating factors were subject to proof beyond a reasonable doubt. Appellant acknowledges contrary precedent from this Court; the issue is raised to preserve it for federal review.

Issue IV. Florida's capital sentencing scheme does not satisfy Eighth Amendment standards because of the increasing number and scope of aggravating factors as well as the elimination of proportionality review. The current system does not adequately channel the sentencer's discretion and does not contain sufficient safeguards against arbitrary and inconsistent capital sentencing.

Issue V. The court erred when it granted the State's First Motion in Limine and precluded the defense from making any argument about the proportionality of a death sentence for Mr. Bevel. Although this Court has eliminated comparative proportionality as a component of mandatory appellate review of death sentences, the limitation of appellate review does not justify limiting the scope of trial arguments in the same way. The U.S. Supreme Court has never precluded or disapproved of proportionality review; the Court has merely said it is not constitutionally required if a state system is otherwise constitutionally adequate.

ARGUMENT

I. The Court Abused Its Discretion in Disregarding Uncontroverted Expert Testimony That Mr. Bevel Was Under Extreme Mental and Emotional Distress at the Time of the Charged Offenses.

The greater weight of the evidence established that Mr. Bevel suffers from persistent PTSD and depression, including at the time of the charged offenses.

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

witness, or other reasons. *See id.* Although a court is not required to accord mental health mitigation any particular weight, *see Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000), a trial court cannot require a nexus between the mitigation and the charged offense, *Fletcher v. State*, 168 So. 3d 186, 219 (Fla. 2015).

Here, no competent, substantial evidence refuted expert testimony that, at the time of the charged offense, Mr. Bevel was under the influence of extreme emotional or mental distress. Dr. Gold's testimony addressed this point directly and explained the roots of Mr. Bevel's PTSD and depression: his mother's death, drug use and domestic violence, physical and sexual abuse, and substance abuse. Dr. Gold's opinion was consistent with the testimony of other expert and lay witnesses. This included Dr. Ouaou's and Dr. Negin's opinions that Mr. Bevel showed neurological and physical evidence of brain damage that would affect his decision-making and emotional regulation. Antorio McCray, William Randall, and Carl Burden all corroborated multiple aspects of Mr. Bevel's social history, including his exposure to drug activity, violence, physical abuse, and the loss of his parents, particularly his mother.

The State did not present any competing expert testimony to rebut Dr. Gold's testimony that Mr. Bevel suffered from PTSD and major depression that created a severe, ongoing mental or emotional disturbance. The State did, however, repeatedly question Dr. Gold about whether Mr. Bevel's PTSD and depression caused his criminal behavior, and Dr. Gold repeatedly clarified his opinion that Mr. Bevel was under the influence of those conditions, not that they caused specific behavior. The trial court's sentencing order focused on causation, noting, "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.) The sentencing order also dismissed Mr. Bevel's personal and medical history as "self reported" and did not acknowledge corroboration in the record.

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

II. The Court Erred in Denying the Defense's Requested Jury Instruction on the Role of Mercy in Capital Sentencing.

The trial court's denial of a requested jury instruction is reviewed for abuse of discretion. *E.g.*, *Coday v. State*, 946 So. 2d 988, 995 (Fla. 2006).

Both this Court and the U.S. Supreme Court have long recognized that a jury can exercise mercy when making capital sentencing recommendations.

However, this Court has also upheld the denial of defense requests to tell the jury that it can exercise mercy when making capital sentencing recommendations. *E.g.*, *Woodbury v. State*, 320 So. 3d 631, 655-56 (Fla. 2021); *Bush v. State*, 295 So. 3d 179, 210 (Fla. 2020). Appellant respectfully suggests these decisions should be reconsidered. A jury cannot exercise a prerogative it does not know it has, and the current instructions do not adequately inform the jury that mercy can play a role in selecting life over death.

The instructions used at Mr. Bevel's trial informed the jury it was neither compelled nor required to find that a person should be sentenced to death:

> Even if you find that the sufficient aggravators outweigh the mitigators the law neither

> compels or requires you to determine that the defendant should be sentenced to death.
>
> Once each juror has weighed the proven factors he or she must determine the appropriate punishment in count one regarding Garrick Stringfield and in count two regarding Phillip Sims for the defendant.

(T. 1830.)

However, the instructions also informed the jury it could not be influenced by sympathy in arriving at its verdict: "Your decision must not be based upon the fact that you feel sorry for anyone or are angry at anyone." (T. 1835.)

In context, being instructed that the jury was not compelled or required to sentence a person to death after weighing the aggravators and mitigators merely reinforced for the jury that the final determination — the choice of recommending death or life in prison without possibility of release — was a separate step. These instructions did not sufficiently convey to the jury that they were allowed to exercise mercy in taking that final, separate step. To the contrary, jurors were reminded they could not make a decision based on feeling sorry for anyone.

The proposed defense instructions — one to be read during the preliminary instructions and one during the final charge — would

have addressed this simply and directly, with almost no change to the existing instructions except for the addition of a line saying that, regardless of the findings as to aggravators and/or mitigators, they were compelled or required to recommend death: "You may always consider mercy in making this determination." (R. 229-30, 247-28.) This is an accurate statement of the law and would have clarified for the jury that they were not precluded from choosing mercy when making their final recommendation, regardless of the outcome of their deliberations on the required findings.

Where the stakes are as high as life and death, the potential for any misunderstanding on the jury's part about what it can consider in imposing sentence violates a defendant's right to due process as well as his right to be free from cruel and unusual punishment.

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

The trial court's failure to subject required findings to proof beyond a reasonable doubt before considering a death sentence reduced the burden of proof on the State and thus denied Mr. Bevel due process of law, creating fundamental error.[3] Fundamental error "goes to the foundation of the case…and is equivalent to a denial of due process." *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) (citation omitted). Fundamental error "is not subject to harmless error review." *Ramroop v. State*, 214 So.3d 657, 665 (Fla. 2017) ("By its very nature, fundamental error has to be considered harmful.").

Any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the finder of fact. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490 (2000)). This Court held in

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

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

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

below, *Rogers* and *Poole* are incompatible with Supreme Court precedent.

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

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

The functional elements of a crime for sentencing purposes are not limited to the defined elements required for conviction. *See Apprendi*, 530 U.S. at 495-96. In addition, the distinction between conviction and sentencing is not what determines the burden of proof in a criminal trial. The legally significant distinction is

whether a particular determination increases the available penalty for a crime. *Id.* (holding the placement of a hate crime sentence "enhancer" within the sentencing provisions of a criminal statute did not prevent the enhancer from functioning as an element). In the context of capital sentencing, any factor that must be found before the death penalty can be selected for a particular defendant is the "functional equivalent" of an element of the charged offense, at least for sentencing purposes. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citing *Apprendi*, 530 U. S. at 494 n. 19); see also *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (holding a state statute allowing a trial court to impose an "exceptional" sentence in excess of a defined statutory range, without a jury finding regarding the reasons justifying the exceptional sentence, violated the defendant's right to a trial by jury).

In *Alleyne*, the Court held unconstitutional a statute imposing a mandatory minimum sentence on the basis of judicial fact-finding. 570 U.S. at 103 (overruling *Harris v. United States*, 536 U.S. 545 (2002)). As it had done before, the Court rejected the argument that the sentence actually imposed in that case could have been imposed in theory even without additional fact-finding. *Id.* at 112-15. And in *United States v. Haymond*, 139 S. Ct. 2369,

2373-74 (2019), the Court held a statute violated the Sixth Amendment and Due Process clause where it authorized a mandatory minimum sentence for a violation of supervised release without requiring jury findings or proof of the violation beyond a reasonable doubt. The Court held that subjecting the defendant to an increased sentencing range based on the trial court's fact-finding violated the Fifth and Sixth Amendments. *Id.* at 2378-79. The plurality rejected an argument that the Sixth Amendment does not apply to post-judgment sentencing proceedings, saying "any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise." *Id.* at 2379 (citing *Ring*, 536 U.S. at 602).

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

Due Process requires proof beyond a reasonable doubt to convict an individual of a crime. *E.g.*, *In re Winship*, 397 U.S. 358, 362 (1970). This means "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. The reasonable doubt standard "reflects a profound

judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (citation omitted). The requirement of proof beyond a reasonable doubt stands between the accused and a conviction based on factual error. *See id.* at 363. It "provides concrete substance for the presumption of innocence." *Id.* (citation omitted). In addition, the reasonable doubt standard has a vital role in maintaining public confidence in the court system. *Id.* at 364.

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

Courts in Colorado, Connecticut, and New Jersey cited due process concerns when applying the standard of proof beyond a reasonable doubt to capital sentencing, including the weighing of

aggravating and mitigating circumstances, before capital punishment was abolished in those jurisdictions. *See People v. Tenneson*, 788 P.2d 786, 789-90 (Colo. 1990); *State v. Rizo*, 833 A.2d 363, 403-410 (Conn. 2003); *State v. Biegenwald*, 524 A.2d 130, 155-56 (N.J. 1987). The Supreme Court of Utah explained the significance of the beyond-a-reasonable-doubt standard in capital sentencing in *State v. Wood*, 648 P.2d 71 (Utah 1982):

> Although we speak of "weighing" the aggravating and mitigating factors, we realize that the term "weighing" is often used in determining the truth or falsity of factual propositions. In the context of a penalty hearing, however, that term is akin to a metaphor which is not altogether descriptive of the mental process involved. The ultimate purpose in the penalty phase is not one of factfinding, but the fixing of a penalty, and the fixing of a penalty is a matter of judgment about what penal consequences should attach to the commission of a capital crime by a particular defendant. The reasonable doubt standard is, of course, also employed as a standard for factfinding; but that standard, which is only used when the most basic interests of the individual are at stake, also conveys to a decision maker a sense of the solemnity of the task and the necessity for a high degree of certitude, given the nature of the values to be weighed, in imposing the death sentence.

Id. at 84.

C. Florida's capital sentencing scheme requires findings that aggravating factors are sufficient to justify the death penalty and outweigh mitigating circumstances before the jury can consider the decision of whether a death sentence can be imposed.

Under Florida's capital sentencing scheme, the determinations that *the aggravating factors in a particular case are sufficient to justify death* and *the aggravating factors outweigh the mitigating circumstances* increase the maximum authorized penalty from life in prison to death. *See* § 921.141(2)-(3), Fla. Stat. The existence of one or more aggravators in Florida does not allow a death sentence to be imposed *until* other findings are made. Despite the statutory "capital felony" label, under Florida's capital sentencing scheme, the findings necessary to convict a defendant of first-degree premeditated murder are insufficient to sentence the defendant to death. *See* § 782.04(1)(a)-(b). A separate proceeding must be held, as provided in sections 775.082 and 921.141, Florida Statutes. The jury does not make a recommendation about the sentence until those findings are made. The trial court, in turn, does not exercise its sentencing discretion until the jury makes its recommendation. *See* § 921.141(2)-(3).

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

Absent the further proceedings and findings defined in section 921.141, the maximum available sentence for first-degree murder is Florida is life in prison. *See* § 775.082(1)(a); § 921.141(3)(a). Therefore, for purposes of the burden of proof, these additional findings are treated as elements of the crime, whether they are called "elements" or something else, and require proof beyond a reasonable doubt.

Here, the findings that the aggravating factors were sufficient to justify death and that they outweighed the mitigating factors were not subjected to the requirement of proof beyond a reasonable doubt. Without those express findings, subject to proof beyond a reasonable doubt, the death sentence in this case is constitutionally

deficient under Amendments V, VI, and XIV to the U.S. Constitution, as well as Article I, sections 9 & 17, of the Florida Constitution.

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

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

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

It is well established that "channeling and limiting of the sentencer's discretion is imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). This requires meaningful narrowing of the class of individuals subject to capital punishment. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987) ("a State

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

Under the current capital sentencing statute, as interpreted by this Court, there is virtually no narrowing of death eligibility before the conclusion of a capital trial, as aggravating circumstances do not need to be alleged in an indictment. *E.g.*, *Pham v. State*, 70 So. 3d 485, 496 (Fla. 2011). Although this Court briefly interpreted the sentencing statute to require a finding of "sufficient" aggravating

circumstances to justify a death sentence, *see Hurst v. State*, 202 So. 3d 40, 57-58 (Fla. 2016), this Court then receded from *Hurst* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *State v. Poole*, 297 So. 3d 487, 507 (2020).

Moreover, when Florida's first post-*Furman* sentencing statute was enacted, it included eight statutory aggravating factors. *See State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). Florida's current capital sentencing scheme makes a defendant eligible for a death sentence if any one of 16 statutory aggravators is found. § 921.141(6)(a)-(p), Fla. Stat. (2021). Beyond the addition of eight statutory aggravating factors, two factors have been amended to expand their scope since the original eight were enacted. Subsection (6)(a), which referred to "a person under sentence of imprisonment" when *Dixon* was decided, now encompasses "a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation." Subsection (6)(d), the prior violent felony aggravator, has been amended since *Dixon* was decided to include additional felonies. *See* 273 So. 2d at 5. Since *Dixon*, cases applying that aggravator have upheld the use of convictions that were pending on appeal as "prior violent felonies."

E.g., *Peek v. State*, 395 So. 2d 492, 499 (Fla. 1981) (superseded by statute on other grounds as stated in *Merck v. State*, 763 So. 2d 295, 299 (Fla. 2000)). An offense occurring contemporaneously with the charged capital offense can be treated as a "prior violent felony" as long as it occurs before sentencing — which, by definition, it must. *See Lucas v. State*, 376 So. 2d 1149, 1153 (Fla. 1979).

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

> In most states, a defendant cannot be eligible for the death penalty unless a jury finds that a statutorily enumerated aggravating factor applies to the defendant's case. However, the number and breadth of these aggravating factors have expanded over the last few decades, with most states listing more than ten factors, such that more than 90% of murderers are death eligible in many states. Thus, although most states sentence a small number of individuals to death each year, their death penalty statutes make it possible for nearly every murderer to be eligible for this penalty.
>
> When only a handful of offenders are sentenced to death despite expansive statutes that render most murderers eligible for the death penalty, it becomes more likely that those selected for death are being chosen arbitrarily.

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

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

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

This Court originally established comparative proportionality review in Florida's post-*Furman* sentencing scheme "to ensure that the statute would be implemented in a way that would avoid the constitutional concerns articulated in *Furman*." *See Lawrence v.*

State, 308 So. 3d 544, 549 (Fla. 2020) (citing *State v. Dixon*, 283 So. 2d 1 (Fla. 1973)). The United States Supreme Court cited Florida's practice of reviewing the proportionality of death sentences favorably in its decision upholding Florida's post-*Furman* capital sentencing scheme. *See Proffit v. Florida*, 428 U.S. 242, 251 (1976).

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

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

limit the death penalty to a small sub-class of capital-eligible cases and prevent the danger of arbitrary results. *Id.*

In reaching its conclusion, the Court reviewed three cases in which it had upheld state statutes both with and without a mandate to review proportionality. *See id.* at 45-48 (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976)). The Court cited the Georgia and Florida appellate review, which both included proportionality, approvingly. 465 U.S. at 45-48; *see also Gregg*, 428 U.S. at 198 ("Moreover, to guard further against a situation comparable to that present in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate."); *Proffitt*, 428 U.S. at 259-60 (noting the reasons for imposing a death sentence "are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law.").

In discussing the Texas sentencing scheme, which lacked a statutory or judicially created requirement of comparative proportionality review, the Court noted the "prompt judicial review

of the jury's decision in a court with statewide jurisdiction." 465 U.S. at 48-49 (quoting *Jurek v. Texas*, 428 U.S. at 276). The Court further noted that the Texas statute at issue effectively limited the sentencer's discretion by requiring the finding of one of five statutory aggravators to make a defendant eligible for a death sentence. *Id.* at 48 n.9. By narrowing its definition of capital murder, the Texas statute limited the death penalty to a "narrowly defined group of the most brutal crimes and aim[ed] at limiting its imposition to similar offenses under similar circumstances." *Id.* at 50 n.10 (quoting *Jurek*, 428 U.S. at 278-79).

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

For example, in *Johnson v. State*, 720 So. 2d 232, 238 (Fla. 1998), this Court invalidated a death sentence on proportionality grounds where the aggravating circumstances included a prior aggravated assault the defendant committed against his brother; his brother was not injured and testified the incident was a misunderstanding. The Court noted that the aggravating circumstance, "although properly found to be present, is not strong when the facts are considered." *Id.* Presumably, under *Lawrence*, Mr. Johnson's death sentence would be affirmed today despite the nature of the aggravating circumstance upon which it rested.

In a case with several parallels to Mr. Bevel's case, the Court vacated a sentence on proportionality grounds where the 19-year-old defendant had bludgeoned a victim to death and the State proved two aggravating circumstances (the motive of pecuniary gain and a contemporaneous attempted murder). *Hawk v. State*, 718 So. 2d 159, 163 (Fla. 1998). Although competent substantial evidence supported the aggravating circumstances, the Court found death was disproportionate in light of significant evidence that the defendant had impairment from a brain injury, was under the influence of alcohol and drugs, and had a history of poor impulse

control. *Id.* Again, under *Lawrence*, that sentence would likely be affirmed today.

A meaningful narrowing of the group of defendants who may face execution must involve more than a mechanical verification of whether the State proved one of 16 different aggravators. Without viewing the nature and proof of aggravating circumstances in an individual case within the context of the body of decisions in which death sentences have been upheld, there is no limit on the sentencer's discretion. This renders the Florida sentencing scheme unconstitutional.

V. The Court Erred in Granting the State's Motion in Limine and Precluding Any Argument to the Jury about the Proportionality of Mr. Bevel's Possible Sentence.

The court erred in granting the State's first motion in limine and in hampering the defense from arguing that Mr. Bevel's case was not among the small number where a death sentence is justified.

The State's motion relied in part on *Herring v. State*, 446 So. 2d 1049 (Fla. 1984), which held that proportionality was not a jury issue. *Herring* is no longer good law; it was based on a former version of Florida Statutes that allocated decision-making in capital cases differently from the current statute, and it was decided at a time when this Court still adhered to a mandate to review each sentence for proportionality. *See id.* at 1056 ("The use of sentences imposed on other defendants relates to the proportionality of the sentence and is an appropriate element to be considered by the trial judge in imposing sentence upon the defendant, but is not a matter for the jury.").

The motion also relied on *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), which receded from this Court's previous requirement

of comparative proportionality review. However, the defendant in *Lawrence* had waived a jury, *id.* at 548, and so that case did not involve what could or could not be argued to the jury. The holding in *Lawrence* was that, under the conformity clause and in light of U.S. Supreme Court precedent saying proportionality review is not constitutionally required, a judicially created requirement of proportionality review on appeal could not stand.

As discussed in Section IV above, the U.S. Supreme Court has never held that proportionality review is improper. It has simply held such review is not constitutionally required for a state statutory scheme to satisfy Eighth Amendment standards. *Pulley v. Harris*, 465 U.S. 37, 50 (1984). As Justice Stevens noted when explaining the denial of certiorari in a separate case:

> We stated in [*Pulley v. Harris*] that the Eighth Amendment does not require comparative proportionality review of every capital sentence. *Id.*, at 44–46; *see also McCleskey*, 481 U.S. at 306, ("[W]here the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required"). But that assertion was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them, *id.*, at 45; it was not meant to undermine our conclusion in *Gregg* and *Zant* that such review is an important component of the Georgia scheme.

Walker v. Georgia, 555 U.S. 979, 983–84 (2008).

Appellate review of Mr. Bevel's sentence was not at issue in the trial court. Interpreting Florida law in conformity with U.S. Supreme Court precedent, as the conformity clause of the state constitution requires, compels a conclusion that arguments based on the proportionality of a defendant's potential sentence are neither improper nor precluded.

Because the trial court erred in extending the reach of *Lawrence* beyond what that decision addressed or the federal constitution requires, Mr. Bevel's sentence violates his right to be free from cruel and unusual punishment under the Eighth Amendment and the Florida Constitution. U.S. Const., amend. VIII; Art. I, § 17, Fla. Const.

CONCLUSION

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

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Doris Meacham, Assistant Attorney General, Capital Appeals Division, on October 3, 2022. I certify that this brief complies with the font and word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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