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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALLEN WARD COX,

Appellant,

vs. SUPREME COURT CASE NO. SC22-1553

STATE OF FLORIDA,

Appellee.
_____________________/

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, FLORIDA

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STATEMENT OF THE CASE

Appellant, Allen Ward Cox was charged by indictment in this capital case with first-degree murder following an incident in December of 1998 at the Lake Correctional Institute ("LCI") which resulted in the death of a fellow inmate, Thomas Baker. (R 2012-13). At the conclusion of his first trial, Mr. Cox was convicted and sentenced to death. (R 2010). This Court affirmed his sentence on direct appeal[1] in 2002 and affirmed the denial of his subsequent post-conviction challenge[2] in 2007. In June of 2017, he was granted a new penalty phase pursuant to Hurst v. Florida, 577 U.S. 92 (2016). (R 627-635, 2011).

In April of 2022, the new penalty phase commenced, wherein the State sought to prove four aggravating circumstances: (1) the murder was "committed by a person previously convicted of a felony and under sentence of imprisonment" ("Imprisonment"); (2) the defendant was previously convicted of another violent felony ("Prior

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[1] See Cox v. State, 819 So.2d 705 (Fla.2002), cert. denied, 537 U.S. 1120, 123 S.Ct. 889, 154 L.Ed.2d 799 (2003).

[2] Cox v. State, 966 So. 2d 337 (Fla. 2007).

Violent Felony"); (3) the murder was especially heinous, atrocious, or cruel ("EHAC"); and (4) the murder was cold, calculated, and premeditated ("CCP"). (R 643). Of these, only EHAC and CCP were contested. (T 612, 1754).

The defense sought to prove a total of 80 mitigating circumstances, two of which were statutory: specifically, (1) "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" and (2) "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." (R 1842-1848, 2017-20).

At the conclusion of the 2022 penalty phase, the jury found that the State had proven only two of the four aggravators presented: specifically, the "Imprisonment" and "Prior Violent Felony" aggravators. (R 1832-34). The jury further found that the aggravating circumstances outweighed the mitigating circumstances and recommended a sentence of death. (R 1832-34). One or more jurors found that one or more mitigating circumstances were established by the greater weight of the evidence. (R 1833).

The following month, in June of 2022, Appellant waived his right to a Spencer hearing. (R 2011). The State and the Defense submitted sentencing memorandums shortly thereafter. (R 1893-1933, 1934-2007).

On October 24, 2022, the trial court sentenced Appellant to death, and contemporaneously issued a written sentencing order detailing the court's consideration and weighing of the aggravating and mitigating circumstances. (R 2010-54). In all, the court found that 57 mitigating circumstances had been established and were entitled to weight. While the relevant details underlying the mitigating factors are discussed in further detail below, the court specifically found that:

(i) Neither of the two statutory mitigating circumstances had been established;

(ii) Of the 78 non-statutory mitigating circumstances, 7 had not been established; and,

(iii) Of the 71 established non-statutory mitigating circumstances, 7 were "not mitigating under the facts of this case".[3]

This appeal follows.

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[3] (R 2034-35, 2037, 2044, 2046-47, 2048, 2053, 2061).

JURY INSTRUCTIONS

The jury instructions contained, in relevant part, language from the then-current standard jury instructions[4] which placed the burden of proving the existence of mitigating circumstances on the defense.

> **It is the defendant's burden to prove that one or more mitigating circumstances exist.** Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case.

(R 1842) (emphasis added).

OVERVIEW OF THE STATE'S CASE

The State's evidence consisted of three general components: (1) testimony from ten inmates and eight Lake Correctional Institute ("LCI") employees concerning their observations of Appellant before, during, and after the murder, (2) testimony from five victims of

[4] Fla. Std. Jury Instr. (Crim) 7.11 (2022).

Appellant's prior felony convictions concerning their observations in those cases, and (3) rebuttal testimony from (i) the state's only expert witness, Emily Lazarou, a psychiatrist, and (ii) two LCI employees concerning their observations of Appellant before and after the underlying offense.

THE TWO AGGRAVATING CIRCUMSTANCES

The two aggravating circumstances found by the jury – "under sentence of imprisonment" and "prior violent felony" – were not contested by the Defense below. In support of the "prior violent felony" aggravator, the State sought to introduce 10 prior felony convictions. The Defense stipulated that Appellant had been convicted of each of the offenses, and the convictions were entered into evidence. (T 612-13). They included:

> a. In May of 1980, at age 17, the **Armed Robbery of a** Convenience Food Mart in Marion County, Kentucky.
>
> b. In February of 1981, at age 18, the **Armed Robbery** of a Convenience Food Mart in Marion County, Kentucky;
>
> c. In July of 1981, at age 18, the **Escape By Use of Force and/ or Threat of Force** from the Taylor County, Kentucky Jail.
>
> d. In October of 1989, at age 27, the **kidnapping, sexual**

battery, attempted sexual battery, and aggravated battery of Bonnie Primeau in Broward County, Florida.

e. In November of 1989, at age 27, the **armed burglary of the dwelling** of Judith and Earl Turner and the aggravated battery of Earl Turner in Broward County, Florida.

f. In December of 1998, at age 36, the **Battery Upon Inmate** of Laurence Wood. [Count II of the instant case].

(R 2015-16) (emphasis added).

Over objection, the State also presented testimony detailing all but two of these offenses[5] from the respective victims; specifically, Mary Lou Hamilton & Michael Bishop (both employees of the Convenience Food Mart), Bonnie Primeau, & Judith and Earl Turner. In its eventual sentencing order, the lower court afforded the "imprisonment" aggravator "great weight", and the "prior violent felony" aggravator – the underlying facts of which the court described as "extremely heinous" – "very great weight." (R 2014-15).

OVERVIEW OF THE DEFENSE'S CASE

The Defense's case was presented through 12 total witnesses – 9 of which provided expert testimony – and consisted of four general

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[5] The escape in 1981, and the battery of Lawrence Wood [Count II of the instant case].

components: (1) testimony from Appellant's family members detailing his traumatic childhood; (2) expert testimony concerning the multiple traumatic brain injuries Appellant sustained as a child, their impact on his neurodevelopment, and the resulting impairments to Appellant's executive functioning and impulse control; (3) expert testimony concerning the impact that childhood abuse and neglect had on Appellant's neurodevelopment and mental health; and, (4) expert testimony from a toxicologist concerning the impact of Antidepressant Discontinuation Syndrome on Appellant's behavior, executive functioning, and impulse control at the time of the murder.

CHILDHOOD IN THE HOLLER

> "So this person, in my mind, it's hard to know anyone that has a worse, more toxic environment, that he can't possibly have developed the appropriate connections of the brain to make him be able to be a person that can react to stimuli normally. [. . .] I can't imagine a worse environment for an individual." (T 1067, 1078).

Dr. Robert Zori, Geneticist.

Allen Cox grew up in rural Kentucky. His family was very poor. (T 1172-73). They had a cabin in the holler with no running water. (T 1129). They went to the bathroom outdoors. (T 1174). He and his sisters often went hungry. (T 1172-74, 1187, 1189). They wore rags

and hand-me-downs and often went barefoot to school. (T 1172-73). They wore sandals in the winter. (T 1172-73).

His parents were very violent. (T 1139, 1157; R 2039-43). No one taught him right from wrong. (R 2047).[6] His father beat his mother. (T 1184; R 2040). His father beat him. (T 1184; R 2039). His mother beat him too; him and his siblings. (T 1132, 1181; R 2041). She did not need a reason.[7] She would make her children strip and whip them naked on the floor. (T 1182-1183). Allen was the oldest. She beat Allen worst of all. (T 1133-34, 1183; R 2040-41).[8]

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[6] "It is established by the greater weight of the evidence that Mr. Cox was not taught the concept of right from wrong; however, this is not mitigating under the facts of this case." (R 2047).

[7] "She never asked questions. She always punished us and it didn't matter if we were guilty or innocent or not. She made us take our clothes off me and my younger brother, and lay on the floor and she'd beat us with the belt while we were naked."
Kathy Null, Allen's younger sister. (T 1182).

[8] A. [. . .] This was not, this was not -- we never got little spankings out of love to correct something we were doing, no, we got beatings.
Q. These where beatings out of anger?
A. Yes.
[. . .]
Q. You said Allen got it a little bit worse?
A. Yes. He got it really bad.
(T 1134).

She abandoned him eventually. (T 1206). She left him with a threat, then drove away. (T 1206). "If he ever comes back, I'll kill him", she said. (T 1206; R 2048-49). He was only 10 years old. (T 1181; R 2048-49). He moved in with his father and stepmother after that. (T 1205-06). His father beat her too. (R 2045-46).

He suffered at least one traumatic brain injury growing up. (R 2027). He was hit in the head with a softball at age 10 and woke up on his aunt's couch some time later. (T 715-716).[9] He was knocked unconscious again in a motorcycle accident at age 14. (T 716, R 2027-28). And again in a logging accident at 16. (R 2027-28).

He tried to kill himself at 16 too. (T 1146, 1367). He swallowed arsenic and librium. (T 1368). He would try again at age 30, after being sentenced to life in prison. (R 2051). And again the next year, at 31. (T 2051). Suicidal ideation appears regularly throughout his DOC records. (T 1470).

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[9] Dr. Mark Rubino, a neurologist, testified this was "[c]learly a concussion." (T 716).

DOC RECORDS LEADING UP TO THE UNDERLYING OFFENSE

Following his suicide attempts and multiple diagnoses for major depressive disorder, he was placed on an antidepressant medication called "Sinequan" while in prison. (T 1470). According to DOC records, his suicidal ideation continued, as did the "high level of depression." (T 1469-1479). While both would worsen over the years, they appeared to be mitigated whenever Appellant was taking Sinequan. (T 1469-1479).

On December 4th, 1998 – 17 days before the murder – Appellant stopped taking his medication after complaining of side-effects. (T 1478). On December 18th – 3 days before the murder – he agreed to try a different antidepressant medication: Prozac. (T 1478-79). His judgment was reported to be "poor" and his insight "fair." (T 1479). His first dose of the new medication was on December 21st, 1998, the day of the murder underlying this case. (T 1479).

SUMMARY OF THE UNDERLYING OFFENSE

The lower court's sentencing order contains the following summary:

> On December 20, 1998, Mr. Cox discovered someone had broken into his footlocker and stolen approximately $500.

After this discovery, Mr. Cox walked out onto the balcony of his dorm and announced that he would give fifty dollars to anyone willing to identify the person who broke into the locker and stole the money. Mr. Cox indicated that when he discovered who had stolen from him, he would kill that person, and he did not care if he got another life sentence. Mr. Cox was informed that Thomas Baker was the individual that broke into the locker and stole the money.

During lunch period on December 21, 1998, Mr. Cox called Thomas Baker over to him, and then hit him with his fists, knocking him down. Throughout the attack, Mr. Baker attempted to break free from Mr. Cox while also denying stealing from him multiple times. At one point during the attack, Mr. Cox said, "This ain't good enough," and stabbed Mr. Baker with an icepick-shaped shank. Mr. Cox, after stabbing Baker, stood, and walked away stating, "It ain't over, I've got one more ... to get." Mr. Cox then walked behind the prison pump house and hid the weapon in a pipe. Mr. Cox left the pump house and proceeded toward his dorm.

While Mr. Cox was returning to his dorm, Mr. Baker fled the attack scene and ran to corrections officers in a nearby building. The officers present at the time testified that Mr. Baker had blood coming from his mouth, and that he was hysterically complaining that his lungs were filling with blood. When prison officials questioned Mr. Baker as to who attacked him, Baker said, "Big Al, Echo Dorm, quad three." Mr. Baker died before arriving at the hospital.

Dr. Barbara Wolf, Chief Medical Examiner for Districts 5 and 24, testified after reviewing the autopsy case file of Mr. Baker. Baker had a number of injuries, some minor skin injuries, and others of a more serious nature. Of the more serious injuries were three stab wounds: two fairly minor wounds on the legs, and one on the left side of Mr. Baker's back below the scapula. The wound below Mr. Baker's

> scapula was less than a quarter of an inch wide, and the 6.88-inch path of the wound entered between two ribs, traveling completely through the aorta, and into the lower portion of the left lung. Dr. Wolf testified that this injury would be consistent with Baker complaining of his lungs filling with blood.

(R 2012-2013).

IMPULSE CONTROL

The defense called three expert witnesses – a radiologist, a neurologist, and a neuropsychologist – who each testified that significant damage has affected areas of the defendant's brain which control impulsivity. (T 724-62, 857-58, 882-92, 1094-95, 1101).

> A. Well, where the red arrows are, this again is the frontal lobe. There are some impairments in there. **There's holes in his frontal lobe, which again leads to loss of function regarding impulsiveness, loss of judgment, loss of planning, ultra planning, judgment.**
>
> **The insula**, insula being more **prominent in emotional control and executive function,** sort of like the integrating part of the brain, **that's impaired.**
>
> Q. **So the parts of the brain that are not functioning properly on the PET scan are the parts of the brain that controls emotional regulation and impulse control; is that what I'm hearing?**
>
> A. **Yes.**

(T 760) (emphasis added).

Three more neuropsychologists[10] testified that their testing supports that conclusion. (T 980-84, 1025-26, 1224-29, 1268-70, 1274-75). One of those experts specified that the defendant "when he gets angry…can't calm himself down." (T 771-72).

> Q. The fact that he wasn't able to calm down from that and he wasn't able to process that and logically think about it and react like a normal human being would, is that a direct result of his brain abnormalities?
>
> A. **Yes, a loss of emotional regulation is something that you can see on the MRIs now**, which is documented in Dr. McMahon's neuropsych testing, even back in 2000, and that was present then. Even Mr. Stamp mentioned that he his emotions were -- he had mental problems, as he said. So those have been present for a long time. **So when he gets angry, he can't calm himself down and he certainly isn't looking at all the possibilities of what can happen from his actions.**
>
> Q. Inherently impulsive too?
>
> A. That's **inherently impulsive** as well.

(T 771-72) (emphasis added).

> Q. In regard to the abnormalities that you see and the emotional dysregulation that you see, based on the scans and based on the neuropsychological testing, **what happens when Mr. Cox is under a stressful situation and he gets upset, can he calm down like the rest of us?**

[10] Dr. Robert Ouaou, Dr. Henry Lee, and Dr. Elizabeth McMahon.

> **A. He has a more difficult time calming down.**
>
> Q. As opposed to a human being with a normal brain that doesn't have all these abnormalities?
>
> A. Right. A lot of people get angry, they're over it if they don't have anything keeping it going, will stay angry and I think **more executive function becomes impaired with planning become poor.**
>
> **Q. So it's not that he can't control himself, it's that he has a hard time regulating those emotions?**
>
> **A. Correct.**
>
> **Q. And that certainly affects the choices that he makes?**
>
> **A. It does.**

(T 857-58) (emphasis added).

A second neuropsychologist compared him to "a freight train that just started down the track and just kept picking up speed without the ability to brake," and a third agreed that "[h]e gets going on a track and that is where he continues…[h]e just keeps moving in the same direction." (T 984, 1270).

> Q. Okay. Trying to think in layman terms again, is he someone that's able to kind of cognize in a rational way and kind of, you know, tap at the handbrake when required, in terms of his decision making, does that make sense?

> A. So when I was -- it does. And I'm going to say no. Obviously, it depends on the situation. [. . .] But based on what I've read from those events, to me, the analogy would be, you know, **a freight train that just started down the track and just kept picking up speed without the ability to brake.**
>
> Q. Okay.
>
> A. And led to disastrous horrible consequences.

(T 984) (emphasis added).

> A. [. . .] The main problem is further back, but he shows a problem in the front also. And that is up here in the frontal lobes where our executive functioning is. It's mild. And **the main impact of that is simply that he's not dealing with an intact brain**. He's not dealing with a brain that is working at a hundred percent. He's dealing with a brain that is working somewhat less than that, particularly in those areas where he is asked to remember something or he's asked to shift set.
>
> In other words, to shift, to be flexible. And **it's probably the greatest impact on his every day thinking is that he's had trouble being flexible in his thinking. He gets going on a track and that is where he continues.** It's very difficult for him to stop, shift set, and go in another direction. He just keeps moving in the same direction.

(T 1269-70) (emphasis added).

> Q. [. . .] Do you believe Allen's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired when he committed the crime that we're here for?
>
> A. Yes, I think so.

> Q. Please explain.
>
> A. **He's not able to process** I'm going to get him and kill him and that's going to be bad and I'm going to go – he doesn't process that. He's -- **he can't control his emotions.** He doesn't plan well. **His process just does not work.**

(T 772) (emphasis added).

In its sentencing order, the court found that the crime was neither spontaneous nor impulsive. (R 2021). The court acknowledged that four defense experts agreed that impulse control deficits are present, but – relying on its own finding that the defendant's actions leading up to the murder showed he could control his behavior – nevertheless ruled that the non-statutory mitigating circumstance that Appellant "suffers from impulse control deficits" is not mitigating on the facts of this case. (R 2021, 2035-36).

More generally, after concluding that neither of the mental health-related statutory mitigating factors had been proved, the court found that the non-statutory mitigating factor of brain damage had been proved, but gave that proof "very little weight." (R 2028-31). The court also found that the defendant suffered at least one head injury,

and that his executive brain function is impaired. It assigned each of those non-statutory mitigators "some weight." (R 2027-28, 2060).

DEMENTIA

Dr. Mark Rubino testified for the Defense in his capacity as a neurologist: "a medical doctor [] who evaluates and treats people with neurological disease."[11] Dr. Rubino testified that his testing of Appellant established the presence of dementia, which he defined as "cognitive impairments that cause functional impairment." (T 737, 856).

> Q. And how about possible dementia?
>
> A. That's part of the cognitive disorder. He probably has -- **he has a dementia, because he has a severe impairment of his thinking, it's I don't know if it's progressive or static.**
>
> Q. And by progressive you mean Alzheimer's?
>
> A. Progressive would be Alzheimer's disease.
>
> Q. And by static you mean just from his brain injury?

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[11] (T 706). See also, *Neurologist*, Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/neurologist. Accessed 24 Sep. 2023 ("a physician skilled in the diagnosis and treatment of disease of the nervous system").

> A. Just from brain injury. Static just means it's not going anywhere, it's just he has loss of function and it's not going anywhere.

(T 768) (emphasis added).

> Q. And **is the neuropsychological testing consistent with dementia** as well?
>
> A. **Yes.** The difference between the 2000, 2004, and current neuropsych testing shows that he has gotten worse.

(T 856) (emphasis added).

While discussing the significance of Appellant's testing results – which he described as "quite remarkable" – Dr. Rubino noted that Appellant was "definitely in a range where he could *also* be suffering from early Alzheimer's disease." (T 737) (emphasis added). He again explained that "dementia can be *both* static *and* progressive", as "static" dementia refers to a "severe brain injury that causes cognitive impairment", while "progressive" dementia refers to conditions such as Alzheimer's disease. (T 737).

> Q. Okay. The results in the MoCA, is it consistent with any type of neurodegenerative disease?
>
> A. Well, 21 is quite remarkable, and because that puts us into a range where Parkinson's patients would not be allowed to say they could have surgery or not, that puts us in a dementia range. And dementia is a term for cognitive

> impairments that cause functional impairment. **But dementia can be both static *and* progressive**. Static would be a severe brain injury that causes cognitive impairment. And progressive, for example, would be Alzheimer's disease.
>
> Q. Okay.
>
> A. He's definitely in a range where **he could *also* be suffering from early Alzheimer's disease**.
>
> Q. But it could also be that the dementia could be a result of his head injuries from throughout his life?
>
> A. All the head injuries and everything that's happened to him since the head injuries.

(T 737) (emphasis added).

He concluded his testimony by reiterating that there was no doubt in his mind that the abnormalities seen in Appellant’s results – both in the brain imaging and in the psychological testing – were caused by traumatic brain injury.

> Q. All the abnormalities that you saw in all the studies, the 2010 MRI, 2019 MRI, 2019 NeuroQuant, and the abnormalities in the 2019 PET scan, could they have occurred or could those abnormalities exist without traumatic brain injury?
>
> A. In something called frontal temporal dementia you can see it, but he didn't have frontal temporal dementia. Behavior is even more messed up in people with FTD. So the only other thing that would cause focal atrophy of the

> frontal and temporal lobes, and over those areas are very consistent with traumatic brain injury.
>
> **Q. So is it your opinion today that the abnormalities that you have seen are from traumatic brain injury?**
>
> **A. Yes.**
>
> **Q. Is there any doubt in your mind about that?**
>
> **A. No.**

(T 856-57) (emphasis added).

In rebuttal to the Defense's neurologist, the State called Emily Lazarou – a psychiatrist – who has worked in the prison system, in a State hospital, and with outpatients found not guilty by reason of insanity. (T 1588). She explained that in those positions "basically we do medication management and psychotherapy…we also manage the staff that manages those patients." (T 1589). Dr. Lazarou testified that she did not consider the murder impulsive because it was "very systematized and planned out over the course of days." (T 1652, 1597-98). During closing arguments, the State argued to the jury that the defendant's conduct had been "the exact opposite of impulsive," in aid of its unsuccessful position that the murder was cold, calculated, and premeditated. (T 1700-01, 1839).

In its sentencing memorandum, the defense argued that the testimony supported findings that *both* static and progressive dementia are present. (R 1954-55, 1968). The court acknowledged that "Dr. Rubino opined that static dementia would be just from brain injuries [. . .] [and] that it is likely Mr. Cox's dementia symptoms are static and caused by head trauma." (R 2057-58). Nevertheless, the court ruled that the non-statutory mitigating factor of "early signs of dementia" had not been proved because "there is no evidence that Mr. Cox suffers from the early signs of *progressive* dementia." (R 2058) (emphasis added).

DISCONTINUATION SYNDROME

The defense also relied on testimony that the defendant, at the time of the crime, was experiencing "discontinuation syndrome" after abruptly terminating "fairly high" doses of a psychoactive medication.

It was undisputed that seventeen days before the murder the defendant took himself off Sinequan, an antidepressant he was taking at a dose of 200 milligrams a day. (T 769, 836, 1580-82). Dr. Skolly-Danziger – testifying as a defense expert in both toxicology and

pharmacology[12] – testified that 200 milligrams is a fairly high dose, and that the drug has a half-life of eighteen days. (T 1355-63). Dr. Skolly-Danziger and Dr. McMahon (one of the aforementioned defense neuropsychologists) both agreed that the drug would still have been in the defendant's system at the time of the murder. (T 1304, 1358-59).

As Dr. Skolly-Danziger explained:

> Q. Okay. So it sounds like, based on what you told us before, with the effects of Sinequan, **he would still be in a sort of withdrawal state by December 18th, since he stopped taking it on December 4th**?
>
> A. **Yes, because that, the half-life of that metabolite, the breakdown product, that nordoxepin, it's lowering. The body has to adjust, adjust to not having a serotonin**. So these are these discontinuation symptoms or withdrawal, so to speak, although it's not a true withdrawal, like an opioid withdrawal, but the body has to adjust to lower levels of serotonin. So there is this discontinuation syndrome that's seen with all antidepressants.
>
> Q. Actually, I think your next slide has some good information about that. There we go. **So you would say**

[12] MS. HAMILTON: Your Honor, I request for Dr. Skolly to offer opinion testimony in the field of toxicology and pharmacology.
MR. LEWIS: We have no objection, Judge.
THE COURT: She may do so.
(T 1338).

> **antidepressants typically would be six weeks or longer?**
>
> A. **Right. Patients who have been on antidepressants for a long period of time require a slow taper because of this discontinuation or withdrawal symptom**. If a drug is discontinued very rapidly, for the fact that the body has to adjust to the new normal.

(T 1359) (emphasis added).

The defense neurologist, Dr. Rubino, explained that the discontinuation of Sinequan without gradually weaning the patient off the drug – as occurred in Appellant's case – precipitates a withdrawal "that can last for weeks", wherein the patient experiences "even more intense anxiety" and agitation to such a degree that the patient becomes "like a powder keg." (T 769-70).

> Q. Okay. And what happens when an individual is on 200 milligrams of Sinequan and gets off of it, three weeks later, how does that affect them?
>
> A. Sinequan, the dose of Sinequan is fairly high and it takes a long time to come off of it. In fact, he should have actually been weaned down off of it, not discontinued, because it precipitates a withdrawal. Not like an opiate withdrawal, but withdrawal where you have even more intense anxiety, even more intense depression **that can last for weeks after it.**
>
> Q. Okay. **So even being off of it for almost three weeks or so, you're still feeling the affects of the withdrawal?**

A. **Yes.**

Q. And how does that affect your mood, how does that affect your behavior?

A. You could be more anxious, more agitated.

Q. Moody?

A. Moody. You can be –

Q. Grouchy?

A. Potentially like a powder keg.

(T 770) (emphasis added).

In rebuttal, the State elicited testimony from Dr. Lazarou – a psychiatrist – that, in her personal clinical experience, Sinequan is out of a patient's system within five days "max" after stopping the dose. (T 1633-36). In the State's sentencing memorandum, counsel relied on Dr. Lazarou's testimony about the effects of discontinuing Sinequan. (R 1906). The State also presented, as a fallback, counsel's own, personal view that even if the drug's half-life is eighteen days, as the defense toxicologist testified, any withdrawal would have dissipated "almost…or fully" after seventeen days. (R 1906).

The court found that the proof did not establish that Appellant was suffering from either withdrawal or discontinuation symptoms at the time of the crime. (R 2055-56). In support, the court noted three times that it was Appellant's own decision to stop taking Sinequan. (R 2019, 2055, 2056). It further relied on Dr. Lazarou's testimony that the drug is out of a user's system in five days, and noted its own fallback conclusion, similar to the prosecutor's, that even if the defense toxicologist's contrary testimony is correct, the drug would have been out of Appellant's system the day after the murder. (R 2055-56).

CLOSING ARGUMENTS

The State's closing arguments included, in relevant part, the following comments:

> MR. BUXMAN: May it please the Court, Counsel.
>
> THE COURT: Yes, sir.
>
> MR. BUXMAN: When Mr. Lewis began his opening statement last week, he did not start by saying good morning to you. And he didn't do that because it's never a good morning when the State has to stand in front of jurors and ask those jurors to recommend to this Judge to sentence a fellow citizen to death. Sometimes people are required to make very difficult choices, and though a choice may be hard, it's still the right choice.

> This decision that you're going to be asked to make should not be one based on sympathy or because you feel sorry for anyone, either the victim or the Defendant in this case. And it should not be based on your personal feelings about the death penalty. It should be based on the facts and the law in this case. That is what dictates justice.

(T 1673).

> The easiest decision in this case to make would be, let's just give him life and let's just go home. But ask yourself, is that justice based on the facts and circumstances of this case? Is that justice for Thomas Baker? Is that justice for a man who has intentionally hurt people over and over and over again throughout his life? Sometimes the right decision is not the easy one.

(T 1675).

SUMMARY OF ARGUMENT

Point one. The trial court failed to consider whether "static" dementia is present, despite the defense presenting, proving, and arguing the presence of that non-statutory mitigator.

Point two. The sentencing court found that two non-statutory mitigators – specifically, Appellant's (1) impaired impulse control and (2) antidepressant discontinuation syndrome – were not mitigating on the facts of this case. Both findings were unsupported by competent, substantial evidence, as both relied on opinion testimony which went beyond the witness's expertise and on opinions which were unsupported by foundational evidence.

Point three. The prosecutor's unobjected-to comments in closing argument tainted the jury's recommendation of death, and as such amounted to fundamental error, where the prosecutor undermined the jury's ultimate decision by suggesting that the State had already made the careful decision required, invoked the uniformly condemned argument that the case is about "justice" for the victim, and denigrated jurors who would consider a life sentence

as being motivated by a desire to simply make "the easiest decision" and "just go home."

Point four. The defense asked the court to remove from the penalty phase jury instructions any language that places on the defense the burden of proving mitigating circumstances. Appellant acknowledges that this Court has held that the defense bears such a burden. Appellant's position is that the caselaw adverse to him does not clearly reflect the intent of the Legislature, has doubtful antecedents, and, in this case, ran afoul of federal caselaw applying the federal Eighth Amendment. The error should be deemed structural.

Point five. Appellant seeks to exhaust the claim for federal review that the United States' Supreme Court decision in Atkins should be extended to prohibit the execution of persons with brain damage.

Point six. Appellant seeks to exhaust the claim for federal review that Florida's capital sentencing scheme is inadequate to protect against the arbitrary and capricious application of the death penalty.

Point seven. Appellant seeks to exhaust the claim for federal review that the death penalty now violates the Eighth Amendment in light of evolving standards of decency.

ARGUMENT

POINT ONE

THE TRIAL COURT FAILED TO CONSIDER WHETHER DEMENTIA IS PRESENT, ALTHOUGH THE DEFENSE PROVED AND ARGUED THE PRESENCE OF THAT NON-STATUTORY MITIGATING CIRCUMSTANCE.

Standard of review. Where a trial court in a capital case fails to evaluate each proposed non-statutory mitigating circumstance, this Court vacates the sentence and remands for issuance of a new sentencing order, provided the error is not shown to be harmless. Ault v. State, 53 So. 3rd 175, 186-87 (Fla. 2010).

Argument. Dr. Rubino, the neurologist called by the defense, testified that dementia is present in this case. The doctor distinguished progressive dementia, such as that caused by Alzheimer's disease, from "static" dementia caused by brain injury, and concluded that both were likely present. The defense argued that the testimony supported findings that both types of dementia are present.

> Q. And how about possible dementia?
>
> A. That's part of the cognitive disorder. He probably has -- **he has a dementia, because he has a severe**

> **impairment of his thinking, it's I don't know if it's progressive or static.**
>
> Q. And by progressive you mean Alzheimer's?
>
> A. Progressive would be Alzheimer's disease.
>
> Q. And by static you mean just from his brain injury?
>
> A. Just from brain injury. Static just means it's not going anywhere, it's just he has loss of function and it's not going anywhere.

(T 768) (emphasis added).

> Q. Okay. The results in the MoCA, is it consistent with any type of neurodegenerative disease?
>
> A. Well, **21 is quite remarkable**, and because that puts us into a range where Parkinson's patients would not be allowed to say they could have surgery or not, **that puts us in a dementia range**. And **dementia is a term for cognitive impairments that cause functional impairment**. But **dementia can be both static *and* progressive**. Static would be a severe brain injury that causes cognitive impairment. And progressive, for example, would be Alzheimer's disease.
>
> Q. Okay.
>
> A. He's definitely in a range where **he could *also* be suffering from early Alzheimer's disease**.
>
> Q. But it could also be that the dementia could be a result of his head injuries from throughout his life?
>
> A. All the head injuries and everything that's happened to him since the head injuries.

(T 737) (emphasis added).

> Q. And whether it is progressive dementia or static dementia, in other words if it's going to get worse and worse or if it's going to stay exactly the same, that dementia, as a neurologist, where do you believe that dementia that he has came from?
>
> A. Well, the traumatic brain injury caused -- there's lots of, lots of factors here. He has severe depression, head injuries, alcohol abuse, so those are all risk factors for Alzheimer's disease. So he could have really Alzheimer's disease. But with all the concussions he had, he also could have CTE, which is kind of more of an insidious thing where you have what's called chronic traumatic encephalopathy. Only time will tell what happens, I'm not a soothsayer, but he seems -- I expect him to get worse over the next through years.
>
> **Q. And is the neuropsychological testing consistent with dementia as well?**
>
> **A. Yes. The difference between the 2000, 2004, and current neuropsych testing shows that he has gotten worse.**

(T 855-56) (emphasis added).

Dr. Rubino concluded his testimony by reiterating that there was no doubt in his mind that the abnormalities seen in Appellant's results – both in the brain imaging and in the psychological testing – were caused by traumatic brain injury.

> Q. All the abnormalities that you saw in all the studies, the 2010 MRI, 2019 MRI, 2019 NeuroQuant, and the abnormalities in the 2019 PET scan, could they have occurred or could those abnormalities exist without traumatic brain injury?
>
> A. In something called frontal temporal dementia you can see it, but he didn't have frontal temporal dementia. Behavior is even more messed up in people with FTD. So the only other thing that would cause focal atrophy of the frontal and temporal lobes, and over those areas are very consistent with traumatic brain injury.
>
> **Q. So is it your opinion today that the abnormalities that you have seen are from traumatic brain injury?**
>
> **A. Yes.**
>
> **Q. Is there any doubt in your mind about that?**
>
> **A. No.**

(T 856-57) (emphasis added).

Despite this testimony, the court ruled that the non-statutory mitigating factor of "early signs of dementia" had not been proved. From the Court's sentencing order:

> Dr. Rubino opined that Mr. Cox has dementia. Dr. Rubino testified that he does not know if the dementia is progressive or static. Dr. Rubino opined that static dementia would be just from brain injuries. Dr. Rubino also opined that it is likely Mr. Cox's dementia symptoms are static and caused by head trauma. Dr. Ouaou opined that Mr. Cox's testing results were consistent with a

> decline in neurocognitive abilities. However, there is no evidence that Mr. Cox suffers from early signs of progressive dementia. It is not established by the greater weight of the evidence that Mr. Cox suffers from the early signs of dementia.

(R 2057-58).

In capital cases, the trial courts must expressly evaluate each statutory and non-statutory mitigating circumstance proposed by the defendant. Ault v. State, *supra*, 53 So. 3rd 175, 186-87 (Fla. 2010). Where the court fails to detail its findings, this Court has vacated the death sentence appealed from and remanded for issuance of a new sentencing order, provided the error is not harmless on the face of the record. Id. at 187.

The federal courts also require further proceedings where a trial court fails to consider relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982). In Eddings the Supreme Court noted that Oklahoma's death penalty statute permits evidence to be permitted as to any mitigating circumstance, and held that "Lockett [v. Ohio, 438 U.S. 586 (1978)] requires the sentencer to listen." 455 U.S. 104 at n.10. Eddings and Lockett are based in the federal Eighth Amendment, which in all death penalty cases requires

consideration of the character of the offender as well as the circumstances of the offense. 455 U.S. 104 at 112.

On the record of this case, this Court should not determine that the error urged on this point was harmless. “Psychiatric mitigating evidence not only can act in mitigation, it can also significantly weaken the aggravating factors.” Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977). Such testimony “has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior.” Middleton v. Dugger, 849 F. 2d 491 (11th Cir. 1988). The disregarded evidence of static dementia stemming from an old injury might reasonably be viewed as ameliorating the weight of both aggravating factors found in this case (that the defendant had committed prior violent felonies and was still under sentence of imprisonment for one of them). This Court should accordingly vacate the death sentence appealed from, and remand for consideration of the evidence showing static dementia is present. Ault, *supra*; Eddings.

POINT TWO

THE SENTENCING ORDER CONTAINS FINDINGS WHICH ARE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE. THOSE FINDINGS SHOULD BE STRUCK, AND THE CASE REMANDED FOR REWEIGHING OF THE EVIDENCE.

Standard of review. Whether a mitigating circumstance has been established is a question of fact subject to the competent, substantial evidence test. Snelgrove v. State, 107 So. 3rd 242, 258 (Fla. 2013).

A finding that a circumstance is not mitigating *on the facts of the case before the court* is also reviewed for whether it is supported by competent, substantial evidence. Cave v. State, 727 So. 2d 227, 231 (Fla. 1998).

Argument. The defense argued, both to the court and to the jury, that moral blameworthiness is diminished here by evidence of brain damage and its effects. As noted, the defense called nine expert witnesses: two of them brought perspective from the social-science realm, and a toxicologist, two medical doctors, and four neuropsychologists all addressed brain function. The toxicologist testified that at the time of the crime the defendant was experiencing

"discontinuation syndrome" after terminating high doses of an antidepressant.

IMPULSE CONTROL

The State called numerous inmates who witnessed Appellant's behavior before and during the murder. Through those witnesses, it was established that Appellant was angered by a theft, that he publicly threatened the life of anyone responsible, and that at lunchtime the next day, in the presence of witnesses, he carried out his threats to cause a violent death. The trial court ultimately found, based on expert testimony, that the defense proved Mr. Cox has limited ability to control his impulses. However, it concluded that deficit is not mitigating on the facts of this case, because the defendant's actions leading up to the murder show that on this occasion, he successfully controlled his conduct. That conclusion is not supported by substantial evidence in the record.

The court specifically found that the crime was "not spontaneous or impulsive." The defense experts' testimony, fairly read, was that although the crime was not *spontaneous*, it reflected a lack of executive control which they believe is directly supported by

evidence of brain injury. Three defense experts clearly explained that the deficit in executive function they perceive expresses itself in diminished ability to control anger *despite* the passage of time.

> A. Well, where the red arrows are, this again is the frontal lobe. There are some impairments in there. **There's holes in his frontal lobe, which again leads to loss of function regarding impulsiveness, loss of judgment, loss of planning, ultra planning, judgment.**
>
> **The insula**, insula being more **prominent in emotional control and executive function,** sort of like the integrating part of the brain, **that's impaired.**
>
> Q. **So the parts of the brain that are not functioning properly on the PET scan are the parts of the brain that controls emotional regulation and impulse control; is that what I'm hearing?**
>
> A. **Yes.**

(T 760) (emphasis added).

> Q. In regard to the abnormalities that you see and the emotional dysregulation that you see, based on the scans and based on the neuropsychological testing, **what happens when Mr. Cox is under a stressful situation and he gets upset, can he calm down like the rest of us?**
>
> **A. He has a more difficult time calming down.**
>
> Q. As opposed to a human being with a normal brain that doesn't have all these abnormalities?

> A. Right. A lot of people get angry, they're over it if they don't have anything keeping it going, will stay angry and I think **more executive function becomes impaired with planning become poor.**
>
> **Q. So it's not that he can't control himself, it's that he has a hard time regulating those emotions?**
>
> **A. Correct.**
>
> **Q. And that certainly affects the choices that he makes?**
>
> **A. It does.**

(T 857-58) (emphasis added).

> A. [. . .] The main problem is further back, but he shows a problem in the front also. And that is up here in the frontal lobes where our executive functioning is. It's mild. And **the main impact of that is simply that he's not dealing with an intact brain**. He's not dealing with a brain that is working at a hundred percent. He's dealing with a brain that is working somewhat less than that, particularly in those areas where he is asked to remember something or he's asked to shift set.
>
> In other words, to shift, to be flexible. And **it's probably the greatest impact on his every day thinking is that he's had trouble being flexible in his thinking. He gets going on a track and that is where he continues.** It's very difficult for him to stop, shift set, and go in another direction. He just keeps moving in the same direction.

(T 1269-70) (emphasis added).

Dr. Lazarou's contrary testimony consisted of assertions that the murder was "systematized" and that it was "planned out over the course of days." Both observations are exaggerations. One day elapsed between the triggering theft and the resulting revenge killing, and the elaborate scheme attributed to Mr. Cox consisted of his getting a shiv from another inmate, hiding it in his pocket, and stabbing his chosen victim with it in broad daylight and in the presence of numerous witnesses.

"It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value." Arkin Construction Co. v. Simpkins, 99 So. 2d 557, 561 (Fla. 1957). In a case where "there were simply no foundation facts" to support an expert opinion, the Third DCA relied on Arkin to hold "there is no reason to consider that testimony." Iden v. Kasden, 609 So. 2d 54, 57 (Fla. 3rd DCA 1992) (remanding for entry of directed verdict in fraud case).

More recently, the Third DCA declined to place any value on an expert's testimony where it was "not only well beyond the witness's supposed expertise but totally conclusory in nature and unsupported

by any discernible, factually-based chain of underlying reasoning." *See* Mount Sinai Medical Center of Greater Miami, Inc., v. Gonzalez, 98 So. 3rd 1198, 1202-03 (Fla. 3rd DCA 2012) (remanding for entry of directed verdict in wrongful death case).

Applying the quoted standards, Dr. Lazarou's expressed views that the murder was "systematized" and was "planned out over the course of days" are unsupported by foundational evidence. In the absence of such a foundation, the basis for her conclusion "cannot be deduced or inferred from the conclusion itself. The opinion of the expert cannot constitute proof of the existence of the facts necessary to the support of the opinion." Arkin, 99 So. 2d at 561.

Further, the quoted observations require no psychiatric training. Where, as here, opinion testimony goes beyond the witness's expertise, that testimony does not amount to competent, substantial evidence. Farm Stores, Inc. v. Fletcher, 621 So. 2d 706, 709 (Fla. 1st DCA 1993.)

Since Dr. Lazarou's contributions regarding impulse control were neither supported by evidence nor within the scope of her expertise, the defense experts' testimony on the subject was

effectively unrebutted. While in capital cases trial judges enjoy broad discretion in considering unrebutted expert testimony, a rational basis for rejecting it must appear of record. Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006). The record of this case does not contain competent, substantial evidence to support the trial court's rejection of the defense experts' uniform view that the incident which gave rise to the murder charge reflects significantly diminished impulse control.

ANTIDEPRESSANT DISCONTINUATION SYNDROME

As noted, it was undisputed that seventeen days before the murder the defendant abruptly took himself off a "fairly high" dose of Sinequan. Two defense experts, a toxicologist and a neuropsychologist, testified that the half-life of the drug is eighteen days. The defense's neurologist added that discontinuing Sinequan without gradually weaning the patient off the drug causes intense anxiety and agitation, with potential for reaction "like a powder keg."

> **Q. Okay. And what happens when an individual is on 200 milligrams of Sinequan and gets off of it, three weeks later, how does that affect them?**
>
> **A. Sinequan, the dose of Sinequan is fairly high and it takes a long time to come off of it. In fact, he should**

> **have actually been weaned down off of it, not discontinued, because it precipitates a withdrawal. Not like an opiate withdrawal, but withdrawal where you have even more intense anxiety, even more intense depression that can last for weeks after it.**
>
> **Q. Okay. So even being off of it for almost three weeks or so, you're still feeling the affects of the withdrawal?**
>
> **A. Yes.**
>
> **Q. And how does that affect your mood, how does that affect your behavior?**
>
> **A. You could be more anxious, more agitated.**
>
> Q. Moody?
>
> A. Moody. You can be –
>
> Q. Grouchy?
>
> **A. Potentially like a powder keg.**

(T 770) (emphasis added).

Dr. Lazarou countered that based on her clinical experience, patients who discontinue Sinequan have it out of their system within five days "max," and the drug would not impact them clinically after that time. Counsel for the State relied on Dr. Lazarou's testimony and presented as a fallback his own view that even if a drug's half-life is eighteen days, any withdrawal symptoms would have dissipated

"almost…or fully" after seventeen days. (R 1906). The court found that the defense did not establish as a non-statutory mitigating circumstance that withdrawal or discontinuation symptoms were present, expressly relying both on Dr. Lazarou's testimony and on the State's fallback reasoning.

A finding that either adopts or rejects a proposed mitigating circumstance must be supported by competent, substantial evidence. Snelgrove, *supra.* The half-life of a substance is a known scientific fact, testified to in this case by a toxicologist who is also a pharmacist. Education and experience in those two subject-matter areas confers the expertise needed to give relevant testimony "on the effect of chemicals on the human body." White v. Esmark Apparel, Inc., 44 F. 3rd 1005, n.6 and accompanying text (5th Cir. 1995).

The court rejected the defense witness's expertise, relying instead on Dr. Lazarou's view, which – given the lack of foundation laid for her testimony – may well have been based on nothing more than informally sizing up her patients. As noted, opinion testimony that goes beyond the witness's expertise does not amount to

competent, substantial evidence. Farm Stores, Inc. v. Fletcher, 621 So. 2d 706, 709 (Fla. 1st DCA 1993.)

The court relied, in the alternative, on the prosecutor's confident assertion that antidepressant discontinuation syndrome and withdrawal from a drug are over and done with, provided the substance in question is almost out of the body. This assertion is not supported by *any* record testimony. The Fifth DCA has characterized such argument as "a figment of the prosecutor's imagination or mis-memory." Crew v. State, 146 So. 3rd 101, 109 (Fla. 5th DCA 2014). The ruling rejecting the non-statutory mitigating circumstance at issue is not supported by competent, substantial evidence.

THE ERRORS WERE NOT HARMLESS

The State may rely on the trial court's findings that the defense proved the presence of at least one head injury early in the defendant's life, proved the presence of brain damage, and proved that the defendant's executive brain function is impaired. The court gave brain damage "very little weight," in light of its conclusion that the experts could be looking solely at atrophy induced by age or by drug abuse. (R 2030-31). Without elaborating, the judge assigned

"some weight" to proof of a head injury, and to proof of impaired executive function. (R 2028, 2060)

Here, as in Williams v. State, 37 So. 3rd 187 (Fla. 2010), findings in the death-sentencing order are inconsistent. In Williams, the trial court found as non-statutory mitigation the facts that the defendant was chemically dependent and was on a cocaine binge at the time he committed a murder. However, the court rejected unrebutted expert testimony when it rejected the statutory mitigator that the capacity to conform the defendant's conduct to the requirements of law was impaired. Id. at 204-05. This Court ultimately reversed Williams's sentence as disproportionate, after finding error in disregarding the unrebutted expert testimony without clearing up the apparent inconsistencies.

Here, the court found not only brain damage and impaired executive function present, but also emotional dysregulation. (R 2031). Again without elaboration, the court assigned that non-statutory mitigating circumstance "little weight." (R 2031). In rejecting the mental health-related statutory mitigating factors, the court found that at the time of the incident the defendant was "in

complete control of his normal faculties." (R 2020). The court further found that the proof "clearly and unambiguously demonstrate[s] that he…had no issues conforming his conduct to the requirements of law." (R 2021).

The court's specific findings are difficult to reconcile with its general view that the defendant is fully culpable. For that reason, this Court should not hold that the sentencing order on its face creates confidence that the errors set out on this point did not prejudice the defense.

POINT THREE

THE CUMULATIVE EFFECT OF THE PROSECUTOR'S IMPROPER COMMENTS DURING PENALTY PHASE CLOSING ARGUMENTS WAS SO PREJUDICIAL AS TO TAINT THE JURY'S RECOMMENDED SENTENCE

Standard of review. A failure to object to improper prosecutorial comment will generally preclude review, unless the comments were so prejudicial as to constitute fundamental error. Caraballo v. State, 762 So. 2d 542, 547 (Fla. 5th DCA 2000). To constitute fundamental error, improper comments made in the closing arguments of a penalty phase must be so prejudicial as to taint the jury's recommended sentence. Thomas v. State, 748 So. 2d 970 (Fla. 1999).

Argument. Courts have long held that "[a] criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence." Brinson v. State, 153 So. 3d 972, 980-981 (Fla 5th DCA 2015) (quoting Ruiz v. State, 743 So.2d 1, (Fla. 1999)). "[I]t is error for a prosecutor to make

statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt," Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998).

The prosecutor's closing argument began with the following:

> MR. BUXMAN: When Mr. Lewis[13] began his opening statement last week, he did not start by saying good morning to you. **And he didn't do that because it's never a good morning when the State has to** stand in front of jurors and **ask those jurors** to recommend to this Judge **to sentence a fellow citizen to death. Sometimes people are required to make very difficult choices, and though a choice may be hard, it's still the right choice.**

(T 1673) (emphasis added).

This argument improperly implied to the jury that this particular case was suited for the death penalty, or the State of Florida would not be seeking it, and that in his own personal review of the case the prosecutor had found the aggravators outweighed the mitigators. This was improper. The prosecutor may not undermine the jury's discretion in determining the proper punishment by implying he, or another authority, has already made the careful

[13] Assistant State Attorney Robert Lewis. (T 2).

decision required. Pait v. State, 112 So.2d 380, 384 (Fla. 1959); Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985) (en banc), reversed on other rounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986).

> The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

Cardona v. State, 185 So. 3d 514, 520 (Fla. 2016) citing Ruiz v. State, 743 So. 3d 1, 4 (Fla. 1999) (quoting Hall v. United States, 419 F.2d 582, 583–84 (5th Cir.1969)).

Shortly after the comment above, the prosecutor returned to a similar refrain:

> **The easiest decision in this case to make would be, let's just give him life and let's just go home.** But ask yourself, is that justice based on the facts and circumstances of this case? **Is that justice for Thomas Baker?** Is that justice for a man who has intentionally hurt people over and over and over again throughout his life? **Sometimes the right decision is not the easy one.**

(T 1674) (emphasis added).

These comments were improper for three reasons. First, "[t]he argument that the case is about 'justice' for the victim or the victim's family has been uniformly condemned" and "has been considered improper under clearly established Florida law for over three decades." Cardona v. State, 185 So. 3d 514, 523 (Fla. 2016) citing Davis v. State, 136 So.3d 1169, 1197 (Fla.2014) (determining the argument that the victim's siblings would want to know what justice was imposed for the victim's murder was improper); Dorsey v. State, 942 So.2d 983, 986 (Fla. 5th DCA 2006) ("demanding justice for the victim" was improper); Shaara v. State, 581 So.2d 1339, 1341 (Fla. 1st DCA 1991) (determining that "the prosecutor's comment that the victim was asking the jury for justice" was improper); Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983) (criticizing the prosecutor's argument, which included: "All I'm going to ask you for is justice. I ask you for justice both on behalf of myself and the people of the State of Florida, also on behalf of [victim's] wife and children.").

Second, it is improper to poison the well of deliberation by suggesting that any juror who would vote for life is motivated by a desire to make "the eas[y] decision" and to "just go home." See United

States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (error to exhort jury to "do its job"; that kind of pressure has no place in administration of criminal justice); United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) ("There should be no suggestion that jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality").

Third, these errors were compounded by the prosecutor's invocation of the theme presented in the first error discussed. The prosecutor's theme of "sometimes the right decision is not the easy one" – which the prosecutor went on to repeat at the end of his closing argument[14] – improperly invited the jurors to compare their decision to vote for death with the prosecutor's personal decision to seek the death penalty.

Fundamental error. Since the comments at issue were not objected to, they must amount to fundamental error to require relief. As noted above, improper comments made in the closing arguments of a penalty phase must be so prejudicial as to taint the jury's

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[14] (T 1743).

recommended sentence. Thomas v. State, 748 So. 2d 970 (Fla. 1999). Appellant respectfully submits these comments meet that test.

The record supports the conclusion that the jurors' ultimate decision was not easily reached. Their rejection of both CCP and EHAC indicates significant weight was given to the extensive mitigation presented, specifically that which evidenced Appellant's significant brain damage and the resulting impairments to his executive functioning and impulse control at the time of the murder. Against this, the jurors were to weigh two overlapping aggravators – Appellant was "under sentence of imprisonment" because of his convictions for a "prior violent felony" – neither of which related to the murder.

In this difficult circumstance, the jury's ultimate decision was undermined by the prosecutor's suggestion that the State had already made the careful decision required, by the "uniformly condemned" argument that "the case is about 'justice' for the victim"[15], and by the denigration of jurors who would consider a life sentence as wanting to make "the easiest decision" and "just go

[15] Cardona, *supra*.

home." For these reasons the jury's recommendation of death was tainted, and this Court should reverse.

POINT FOUR

PLACING A BURDEN ON THE DEFENSE TO SHOW MITIGATING CIRCUMSTANCES IS ERROR, AS THE LEGISLATURE HAS ALLOCATED NO SUCH BURDEN, AND THE BURDEN UNDERCUTS, AND IS NOT LOGICALLY CONSISTENT WITH, DEATH PENALTY JURISPRUDENCE

Standard of review. Whether a standard jury instruction is accurate comprises a pure question of law subject to *de novo* review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

Argument. The penalty-phase jury instructions in this case contained language that placed the burden of proving mitigating circumstances on the defense. Appellant acknowledges that this Court has held that the defense bears such a burden, Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), *receded from on other grounds in* Trease v. State, 768 So. 2d 1050 (Fla. 2000), and that no objection to this language was raised below.

Appellant's position is that Section 921.141 of the Florida Statutes is, and always has been, silent as to a burden of proof relevant to mitigation[16], and that Campbell does not clearly reflect

[16] *Cf.* Section 921.141(2), Fla. Stat. (2022) with Ch. 95-159, §1, Laws of Florida, Ch. 79-353, §1, Laws of Florida, and Ch. 72-72, §1, Laws of Florida.

the intent of the Legislature, has doubtful antecedents, and in this case runs afoul of caselaw applying the federal Eighth Amendment.

As this Court has clarified, Florida's capital sentencing process begins with a finding that the defendant is eligible for the death penalty, *i.e.*, a unanimous finding that a statutory aggravating factor has been proved beyond a reasonable doubt. State v. Poole, 297 So. 3rd 487, 501 (Fla. 2020), *citing* Tuilaepa v. California, 512 U.S. 967 (1994). If that "eligibility phase" results in a finding favorable to the State, the case enters the "selection phase," where the jury is tasked with determining the appropriate penalty. Id.

Section 921.141 of the Florida Statutes is, and always has been, silent as to a burden of proof relevant to mitigation[17], and the Supreme Court has expressed doubt

> whether it is even possible to apply a standard of proof to the…selection phase of a capital-sentencing proceeding. It is possible to do so for the…eligibility phase, because that is a purely factual determination. The facts justifying death…either did or did not exist – and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call).

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[17] *Cf.* Section 921.141(2), Fla. Stat. (2022) with Ch. 95-159, §1, Laws of Florida, Ch. 79-353, §1, Laws of Florida, and Ch. 72-72, §1, Laws of Florida.

Kansas v. Carr, 577 U.S. 108, 119 (2016) (punctuation omitted).

This Court has echoed that doubt. *See* Poole at 503, quoting Carr for the further thought that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy."

Florida's Legislature characterizes the jury's duties during the selection phase as "a weighing." §921.141(2)(b), Fla. Stat. That focus on weighing, rather than findings, suggests that the Legislature agrees with the view set out in Kansas v. Carr, and has at all times intentionally *not* prescribed a burden of proof for the selection phase.

Importantly, no express allocation of a burden of proof on mitigation was present in Florida's Standard Jury Instructions until 2009. *See* In re Standard Jury Instructions in Criminal Cases, 22 So. 3rd 17, 21 (Fla. 2009). In authorizing the new language which allocated the burden to the defense, this Court relied on cases which rely on Campbell v. State, *supra. See* id., citing *e.g.* Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006).

At the time of Appellant's penalty phase, the standard jury instructions, and those eventually given in this case, read:

> it is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence.

Fla. Std. Jury Instr. (Crim.) 7.11. (R 1838).

In Campbell v. State, this Court for the first time specified that mitigating circumstances must "ha[ve] been reasonably established by the greater weight of the evidence." 571 So. 2d 415, 419 (Fla. 1990). For that principle this Court cited Brown v. Wainwright, 392 So. 2d 1317, 1331 (Fla. 1981). Campbell at n.5. What this Court said in Brown on the subject is that, as the reviewing court in capital cases, "[o]ur only concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances." 392 So. 2d at 1331.

Brown, of course, predates Apprendi v. New Jersey, 530 U.S. 466 (2000), which has led to the understanding that the federal Sixth Amendment by and large governs aggravating factors, while the

federal Eighth Amendment controls the treatment of mitigation. *See* Poole, *supra*, 297 So. 3rd at 500.

Mitigating circumstances can arise from the defendant's history, but also from the circumstances of the offense. *E.g.,* Bright v. State, 299 So. 3rd 985, 996 (Fla. 2020); Fla. Std. Jury Instr. (Crim.) 7.11. Historical information is naturally within the knowledge of the defense, but the circumstances of the offense are proved up largely by the State. This practical consideration, as well as the perception that "a weighing" of mitigation is in general a bad fit with burdens and standards of proof, may have motivated the Florida Legislature to deliberately forego the opportunity to allocate to the defense any burden regarding mitigation.

Constitutional constraints apply here as well. Juries in capital cases may not be precluded from considering, and giving effect to, relevant mitigating circumstances. Skipper v. South Carolina, 476 U.S. 1, 4 (1986). As noted, Florida's current burden of proof regarding mitigation begins with "it is the defendant's burden to prove that one or more mitigating circumstances exist." Particularly in an emotional case, jurors may well be disinclined to find *any* proof brought by the

defense mitigating; a juror so disinclined may conclude from the quoted admonition that the defense has *ipso facto* failed to meet its burden and that a vote for death necessarily follows.

Similarly, if mitigation relied on in closing was introduced by the State as part of the circumstances of the charged offenses, the same result may ensue. Where a jury instruction enhances the risk of an outcome adverse to the defendant in a capital case, the Eighth Amendment prohibits giving that instruction. Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980).

Appellant's view, for the foregoing reasons, is that it is error to read the instruction at issue, and that such error should be deemed structural. *See generally* Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993) (misdescription of the burden of proof vitiates the jury's findings). Accordingly, Appellant respectfully requests this Court remand for a new penalty phase.

POINT FIVE

THE EXECUTION OF CERTAIN BRAIN DAMAGED OFFENDERS VIOLATES THE EIGHTH AMENDMENT

Standard of Review. "Constitutional challenges to statutes are pure questions of law, subject to de novo review." Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016).

Argument. In Gregg v. Georgia, 428 U.S. 153 (1976), "the Court firmly embraced the holdings and dicta" from prior cases[18] "to the effect that the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

"Under Gregg, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

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[18] Including Furman v. Georgia, 408 U.S. 238 (1972); and Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).

In Atkins v. Virginia, 536 U.S. 304 (2002), the U.S. Supreme Court held the Eighth and Fourteenth Amendments prohibit the death penalty for persons who had intellectual disabilities at the time of the offense. Applying Gregg, the Court found that the penological purposes served by the death penalty – specifically, "retribution and deterrence of capital crimes by prospective offenders," Gregg v. Georgia, 428 U.S. 153 (1976) – were not measurably furthered by the execution of these individuals. Id., 317-321.

"With respect to retribution – the interest in seeing that the offender gets his 'just deserts' – the severity of the appropriate punishment necessarily depends on the culpability of the offender." Atkins, at 319, and "[w]ith respect to deterrence – the interest in preventing capital crimes by prospective offenders – it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,' " Atkins, at 319 quoting Enmund v. Florida, 458 U.S. 782, 799 (1982).

As the Court explained in Atkins, neither of these justifications applied to the intellectually disabled:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of

> the punishment will inhibit criminal actors from carrying out murderous conduct. **Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability** to understand and process information, to learn from experience, to engage in logical reasoning, or **to control impulses—that also make it less likely that they can** process the information of the possibility of execution as a penalty and, as a result, **control their conduct based upon that information.**

Atkins, at 320 (emphasis added).

In Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court applied the same rationale to prohibit the execution of persons who were under 18 at the time of their capital offense. As in Atkins, the rationale underlying Roper was that penological justifications for the death penalty are also inapplicable to juveniles, who are inherently less morally culpable and less likely to be deterred due to their youth, as those in Atkins were due to their condition, and, therefore, their execution is prohibited by the Eighth Amendment.

Similarly, individuals with brain damage – particularly, as the evidence in this case demonstrates, when that brain damage occurs during childhood – are often significantly inhibited in their ability to engage in logical thought, to understand and process information, and to control their impulses. Such a condition renders them less

likely to be deterred, and less morally culpable. As the Supreme Court noted in Atkins, and reiterated in Roper, " '[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution.' " Roper, at 536, quoting Atkins, at 319. Those impaired by brain damage are no different.

"Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " Roper, 543 U.S. at 568 quoting Atkins, at 319. See also, Hall v. Florida, 572 U.S. 701, 709 (2014) ("This is not to say that under current law persons with intellectual disability who 'meet the law's requirement for criminal responsibility' may not be tried and punished. (Citation omitted) They may not, however, receive the law's most severe sentence.").

Appellant respectfully submits that, just as with the intellectually disabled, as in Atkins, and just as with juveniles, as in Roper, the imposition of the death penalty on brain damaged

offenders makes “no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering”, Coker v. Georgia, 433 U.S. 584, 591-92 (1977), and, as such, sentencing these individuals to death violates the Eighth Amendment's prohibition of cruel and unusual punishment.

POINT SIX

FLORIDA'S SCHEME RISKS THE ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY AND, THEREFORE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Standard of review. Whether a statute is constitutional is a pure question of law, reviewed de novo. See, e.g., Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016).

Argument. Where discretion is afforded to a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion). Since reinstating the death penalty in Gregg v. Georgia, the U.S. Supreme Court has barred "sentencing procedures that create [] a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner."[19]

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[19] 428 U.S.153, 188 (1976) (plurality opinion); see also Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (recognizing the heightened

From Gregg & Proffitt to Pulley. In Gregg, "[t]he approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983) (emphasis added).

In Proffit v. Florida, 428 U.S. 242 (1976), the Supreme Court approved Florida's post-Furman capital sentencing scheme, which this Court had approved three years prior in State v. Dixon, 283 So. 2d 1 (Fla. 2010). Both this Court in Dixon and the Supreme Court in Proffitt presumed – in analyzing whether Florida's capital sentencing scheme violated the Eighth Amendment – that the comparative proportionality review pronounced in Dixon would be

"need for reliability in the determination that death is the appropriate punishment in a specific case").

conducted in every death penalty case. Indeed, both decisions lauded this protection as a guarantee that Florida's system sufficiently would protect against the arbitrary and capricious imposition of the death penalty.

> **Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case**. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. **If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.** Thus, the discretion charged in Furman v. Georgia, Supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (emphasis added).

> Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. **The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.**

Proffitt, at 258 (citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (emphasis added)).

> Florida, like Georgia, has responded to Furman by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he

> should be sentenced to death. **If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, 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.** As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed. See Furman v. Georgia, 408 U.S., at 310, 92 S.Ct., at 2762 (Stewart, J., concurring). Accordingly, the judgment before us is affirmed.

Proffitt, at 259 (emphasis added).

The approval in Proffitt also relied on the demonstrated effectiveness of proportionality review which, at the time of the decision, had led this Court to vacate 8 of the 21 death sentences that had come before it.

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover**, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system,** under which the evidence of **the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted."** Songer v. State, 322 So.2d 481, 484 (1975). See also Sullivan v. State, 303 So.2d 632, 637 (1974). The Supreme Court of **Florida**, like that of Georgia**, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed.** Indeed, **it has vacated 8 of the 21 death**

> **sentences that it has reviewed to date.** See Taylor v. State, 294 So.2d 648 (1974); Lamadline v. State, 303 So.2d 17 (1974); Slater v. State, 316 So.2d 539 (1975); Swan v. State, 322 So.2d 485 (1975); Tedder v. State, 322 So.2d 908 (1975); Halliwell v. State, 323 So.2d 557 (1975); Thompson v. State, 328 So.2d 1 (1976); Messer v. State, 330 So.2d 137 (1976).

Proffitt, at 252-253 (emphasis added).

In Pulley v. Harris, 465 U.S. 37 (1984) the Supreme Court, in reviewing Tennessee's capital sentencing scheme, held that the Eighth Amendment does not require "comparative proportionality review by an appellate court [. . .] in every case in which the death penalty is imposed." Id., at 50. The Court explained that while "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, [] "each distinct system must be examined on an individual basis." Pulley, 465 U.S. at 45 (quoting Gregg, 428 U.S., at 195).

From Pulley and Henry to Lawrence and Cruz. Shortly after Pulley, this Court decided State v. Henry, 456 So. 2d 466 (Fla. 1984), wherein it acknowledged "that proportionality review is not a requirement of the federal constitution, Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), but rather a feature of state

law, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Thus, the parameters of that duty are set forth in our cases interpreting that duty." Henry, 456 So. 2d at 469.

In 2020, this Court – relying on Pulley – announced in 2020 that it would no longer perform comparative proportionality review in death cases. Lawrence v. State, 308 So. 3d 544 (Fla. 2020). In 2023, this Court – relying on Lawrence – announced it would also no longer conduct "relative proportionality review" in death cases: the practice by which this Court reviewed the sentences of capital co-defendants to enforce "the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." Shere v. Moore, 830 So. 2d 56, 60-61 (Fla. 2002) citing Ray v. State, 755 So.2d 604, 611 (Fla.2000). See also Jennings v. State, 718 So.2d 144, 153 (Fla.1998) ("While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable.") (citation omitted).

Florida's scheme now fails to sufficiently reduce the risk of the arbitrary infliction of death sentences. The Pulley Court acknowledged that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." Pulley, at 879-80. Appellant respectfully submits that Florida's system has become such a system, as many of the system's checks on arbitrariness have either been eliminated or eroded since it was last approved by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 95 (1976).

A capital sentencing scheme, either through legislatively enumerated aggravating factors or through legislatively mandated guilt-phase findings, must genuinely narrow the class of persons eligible for the death penalty. Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), quoting Zant v. Stephens, 462 U.S. 862, 877 (1983). Each aggravating factor, taken singly, must also narrow the eligible class. Zant, at 877. Florida's current scheme, however, fails to accomplish the former, and many of Florida's individual aggravators fail to accomplish the latter.

These failures are due to Florida's "aggravator creep" problem.[20] Since the Supreme Court's approval of Florida's system in Proffitt, the scope of Florida's original eight aggravators has broadened significantly, and the number of aggravating factors in Florida has doubled from eight to sixteen.[21] [22]

This doubling of the number of aggravators, in conjunction with the fact that many aggravators are not tightly drawn and, consequently, have significantly broadened in scope, has resulted in a system under which, as of 2022, virtually all conceivable murders fit at least one of the sixteen categories of eligibility.

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[20] In Hidalgo v. Arizona, 138 S. Ct. 1054 (2018), four Justices commented on the Court's denial of certiorari. The state court had held that Arizona's capital scheme is sufficiently narrowly drawn even if it assumed that 98% of Arizona's first-degree murder cases are automatically eligible for death-penalty proceedings. The four Justices recognized "a possible constitutional problem" which "warrants careful attention and evaluation." 138 S. Ct. at 1057. In Florida, the reported cases and the relevant statutes on their face establish that an "aggravator creep" problem exists.

[21] Chapters 2010-120 '1, 2005-28 '7, 96-290 '5, 95-159 '1, 91-270 '1, 88- 381 '10, 87-368 '1, Laws of Florida.

[22] Of these 16, the majority – specifically: a, b, d, j, l, m, n, o, & p – relate solely to the status of either the victim or the defendant.

For instance, Florida's scheme treats as an aggravator the fact that a defendant was found guilty of felony-murder – Section 921.141(6)(d) – rather than premeditated murder. As Tennessee, North Carolina, and Wyoming have held, doing so necessarily fails to narrow the death-eligible class.[23] The conduct underlying common predicate felonies has also broadened over the years[24], and the statute has been expanded to cover significantly more participants.[25]

Section 921.141(6)(b) – which renders a defendant's prior conviction for a prior violent felony as an aggravating circumstance – has also, in practice, failed to narrow the eligible class. This court has construed "prior" broadly, to include violent crimes on other victims committed in connection with the murder[26], as well as to

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[23] State v. Middlebrooks, 840 S.W. 2d 317, 346-47 (Tenn. 1992); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (N.C. 1979); Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991).

[24] See Sparre v. State, 164 So. 3rd 1183, 1200-01 (Fla. 2015) (burglary can occur after invitation is effectively rescinded); Rockmore v. State, 140 So. 3rd 979, 982 (Fla. 2014) (robbery includes force used after taking).

[25] See State v. Dene, 533 So. 2d 265, 266-69 (Fla. 1988).

[26] See, e.g., Stephens v. State, 787 So. 2d 747, 761 (Fla. 2001).

include offenses which occurred years *after* the offense for which the defendant faces the death penalty.[27]

Section 921.141(6)(i) – the cold, calculating and premeditated ("CCP") aggravator – has similarly outgrown its ability to narrow the eligible class. In its early years, CCP was applied in cases involving contract killings and execution-style killings.[28] In recent years, however, a CCP finding has been upheld so long as the murder was not committed impulsively or on the spur of the moment, and was not committed in a state of rage or loss of control[29], "even where there is evidence that the final decision to kill was not made until shortly before the murder itself."[30]

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[27] Brown v. State, 473 So. 2d 1260, 1266 (Fla. 1985) ("Appellant's argument that his aggravated battery conviction could not be considered in support of the section 921.141(5)(b) aggravating circumstance because the offense occurred after the capital felony is without merit. The aggravated battery conviction was entered previous to the sentencing for the capital felony. Lucas v. State, 376 So.2d 1149 (Fla.1979).").

[28] See Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986) and Garron v. State, 528 So. 2d 353, 360-61 (Fla. 1988).

[29] Campbell v. State, 159 So. 3rd 814, 830-31 (Fla. 2015).

[30] Gosciminski v. State, 132 So.2d 678, 712 (Fla. 2013).

The bar for proving CCP has been significantly lowered as well. Prior to 2020, while CCP could "be established by circumstantial evidence, it 'must be inconsistent with any reasonable hypothesis which might negate the aggravating factor.' " Gordon v. State, 704 So. 2d 107, 114 (Fla. 1997) quoting Geralds v. State, 601 So.2d 1157, 1163 (Fla.1992). This safeguard was eliminated by this Court's decision in Bush v. State, which jettisoned Florida's "reasonable hypothesis of innocence" standard for criminal cases based on circumstantial evidence.[31]

Section 921.141(6)(a) – the "under sentence of imprisonment" aggravator – has also broadened significantly. At the time of Proffitt, this aggravator[32] was limited to murders committed "while under sentence of imprisonment." See Proffitt v. Florida, 428 U.S. 242, n. 6 (1976) quoting Section 921.141(5) (Supp. 1976-1977) of the Florida Statutes. Since then, it has been expanded by the legislature to

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[31] See Bush v. State, 295 So. 3d 179, 216 (Fla. 2020) (J. Labarga, dissenting) ("today, this Court eliminates another reasonable safeguard in our death penalty jurisprudence and in Florida's criminal law across the board.").

[32] Then §921.141(*5*)(a).

include murders committed by anyone on probation or community control. See Section 921.141(6)(a), Fla. Stat. (2022) ("The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation").

As Justice Labarga opined in his dissent in Lawrence, "the fact that this Court has reversed death sentences due to a lack of proportionality underscores the need for proportionality review," and its elimination marks "the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence."[33] Appellant respectfully requests this Court recede from its decision in Lawrence, as what was accurately described as an "additional safeguard" to Florida's scheme in 1976 has become essential to the version in place today; a system with considerably

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[33] Lawrence, 308 So. 3d at 552 (J. Labarga, dissenting) citing McCloud v. State, 208 So. 3d 668 (Fla. 2016); Phillips v. State, 207 So. 3d 212 (Fla. 2016); Yacob v. State, 136 So. 3d 539 (Fla. 2014); Scott v. State, 66 So. 3d 923 (Fla. 2011); Crook v. State, 908 So. 2d 350 (Fla. 2005); Williams v. State, 707 So. 2d 683 (Fla. 1998); Jones v. State, 705 So. 2d 1364 (Fla. 1998); Voorhees v. State, 699 So. 2d 602 (Fla. 1997); Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

less protections, and under which virtually all conceivable murders fit at least one of the sixteen categories of eligibility.

The death penalty is disproportionate in this case. "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." Roper, 543 U.S. at 568 citing Thompson v. Oklahoma, 487 U.S. 815, 856, (1988) (O'CONNOR, J., concurring in judgment). The Eighth Amendment requires that capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." Roper v. Simmons, 543 U.S. 551, 568-69 (2005) citing Atkins v. Virginia, 536 U.S. 304, 319 (2002). To this end, Appellant respectfully submits that the death penalty is disproportionate in this case, and accordingly prohibited by the Eighth Amendment, as the brain damage Appellant sustained during childhood, and the resulting significant, life-long impairments to his impulse control and executive functioning that flowed therefrom, necessarily exclude him from the category of offenders with "extreme culpability" for which the death penalty is exclusively reserved.

POINT SEVEN

THE DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT

Standard of review. "Constitutional challenges to statutes are pure questions of law, subject to de novo review." Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016).

Argument. "Often when deciding whether a punishment practice is, constitutionally speaking, 'unusual,' this Court has looked to the number of States engaging in that practice. Atkins v. Virginia, 536 U.S. 304, 313–316, 122 S.Ct. 2242 (2015); Roper v. Simmons, 543 U.S. 551, 564-66, 125 S. Ct. 1183 (2005). In this respect, the number of active death penalty States has fallen dramatically." Glossip v. Gross, 576 U.S. 863, 940 (2015) (J. Breyer, dissenting).

"In 1972, when the Court decided Furman, the death penalty was lawful in 41 States. Nine States had abolished it." Id. Since then, the number of active death penalty states has fallen to 24. At present, 23 states do not have an active death penalty. If Governor-imposed moratoriums are included – currently active in California, Oregon,

and Pennsylvania – this number rises to 26. As of last year*, the majority of states now prohibit the death penalty*.[34]

Further, it " 'is not so much the number of these States that is significant, but the consistency of the direction of change.' "[35] Here, the consistency and direction of change away from the death penalty is unambiguous. Writing in 2015, Justice Breyer concluded that "capital punishment has indeed become unusual," noting that "[s]even States have abolished the death penalty in the last decade"[36]

Since that time, 5 more states have joined the chorus. In 2016, Delaware's Supreme Court declared their death penalty scheme unconstitutional, as did Washington's in 2018. New Hampshire's legislature abolished their death penalty in 2019, Colorado repealed

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[34] Death Penalty Information Center, State by State (Sept. 20, 2023), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

[35] Roper, 543 U.S., at 566, 125 S.Ct. 1183 (quoting Atkins, supra, at 315, 122 S.Ct. 2242) (finding significant that five States had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court's decision in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)).

[36] Glossip, at 942 (J. Breyer, dissenting) (citing Death Penalty Information Center, States With and Without the Death Penalty).

its death penalty statute for future offenses in 2020, and Virginia repealed its death penalty statute in its entirety in 2021.

It is therefore evident – from the declining number of death sentences imposed each year, the growing number of jurisdictions that have abolished capital punishment, and the palpable reluctance to carry out executions in the states that still permit the death penalty – that the "objective indicia of society's standards," as expressed through legislation and state practice, is no longer compatible with "evolving standards of decency" and therefore violates the Eighth Amendment.[37]

Additional constitutional infirmities. Further, "[t]oday's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose."[38]

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[37] Graham v. Florida, 560 U.S. 48, 61, 58 (2010).

[38] Glossip, 576 U.S. at 909 (J. Breyer, dissenting).

Unreliability. As of 2002, "there was evidence of approximately 60 exonerations in capital cases."[39] By 2015, "the number of exonerations in capital cases ha[d] risen to 115." Id. (J. Breyer, dissenting). As of 2022, that number stands at 190.[37] Florida leads the nation in this regard, and has exonerated *30 people* sentenced to death.[40] These statistics demonstrate not only that there is a risk that the death penalty will be imposed arbitrarily, but that such arbitrary imposition actually does occur all too frequently.

Arbitrariness. Otherwise irrelevant factors, such as geography, play far too dominant a role in determining who is sentenced to death. See Glossip, at 918 (J. Breyer, dissenting). This is "not simply because some States permit the death penalty while others do not," but rather because even "within a death penalty State, the imposition

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[39] Id., at 911 (J. Breyer, dissenting) (citing Atkins, 536 U.S., at 320, n. 25, 122 S.Ct. 2242)).

[40] Death Penalty Information Center (DPIC), Innocence Database (September 20, 2023), https://deathpenaltyinfo.org/policy-issues/innocence-database?state=Florida&sort=exonerationYear/desc.

of the death penalty heavily depends on the county in which a defendant is tried."[41]

"Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide [. . .] And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for all death sentences imposed nationwide."[42]

Yet "whether one looks at research indicating that irrelevant or improper factors – such as race, gender, local geography, and resources – do significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors – such as 'egregiousness' – do not determine who receives the

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[41] Id., at 918-19 (J. Breyer, dissenting) (citing Smith, The Geography of the Death Penalty and its Ramifications, 92 B. U. L. Rev. 227, 231–232 (2012); Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. Empirical Legal Studies 637, 673 (2014)("[T]he single most important influence from 1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]").

[42] Id., (J. Breyer, dissenting) (citing DPIC, The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All 9 (Oct. 2013).

death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily."[43]

Cruelty. In 1890, the Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist *for the period of four weeks*, as to the precise time when his execution shall take place." In re Medley, 134 U.S. 160, 172 (1890). The "long wait between the imposition of sentence and the actual infliction of death" is "inevitable" and often "exacts a frightful toll."[44]

"In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured, not in weeks, but in *decades*."[45] Perhaps worse still, most prisoners must suffer this "frightful toll" in solitary confinement, as

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[43] Id., at 920 (J. Breyer, dissenting).

[44] Furman, 408 U.S., at 288, 92 S. Ct. 2726 (Brennan, J., concurring).

[45] Glossip, at 927 (J. Breyer, dissenting) (emphasis added).

nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day.[46]

In sum, Appellant respectfully submits that the death penalty – now active in only a minority of states – constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, as it no longer comports with "evolving standards of decency," exacts a decades-long, torturous and "frightful toll" on defendants, is unreliable in its imposition, and is arbitrary in its application.

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[46] American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report).

CONCLUSION

Appellant respectfully requests, as to the issues raised in Points 3 and 4, this Court vacate Appellant's death sentence and remand for a new penalty phase.

As to the issues in Points 1 and 2, Appellant requests this Court vacate his sentence and remand with directions for the trial court to reweigh the aggravating and mitigating circumstances.

As to the issues in Points 5, 6, and 7, Appellant requests this Court vacate his sentence and remand with directions to impose a sentence of life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, at www.myflcourtaccess.com; the Office of the Attorney General, Assistant Attorney General Stephen D. Ake, at capapp@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Mr. Allen Ward Cox, DOC #188854, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 6th day of October, 2023.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing initial brief complies with the Florida Rules of Appellate Procedure in that it is set in Bookman Old Style 14, and in that it does not exceed the word count set out in the Rules.

/s/ Robert Jackson Pearce III
Robert Jackson Pearce III
Assistant Public Defender