IN THE SUPREME COURT OF FLORIDA
CASE NO. SC2023-0058

TIMOTHY W. FLETCHER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Fletcher". Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. Citations to the trial transcript will be noted by (TT, __) followed the page number; citations to the direct record on appeal will be noted by (R, __) followed by the page number.

STATEMENT OF THE CASE

On April 15, 2009, Timothy Fletcher, Appellant, and his codefendant, Doni Ray Brown, escaped from their cell in the Putnam County Jail, broke into the home of Fletcher's elderly relative, Helen Googe, and murdered her while attempting to rob her. He was indicted for her murder, two counts of grand theft auto, two counts of burglary, home invasion robbery, and escape. He was convicted on May 25, 2012, on all counts and following a penalty phase trial received a non-unanimous recommendation of death from the jury. The trial court sentenced him to death, and his convictions and sentences were upheld on direct appeal. During postconviction litigation his death sentence was overturned pursuant to *Hurst v. Florida* and *Hurst v. State*. Following a second sentencing hearing,

Appellant received a unanimous jury recommendation for death and a *Spencer* hearing was held on November 22, 2022. Subsequently, on January 3, 2023, Appellant was again sentenced to death. This appeal follows.

STATEMENTS OF THE FACTS

This Court summarized the facts from the guilt phase of Appellant's first trial as follows:

> On April 14 and 15, 2009, Timothy Fletcher was lawfully in custody at the Putnam County Jail. On the evening of April 14, 2009, and into the early morning hours of April 15, 2009, Fletcher and his cellmate, Doni Ray Brown, escaped their jail cell pursuant to a previously-discussed plan. Following their eventual re-arrest, Fletcher was interrogated by a detective with the Putnam County Sheriff's Office and an investigator with the State Attorney's Office. During the interrogation, Fletcher recounted the details of the escape and subsequent crimes.
>
> Fletcher explained that on his return from a court hearing on April 2, 2009, he removed a car jack from the jail transportation vehicle, which he concealed in his pants. Nearly two weeks later, on April 14, 2009, after another trip to and from the courthouse, he appropriated the handle for the jack in the same manner. Fletcher explained they executed the escape because he had just been sentenced to ten years' incarceration.
>
> That evening, Fletcher and Brown used the jack and jack handle to pry the toilet away from the wall of their cell, which created a hole through which they could escape. Just after the 2 a.m. cell check, Fletcher and Brown

escaped through the hole. They then crawled under a fence, climbed over another fence, and through a gap in a third fence. This brought them to a field next to the jail, which they crossed to reach the highway.

They searched for a vehicle at various properties along the highway. First, they located a Z71 pickup truck. After breaking the window, he and Brown entered the vehicle, but Fletcher was unsuccessful as he attempted to start the engine. They searched for a second vehicle and located an unlocked van. However, they were also unable to start that vehicle, so they searched for a third vehicle. They discovered an unlocked Ford pickup truck with the keys in it in a fenced-in yard of a business. Brown struck the gate with the pickup and knocked it down.

As they had previously planned, Fletcher and Brown drove to the house of Helen Googe, the ex-wife of Fletcher's grandfather, because it was the closest place where he and Brown believed they could acquire money. Fletcher believed that Googe kept money in a safe at her house, and he had knowledge of her financial status.

At this point during his post-arrest statement, Fletcher provided varying accounts of subsequent events. In his initial account, Fletcher asserted that Googe voluntarily admitted him into the house, and Brown followed. Fletcher described altercations between Brown and Googe that ultimately led to Googe's death. He asserted that, other than one open-handed slap, he was either absent from the room during the altercations or nothing more than a passive bystander. However, Fletcher renounced this version of events after a detective informed him that fingernail scrapings had been collected from Googe to test for DNA evidence. The officer observed that Fletcher had scratch marks on his hands and arms, whereas Brown did not, and asked Fletcher if there was any reason why his DNA would be found under Googe's fingernails. Fletcher responded that it should not be, but also stated that he

had held Googe down at one point. The detective asked when this occurred, and Fletcher responded, "I really don't even want to tell you everything that happened, to be honest with you." After some discussion, Fletcher admitted, "I'll be honest with you, I kind of lied to you a little bit," and then presented a different version of the events that transpired at Googe's home. This second description matched the description provided by Brown, except with the roles reversed—both Fletcher and Brown asserted that the other committed the actual strangulation of Googe.

Fletcher confessed that he and Brown entered the house through a firewood door that provided an opening to pass wood into the house from the outside. Fletcher was aware that Googe had firearms on the walls of her house; while in jail, he and Brown discussed using a gun to scare and rob Googe. After they entered the house, Fletcher removed an unloaded revolver from the wall above the bathroom door and gave it to Brown. Upon retrieving the gun, Fletcher and Brown changed into clothes belonging to Fletcher's grandfather that they found at the house. Fletcher showed Brown the safe, which was located inside a closet.

Fletcher located Googe's purse, which contained a credit card, car keys, and $37. Fletcher placed the purse in the closet with the discarded prison clothing. Fletcher and Brown then approached the bedroom where Googe slept, and Brown entered the room. Fletcher had tied a t-shirt around his face so that Googe would not recognize him, and Brown donned a blue and red baseball cap that he pulled down over his face. Fletcher intended to remain outside of the room until Brown indicated that Googe was restrained. Brown approached the bed, pointed the gun at Googe's face, and woke her up. Brown then said, "[t]his is a stickup, roll over and you'll be all right." Googe sat up and screamed that she was frightened at least four times. She asked, "why are you doing this?" Brown told her that

nothing would happen to her as long as she complied with his instructions. Brown then signaled for Fletcher, who entered the room, pushed Googe onto the bed, and tied her hands with a phone cord.

Googe informed them that she did not have any money, except maybe $40 in her purse. Brown asked what was in the safe, and she asserted that she did not have a safe. After Brown informed Googe that he knew she had a safe, she repeated that she had no money. During this interaction, Googe attempted to get out of the bed and her hands became untied. While describing these events during his post-arrest statement, Fletcher commented, "[s]he wasn't listening—she didn't want to listen."

After the cord became untied, Brown held the gun against Googe's head and pushed her back onto the bed. Fletcher then said, "you better fucking listen, we don't want to hurt you, just you better fucking listen." They continued to argue with Googe and demanded to know the personal identification number to her credit card, but she stated that she did not have one.

Googe jumped out of the bed, but Brown pushed her back down, put the gun on a dresser, and climbed on top of her. He held her down with one hand on her neck and the other on her chest and told her, "[b]itch, this ain't how it works." Googe was kicking her legs, and Fletcher picked up the gun, pressed it against her leg, and said, "[y]ou better stop moving your fucking legs or else I'm going to shoot you."

Googe then went with Fletcher and Brown to the safe. However, she said that she needed her glasses, so Brown led her back to the bedroom. Once there, Googe claimed she needed to use the restroom. She entered the restroom and tried to slam the door shut. Brown pushed the door open, and Googe hit him with a hairdryer. Brown yelled for Fletcher, who had remained by the safe. When Fletcher entered the bedroom, Brown had Googe pinned to the bed

with a pillow over her face, and Googe was attempting to fight back. After Fletcher entered the bedroom, the three returned to the closet that contained the safe.

Googe opened the safe with her hands visibly shaking. Brown and Fletcher looked for money, but did not find any. Brown pointed the gun at Googe and asked where the money was. Googe repeated that she did not have any money, except for some money in her purse.

Googe then attempted to rise, but Brown pushed her down to the floor. With Googe in a fetal position, Brown wrapped his arm around her neck and mouthed to Fletcher that he was going to kill her. Fletcher stated that he watched, but otherwise did nothing. After several minutes, Brown said it was not working and released her. He mouthed to Fletcher that he would break Googe's neck, then grabbed her chin and head and attempted to do so, but failed.

Fletcher, Brown, and Googe then moved towards the den. Fletcher secured his arm around Googe's neck, and Brown attempted to pick Googe up by her feet. Brown lifted one of Googe's legs off the ground, but was unable to hold the other because she kicked at him. During the struggle, Googe scratched Fletcher, who called her a bitch and released her. When Googe attempted to rise from the ground, Fletcher struck her in the head three times—once on the cheek and twice high on the side of her head—with an open hand. Fletcher explained during his post-arrest statement that he struck her

> [b]ecause she was—she was being ignorant.... If she wouldn't have been being like that, she wouldn't have never got hit or nothing. She was being—... She was—she was ready to fight. She wanted to fight. She didn't want to just—over $37. All she had to do was just be quiet and give up the $37 and tell—say what the PIN number

> is to her credit card and she would have just got tied up and left.

Fletcher stated that Brown positioned himself on top of Googe with his knees on her arms to hold her down, and choked her with both hands. Googe began kicking, so Fletcher held her legs down at the knees. Googe tried to speak, but could only make choking noises. When Googe stopped fighting, Fletcher let her go and entered another room, where he took a jewelry box. Fletcher claimed that when he returned to the den, Brown had released Googe, who was laying on her side making snoring noises. Fletcher watched her while Brown retrieved a plastic storage bag from the kitchen. Brown placed the bag over Googe's head and secured it by tying a phone cord around Googe's neck. The bag became foggy. Fletcher stated that he left the room, and when he returned, Brown informed him that Googe was dead.

Fletcher and Brown then departed from the house. Fletcher drove Googe's Lincoln Town Car, and Brown drove the stolen pickup truck. They discarded the pickup in the woods a short distance from Googe's house. The plastic bag, the telephone cord, the prison clothing, the purse, and the wallet were discarded in a retention pond.

Fletcher then described the remainder of their flight through Georgia and Tennessee, to his aunt and uncle's house in Kentucky, and then their return to Florida, where they were re-arrested.

The evidence presented during trial with respect to the discovery of the escape and Googe's murder corroborated the description of events given by Fletcher, with the exception of who strangled Googe. After the officers discovered that Fletcher and Brown were missing, a K–9 officer and his trained canine were dispatched to search for Fletcher's and Brown's scents. The canine detected a scent outside of the barbed-wire fence that separated the

sheriff's office and the field. This scent led across the highway and terminated near a dance studio. The owner of the Z71 pickup truck—the first vehicle that Fletcher stated he and Brown attempted to steal—had left his truck outside of the studio to advertise that it was for sale. He received a phone call from the sheriff's office on April 15 that his vehicle had been broken into, and he travelled to the studio, where he discovered that the passenger window of the extended cab had been smashed. Additionally, the steering column and ignition had been tampered with, as though someone had tried to start the vehicle without a key.

On that same morning at approximately 9 a.m., the owner of a home and business across from the jail discovered that the ignition switch to his blue GMC van was broken and locked into position, also as if someone had forcibly attempted to start the vehicle without a key. He walked over to the sheriff's office and told officers about his vehicle. A crime scene technician observed muddy footprints that led from the dance studio towards the van. Additionally on that morning, the owner of a tire business located across from the jail discovered that the gates of the business were lying flat on the driveway as though they had been run over. He also noticed that his Ford F150 was missing. He reported this to the sheriff's office. The truck was later discovered in the woods near Googe's residence. Meanwhile, at approximately 6:40 that morning, a deputy with the Clay County Sheriff's Office observed a four-door gold Lincoln with Putnam County license plates while he drove home from work. He became suspicious because nothing was open in the area, he rarely saw Putnam County plates there, and his office had received a "be on the lookout" for two escapees from the Putnam County Jail. He wrote down the tag number and accelerated to examine the individuals in the vehicle. He was able to see the passenger, who was wearing a blue baseball cap with a red bill. The officer continued home, and later ran the plate number through the National Crime Information

Center database. He discovered that the vehicle was owned by Googe, who he knew had been married to Fletcher's grandfather. He recalled that Fletcher was one of the escaped prisoners, and contacted the Putnam County Sheriff's Office. Later that day, he saw a television broadcast with photographs of Fletcher and Brown, and he recognized Brown as the passenger in the Lincoln.

Because of the observation by the Clay County deputy, a warrants officer with the Putnam County Sheriff's Office was asked to make contact with Googe. When the officer arrived at the property, the Lincoln was not in the carport. The officer knocked on the door and, when nobody responded, walked around the house knocking on doors and windows. He travelled to a nearby grocery store to ask if anyone had seen Googe, her Lincoln, or a truck matching the one missing from the tire business. Nobody had seen Googe or the missing vehicles, and the officer returned to the property. When two other officers arrived, they entered the home and found Googe dead.

A crime lab analyst with the Florida Department of Law Enforcement (FDLE) located pliers above the firewood door that created an entrance into the home. The lock on the door was still attached, but the hasp was broken. Inside the home, the analyst found an open jewelry box on the floor of the study. The interior walls of the family room were decorated with a sword, knives, and a revolver. The weaponry was supported by wooden pegs, but one set of pegs was unadorned. In the master bedroom, he found a phone set on the floor with the cord broken off, and a hairdryer in the bathroom. Near Googe's body, he found part of a broken eyeglasses chain. The remainder of the chain, as well as the eyeglasses, were found near the safe. A detective with the Putnam County Sheriff's Office contacted Googe's credit card company and obtained a subpoena for records showing any transactions on April 15, 2009. Two transactions occurred on that date, one at a Florida gas station, and another at a Georgia gas station.

Law enforcement learned that after Brown and Fletcher left Googe's home, they proceeded to the home of Brown's aunt. She allowed Brown into the house and he used her computer to look up directions, which he wrote down. Brown then departed, and his aunt testified that she saw him enter the passenger's seat of a vehicle resembling a tan Cadillac with a Caucasian driver. She did not observe any scratches or other physical injuries on Brown.

The FDLE crime lab analyst who processed the Lincoln found a piece of paper with handwritten directions. The paper had fingerprints and handprints that were identified as belonging to Brown. A soda bottle was also discovered, which had a fingerprint that was identified as belonging to Brown. Brown's fingerprints were also identified on a handbook and a plastic shopping bag found in the vehicle. The FDLE also analyzed swabs taken from the Lincoln for DNA evidence. The analyst found a complete DNA profile on the swab taken from the headlight switch and an interior door handle that matched Fletcher's DNA profile. The probability that the DNA profile would match another individual is approximately one in 490 trillion Caucasians, one in 13 quadrillion African Americans, and one in 1.1 quadrillion Southeastern Hispanics. Two soda bottles found in the car were also analyzed for DNA evidence, and the analyst found mixed DNA profiles on each bottle. With respect to the first bottle, Brown was a possible contributor, but no determination could be made as to whether Fletcher was a possible contributor. More than 99% of Caucasians, African Americans, and Southeastern Hispanics could be excluded as contributors to the mixed DNA profile. With respect to the second bottle, Brown and Fletcher were both possible contributors to the mixed profile, and again more than 99% of Caucasian, African American, and Southeastern Hispanic individuals could be excluded as contributors. With respect to the fingernail scrapings taken from Googe, the analyst found a partial DNA profile that matched the known profile of Fletcher. The probability that the partial DNA profile would match

another individual is approximately one in 260 million Caucasians, one in 3.6 billion African Americans, and one in 580 million Southeastern Hispanics.

The medical examiner determined that the cause of Googe's death was asphyxia due to manual strangulation. He identified fingertip contusions2 under the chin, as well as hemorrhages in the neck area. The injuries were consistent with a person grabbing Googe around the neck and squeezing with his or her thumbs down onto her neck. Additionally, the cartilage of Googe's larynx was fractured and surrounded with contusions and hemorrhages, and the thyroid cartilage was fractured. The medical examiner found a contusion on Googe's left upper eyelid, which was the result of blunt trauma, as well as a contusion on the right side of her scalp. The scalp contusion was superficial, and there was no underlying skull fracture, bleeding into her brain, or subdural or subarachnoid hemorrhages. On her right arm, he found fingertip contusions, which indicated that she was restrained by someone. Because Googe was elderly, little force would be necessary to cause this kind of bruising. There was also a contusion and ligature marks on Googe's left wrist and a superficial laceration on her right forearm that most likely resulted from being held by the wrist. The medical examiner also found abrasions on her knees.

The medical examiner determined that all of Googe's injuries occurred pre-death and during the same time frame. Because there was no significant trauma to the head that would cause a loss of consciousness, he also concluded that the injuries occurred while Googe was conscious. Significantly, there was no hemorrhaging at the top of the brain, despite the fact that Googe was elderly and would bleed more easily.

On May 25, 2012, a jury found Fletcher guilty of the first-degree murder of Googe, two counts of grand theft of a

> motor vehicle, home-invasion robbery, two counts of burglary, and escape.

Fletcher v. State, 168 So.3d 186, 193-9 (Fla. 2015). Following a penalty phase the jury recommended a sentence of death by a vote of eight to four, a recommendation the court followed. *Id.* at 201. His convictions and sentence of death were upheld on direct appeal. *Id.* at 222.

Appellant filed motion for postconviction relief under Fla. R. Crim. Pro. 3.851 alleging, among other things, that he was entitled to a new penalty phase pursuant to *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). (R, 575-648). Following a hearing, the trial court granted Appellant a new penalty phase due to the nonunanimous jury recommendation on August 28, 2017. (R, 1753-58). Following extensive pretrial litigation, the new penalty phase began on April 21, 2022.

The State presented much of the same evidence outlined above, including Appellant's lengthy confession and the DNA evidence linking him to the body of the victim. They also introduced the judgement and sentence for Appellant's previous burglary convictions that he had been in jail for. (TT, 573). Finally, they

introduced three victim impact statements over defense objection of Debra Black, the victim's daughter, Kristofer Key, her nephew, and Randall Key, her brother. (TT, 577-584).

In mitigation the defense first called Dr. Daniel Buffington, a pharmacologist and toxicologist. (TT, 622). Dr. Buffington reviewed Appellant's medical records and history of both prescription and illicit drug use and met with Appellant to get a self-report. (TT, 625-7). Appellant was prescribed Prozac in his youth that appeared to be prescribed for depression and PTSD, but it made symptoms worse. (TT, 630-1). Throughout the years he was also prescribed more potent medications, Remeron, Trimectal, Seroquel, and Trazodone. (TT, 632-3). When he was in jail he received several diagnoses, including depression, antisocial personality disorder, anxiety, and insomnia. (TT, 634). He first tried alcohol when he was six, marijuana when he was eleven, and cocaine in his teens. (TT, 634-5). The records indicated some head injuries, and he was variously prescribed Lortab and Hydrocodone, two opiates. (TT, 636-42). Appellant was later prescribed Lamictal, which is antiseizure drug, but when combined with a strong antidepressant like Effexor, which he also received, can be effective at treating powerful depression that is not responding to

other treatments. (TT, 643). He was also at times prescribed Xanax. (TT, 644). In addition to cocaine Appellant tried other illicit substances, including methamphetamine, which is a drug that makes people feel strong and powerful, but impairs their judgment, causes confusion and impulsivity, makes the person hyperexcitable, and can keep you awake. (TT, 646-7). According to Appellant, he and his codefendant had been using meth for four days leading up to the jailbreak. (TT, 649). Dr. Buffington testified that this methamphetamine binge meant Appellant was under the influence of extreme mental and emotional disturbance at the time of the crimes because it would have caused a mounting paranoia. (TT, 651). Dr. Buffington also said Appellant had suicidal ideations and had also been diagnosed with bipolar disorder, depressive disorder, and ADHD. (TT, 653-5). Despite Appellant's self-report, there were no records in the jail or evidence in the cell of his methamphetamine use. (TT, 660-1).

Next, the defense called Dr. Jennifer Rohrer, a forensic psychologist. (TT, 671). In addition to reviewing many records, she also met with Appellant in prison in June 2021 and April 2022. (TT, 679). She used something called the Trauma Symptom Inventory to

assess Appellant for any trauma-related disorders. (TT, 681). The test showed elevated results, which is consistent with PTSD. (TT, 695). Any score above 70 in a category indicates that the symptom or reaction is a significant problem or concern for the interviewee, and Appellant scored higher than 70 in anger, hyperarousal, intrusive experiences, tension reduction behaviors, and suicidality. (TT, 696-7). However, she did acknowledge that this particular survey was designed to assess PTSD symptoms that have occurred only within the last six months and would give any information about PTSD experienced more than a decade earlier, when the crimes occurred. (TT, 738-9). She said the records indicated two possible suicide attempts in the past, once when he cut his wrists when he was fourteen, and another time when he was banging his head into a wall repeatedly when he was eighteen or nineteen. (TT, 696-7). He also was attacked twice in jail, once in 2003 when he was assaulted with a lock in a sock, and a second time in 2005 when he was stabbed several times and had to spend two weeks in the hospital. (TT, 700).

Dr. Rohrer also testified about Appellant's childhood experiences. His mother was assaulted by his father when she was still pregnant with him, and he reported that his father abused his

mother consistently throughout his childhood. (TT, 701-2). His father had a long criminal record that included batteries, aggravated assaults, and alcohol-related offenses. (TT, 702). In 1990, Appellant witnessed his father hold a shotgun on his mother, threatening to kill her in front of the children. (TT, 703). His father was also an alcoholic who would abuse Appellant physically. (TT, 703-4). His parents separated when he was about ten years old and he felt abandoned by his mom because she moved out. (TT, 704-5). She also described incidents that she thought Appellant wouldn't feel was abuse, but which she believed qualified as sexual abuse, because there were instances of Appellant sleeping with women who were thirty when he was only fourteen. (TT, 704-5). Appellant had a brother who was six years younger, and he said that by the time Appellant was eleven he was basically raising himself and his brother alone, as their dad would be gone on work trips for weeks at a time. (TT, 706). They often went without food during these times. (TT, 707). His mother was diagnosed with brain cancer in his teens, and she died when he was around eighteen; he was in jail at the time and missed her funeral. (TT, 708). He said his mother was one of the few people who ever was kind to him and her death was hard on him. (TT, 708-9). The other

person who was kind to him was his grandfather, who praised Appellant's criminal behavior. (TT, 711).

Appellant was twenty-five at the time of the escape, but Dr. Rohrer testified his substance use stunted his emotional maturity and he was acting more on an adolescent level. (TT, 709-10). In Dr. Rohrer's opinion, Appellant was under extreme mental or emotional distress during the crimes and his capacity to appreciate his criminality or conform his conduct to the law was substantially impaired. (TT, 714-5). Despite noting several mental health diagnoses, Dr. Rohrer agreed that some of his bipolar symptoms can be explained by other disorders and the mania associated with the disorder was not present in any records or reported anywhere. (TT, 736-7). He also did not ever exhibit the avoidance of triggering traumas that is required for a PTSD diagnosis. (TT 741-2). And although he self-reported meth use leading up to the crime, there was no drug paraphernalia found in his cell and his own codefendant told the police they had not been using drugs. (TT, 747-8).

The defense then called Jeffrey Fletcher, Appellant's younger brother. (TT, 756). He testified their mother left their home when Appellant was about eleven without telling them, they instead

learned about from notes she left them when they got back from school. (TT, 758). They did not see or hear from her for eight months after that (TT, 759). When they did, they learned she had moved in with a man named Charlie Stapleton, and although Jeffrey went to live with them, Appellant was forced to go back to their father because Stapleton didn't want him around. (TT, 760-1). He confirmed that their father would leave for long stretches of time and they would have difficulty getting food and only had intermittent supervision from a babysitter during those times. (TT, 762-5). Their dad would drink every day and would consume a whole bottle of liquor or an entire case of beer. (TT, 765-6). He got nasty and angry when he was drunk and would attack the two of them without provocation, focusing more on Appellant. (TT, 765-7). He was also verbally abusive, and they would often escape his attacks by hiding somewhere in the house or sleeping outside. (TT, 770-1). Although he described all this abuse in his testimony, he confirmed that he had previously testified at another hearing that their father had not abused them. (TT, 784-5). He also said their grandfather got Appellant to steal cars for him to sell. (TT, 775-6).

Appellant's final witness was Roy Walker, his self-described best friend. (TT, 788-9). They met when Walker was nine years old and spent time together skipping school. (TT, 790-1). He witnessed Appellant's father beating and calling him names, and Appellant's stepfather, Stapleton, would cheat on his mom in a trailer right next to the house. (TT, 791-3). When the two of them were still only twelve Appellant's father started taking them to a local bar to play people in pool for money, keeping most of the winnings and hurting Appellant if he lost. (TT, 794-6). When they were young Appellant would sometimes go to Walker's house to sleep on his trampoline. (TT, 799). Appellant was made fun of in school a lot. (TT, 804).

In rebuttal, the State called two experts, starting with Dr. Bryce Goldberger, a forensic toxicologist. (TT, 838). He testified that someone who is using methamphetamine has increased alertness, shaking, and can experience paranoia. (TT, 843-4). He also said it is a very impairing drug and if he had been on it, would have affected Appellant's ability to do complex tasks like escaping jail, concealing the escape, stealing a car, and finding his grandmother's house. (TT, 844-5).

The State then called Dr. Gregory Prichard, a forensic psychologist. (TT, 867). In addition to reviewing many records and evidence from the crimes, Dr. Prichard met with Appellant twice for interviews, once in May 2012 and a second time in April 2022. (TT, 871). Dr. Prichard did not believe Appellant ever met the criteria for a PTSD diagnosis because the first evidence of it is a self-report by Appellant in 2008, but he only reported nightmares and no other symptoms or criteria that matched PTSD. (TT, 872-7). In particular, the facts of the crimes themselves, and the murder, contradict the avoidance symptom. (TT, 878-9). He testified Appellant's high suicidality score did not match what they knew about him, and in fact Appellant reported he had never tried to kill himself: he wasn't really trying to commit suicide when he cut his wrists and he banged his head into a wall out of frustration. (TT, 880-1). Dr. Prichard also disagreed with the bipolar diagnosis as there was no evidence of mania, although he agreed there was evidence of depression. (TT, 885-8.) He also agreed with the polysubstance abuse and antisocial personality disorder diagnoses. (TT, 893-7). As for the other diagnoses, he noted that they could appear in his records because in a correctional setting a doctor has to notate some mental health

diagnosis whether the patient meets it or not when they prescribe a drug to treat a symptom that is being reported. (TT, 889-90). Dr. Prichard pointed out their was no evidence of methamphetamine use other than Appellant's self-report, and that his actions—procuring the tools in the weeks ahead of time, waiting for the right time to escape, making their beds look occupied, getting out of the jail grounds and stealing a car, and getting to the victims house—were all inconsistent with the impairments methamphetamine would have been causing. (TT, 899-900).

Following closing arguments the jury found the existence of four aggravating factors beyond a reasonable doubt, did not find any mitigation had been proven by the greater weight of the evidence and gave a unanimous recommendation for death. (TT, 1136-8).

The *Spencer*[1] hearing was held on November 22, 2022. (R, 4019). At the hearing the defense presented the testimony of Aubrey Land, a retired law enforcement correctional professional and now consultant. (R, 5232). He was called to provide testimony about Appellant's possible adjustment to prison if given a life sentence. (R,

[1] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

5234-5). He testified Appellant would be well-suited to teaching and tutoring other inmates who want to earn a GED or similar degrees. (R, 5238). He also testified that Appellant could adjust well to life in prison. (R, 5244). The Appellant also gave a statement to the court. (R, 5253-4).

Appellant's sentencing hearing was held on January 3, 2023, and the judge issued his order that same day. (4087-4124). The court found the existence of four aggravating factors, two of which merged for a final finding of three aggravating factors: 1) Appellant was previously convicted of a felony and under sentence of imprisonment; 2) the murder was committed during the commission of a robbery (merged with factor three); 3) the murder was done for pecuniary gain (merged with factor two); and 4) the murder was especially heinous, atrocious, or cruel. (R, 4091-6). The court assigned all three factors great weight. The court considered fifty-two mitigating factors, finding seven were not supported by the evidence (notably, including that he suffered from PTSD, that he was affected by a bipolar disorder, and the statutory mental health mitigators). As to the other mitigators, the court gave only great weight to the codefendant's life sentence and no or slight weight to the other factors individually,

although he did find that cumulatively they would be given moderate weight. (R, 4096-4121). Although not expressly stated in the order, the trial court seemingly gave the jury recommendation less than great weight due to their finding of no mitigation. (R, 4122). However, he ultimately followed the recommendation and sentenced Appellant to death. (R, 4124).

SUMMARY OF THE ARGUMENTS

POINT I: Appellant's argument is purely speculative about what occurred during deliberations for the jury during penalty phase, and any such speculation is simply an attempt to ask this Court to invade the province of the jury. There is no actual evidence the jury disregarded the trial court's instructions, and there alternate explanations for their finding of no mitigation. Regardless, the trial judge acts as a check on the jury and did its own analysis of mitigation and found dozens for Appellant, but still felt the appropriate penalty was death.

POINT II: Trial counsel never requested an *Enmund/Tison* instruction, did not object to the exclusion of one, and therefore this evaluated for fundamental error. As Appellant satisfies the dictates of *Enmund* and *Tison*, and the trial court made findings of fact to the

same, it is not fundamental error to not have given the jury a specific instruction on the standard.

POINT III: It is not fundamental error to require Appellant to prove mitigating circumstances by the bare minimum legal standard of proof, preponderance of evidence, and Appellant's sentence is not tainted by that jury instruction.

POINT IV: The trial court did not abuse its discretion in declining defense counsel's special jury instruction on mercy. The standard jury instructions are presumptively valid and already include an instruction this Court has recognized as the "mercy instruction".

POINT V: Victim impact evidence generally has long been recognized by this Court and the United States Supreme Court as valid in a capital penalty phase, and Appellant does not make any specific objections to the minimal victim impact presented in this case.

POINT VI: The prosecutor's closings arguments, when viewed in context, were a legitimate argument on what weight the jury should give to particular mental health mitigation, and if they weren't they were either properly cured by the trial court's two curative instructions or harmless beyond a reasonable doubt.

POINT VII: There are no errors, or any errors are harmless beyond a reasonable doubt, and so there is no cumulative error.

POINT VIII: This Court has long-rejected the same or similar arguments Appellant makes arguing against the constitutionality of Florida's death penalty scheme, and Florida's rejection of comparative proportionality and relative culpability do not strip it of the safeguards against arbitrary imposition given the many narrowing features worked into the statute.

POINT IX: This Court receded from comparative proportionality review in 2020, relative culpability in 2023, and therefore this claim is meritless. But even under this Court's pre-2020 precedent this case still would have satisfied both analyses in finding the death penalty proportionate in Appellant's case.

ARGUMENT

POINT I: IT WAS WITHIN THE PROVINCE OF THE JURY TO DETERMINE WHAT, IF ANY, MITIGATING CIRCUMSTANCES WERE PROVEN OR GIVEN WEIGHT

At the close of the penalty phase and following deliberations, the jury indicated on the verdict form that none of them had found one or more mitigating circumstances to have been established. (TT, 1135). Appellant argues that the only conceivable explanation for this

is that the jury disregarded the judge's instructions, and he is entitled to a new penalty phase in front of a different jury.

However, this argument is purely speculative and not based on any evidence in the record. It is within the province of the trier of fact consider the evidence presented and give it whatever weight it finds is appropriate. *Lucas v. State*, 376 So.2d 1149, 1153-4 (Fla. 1979). In this case much of the mental health mitigation, which was a significant portion of the defense presentation was rebutted by State experts, and similarly rejected by the trial court in its sentencing order. Additionally, the jury's finding of no mitigation could just as easily be construed as a finding they did not find the mitigation weighty in comparison to the aggravation presented. Jurors are not lawyers or judges, and the nuance of finding that a mitigator was proven, but to give it no weight regardless may not have occurred to them. We simply do not know what went on during deliberations or what was said, because to find out would be to invade the province of the jury. Fletcher is not entitled to a new penalty phase hearing based on the mere assumption that the jury purposely disregarded the trial court's instructions.

Finally, the jury is not the ultimate decider on what aggravation and mitigation is found to be proven, the judge is, and the trial court considered the jury's findings in its sentencing order. In fact, as the court pointed out, Fla. Stat. § 921.141(2) has no requirement that the jury make any independent or specific findings regarding the existence of mitigating factors. (R, 4121). The jury is only required to find at least one aggravating factor, specifying which one or ones, and then is to do a weighing process against any mitigation it may have found. Fla. Stat. § 921.141(2)(a-b). "The Court, and the Court alone, is charged by the statute with providing the detailed analysis of each one of the mitigating circumstances." (R, 4121). As such, the court concluded a jury's finding or not finding on mitigation is surplusage, and their answer to that question can be disregarded due to the independent, detailed analysis required by the trial court. (R, 4121). Ultimately, the trial court considered fifty-two mitigating circumstances offered by Appellant, rejecting seven as unproven and giving slight or no weight to the vast majority of mitigation found to exist. The court also considered the jury's lack of finding mitigation in deciding how much weight to give their verdict.

This claim should be denied.

POINT II: THE COURT'S FAILURE TO GIVE AN *ENMUND*[2]/*TISON*[3] INSTRUCTION TO THE JURY DOES NOT AMOUNT TO FUNDAMENTAL ERROR

In this claim Appellant argues that the trial court's failure to give an *Enmund/Tison* instruction to the jury so taints his penalty phase that he is entitled to a new trial. As trial counsel never requested such an instruction, any error in not giving it must rise to the level of fundamental error.

Appellant's mention of *Cruz v. State*, 320 So.3d 695 (Fla. 2021) is apt, as this Court evaluated the lack of an *Enmund/Tison* instruction for fundamental error in a similar scenario. As in this case, Cruz and a codefendant were each involved in a murder where there was not clear evidence of who killed the victim. *Id.* at 717. As in this case, Cruz did not request a special instruction or object to the lack of one. *Id.* at 722. This Court concluded that there was no fundamental error because the record showed that Cruz's conduct showed he was not merely an aider or abettor, and he had major participation in the felony committed, combined with reckless indifference to human life. *Id.*

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[2] *Enmund v. Florida*, 458 U.S. 782 (1982).
[3] *Tison v. Arizona*, 481 U.S. 137 (1987).

The trial court below, while not doing the analysis under the heading of "*Enmund/Tison*" did make relevant findings, and the record supports, that Appellant's conduct in this case satisfy the requirement. When discussing the mitigation that his codefendant received a life sentence the court wrote:

> [H]e was the mastermind of the scheme that resulted in Ms. Googe's death. While he, indeed, may not have planned her death, he set the scheme in motion that led to it. Moreover, as the State notes in its memorandum, his confession, in which he tries to deflect blame to Mr. Brown, was riddled with inconsistency. Finally, as noted in the last aggravating factor, he alone had the negative animus towards Ms. Googe ("She ain't my grandma, she's a bitch") and he alone bears the scars of her fight for her life. This Court is charged with making an independent examination of the evidence apart from that of the jury and finds the Defendant has significantly more culpability for Ms. Googe's death. He bragged that he was the only one who "had the balls to do it."

(R, 4097).

The evidence in this case is clear that he was not a mere aider or abettor and was in fact the driving force behind what happened. He stole the car jack, he stole the jack handle, he hid the items in their cell, he decided they were going to Googe's house, he decided they were going to rob her, he knew how to sneak into her house, he had preexisting animosity toward the victim, and only his—not his

codefendant's—DNA was found under the fingernails of the victim. Doni Ray Brown was essentially just along for the ride. The only available evidence points to him being the actual killer, but even if this Court finds the evidence insufficient to make that finding, he clearly was a major participant in the felony and showed a reckless indifference for human life when he broke into the home of an elderly relative with the sole intent to rob her in the middle of the night.

As his conduct satisfies the *Enmund/Tison* requirements, it was not fundamental error for the court to not give a special instruction, and the jury is not tasked with making such a finding on a verdict form regardless. This claim should be denied.

POINT III: IT IS NOT ERROR FOR THE DEFENSE TO HAVE TO PROVE A MITIGATING CIRCUMSTANCE UNDER THE VERY FORGIVING "GREATER WEIGHT OF THE EVIDENCE" STANDARD

Appellant claims that there is no statutory authority for requiring the defense to prove mitigating circumstances by the greater weight of the evidence, the lowest burden of proof available in court. He argues this burden prevents the jury from giving meaningful effect to mitigation, that the error is structural, and he is entitled to a new trial with the "erroneous" instruction removed. He

also argues that there is no presumption that standard jury instructions are presumptively accurate, which is patently inaccurate. *See*, *Bellsouth Telecomm., Inc. v. Meeks*, 863 So.2d 287, 293 (Fla. 2003) ("Standard jury instructions are not binding precedent; however, the instructions are published under this Court's authority *and are presumed to be correct*.") Defense counsel did not object to the instruction or request an alternate instruction, so the standard of review is fundamental error.

At the outset, a fundamental omission in Appellant's argument is that if mitigating circumstances don't have to meet the bare minimum preponderance of the evidence standard, what standard applies? He advances none, which presumes he is suggesting that any mitigating circumstances presented to the judge and jury must be accepted as true, regardless of how little, or even no, evidence there is to support it, and that then the only task of the factfinder is to decide how much weight to give it. Not only is this nonsensical, as a courtroom is meant to be a place where facts are proven and not simply accepted without question, but it would have no material impact on the weighing process as it works today. A judge or jury can already find mitigating circumstances to be proven by the greater

weight of the evidence, but then assign it no weight. Under Appellant's regime, a judge or jury would "accept" the unsupported mitigator and then simply assign it no weight as there is no evidence to support it, which is indistinguishable from simply finding it unproven altogether. Meeting this burden would have no impact on the jury's weighing process, and so there is no error.

There is also United States Supreme Court precedence on point finding that imposing this standard on capital defendants is not a constitutional violation. In *Walton v. Arizona*, 497 U.S. 639 (1990) *overruled on other grounds*, that Court considered a death penalty statute that imposed a preponderance of the evidence standard on mitigation evidence. There, the Court held, "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 650. *See also*, *Kansas v. Carr*, 577 U.S. 108, 119 (2016)("It would be possible, of course, to instruct the jury that the facts establishing mitigating circumstances need only be proved by a

preponderance.") So contrary to Appellant's assertions, the U.S. Supreme Court has expressly held this burden of proof does not violate the Constitution.

Additionally, this burden of proof has been long-established in Florida. *See Campbell v. State*, 571 So.2d 415 (Fla. 1990). In *Campbell*, this Court clarified that mitigating circumstances must be proven by the greater weight of the evidence, expressly to avoid the kind of arbitrary imposition of the death penalty Appellant fears. *Id.* at 419 ("As this case demonstrates, our state courts continue to experience difficulty in uniformly addressing mitigating circumstances.") This Court has consistently upheld that burden of proof, most recently in *Loyd v. State*, --- So.3d ---, 2023 WL 7815783 (Fla. 2023) where the Appellant made the exact same claim as Fletcher and was rejected. *Id.* at *21. *See, also Coday v. State*, 946 So.2d 988, 1003 (Fla. 2006); *Weaver v. State*, 894 So.2d 178, 197 (Fla. 2004), *Bryant v. State*, 785 So.2d 422, 431 (Fla. 2001); *Knight v. State*, 746 So.2d 423, 436 (Fla. 1998).

Finally, Appellant's claims that Florida's capital sentencing statute and jury instructions are unconstitutional because they shift the burden of proof as to the weighing of aggravation and mitigation

have consistently been rejected by this Court. *See Bush v. State*, 295 So.3d 179, 210 (Fla. 2020) (standard penalty phase jury instructions do not 'impermissibly shift the burden to the defense to prove that death is not the appropriate sentence.' (quoting *Rogers v. State*, 957 So.2d 538, 555 (Fla. 2007); *Lebron v. State,* 982 So.2d 649, 666 (Fla. 2008) (penalty-phase instructions do not improperly shift burden of proof to the defendant); *Barnhill v. State,* 971 So.2d 106, 117 (Fla. 2007) (Florida's death penalty statute and jury instructions do not unconstitutionally shift the burden of proof); *Reynolds v. State,* 934 So.2d 1128, 1151 (Fla. 2006) (rejecting claim that capital sentencing statute and instruction unconstitutionally place a higher burden on the defendant to establish that life is the appropriate penalty than is placed on the State to establish that death is appropriate).

This claim should be denied.

POINT IV: THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR A SPECIAL INSTRUCTION ON MERCY

The trial court has wide discretion in instructing the jury, and the decision to give or refuse to give a special jury instruction is reviewed under the abuse of discretion standard. *See Hudson v. State*, 992 So.2d 96, 112 (Fla. 2008).

In this case defense counsel filed a motion requesting a lengthy special instruction on "mercy":

> THE DEATH PENALTY IS NOT REQUIRED
>
> You are never required to impose a death sentence. You have complete control and discretion in determining whether or not the circumstances of this case justify a sentence of death. You must consider whether the aggravating factor or factors you have unanimously found to be established in this case sufficiently outweighs the mitigating factor or factors each of you, individually, find to be established-including the mitigating factors which both parties have stipulated exist-before you may consider imposing a sentence of death. You may consider mercy in making this determination.

(R, 3793-3805).

"In order to be entitled to a special jury instruction, [the defendant] must prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing." *Bush v. State*, 295 So.3d 179, 206 (Fla. 2020).

As Appellant concedes, mercy cannot conceivably be provable by evidence. Initial Brief at 52. Also, mercy is not a "theory of defense", but an attempt to implore the jury to set aside the fact that the aggravators outweigh the mitigators and decide to have mercy on

the defendant anyway. It's an acknowledgement that the defense theory that the aggravators are not weighty enough may have failed, and that the jury should vote for life anyway. The only part of this three-part test that is met is that it is a correct statement of the law that the jury can consider mercy in making its decision. *Woodbury v. State*, 320 So.3d 631 (Fla. 2021).

Appellant asserts that precluding consideration of mercy, in the absence of a mercy instruction amounted to structural error. The instructions proposed by Appellant were not required to ensure the consideration of mitigating factors. The "failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards." *Coday v. State*, 946 So.2d 988, 994 (Fla. 2006) (*quoting Stephens v. State*, 787 So.2d 747, 755 (Fla. 2001)); *Flowers v. State*, 158 So.3d 1009, 1066 (Miss. 2014), *cert. granted, judgment vacated on other grounds*, 136 S. Ct. 2157 (2016) (although the court stated that the life without parole option was stated more clearly in D–39 than in the omnibus instruction, it cannot be said that the jury was not given the instruction. The trial court did not err in refusing instruction D–39).

As here, the standard penalty phase jury instructions sufficiently obviated the need for a specific instruction regarding mercy or sympathy. The standard jury instructions specifically instructed the jurors regarding the concepts contained in Appellant's proposed jury instruction regarding mercy. *See* Fla. Std. Jury Instr. 7.11 (Crim.) ("Regardless of the results of each juror's individual weighing process—even if you find that sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death."). This Court has even specifically acknowledged this as the "mercy instruction". *Reynolds v. State*, 251 So.3d 811, 816 n.5 (Fla. 2018). Additionally, Appellant was able to argue mercy in closing argument extensively:

> But this is in your instructions, and we're going to talk a little bit, you know, more about it at the end because it will also factor into something I'm going to talk about, about mercy.
>
> "Regardless of the results of each juror's individual weighing process" -- and it was me that underlined "each individual juror's weighing process" -- "even if you find that the sufficient aggravators outweigh the mitigators, the law
> neither compels nor requires you to determine that the defendant should be sentenced to death."

And I know we talk about there's a lot of information, rightfully so, in the instructions. Mr. Johnson talked about it. We talk about it. You know, there's aggravators and then there's mitigators and, you know, the weighing process and what outweighs or doesn't outweigh something. But this is -- this is in your instructions.

This is part of the law and, I submit to you, the most important part of the law when you're considering the imposition of life in prison without the possibility of parole or death. The law says you are not required -- you are never required -- despite all the factors that are presented to you, to return a verdict of death.

. . .

So let me talk to you about -- let me show you -- so when we talk about -- I want to talk to you for a few moments about the concept of mercy and the ways mercy can be considered in this particular case.

. . .

You can also consider, and do consider, that regardless of the weighing process, that the law neither compels or requires you to determine that the defendant should be put to death.

So my argument to you is in all those ways, life in prison is a merciful and a just sentence. It certainly was for Doni Brown. So that's what -- when we talk about mercy, I argue to you that the law is in his favor, Mr. Fletcher's favor, with that consideration.

. . .

And so given all of the law that is before you -- and you're not required to return death – I would submit to you mercy

> is every much a part or can be as much a part of your consideration.
>
> But one thing I want to then move on to is the fact that -- and sometimes jurors don't really think of it in this way -- is that life without parole is punishment. It's also lawful. So you are -- when you're thinking about following the law, a life sentence without parole is lawful, and it's also punishment.

(TT, 1110-12; 1119-21; 1124-5).

This Court has rejected similar claims regarding jury instructions on the role of sympathy. *Bush v. State*, 295 So.3d 179, 210 (Fla. 2020); *Downs v. Moore*, 801 So.2d 906, 913 (Fla. 2001); *Moore v. State*, 820 So.2d 199, 210 (Fla. 2002); *Zack v. State*, 753 So.2d 9, 23–24 (Fla. 2000); *Hunter v. State*, 660 So.2d 244, 253 (Fla. 1995).

This claim should be denied.

POINT V: VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED BY THE COURT

A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. *Kalisz v. State*, 124 So.3d 185, 211 (Fla. 2013), *cert. denied*, 134 S. Ct. 1547 (2014); *Deparvine v. State*, 995 So.2d 351, 378 (Fla. 2008). As stated in *Jackson v. State*, 127 So.3d 447, 473 (Fla. 2013), permissible victim impact statements

do "not fall within one of the proscribed categories of victim impact evidence delineated in section 921.141(7). These proscribed categories are characterizations and opinions concerning (1) the crime, (2) the defendant, or (3) the appropriate sentence." Appellant has not established, and cannot establish, an abuse of discretion in the trial court's admission of the victim impact evidence.

Despite acknowledging that such evidence is permitted by both the U.S. and Florida Supreme Courts, Appellant argues that the victim impact evidence was improperly admitted during the penalty phase and should have been limited to the *Spencer* hearing. He does not identify anything in particular in the admitted statements that was objectionable, but makes a blanket statement on victim impact statements in general.

"Evidence of a family member's grief and suffering due to the loss of the victim is evidence of 'the resultant loss to the community's members by the victim's death' permitted by section 921.141(7)[4],

[4] Section 921.141(7), Florida Statutes (2006), provides that in a capital case, once the prosecution has provided evidence of one or more aggravating factors, the prosecution may present victim impact evidence and that: Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.

and the admission of such evidence is consistent with the Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808 (1991)." Victim impact evidence "relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family" is entirely proper. *Id.* *Payne* does not preclude the State from depicting to the jury the "life" of the human being murdered by the defendant. *Id.* at 822.

In the instant case, the trial court acted within its discretion in allowing witnesses to give victim impact statements. *See Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004) (Upholding the trial court's admission of victim impact evidence presented during the penalty phase from three witnesses—the victim's husband, mother, and best friend—regarding their relationship with the victim and the loss they suffered due to her murder). The evidence presented in this case was limited to the type of evidence specified in section 921.141(7), Florida Statutes. Here, the proper balance was struck between the victims' family members' right to be heard and to assist the jury in

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Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

understanding the loss of Helen Googe, and Appellant's right to a fair trial. Also, only three short statements were presented spanning a mere seven pages of the trial transcript, and two were read by a representative of the witnesses instead of the aggrieved family members themselves, which would naturally diminish their emotional impact. (TT, 577-584).

This Court spells out the purpose of victim impact statements in *Deparvine v. State*, 995 So.2d 351, 378 (Fla. 2008), stating, "[v]ictim impact evidence is designed to show 'each victim's uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be,'" *quoting Payne v. Tennessee*, 501 U.S. 808 (1991). The victim impact evidence presented in this case was not unnecessarily emotional or inflammatory. None of the four statements made any mention of Appellant. None asked for a specific sentence or punishment. None was overly emotional, and none made mention of revenge or retribution. None of the statements discussed the crime. Each statement merely sought to express the specific loss that individual felt.

Even if this Court were to find any error in the admission of the victim impact evidence, given the strong case in aggravation, the error is harmless beyond a reasonable doubt. *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998). There is no reasonable possibility that the jurors advised imposition of the death penalty based on the complained-of comments instead of the aggravating factors. Neither did the judge impose the death penalty because of the complained-of victim impact testimony. Rather, he imposed it because Fletcher met the statutory criteria.

This claim should be denied.

POINT VI: THE PROSECUTOR'S CLOSING ARGUMENTS WERE NOT IMPROPER, AND IF THEY WERE, THEY WERE PROPERLY ADDRESSED BY A CURATIVE INSTRUCTION OR HARMLESS

In this claim Appellant points to only one comment made by the prosecutor, which was objected to by defense counsel and immediately sustained by the trial court. As the error was preserved, the proper standard of review is a harmless error or per se reversible error test. *Johnson v. State*, 53 So.3d 1003 (Fla. 2010). Improper closing arguments are subject to the harmless error test. *State v. Murray*, 443 So.2d 955, 956 (Fla. 1984).

Appellant only selectively cites one part of the State's closing in making this claim. To determine whether a prosecutor has engaged in improper argument, it is necessary to evaluate the actions of the prosecutor in context rather than focus on the challenged statement in isolation. *See State v. Jones*, 867 So.2d 398, 400 (Fla. 2004). The complained-of comment came at the end of an extensive closing argument addressing all the mental health mitigation that had been presented, and what weight the jury should give it:

> And in this particular case, the things that were mentioned as reasons why he was under the influence or did not appreciate his conduct was the defense experts opined that he suffered from posttraumatic stress disorder, bipolar disorder, depressive disorder, and antisocial personality disorder.
>
> And you heard the testimony of Dr. Prichard. Dr. Prichard was, like, "I don't have any issue with the fact that Timothy Fletcher suffered trauma in his life." We heard a lot of evidence about that. Some of that evidence is hard to listen to, and it's sad.
>
> But when we talk about posttraumatic stress disorder, what Dr. Prichard said was this is extreme. It's extreme, and it lasts for a long period of time. And there's certain required criteria before you can issue a valid diagnosis of posttraumatic stress disorder.
>
> One of those criteria, one of those necessary criteria, is avoidance. And Dr. Prichard said, you know, when you apply this particular mental disorder to the events in question at the time that it occurred, it doesn't jive with

what the criteria is. The criteria is whenever you suffer trauma in this particular case, the trauma was abuse, violence against Timothy Fletcher or violence that he witnessed that his father committed against his mother.

And Dr. Prichard said in that situation, where the trauma lS violence, the person who's suffering from posttraumatic stress disorder would avoid situations where violence is going on. And in this particular case, Timothy Fletcher wasn't avoiding this situation. Timothy Fletcher was the one that precipitated it. He's the one that caused it. The violence didn't come to him. He went to it. He's the one that committed the violence. He wasn't avoiding it.

Posttraumatic stress disorder, whether he had it at some point in time in the past or whether he had it at some point in time when he was in prison and he got stabbed, at the moment that he killed Helen Googe, whatever posttraumatic stress disorder he may have had at some other point in time had no effect whatsoever on this crime because he sought out the violence, he caused the violence, he precipitated this violence.

As for the bipolar disorder, again -- and my question with Dr. Rohrer, if you noticed, I asked her, "Do you, today, diagnose him with bipolar disorder?"

And her response was "Well, I do by history." And what that was code for is, "No, I don't diagnose him with that today, but I see some things in his records that indicate that somebody in the past did."

And so when Dr. Prichard testified, he talked about those records. And what he said was there's some notations in those records while he was in prison, while he was in jail, bipolar; but none of the records -- none of the records document the necessary criteria, the symptoms that make a bipolar disorder. And he goes, "If he had those symptoms, they would have noted it" the extreme mania

where you're bouncing off the walls and not just -- you know, there are people that that's sort of their personality, but it's a marked difference from their baseline, the way they normally are. And it's not just for a period of time. It's for weeks, or at least more than a week, I believe, is what he said. And it's something that would be obvious to you.

And he's in a controlled setting. He's in the jail. He's in prison. There are people to watch him, monitor him 24 hours a day. In all that period of time, all that period of time, not a single person noted any of those symptoms – no mania.

And Dr. Prichard explained, well, why would it be that somebody would write down bipolar? And Dr. Prichard said in the prison environment, in the jail environment, you have inmates, they're depressed, they're irritable, they're angry; and the medication that can help with that is the same medication that they give people with bipolar, because irritability is one of those symptoms, and this medication can treat that symptom and help them with that. But a doctor can't just simply give somebody the medicine without justifying the reason for it, and so they write down bipolar.

It doesn't mean that he actually had bipolar. If it did, there would be documentation in those records that showed that he had the symptoms, those severe symptoms, for a long period of time. None of that is actually in the records.

The other part of this argument is this claim that Timothy Fletcher, for days prior to this murder, he and Doni Brown were using meth in the jail, and they were staying up for days on end; and when he committed this murder, he was sleep-deprived and he was high on meth.

Well, we heard the evidence in this particular case. There was no evidence that he actually did use meth. All of the evidence on this that supports this is nothing more than

Timothy Fletcher's story. There's no corroborating evidence that showed that he actually did use meth. There's nothing found in the jail cell, no meth, no paraphernalia. Doni Brown himself denied – when he was asked, Doni Brown himself denied that they used any drugs.

And not only that, but the very circumstances of this crime cut against this claim. We heard Dr. Goldberger and Dr. Prichard, for that matter, testify about a person who uses meth and is high on meth. And they can do things, but they don't do them very well. It's very difficult for them to perform complex tasks.

And when you think about how this crime occurred from beginning to end, you had somebody that was planning to this escape, and then they begin to pull out that toilet-sink fixture; and they remove that rebar; and they get through the plumbing chase; and they get through that outside door; and then they've got to figure out how to get through all of these fences; and then they've got to figure out how to get a car; and then they've got to drive that car to Helen Googe's house.

This crime, the circumstances of this crime, show very sophisticated planning; it showed a dogged determination to accomplish their goals. This was not some impulsive act. This was not something that was just done because he was high on methamphetamine.

What Dr. Prichard also said -- we've heard Dr. Rohrer testify and agree -- you know, and she said that she believed and diagnosed the defendant with antisocial personality disorder; and Dr. Prichard told you what that means. Antisocial personality is not try to avoid people. That's asocial. Antisocial personality, which he said is the predominant characteristic of Timothy Fletcher's mental status -- and what did he tell you about that? You know, there's a lot of mental health conditions that are organic -

> - bipolar, things of that nature, schizophrenia – where there's some chemical imbalance in the brain that causes a person to act in ways that are different. But that's not the case with antisocial personality disorder.
>
> What antisocial personality is, it's a character trait. It's characterological. And what that means is, is that there's a history with Timothy Fletcher of breaking the law, of violating the rights of others. Another characteristic is deceitfulness.
>
> So in what way is that mitigating? It's not. It's not mitigating. It just tells us about his character. There's nothing organic in terms of his --
> MR. WOOD: Judge, may we approach?
>
> THE COURT: No. Sustained. The jury will disregard the last argument, that is, it being argued as a mitigating circumstance.
>
> Please move on, Mr. Johnson.

(TT, 1056-63).

In context, the prosecutor had been going through each mental health diagnosis, explaining to the jury why he believed they did not apply, each explanation for the mental health mitigators and why they did not apply, and then addressed the main diagnosis both sides' experts agreed on: antisocial personality disorder. It is permissible to argue what weight a jury should give mitigation, and the prosecutor was juxtaposing more serious mental illnesses which he believed Appellant was not properly diagnosed with, with a less

seriousness personality disorder that did apply, but would not be as mitigating as those organic, chemical disorders. This is proper argument. Also, the State's rebuttal testimony related to antisocial personality disorder and the closing argument was invited by the defense as they were the first to put on testimony of the disorder. *Fletcher v. State*, 168 So. 3d 186, 211 (Fla. 2015)("Because Fletcher presented evidence that he was diagnosed with antisocial personality disorder . . . he opened the door to Dr. Prichard's testimony.")

Regardless, an objection was sustained and not one, but two different curative instructions were given to the jury, one within seconds of the objection and the second after the State finished its closing argument and before the defense began theirs. The language of the second curative instruction was agreed to by defense counsel before it was given. If this Court agrees that the comments were error, they were harmless beyond a reasonable doubt. There was not a reasonable probability that the comments changed the outcome of the case. At the sentencing stage, the jury faced the central question of whether to sentence Fletcher to death or to life imprisonment. *Spivey v. Head*, 207 F.3d 1263, 1277–78 (11th Cir. 2000).

The State's comments in closing argument neither misrepresented the law or the facts in any way and were not improper. In the present case, the comments at issue represented a very brief portion of the State's entire closing and much like the "slap on the wrist" hyperbole in *Spivey*, there is not a reasonable probability that the language used here changed the outcome of the case. Moreover, the State clarified that it was intentionally argued as to the weight to give mitigation. (TT, 1072).

Both the jury and the judge found four aggravating factors: 1) Appellant was previous convicted of a felony and under sentence of imprisonment; 2) the murder occurred while Appellant was engaged in the commission of a robbery; 3) the murder was committed for financial gain (merged with aggravator number 2); 4) the murder was especially heinous, atrocious, or cruel. The judge assigned great weight to all of the resulting three factors, and even after finding *forty-five* mitigating circumstances to have been proven, still decided that death was the appropriate penalty even over his own moral objections. (R, 4123) ("Candidly, my own personal and religious bias is against the death penalty."). The jury either found no mitigators as proven or did not assign them weight enough to outweigh a death

recommendation. In light of these facts, the weighty aggravation in favor of the death penalty versus the mitigation provided by the defense, there is no reasonable probability this one comment, particularly when viewed in context, affected the jury's verdict. This is especially true when observing this very Court has recognized that antisocial personality disorder has the danger of being seen as more hurtful than helpful even without comment by the prosecutor and can be dangerous for the defense to present. *See Allred v. State*, 186 So.3d 530, 537 (Fla. 2016) (Holding that counsel was not ineffective for deciding not to present evidence of antisocial personality disorder as that or similar diagnoses can be viewed negatively by jurors and not seen as mitigation).

POINT VII: CUMULATIVE ERROR CLAIM

Appellant claims the cumulative error of individual claims has deprived him of a fair trial. This Court has explained that "where the alleged errors urged for consideration in a cumulative error analysis are individually either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009) (internal citations omitted). All of Appellant's claims are without merit or any errors are harmless beyond a

reasonable doubt, so this claim should be summarily denied. Any errors this Court finds, when weighed against the extreme aggravation in this case that outweighs the mitigating factors, leads to a finding of no cumulative error.

POINT VIII: FLORIDA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL AND PROPERLY NARROWS THE CLASS OF DEATH-ELIGIBLE DEFENDANTS

Appellant argues that an increase of the number of aggravating factors, in addition to recent changes in the law such as this Court receding from proportionality review and relative culpability render this state's capital sentencing scheme unconstitutional.

In 1972, the United States Supreme Court imposed a temporary, nation-wide moratorium on the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman* the Court held that the death penalty was being indiscriminately and capriciously imposed, and implicitly tasked the states with formulating a fairer system of administering it. *Id.* at 309-10. Four years later, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court reinstated the death penalty under Georgia's new statutory scheme. Georgia had instituted a scheme similar to that used by most states today: capital punishment was reserved for a few select crimes, and the trial was bifurcated into guilt

and penalty phases; during the penalty phase the judge or jury would hear arguments in aggravation and mitigation, and while the state was limited to certain aggravation, the defendant was given wide latitude in what could be presented in mitigation. *Id.* 162-3. After trial, capital defendants, like in Florida, were afforded an expedited direct review of their case by the Supreme Court of Georgia, who would independently determine the appropriateness of the sentence. *Id.* at 166-7. The Court found that these procedures properly narrowed the application of the death penalty to only the worst-of-the-worst and provided objective criteria to avoid its freakish or wanton use. *Id.* at 206-7. This narrowing of cases is a "constitutionally necessary function" of state death penalty statutory schemes. *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

Appellant argues that Florida's death penalty statute and related laws have broadened the number of cases to such a degree as to betray those requirements of *Furman* and *Gregg*. He goes so far as to argue that every conceivable fact situation that could support a charge of first-degree murder includes at least one of Florida's aggravating factors. Even if we assume this assertion is correct for the sake of argument (which it is not), it completely ignores how the

death penalty is implemented in the State of Florida. The existence of an aggravating factor is only the first step in the process Florida uses to narrow the number of first-degree murder cases that result in the death penalty to only the worst of the worst.

He also claims that this Court misinterpreted *Pulley v. Harris*, 465 U.S. 37 (1984) when it used that case to find proportionality review, and later relative culpability, were not constitutionally required and violated Florida's conformity clause. *Pulley* reviewed California's death penalty statute, and as Appellant's argument goes, that case found proportionality review was not required due California due to other checks and balances in the statute that supposedly do not exist in Florida. However, the additional checks and balances the California statute had in place at the time of *Pulley* are materially indistinguishable from the ones Florida employed in Appellant's case. In California, a person convicted of murder was sentenced to death unless at least one "special circumstance" was found beyond a reasonable doubt by the jury along with a finding of guilt. *Id.* at 51. After that, the trial proceeded to a second phase which determined the appropriate penalty, and the jury would be presented additional evidence to weigh the aggravating and mitigating

circumstances. *Id.* at 52. If the jury returns a verdict for death, the trial judge then had to make its own determination about the appropriate penalty and could still impose life. *Id.* And then, if a sentence of death is imposed the defendant received automatic review by the California Supreme Court, "which would seem to include review of the evidence relied on by the judge." *Id.* at 53.

It is hard to understand how Appellant can argue this provides a robust check and balances system to imposition of the death penalty, but Florida's statute does not. First, while not a part of Appellant's case because it was a resentencing from a 2009 murder, currently prosecutors must file a notice with the court within 45 days of a defendant's *arraignment*, which occurs shortly after arrest, listing the aggravators they believe they can prove, or they are forever prevented from seeking the death penalty in cases where pretrial litigation often lasts years. Fla. Stat. § 782.04(1)(b). Under the statute used to sentence Appellant, a jury must make multiple decisions before returning a verdict for the death penalty. First, they must unanimously determine that at least one aggravating factor has been proven beyond a reasonable doubt; they can only choose from those presented by the prosecution, and the prosecution is limited by a

statutory list of specific aggravators. Fla. Stat. § 921.141 (2)(a);(6) (2019). Before they even start the weighing process, they then must unanimously find that any aggravators they found are sufficient on their own to warrant the death penalty. See Fl. Standard Jury Inst. 7.11 ("If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor[s] [is][are] sufficient to impose a sentence of death, the next step…") (emphasis added). After making this unanimous determination, the jurors make individual determinations about which, if any mitigating factors were proven by a preponderance of the evidence. *Id*. In addition to a list of statutory mitigating circumstances, the defense is permitted to present, "the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty," and so the defense is not limited in any way as to what they can present in mitigation. Fla. Stat. § 921.141 (7) (2019). The jury must then make another unanimous finding, this time that whatever aggravators they unanimously found outweigh any mitigators they each individually found to exist. Fla. Stat. § 921.141 (2)(b)(2) (2019). After all this, their job is still not done; they must then unanimously find, after unanimously agreeing that the aggravators outweigh the

mitigators, that the appropriate punishment is death. Fla. Stat. § 921.141 (2)(c) (2019). Even after all of these findings were made by a jury, the judge still has the authority to impose a life sentence instead of death; the judge, however, cannot override a life verdict. Fla. Stat. § 921.141 (3)(a) (2019).[5] This lengthy narrowing process is a far cry from Appellant's suggestion that the only inquiry that matters is the existence of one aggravating factor. After all that is completed, a capital defendant is then entitled to automatic review by this Court to determine whether there was sufficient evidence of guilt and of aggravating factors.

Appellant argues California has safeguards that Florida does not: that the aggravators had to be alleged in the indictment, and that the jury had to find an aggravator during the guilt phase. Florida

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[5] This is not a hypothetical part of the process and judges have not just been rubber stamps for the jury's verdict or the defendant's capitulation. The undersigned is aware of several cases where there was a jury waiver or a 12-0 jury verdict that was overridden for a life sentence. *See*, *e.g.*, *State of Florida v. Juan Rosario*, Case No. 2014-CF-14049 (Orange County, 12-0 jury recommendation overridden); *State of Florida v. David Frances*, Case No. 2000-CF-16204 (Orange County, 12-0 jury recommendation overridden); *State of Florida v. Larry Perry*, Case No. 2013-CF-612 (Osceola County, 12-0 jury verdict overridden); *State of Florida v. John Campbell*, Case No. 2010-CF-1012 (Citrus County, defendant waived a jury recommendation, still received a life sentence).

currently has to give similar advance notice of aggravators with the 45-day-within-arraignment filing requirement, and a jury still has to find at least one aggravating factor beyond a reasonable doubt, they just have to do so in the penalty phase. He does not explain how requiring the finding in the guilt phase—which is often when most of the evidence of aggravation is presented simply as a part of proving guilt anyway—provides such a stronger check than Florida's to render our statute unconstitutional without comparative proportionality. Florida's capital punishment statutory scheme only begins, and ends well after, the finding of a single aggravating factor in a first-degree murder case.

Appellant argues this Court's decision in *Bush v. State*, 295 So.3d 179 (Fla. 2016) rejecting of the "reasonable hypothesis of innocence" rule further erodes the constitutionality of its death penalty statute. That rule held when the State relied on purely circumstantial evidence to convict a defendant, the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. *Id.* at 200. Not only is that ruling irrelevant to discussion on the imposition of the death penalty, as it dealt purely with guilt/innocence issues, but as this Court pointed

out in Bush, the standard was confusing and, "it should be obvious that it wholly defies reason to suggest that a standard for determining whether evidence is sufficient for conviction is incorrect if used by a juror . . . but appropriate for use by a judge to determine whether the verdict complies with the law." *Id.*

Appellant argues that every possible factual scenario for first-degree murders could result in the death penalty due to "aggravator creep." Importantly, this Court has considered and rejected similar arguments consistently. *See Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006) (rejecting the argument that "Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony."); *Ault v. State*, 866 So.2d 674, 686 (Fla. 2003) (rejecting the argument that the murder in the course of a felony aggravator is unconstitutional because it constitutes an automatic aggravator and does not narrow classes of persons eligible for the death penalty); *see also Victorino v. State*, 23 So.3d 87, 104 (Fla. 2009) (rejecting the claim that the HAC aggravator is unconstitutionally vague and overbroad). Appellant also severely

misrepresents the facts in *Colley v. State*, 310 So.3d 2 (Fla. 2020) that led to this Court finding HAC for both murders in that case, most importantly the fact that neither victim received only one gunshot wound before death; victim Amanda Colley received nine gunshot wounds and victim Lindy Dobbins had three, while the two women experience this preceding their deaths:

> Both women fled to the master bedroom area only after being shot at by Colley from outside the house. They knew that Colley was on a murderous rampage. After Colley found Amanda, he shot her once, left her to kill Lindy, and then returned to inflict the gunshots that caused Amanda's death. The medical examiner testified that Amanda likely sustained painful wounds before the shot that killed her. Similarly, Lindy cowered in fear behind a chest, heard her friend being shot, and then was executed upon Colley's return to the closet. The totality of these circumstances demonstrates that both murder victims experienced exceptional anguish before their deaths.

Id. at 9-10; 15.

Appellant also claims the court improperly doubled the pecuniary gain factor with the committed during the commission of a robbery factor, but the record and his own brief acknowledge those aggravators merged into one for consideration and were not doubled. (R, 4181-2); IB at 118.

Next, Appellant challenges the constitutionality of the under sentence of imprisonment aggravator. This aggravator has long been upheld and applied by this Court. *See*, *e.g.*, *Delap v. State*, 440 So.2d 1242, 1256 (Fla. 1983). And while he argues that the definition has been improperly enlarged to encompass more possible defendants over the years, those arguments are irrelevant because there can be no doubt that this aggravator was meant to apply to, at the bare minimum, defendants like Appellant who had received a prison sentence and literally had to break out of jail to commit their murder.

This claim should be denied.

POINT IX: THIS COURT NO LONGER PERFORMS PROPORTIONALITY REVIEW, BUT THIS CASE WOULD SATISFY IT REGARDLESS

This claim is similar to point two, arguing that this Court should recede from *Lawrence v. State*, 308 So.3d 544 (Fla. 2020) and *Cruz v. State*, 372 So.3d 1237 (Fla. 2023) which found comparative proportionality and relative culpability to not be constitutionality mandated and receded from those practices.

This Court has consistently declined to revisit its decision in *Lawrence* and rejected similar claims, as recently as November of last year. *See*, *e.g.*, *Loyd v. State*; *Sievers v. State*, 355 So.3d 871 (Fla.

2022); *Gordon v. State*, 350 So.3d 25 (Fla. 2022). Also, not only does Appellant not make any argument as to how his sentence is disproportionate, this Court already performed a proportionality review after his first sentencing and found that it was. *Fletcher*, 168 So.3d at 220-1.

This claim should be denied.

CONCLUSION

Appellant's convictions and sentences of death should be upheld in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing

Appellee's Answer Brief has been furnished via e-portal to: Steven N. Gosney, Assistant Public Defender, **gosney.steven@pd7.org,** 444 Seabreeze Blvd. Suite 210, Daytona Beach, Florida 32118 on this 10th day of January, 2024.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Bookman Old Style, and word count is 14,390 in compliance with Fla. R. App. P. 9.210 and 9.045.

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