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IN THE SUPREME COURT OF FLORIDA

TIMOTHY W. FLETCHER,

Appellant,

vs. CASE NO. SC23-0058

STATE OF FLORIDA,

Appellee.
_____ /

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record on appeal is comprised of two digital files with consecutively numbered pages. The record on appeal has 5,312 pages, and counsel will refer to the record on appeal using the letter "R." The trial transcript has 1,153 pages, and counsel will refer to the trial transcript using the letter "T."

STATEMENT OF THE CASE

"This is a close call in this case," The trial judge opined during his pronouncement of a death sentence. (R4193) In a case where the State seeks to put one of its citizens to death, the maximum amount of due process should be applied.

Timothy Wayne Fletcher, hereinafter Appellant, was indicted by a grand jury with murder in the first degree for the April 15, 2009 strangulation death of Ms. Helen Googe. On May 25, 2012, a jury found Mr. 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. The first penalty phase concluded with the jury recommending a death sentence for the murder of Helen Googe by a vote of eight to four. (R19)

On direct appeal this Court released an opinion affirming the death sentence. See Fletcher v. State, 168 So. 3d 186 (Fla. 2015). (R120-187, 192-194) The Appellant filed a Fla. R. Crim. P. 3.851 motion for post- conviction relief. (R575-648) The hearing on the motion was held on February 15, 2017, and again on May 17, 2017. (R649, 1735-1750) On August 28, 2017, Mr. Fletcher was granted

relief under that Rule pursuant to Hurst v. Florida, 577 U.S. 92 (2016) and Hurst v. State, 202 So. 3d 40, 45 (Fla. 2016) (R1753-1758)

The Appellant filed a pre-trial motion to limit victim impact evidence. (R3027-3030) The Court partially granted and partially denied the motion on March 15, 2022. (R3364-3365, 3763-3768) On August 22, 2021, the defense moved to preclude improper closing argument. (R3031-3033, 3763-3768) On March 14, 2023, the Court granted this motion by written order. (R3360-3362) The State listed four (4) aggravators in support of the death penalty. (R1751-1752, 3123-3126; T63-77) The Appellant moved to declare the aggravating factors unconstitutional as written and as applied. (R3050-3056); (R3059-3087); (R3088-3092) and (R3034-39) The Court denied the motions by written order. (R3358-3359); (R3129-3130); (R3127-3128) and (R3356-3357) On April 6, 2022, the defense filed a motion for special jury instruction regarding "mercy." (R3233-3435) The requested mercy instruction was not given. (R3793-3805)

Three victim impact statements were read to the jury over

defense objection; namely Debra Black, Kristopher Key, and Randall Key (the last two read by witness Douglas Crews). (T576-584) After the presentation of the victim impact testimony, the State rested. (T584) During the charge conference discussing the jury instructions, the defense preserved numerous objections, as argued below. (T959-961) The Court read the jury instructions to the jury. (T1007-1028) The State and Appellant conducted their closing arguments. The Appellant made an objection and motion for mistrial related to an improper closing argument by the State in violation of pre-trial orders. (T1028-1127) The jury returned a unanimous penalty phase verdict for death and on the special verdict form found no mitigation had been proven. (T1135; R3806-3808)

The Spencer hearing was held on November 22, 2022. (R4019) The State and Appellant each submitted a sentencing memorandum prior to sentencing. (R4059-4081, 4023-4058) On January 3, 2023, the trial court conducted its sentencing hearing. (R4082-4135; R4178-4196, 4194) The trial court submitted a written sentencing order. (R4087-4124) The trial court ruled that the financial gain

merged with the robbery aggravator. (T961) The trial court assigned the following weights to each aggravator:

Prior Felony Under Sentence of Imprisonment), Great weight. (R4087-4124, 4181) Murder committed while committing robbery and Murder was committed for financial gain, merged: Combined, great weight. (R4087-4124, 4181-4182) aggravator (EHAC): Great weight. (R4087-4124, 4182-4183)

As for the mitigators presented, the Court found the following: The fact that the co-defendant was given a life sentence was afforded great weight. (R4087-4124, 4183-4185) In considering the totality of the other mitigation, the Court assigned moderate weight. (R4087-4124, 4185-4187) Considering the mitigation produced at the Spencer hearing (that the Appellant can serve the prison community), the Court assigned slight weight. (R4087-4124, 4186-4187) In considering the defendant's anti-social personality disorder, the Court pronounced that it did not consider it as any kind of aggravator, but as a mitigator, and assigned it slight weight. (R4087-4124, 4187-4188)

During its pronouncement of a death sentence, the trial court

opined on the closeness of the death decision, stating: "This is a close call in this case. It's made closer by the jury's erroneous surplus finding on the verdict form." (R4193) The trial court again sentenced Mr. Fletcher to death. (R4082-4135; R4178-4196, 4194) The Appellant filed a timely Notice of Appeal. (R4143) This appeal follows.

STATEMENT OF THE FACTS

The facts accepted by the Court on direct appeal from the guilt phase are fully contained within the prior decision of this Court.

"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."

(Fingernail scrapings taken from Googe matched the known profile of Fletcher.)

"The medical examiner determined that the cause of Googe's death was asphyxia due to manual strangulation. He identified fingertip contusions 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."

Fletcher v. State, 168 So. 3d 186, 193–99 (Fla. 2015)

The penalty phase in this case took place April 21, 2022 before the Honorable Judge Howard O. McGillin. (T1-1153) The State's

first witness, Putnam County jail guard Charles Wood described the events surrounding the discovery of the escape from jail by Mr. Fletcher preceding the murder. (T79-99)

The second witness, John Merchant, further described how the escape took place, described the crime scene, and subsequent capture of the escapees. (T106-143) The third witness, Ofc. Lynn Nicely, described finding the body of the victim, Ms. Googe, in her home. (T130-166) The fourth witness, John Holmquist, introduced photos and evidence collected from the crime scene. (T167-206) This included fingernail scrapings and clippings from Ms. Googe. (T200) The fifth witness, Douglas Crews, described the identity of Ms. Googe and her relationship with Mr. Fletcher. (T204-225) The sixth witness, Investigator David Sanders, recovered tangible evidence from Georgia including a social security card, some blue clothing, a blue canvas shoe, two blue cotton shirts and pants, and a women's housecoat. (T227-236) These items were found floating in the water in a Georgia pond described by Mr. Fletcher. In addition, there were numerous personal documents found including bank receipts, a passport, birth certificates, and banking

documents, all of which had the name 'Helen Googe" on them. In a ditch at another location in Georgia, a credit card in the name of Ms. Googe was found. The seventh witness, Maria Lam, testified that DNA from under the fingernails of Ms. Googe were from Mr. Fletcher. (T266-270) For their eighth witness, the State called Investigator Richard Brendel. (T287-535) Investigator Brendel introduced the Miranda form used in the case. (T290-292) The State next called Dr. Predrag Bulic, M.D., the medical examiner, who testified that the cause of death was manual strangulation. (T538-545, 566)

The defense presentation began on day three of the penalty phase. The defense's first witness, Dr. Buffington, testified as a clinical pharmacologist and toxicologist. (T622-655) He summarized the mental health history of Mr. Fletcher using his drug prescriptions from over twenty different prescribers as well as illicit drug use. (T628-655) The Doctor testified that in Mr. Fletcher's youth, there were behavioral problems, direct depression problems, anxiety issues, and PTSD. Some of those were treated early with Prozac, which was ineffective and in fact counter- productive.

(T630-631) He was then placed on Remeron, a much more powerful antidepressant, as well as Trimectal, Seroquel, and Trazodone. (T632-633)

Mr. Fletcher's youth was characterized as continual access to medical and behavioral healthcare services. (T633) In his twenties, Mr. Fletcher exhibited depression, antisocial personality disorder, anxiety, and insomnia, all of which could have been caused by trauma in his youth. (T634) Suicidal tendencies were also present. (T652-653) Illicit drug use also dominated his youth, including alcohol use beginning at age six, marijuana by age eleven, and cocaine by age fourteen of fifteen, and later methamphetamine. (T634-635, 644) The early childhood drug use caused detrimental brain development which was exacerbated by early childhood head injuries. (T635)

Mr. Fletcher's mental health history was consistent with PTSD caused by personal traumas such as the death of his mother, and the beatings and abuse by his father. (T641) Mr. Fletcher was also later prescribed Lortab, Lamictal, Xanax, and Effexor. (T642-643) His prescriptions were inconsistently managed by over twenty

different prescribing doctors. (T649-650) The doctor opined that binging methamphetamine in the jail for several days before the crime caused prolonged sleep deprivation, and that Mr. Fletcher was under the influence at the time, of extreme mental and emotional disturbance, such that his capacity to appreciate his actions and conduct were impaired. (T646-651)

The defense's second witness was Dr. Jennifer Rohrer. (T671-750) Dr. Rohrer, a clinical and forensic psychologist, testified that Mr. Fletcher was diagnosed with PTSD from age fourteen, as well as bi-polar disorder in his early 20s, with a consistent diagnosis of depression throughout his life. (T684-688) This was exacerbated by continual untreated poly-substance abuse which included alcohol at age six, escalating to daily use, K2 (spice or synthetic marijuana), cocaine, LSD, mushrooms, methamphetamine, opiates, and benzodiazepines. (T689-691) Mr. Fetcher was also diagnosed with an early childhood speech disorder, PTSD, suicidality, an adjustment disorder, and antisocial personality disorder. (T692-697) Mr. Fletcher had been attacked multiple times while incarcerated, contributing to his PTSD.

(T699-701)

Mr. Fletcher had no positive role models during his upbringing. (T702-12) His father had a history of alcoholism and inter-family violence with a criminal history of over thirty-eight pages, including an incident where Mr. Fletcher's father held a shotgun at his wife, and threatened to kill her in front of the children. (T702-704) The father left the family when Mr. Fletcher was aged ten, leaving Mr. Fletcher to care for his younger brother, sometimes homeless, alone, and without food. (T704-706) His mother was diagnosed with brain cancer when Mr. Fletcher was aged fourteen and she died when he was aged eighteen. (T708-712)

Mr. Fletcher used methamphetamine for four consecutive days before escaping from the jail. (T712) Mr. Fletcher had been under the influence of methamphetamine and without sleep for four days at the time of the murders, suffered from untreated mental illness, depression, a trauma disorder, and bipolar disorder. (T712-715)

The third defense witness was Jeff Fletcher, who was the younger brother of the Appellant. (T756-788) Appellant's mother left the home unexpectedly when Mr. Fletcher was age ten.

(T761-762) Mr. Fletcher described the chaotic situation at their childhood home. (T756-788) Mr. Fletcher's upbringing was fraught with abuse, alcoholism, and abandonment. (T756-788) During an extended period, the two young brothers were left alone in the home since their father was incarcerated. (T762-763) Hunger was a persistent problem, with survival dependent on neighbors and school food. (T763-764) Their six foot two, two-hundred and-forty-pound father drank every day, which caused him anger, physical violence, and mental abuse, mostly directed at Timothy. (T765-772) When Appellant's mother passed, Timothy was unable to attend her funeral due to being incarcerated. (T773-774) Timothy's grandfather, whom he looked up to, would entice him to steal dirt bikes so that they could be resold in his pawn shop. (T776)

The fourth defense witness was Roy Lee Walker, Jr. (T788-812) Mr. Walker was the best friend of Mr. Fletcher, who testified about the beatings and abuse Mr. Fletcher suffered at the hands of his intoxicated father, sometimes escaping to sleep outside on a trampoline. (T791-812) This abuse only subsided when a

twelve-year-old Timothy Fletcher won money for his father at pool tables at the local bar. (T794-801) He further explained Mr. Fletcher's reactions when his mother suffered and passed away from cancer when he was a teenager. (T792-795)

Mr. Fletcher chose not to testify after Court inquiry. (T820, 826-827, 831-833) Before resting and based on a stipulation by the parties, the defense introduced the life sentence of co-defendant Doni Ray Brown as mitigation. (T834-836)

In rebuttal the State called Dr. Bruce Goldberger, and he testified about the effect of methamphetamine and its relation to the facts of the case. (T837-861) Specifically, Dr. Goldberger opined that the skill level to conduct the escape weighed against a high level of methamphetamine intoxication at the time of the incident. (T844-847) The second State rebuttal witness, Dr. Gregory Prichard, did not agree with the PTSD defense or basically any conclusions of the defense experts. (T866-946)

SUMMARY OF THE ARGUMENTS

POINT I: IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, THE JURY WRONGFULLY IGNORED MITIGATION EVIDENCE.

The Eighth and Fourteenth Amendments require that sentencers consider all mitigating factors surrounding the accused murderer before coming to the decision of applying the death penalty. This means that the jury may not ignore mitigation evidence. The "reverse jury nullification" in the context of a capital murder trial as exhibited in this case is a gross violation of Due Process.

POINT II: IN VIOLATION FO THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION, THE ABSENCE OF AN ENMUND/TISON JURY INSTRUCTION OR FINDING WAS FUNDAMENTAL ERROR.

In this case, where it was clearly disputed at the penalty phase whether Mr. Fletcher killed the victim, the Court was required to give a Enmund/Tison instruction, and the jury was required to make specific factual findings to impose the sentence of death. No such instruction was given, nor were there any requisite factual findings by the jury.

POINT III: DEFENSE BURDEN TO SHOW MITIGATION IS ERROR.

Placing a burden on the defense to show mitigating circumstances exist by a greater weight of the evidence is error, as the legislature has allocated no such burden, and the burden undercuts and is not logically consistent with death penalty jurisprudence. 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 IV: MERCY INSTRUCTION

Mr. Fletcher's request for an express jury instruction on "mercy" should have been granted. Appellant seeks to exhaust for federal review the claim that the error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be ascertained from the record.

POINT V: VICTIM IMPACT STATEMENTS SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

The jury's penalty phase verdict was tainted by improper victim impact evidence, rendering the death sentence unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article I Section 17 of the Florida Constitution. The appellant objected to the state introducing victim impact evidence on the grounds that the penalty phase is to determine whether aggravating and mitigating factors exist and victim impact evidence is not relevant to this phase of the trial. The trial court followed the present state of the law of this Court and ruled the evidence admissible. Appellant submits that Payne and Windom are erroneous and urges this Court to recede from Windom.

POINT VI: IMPROPER CLOSING ARGUMENTS.

During the penalty phase trial closing argument, the prosecutor made improper argument converting what is a mitigator into an aggravator which tainted the jury's verdict and rendered the sentencing proceeding fundamentally unfair.

POINT VII: CUMULATIVE ERROR.

Defendant's convictions and sentence of death must be

vacated due to the cumulative effect of the guilt and penalty phase errors.

POINT VIII: FLORIDA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL.

Section 921.141 Florida Statutes is unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution and Article I Section 22 of the Florida Constitution. Florida's death penalty scheme now fails to sufficiently reduce the risk of arbitrary infliction of death sentences. When death is sought by the State, maximum Due Process must be applied. A death penalty scheme must genuinely narrow the class of defendants eligible for the death penalty, which Florida's scheme does not do. Florida's abandonment of proportionality, erosion of common law protections for the innocent, and aggravator creep generally make Florida's death penalty scheme unconstitutional. Specifically: Section 921.141(6)(A) Florida Statutes (under sentence of imprisonment factor) is unconstitutional; Section 921.141(6)(D) Florida Statutes (felony murder – the least culpable form or murder - used as aggravator) is unconstitutional; Section 921.141(6)(F) Florida Statutes (murder committed for pecuniary gain) is unconstitutional; Section 921.141(6)(H) Florida Statutes (EHAC) is unconstitutional; Section 921.141(6)(i) Florida Statutes (CCP) is unconstitutional.

POINT IX: THIS CASE FAILS PROPORTIONALITY.

The Appellant's death sentence was disproportionate, and this Court should conduct a proportionality analysis, vacate the death sentence and remand for a life sentence. Florida reserves the death penalty for the most aggravated and least mitigated of first-degree murderers. The totality of the circumstances of this case, compared with other capital cases, render the death sentence a disproportionate penalty.

ARGUMENTS

POINT I

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, THE JURY WRONGFULLY IGNORED MITIGATION EVIDENCE.

Mitigation, also referred to as "mitigating factors" or "mitigating evidence," is evidence the defense can present in the sentencing phase of a capital trial to provide reasons why the defendant should not receive a death sentence. This evidence, which can include mental problems, remorse, youth, childhood abuse or neglect, a minor role in the homicide, or the absence of a prior criminal record, may reduce the culpability of the defendant in the killing or may provide other reasons for preferring a life sentence to death. The United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978) has ruled that in deciding between the death penalty and life in prison, the jury may consider any mitigating evidence a juror finds relevant. The jury is instructed to weigh the mitigating factors presented by the defense against the aggravating factors presented by the prosecution.

Eighth Amendment jurisprudence establishes two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. Gregg v. Georgia, 428 U. S. 153 (1976); Furman v. Georgia, 408 U. S. 238 (1972). Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense.'" Lockett at 604. Consideration of such evidence is a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U. S. 280, 304 (1976)

In the case at bar, the jury found that the Appellant did not provide valid mitigating evidence. (T1135; R3806-3808) Specifically, on the jury verdict form, the jury was asked:

"C. Mitigating Circumstances: One or more individual jurors find that one or more mitigating circumstances was established by

the greater weight of the evidence. __X__ No" (R3807)

To find no mitigation evidence the jury clearly ignored the judge's instructions to find what mitigation had been proven. The issue in the case at bar is whether the jury has the discretion to ignore mitigation evidence. This is a matter of "reverse jury nullification." Reverse jury nullification in the context of a capital murder trial is a gross violation of Due Process and should be rejected by this Court. The Appellant submits that the Eighth and Fourteenth Amendments require that sentencers consider all mitigating factors surrounding the accused murderer before coming to the decision of applying the death penalty.

In the case of Sparf v. United States, 156 U.S. 51 (1895) the United States Supreme Court clarified questions related to the duty of criminal trial juries. In Sparf the defendants there, convicted of murder, sought review on the theory that the trial judge had unconstitutionally usurped the jury's province by instructing it that, although it had the power to bring in a verdict of manslaughter, any verdict other than a conviction for murder or a total acquittal would violate its oaths and duties. The Supreme

Court rejected their argument, holding that, although a jury has an absolute power to ignore a judge's directions, it has no such right to ignore directions, and to do so is wrongful:

> The trial was thus conducted upon the theory that it was the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.

Sparf at 106. In this case the jury ignored the trial judge's instructions related to the constitutional requirement to consider mitigation. The result is that the Appellant was denied a fair trial. "One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' " McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) A juror meets the constitutional standard for impartiality where the juror "can lay aside his opinion and render a verdict based on the evidence presented in court." Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984). As the Tenth Circuit has

explained, a "defendant's right to an impartial jury does not include a right to a jury composed of person who will disregard the district court's instructions." United States v. James, 203 F.3d 836 (10th Cir. 2017)

In this instance, the Appellant should be granted a new penalty phase where the jury properly follows the trial judge's jury instructions and weighs the proven mitigation evidence against the aggravating circumstances and then renders a just verdict.

POINT II

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION, THE ABSENCE OF AN ENMUND/TISON JURY INSTRUCTION OR FINDING WAS FUNDAMENTAL ERROR.

Standard of review. This merit point is subject to fundamental error analysis. To be entitled to fundamental-error reversal when an instruction that must be given per Apprendi is not given, an Appellant must show the omission is pertinent or material to what the jury must consider in order to convict and must be disputed at trial. See Sewart v. State, 420 So. 2d 862, 863 (Fla. 1982); Reed v. State, 837 So. 2d 366, 369 (Fla. 2002) citing State v. Delva, 575 So.2d 643, 645 (Fla.1991) (fundamental error to fail to instruct jury on essential element when that element is disputed at trial).

Argument. Trial court errors, regardless of whether they occur before trial, during trial, or following trial, may be addressed by an appellate court only if the error has been "preserved" in the trial court for review on appeal. But the preservation requirement does

not apply in connection with a trial court error that amounts to "fundamental error." Accordingly, this type of error may be argued for the first time in an appellate brief. See Florida Statute 924.051 ("A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.") Fundamental error is also not subject to harmless error analysis because "all fundamental error is harmful error." Reed v. State, 837 So. 2d 366, 370 (Fla. 2002).

In order for the jury to recommend a sentence of death, they must find the defendant was a major participant in the crime of robbery or burglary and that defendant's state of mind at the time amounted to reckless indifference to human life. This requirement is laid out by the Supreme Court of the United States in the cases Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987). Further, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond reasonable doubt,

pursuant to the Sixth Amendment right to a jury trial, incorporated against the states through the Fourteenth Amendment, and Apprendi v. New Jersey, 530 U.S. 466 (2000) and its progeny. This Court recognizes this requirement.

> "In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court overturned Enmund's death sentence for felony murder because this Court "affirmed the death penalty in th[e] case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." Id. at 801. The High Court revisited its holding in Enmund in Tison v. Arizona, 481 U.S. 137 (1987). In Tison, the High Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Tison, 481 U.S. at 158."

Perez v. State, 919 So. 2d 347, 365 (Fla. 2005)

In Perez v. State, 919 So. 2d 347 (Fla. 2005), this Court held that in a felony-murder case where there is a dispute over whether the defendant himself killed the victim, the jury must decide whether the defendant's participation was sufficiently culpable to warrant death vis-à-vis the co-defendant. In such cases the jury must decide whether one of the following was proved beyond a

reasonable doubt: (a) the defendant killed the victim; (b) the defendant intended to kill the victim; (c) the defendant intended that deadly force would be used in the course of the felony, or instead; (d) the defendant was a major participant in the underlying felony and exhibited reckless indifference to human life. See Jackson v. State, 575 So. 2d 181, 193 (Fla. 1991). In Perez, this Court advised that when culpability between co-defendants is at issue, a jury must be instructed during the penalty phase. The recommended language by this Court is as follows: "In order for you to recommend a sentence of death in this case you must find the defendant was a major participant in the crime of robbery or burglary and that defendant's state of mind at the time amounted to reckless indifference to human life." See Perez. Here, no such instruction was given, nor were there any requisite factual findings by the jury.

In the present case, it was clearly disputed at the penalty phase whether Mr. Fletcher killed the victim. (T48-57, 69, 1036-1040, 1053, 1081-1092) After the State rested at penalty phase, the judge found "this is a felony-murder case where the

"whodunit" pointer is wedged firmly in the middle as far as who did the killing, with the Court below stating, "What I've heard is that both of them did it." (T607) By the time of the sentencing order, the judge's findings evolved to "the evidence points only to this Defendant [as the actual killer]. The proof is beyond and to the exclusion of a reasonable doubt." (R4096) Note that unlike Cruz v. State, 320 So. 3d 695, 722, 708 (Fla. 2021) wherein the jury made special findings on the verdict form that Cruz possessed a firearm during the commission of the crimes and that Cruz discharged a firearm causing the death of his victim, in the present case the jury made no such finding.

This factual dispute should have been submitted to the jury. Such a factual finding by the jury is required before death may be imposed and cannot be made by the judge pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000) and its progeny.

Besides the constitutional requirement of Enmund v. Florida and Tison v. Arizona, stated earlier, the Eighth and Fourteenth Amendments of the United States Constitution further require that the capital sentencing decision be individualized and allow for the

particularized consideration of relevant aspects of the character and record of each convicted defendant. Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Lockett v. Ohio, 438 U.S. 586 (1978). The jury verdict finding the Appellant guilty of murder under an acting-in-concert theory, does not establish that the Appellant had the requisite intent to be eligible for the death penalty under Enmund and Tison because the instructions permitted the jury to possibly find the defendant guilty of this offense based upon the intent of the co-defendant Doni Brown.

The Appellant is mindful that this Court in Cruz v. State, 48 Fla. L. Weekly S140 (Fla. July 6, 2023) held that relative culpability appellate review is not constitutionally required. Athough this may be the current jurisprudence in Florida, this holding does not change the requirement that a jury should receive a jury instruction on relative culpability in arriving at a death penalty verdict pursuant to the Florida Conformity clause found in Article 1 section 17 of the Florida Constitution which requires the State of Florida to follow Eighth Amendment jurisprudence promulgated by the U.S. Supreme Court.

The United States Supreme Court in Enmund v. Florida, 458 U.S. 782 (1982) used a balancing test to decide whether the sentence of death for a non-triggerman defendant who was involved in a felony where a murder took place is constitutional. In the 4-1-4 decision, the Court decided that in the case of a defendant who "neither took life, attempted to take life, nor intended to take life," imposing the death penalty violates the Eighth Amendment. Enmund at 787 The Court thus held that in order to impose the death sentence, the non-triggerman defendant must intend the murder of the decedent.

In the present case, the state charged Appellant and Doni Ray Brown with first degree murder, home-invasion robbery, two counts of burglary, and escape. There was substantial evidence, in the form of Appellant's statement to the police, that Appellant entered Ms. Googe's house with the intent to get money in finance their escape from authorities. The Appellant further confessed that Doni Brown committed the murder of Ms. Googe after it was discovered that she had no money. Despite the Appellant's confession denying culpability, there was no requested Enmund/Tison jury instruction

to determine which defendants was more culpable for Ms. Googe's murder. This Court should reverse and remand this case back to the trial court for a new penalty phase trial.

POINT III

DEFENSE BURDEN TO SHOW MITIGATION IS ERROR.

Placing a burden on the defense to show mitigating circumstances exist by a greater weight of the evidence 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. 3d 1013, 1019 (Fla. 2016). Further, this merit point is subject to fundamental error analysis.

There is no presumption in favor of standard jury instructions.

"It is surely frustrating, for both trial courts and appellate judges, that the standard jury instructions [...] have so many potential pitfalls." [...] "However, the use of the standard jury instructions does not relieve the trial court of its obligation to determine whether the standard instructions accurately and adequately state the law." Brown v. State, 11 So. 3d 428, 432 (Fla. 2d DCA 2009) (citing Moody v. State, 359 So. 2d 557, 560 (Fla. 4th

DCA 1978)); accord Harvey v. State, 448 So. 2d 578, 580-81 (Fla. 5th DCA 1984) ("Unfortunately, trial attorneys and trial judges often fail to recognize that instructions promulgated by a Supreme Court Committee on Standard Jury Instructions, whether criminal or civil, are merely the work product of a conscientious committee and not immutable postulates from Olympus. Committees, after all, sometimes construct camels rather than race horses.")" Jackson v. State, 179 So. 3d 443, 447 (Fla. 5th DCA 2015) Per In re Amendments to Florida Rules of Judicial Admin., Florida Rules of Civil Procedure, & Florida Rules of Criminal Procedure-Standard Jury Instructions, 45 Fla. L. Weekly S121 (Fla. Mar. 5, 2020), the instructions are not authority towards accurately stating the applicable law.

"Therefore, in order to put in place a more efficient process for providing standard jury instructions to be used in civil and criminal cases and to avoid any misconception that this Court has "adopted," "approved," or otherwise ruled on the legal correctness of the standard jury instructions prepared by the committees, the Court has determined that it should no longer be involved in the development and authorization for use of Florida's standard jury instructions. Rather, the three committees the Court has created to prepare standard jury instructions should be authorized to develop and approve, by two-thirds vote, new and amended standard jury instructions to be published for use in the committees' respective

case types. Adopting a procedure for providing standard jury instructions that does not require this Court's involvement is consistent with the procedures for providing the standard, pattern, or model jury instructions that are used in most other states, in which entities other than the states' high court are responsible for developing and approving those instructions for use."

In footnote 6, the Court further opined:

This appears to be true despite the fact that the Court also has explained that such substantive determinations cannot be made by the Court in a jury instructions case and must be left for an actual case and controversy.

The deference to standard jury instruction committees does find support in other pronouncements by this Court. *But see* Stephens v. State, 787 So. 2d 747, 755 (Fla. 2001) However, Stephens cites State v. Bryan, 290 So.2d 482 (Fla.1974) for this proposition, which does not contain any such presumption. Ultimately, the responsibility to say what the law is remains exclusively with the judicial branch.

Argument. On the jury verdict form, the jury was asked and answered:

"C. Mitigating Circumstances: One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence. X No" (R3807)

Thus, the jury returned a unanimous penalty phase verdict for

death but found no mitigation had been proven by a greater weight of the evidence. (T1135; R3806-3808)

The sentencing body cannot be precluded from considering **and giving effect to** relevant mitigation. See Smith v. Texas, 543 U.S. 37 (2004) (procedure unconstitutional where jury asked to answer “yes” or “no” to two questions in a manner where valid mitigating evidence was not considered) (emphasis added).

Section 921.141 of the Florida Statutes is, and always has been, silent as to a burden of proof relevant to mitigation. Cf. Section 921.141(2), Florida Statutes (2022) 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. See State v. Poole, 297 So. 3d 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. Only if the selection phase ends with a unanimous death verdict does the

process continue. § 921.141(2)(c), Florida Statutes (2022).

Florida's Legislature characterizes the jury's duties during the selection phase as "a weighing." §921.141(2)(b), Florida Statutes. 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.

In Florida's Standard Jury Instructions, no express allocation of a burden of proof on mitigation was present until 2009. See In re Standard Jury Instructions in Criminal Cases, 22 So. 3d 17, 21 (Fla. 2009). Thereafter, new language was added which allocated the burden to the defense. The assignment of a greater weight of the evidence burden of proof in the instructions was error, as it was not, and is not, statutorily authorized and undercuts consideration of valid mitigation by individual jurors. The "greater weight of the evidence for mitigation" instruction was echoed throughout the trial in the present case. (T38, 42, 867, 1013, 1020, 1026, 1043, 1076, 1137; R1909, 2090, 2158, 2352, 2585, 3528, 3807, 4024)

As stated above, in the jury interrogatory, the jury checked

"NO" in response to the question, "One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence." (R1137) As a practical matter, the jury finding that "NO" mitigating circumstance was proven by a greater weight of the evidence could have precluded the consideration of factors that by law must be considered (such as mercy). For instance, it was stipulated by the parties that Doni Brown received a life sentence for his involvement in the case. The Defendant entered a certified copy of Brown's Judgment and Sentence, as well as a certified copy of his signed plea form (where the State waived the death penalty and agreed to life without parole for Mr. Fletcher's co-defendant). In the face of this, the jury failed to find ANY mitigation. (R1137)

In this case, at least in part due to the burden of proof allocated to the defendant, it is probable that the jury did not consider mitigation before delivering a sentence of death – even that mitigation that was stipulated to by the parties. The instructions and the law require the jury to give meaningful effect to mitigation. See Abdul-Kabir v. Quarterman, 550 U.S. 233, 234 (2007) citing,

e.g., the plurality opinion in Lockett v. Ohio. ("Sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.") The error in giving the instruction that puts the burden on the defense clearly was not harmless on this record.

In applying the harmless error test, the state cannot prove there is no reasonable possibility that the error did not contribute to the defendant's conviction, especially when the allocation of burden infused practically the entire defense mitigation presentation. See Bartholomew v. State, 101 So. 3d 888, 894 (Fla. 4th DCA 2012); Bryant v. State, 124 So. 3d 1012, 1015-16 (Fla. 4th DCA 2013)

Appellant is mindful that this Court has held that the defense bears a burden in presenting mitigation. See 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). Appellant's position is

that Campbell does not clearly reflect the intent of the Legislature, has doubtful antecedents, and in this case runs afoul of caselaw applying the federal Eighth Amendment.

In Campbell, this Court for the first time specified that mitigating circumstances must have been reasonably established by the greater weight of the evidence. Specifically, Campbell stated, "**The court** must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by **the greater weight of the evidence**:" Campbell at 419 (emphasis added). 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. 3d at 500. Thus, in Campbell, the Court read additional requirements into the law of mitigation without statutory authority, and was referring to standards applying to judge findings, not jury findings.

Mitigating circumstances can arise from the defendant's history, but also from the circumstances of the offense. E.g., Bright v. State, 299 So. 3d 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 largely by the State. This practical consideration, as well as the perception that 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.

To better understand why the allocation of any burden on the defense to prove mitigation is erroneous, one only need look to mercy as mitigation. As argued elsewhere in this brief, mercy is an essential part of the death penalty phase. Yet, if Campbell is to be

followed, the defense is required to prove "mercy" mitigation by a greater weight of the evidence. This is illogical as well as impossible. The flaw is in allocating a greater weight of the evidence burden on the defense in the first place.

Constitutional constraints apply here as well. Juries in capital cases may not be precluded from considering, and giving effect to, relevant mitigating circumstances. See, i.e., 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. In any case, 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. See Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980).

It was error to allocate any burden of proof to the defense to prove mitigation. The error should be deemed structural, i.e., not subject to harmless-error analysis. See generally Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993) (misdescription of the burden of proof vitiates the jury's findings). See also Johnson v. State, 53 So. 3d 1003, 1007 (Fla. 2010) (harmless-error analysis inappropriate where the reviewing court cannot meaningfully consider how an error affected the jury). Campbell does not reflect any view ever expressed by the Florida Legislature, and the single case cited in the Campbell opinion on the point does not support the disputed principle. The proper question is whether there is a valid reason to not recede from Campbell. E.g., Lawrence v. State, 308 So. 3d 544, 551 (Fla. 2020), citing State v. Poole, 297 So. 3d 487, 507 (Fla. 2020).

In as much as Campbell has been read to allocate a burden of proof to the defense to prove mitigation to a jury by a greater weight of the evidence, Campbell was wrongly decided and should be

overruled. This Court should act on it and order a resentencing on that ground.

POINT IV

MERCY INSTRUCTION SHOULD HAVE BEEN GIVEN.

Mr. Fletcher's request for an express jury instruction on "mercy" should have been granted.

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

Argument. On April 6, 2022, Mr. Fletcher filed a motion for special jury instruction regarding "mercy." (R3233-3435) The defense in the present case requested a special jury instruction as follows:

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.

The requested mercy instruction was not given. (R3793-3805; T 1007-1028)

Standard Jury Instruction 7.11(a) provides:

"Regardless of the results of your individual weighing process, the law neither compels nor requires you to determine that the defendant should be sentenced to death."

This Court has referred to this provision of Standard Instruction 7.11 as the "mercy instruction." Reynolds v. State, 251 So. 3d 811, 816 n.5 (Fla. 2018); Woodbury v. State, 320 So. 3d 631, 656 (Fla. 2021) Appellant asserts that despite whatever label is assigned to this provision, the fact that the Court did not explicitly acknowledge mercy as an acceptable reason to choose life undercuts such arguments to the jury.

Counsel is mindful that this Court has acknowledged defense counsel's right to make his mercy argument to the jury. In Downs v. Moore, 801 So. 2d 906 (Fla. 2001), it was argued that appellate counsel was ineffective for failing to challenge the trial court's denial of several proposed jury instructions, one of which was the "mercy" instruction. Without addressing the performance prong of Strickland, the Court reasoned that defense counsel's closing

summation, which incorporated the mercy argument, was adequate to ensure that the integrity of the appellate process had not been compromised. It therefore appears that while the trial court is not required to instruct the jury on mercy, defense counsel may certainly make a mercy argument during his penalty phase closing. Appellant is also mindful that in recent years, Florida has greatly eased the ability of the State to attain a death penalty in all murder cases, including rejecting the present argument in Woodbury v. State, 320 So. 3d 631 (Fla. 2021). In Woodbury, as here, the defense at trial unsuccessfully sought to modify Florida's standard criminal jury instruction 7.11 for use in the penalty phase. There, as here, the defense sought an instruction that would have expressly told the jurors that mercy could guide their decision-making; the request was denied, and the jury was read the standard instruction. The gravamen of Woodbury is that standard language in 7.11 adequately conveys the idea that jurors may be guided by mercy; that standard language reads “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." 320 So. 3d at 656.

Mercy is central to the death-penalty selection process, as viewed by the Supreme Court of the United States. The Court has observed that "what our case law is designed to achieve" in the selection process is a conscious jury decision to accord or withhold mercy. See Kansas v. Carr, 577 U.S. 108, 119 (2016). This Court agrees. See State v. Poole, 297 So. 3d 487, 503 (Fla. 2020) (citing Carr); see also State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (defending a client's interests in a penalty phase consists of "seeking the mercy of society.") Making the law explicit to the jury rather than implied should be the standard.

Generally, "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). Here, as argued elsewhere in this brief, death is different and mercy is not provable by evidence, but springs from the conscience of each

individual juror. Second, while the standard instruction implies mercy, it does not explicitly state it. Thus, the standard language is inadequate to explain the mercy consideration. Third, the requested instruction correctly states the law.

Looking to Federal practice, under the Federal Death Penalty Act (FDPA) "mercy is not precluded from entering into the balance of whether the aggravating circumstances outweigh the mitigating circumstances." United States v. Rodriguez, 581 F. 3d 775, 813-14 (8th Cir. 2009); United States v. Allen, 247 F. 3d 741, 782 (8th Cir. 2001). Thus, under federal law the defendant is afforded a mercy instruction in addition to not being prohibited from urging the jury to be merciful in its deliberations and in its consideration of mitigating factors. Allen at 782. This language is reflected in the applicable jury instruction which was requested in this case.

The Mississippi Supreme Court, considering indistinguishable language, has held that it "seems simply to instruct the jury on its ability to impose a sentence of life in prison, rather than the death penalty." Flowers v. State, 158 So. 3d 1009, 1066 (Miss. 2014), cert. granted, judgment vacated on other grounds, 136 S. Ct. 2157

(2016). Appellant submits that the Mississippi court correctly intuits the layperson's likely reaction to the language in question.

The error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be ascertained from the record. See generally Johnson v. State, 53 So. 3d 1003, 1007 (Fla. 2010) and United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006).

The State may further argue that any error in the jury instructions was cured by defense counsel's mercy-based argument to the jury. The Third District has rejected a similar argument: "[w]e are not persuaded that permitting defense counsel to argue [a pertinent point] to the jury in closing was an adequate substitute for an instruction from the court. The comparative value of arguments by counsel and instructions by the court, through the eyes of the jury, cannot be underestimated given the fact that 'particularly in a criminal trial, the judge's last word is apt to be the decisive word.'" Cliff Berry, Inc. v. State, 116 So. 3d 394, 411-12 (Fla. 3d DCA 2012), citing Boyde v. California, 494 U.S. 370, 384 (1990) and Bollenbach v. United States, 326 U.S. 607, 612 (1946).

Appellant asks this Court to recede from Woodbury v. State, 320 So. 3d 631 (Fla. 2021), to reverse his sentence, and to remand for a new penalty phase.

POINT V

VICTIM IMPACT STATEMENTS SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

The jury's penalty phase verdict was tainted by improper victim impact evidence, rendering the death sentence unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article I Section 17 of the Florida Constitution.

Standard of review. Generally, rulings on evidentiary admissibility are reviewed for abuse of discretion. See Patrick v. State, 104 So. 3d 1046, 1056 (Fla. 2012). A court abuses its discretion if its ruling is based on an erroneous view of the law. Id. Mixed questions of law and fact which determine constitutional rights should be reviewed using a two-step approach, deferring to the trial court on questions of historical fact but conducting de novo review of the constitutional issue. See City of Fort Lauderdale v. Dhar, 185 So. 3d 1232, 1234 (Fla. 2016), citing Connor v. State, 803 So. 2d 598, 605 (Fla. 2001).

Argument. The defense moved to preclude or limit victim impact evidence from being presented to the jury. (R3027-3030) The Court partially granted and partially denied the motion.

(R3364-3365, 3763-3768) The defense argued, inter alia, that the victim impact presentation should only be presented at the Spencer hearing as victim impact statements do not go to any statutory aggravator. Id. In fact, victim impact evidence may not be considered by the jury for aggravation. See In re: Standard Criminal Instructions in Capital Cases, 214 So. 3d 1236 (Mem) (Fla. 2017). The State listed four (4) aggravators in support of the death penalty. (R1751-1752, 3123-3126; T63-77) Three victim impact statements were read to the jury over defense objection; namely Debra Black, Kristopher Key, and Randall Key (the last two read by witness Douglas Crews). (T576-584) The contents of the victim impact statements read to the jury were not relevant to any of the four statutory factors. (T576-584) This was in fact explicitly stated by the trial court: i.e. "You may not consider this evidence as an aggravating factor." (T576)

To be admissible in a penalty phase, the State's direct evidence must relate to a statutory aggravating factor. See Perry v. State, 801 So. 2d 78, 90 (Fla. 2001). The State may not present evidence of non-statutory aggravation under the pretense that it is

being admitted for some other purpose. Id. at 91. Therefore, generally, the admission of non-statutory death penalty aggravation is error. The only factors that allow a defendant convicted of capital murder to be eligible for the death penalty are those contained in Section 921.141(6) Florida Statutes. Victim impact is not one of those circumstances.

This Court looks to how testimony was presented to determine if it was proper cross-examination or rebuttal, or instead improper non-statutory aggravation. See Kormondy v. State, 703 So. 2d 454, 462-63 (Fla. 1997). In Kormondy, during penalty phase the State elicited testimony from a defense witness that Kormondy had threatened to kill two of the witnesses against him. This Court reversed the ensuing death sentence based on introduction of that evidence, because future dangerousness is not a statutory aggravating factor in Florida. It rejected the State's argument that the evidence was relevant to rebut defense testimony to the effect that Kormondy was prone to impulsive behavior, holding that "in the way the statement was presented by the State, it became another non-statutory aggravating factor." Id. at 463.

The admission of the family members' opinions and characterizations of the crimes could serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. Such admission is therefore inconsistent with the reasoned decision making required in capital cases. Counsel is mindful that Booth v. Maryland, 482 U.S. 496 (1987) was overruled just four years later by Payne v. Tennessee, 501 U.S. 808 (1991). The State codified the law as set out in Payne, in Section 921.141(8) Florida Statutes. That statute provides that the State may introduce proof designed to demonstrate the victim's uniqueness as an individual and the resultant loss to the community, provided that evidence does not characterize the defendant or convey an opinion as to the appropriate sentence. This Court in Windom v. State, 656 So. 2d 432 (Fla. 1995), approved the statute, holding that it does not impermissibly affect weighing of aggravation and mitigation, or otherwise interfere with defendants' rights. 656 So. 2d at 438.

The Supreme Court found that victim impact evidence does not violate the Constitution but noted that it should be a "quick

glimpse" of the victim in life. Payne at 830, O'Connor, J., concurring. This "quick glimpse" has morphed into a full-length feature film in some cases.

The fact that there is no burden of proof for victim impact evidence supports the conclusion that victim impact evidence is not properly presented to the jury in the penalty phase. Jury confusion is the likely result when all other aggravating evidence is considered under one standard, and then an oddball second category of evidence is presented to which no standard of proof standard is instructed, other than it is not to be considered as aggravation. This incompatible set of standards demonstrates that this evidence should be reserved for the Spencer hearing.

Appellant asserts that the introduction of the victim impact statements at the sentencing phase of Mr. Fletcher's capital murder trial violated the Eighth Amendment. The evidence should not have been introduced in a proceeding as weighty as a capital punishment hearing because it served no function other than inciting jurors' emotions. See Payne, John Paul Stevens, in dissent.

Prior to Payne, the Eighth Amendment to the United States

Constitution prohibited the introduction of victim impact evidence at the sentencing phase of a capital murder trial. See Booth. Booth correctly pointed out that the admission of such evidence creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. The focus is not on the defendant, but on the character and reputation of the victim and the effect on his family, factors which may be wholly unrelated to the blameworthiness of a particular defendant. Booth pointed out that the presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. Of course, Payne overruled Booth. After the enactment of Section 921.141, Florida Statutes and this Court's holding in Windom v. State, 656 So. 2d 432 (Fla. 1995), prosecutors are presenting this type of emotion-laden evidence to juries throughout this state.

Before the presentation of the victim impact statements to the jury, the Court stated, “This evidence is presented to show the victim's uniqueness as an individual and the resultant loss by

Helen Googe's death." (T576) There is no reason why this purpose cannot be fulfilled at a Spencer hearing. Evidence that is not relevant is not admissible. Victim impact evidence is not probative to any statutory aggravator and is therefore not relevant to the sentencing question. Evidence should be excluded when its prejudicial effect exceeds its probative value. Victim impact evidence is emotionally charged by its very nature and is therefore high in prejudicial effect.

Appellant submits that Payne and Windom are erroneous and urges this Court to recede from these cases. A new penalty phase is required, without victim impact evidence being presented to the jury, but only later at a Spencer hearing.

POINT VI

IMPROPER CLOSING ARGUMENTS

The improper argument in closing by the prosecutor in the penalty phase improperly converted mitigation into aggravation and improperly diminished valid mitigation.

Standard of review. Where a trial court overrules objections to closing argument, the reviewing court considers whether the rulings represented an abuse of the court's discretion. See Cardona v. State, 185 So. 3d 514, 520 (Fla. 2016). If the rulings are deemed erroneous, the reviewing court applies the harmless error standard, placing the burden on the beneficiary of the errors to show beyond a reasonable doubt that there is no reasonable possibility that they contributed to the conviction or death sentence. Id.

Argument. During the original trial, prosecutor Johnson made numerous improper closing arguments to the jury. This point was raised by appellate counsel after the first trial in the original direct appeal. In response, this Court addressed the improper tactics of this very same prosecutor in this very same case but held the closing arguments not reversable under a fundamental error analysis. See Fletcher v State, 168 So. 3d 186 (Fla. 2015).

In response to the closing argument predilections of this prosecutor, on August 22, 2021, the defense filed “defendant's motion in limine to preclude improper closing argument.” (R3031-3033) In that motion, the following admonition was listed:

> "Consideration of aggravating factors is limited to only those set forth in section 921.141(5), Fla. Stat Miller v State, 373 So. 2d 882, 885 (Fla. 1979). Consideration of nonstatutory aggravating factors is impermissible. See Fletcher v State, 168 So. 3d 186 (Fla. 2015); Atwater v State, 626 So. 2d 1325, 1328 (Fla. 1993); Sireci v State, 587 So. 2d 450, 454 (Fla. 1991); Oyola v State, 158 So.3d 504, 509-513 (Fla. 2015); Delhall v State, 95 So. 3d 134, 170 (Fla. 2012); Poole v State, 997 So. 2d 382, 392 (Fla. 2008); Perry v State, 801 So. 2d 78, 79, 911 (Fla. 2001); Kormondy v State, 703 So. 2d 454, 463 (Fla. 1997)."
>
> "e. That the Defendant is like all other murderers on death row. It is improper for the state to denigrate mitigating evidence, including mental health mitigation. See Delhall, supra at 167-68; Franqui v State, 59 So. 3d 82, 98 (Fla. 2001)."

On March 14, 2023, the Court granted this motion by written order. (R3360-3362) Specifically, the Court stated:

> "The Supreme Court had to address many of these same issues arising from the initial trial in this case. This Court observes that while the comments made were not the basis for a successful appeal, nor were they models of proper argument, the Supreme Court's Order provides reminders of the necessary touchstones of proper argument. There should be no denigration of the Defendant's case. (Dehall v. State, 95 So.

3d 134 (Fla. 2012) and Brooks v. State, 762 So. 2d 879, 903 (Fla. 2000))

The State cannot convert mitigating factors into aggravating factors, nor can they create new aggravating factors. [Emphasis added]

During the closing argument, the prosecutor made the following improper argument to the jury: (T1063-1064)

> "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 ln 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."

Defense counsel preserved the point by contemporaneous objection which was sustained. At the conclusion of the State's argument, the defense sought a mistrial based on the prosecutor turning mitigation evidence into aggravating evidence: (T1071-1072)

> COURT: Mr. Wood, as to your objection, do you wish any other curative instruction?
>
> MR. WOOD: Judge, I actually would think it would be

appropriate to ask for a mistrial in the case because -- I appreciate the Court's attention, quick attention, to the objection. I am concerned that there was emphasis by the State, undue and unnecessary and, frankly, illegal. We never put forward antisocial personality disorder as a circumstance, a mitigating circumstance; and the Court has read those circumstances. I would move for a mistrial.

THE COURT: State?

MR. JOHNSON: Well, Your Honor, the comment that was made, I mean, there was -- the defense experts testified about him having antisocial personality disorder. We had Dr. Prichard saying that that's really what's going on here. That was the argument. And the argument was in the weighing the other testimony about the other mental health conditions that those experts said he had, when you're weighing that, what's really going on here is this.
Now, the Defense was the one that initially brought up antisocial personality disorder and brought up that testimony. It was simply a comment on weighing that particular evidence. I wasn't doing anything of the sort in terms of trying to make that into an aggravating circumstance.

THE COURT: Mr. Wood?

MR. WOOD: Well, Judge, they -- when I made the objection, Mr. Johnson had just said that the Defense has put forth -- said this is a mitigating circumstance. That's why I made the objection. And I don't think you can unring the bell.

THE COURT: Well, I will tell you I'm not going to grant a mistrial, but I am going to give a curative."

In this case, the following aggravating factors were at issue:

(1) the murder was committed by a person previously

convicted of a felony and under a sentence of imprisonment,
(2) the murder was committed while Fletcher was engaged, or was an accomplice, in the commission of a robbery,
(3) the aggravating circumstance that the murder was committed for financial gain; and
(4) the murder was especially heinous, atrocious, or cruel (EHAC).

(R1751-1752)

The comments made by the prosecutor do not go to any of the above listed aggravating factors listed in the case, thus any argument by the prosecutor that antisocial personality disorder should be used as aggravation is improper. The statement above has no relevance in determining the appropriate penalty. Yet, despite the best efforts of the defense and the efforts of the Courts, the prosecutor improperly injected an improper aggravating factor within its case.

As the trial court below observed, "This is a close call in this case." (R4193) The death penalty is the most serious and extreme penalty that can be imposed by the State. As said so directly by the Court in Furman v. Georgia, 408 U.S. 238 (1972), "death is different." Prosecutorial misconduct has "long been recognized" as grounds for reversal. See Berger v. United States, 295 U.S. 78

(1934) (“it is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed.”)

The Florida Courts have for decades admonished prosecutors to uphold the law by following the law in closing arguments. This requires a modest amount of self-discipline and ethics, yet these endless admonitions do not seem to be sufficient to restrain prosecutorial emotion. This same prosecutor engaged in willful violations of the rule resulting again in an unfair sentencing. What more can the defense do to prevent these improper arguments or to preserve the issue? This Court should reverse and remand for a new sentencing.

POINT VII

CUMULATIVE ERROR.

Mr. Fletcher's convictions and sentence of death must be vacated due to the cumulative effect of the errors.

Standard of review. Where multiple errors are found, even if deemed harmless individually, “the cumulative effect of such errors" may "deny to defendant the fair and impartial trial that is the inalienable right of all litigants.” See Hurst v. State, 18 So. 3d 975, 1015 (Fla. 2009).

Argument. Should Defendant's individual issues be considered harmless error, Defendant would tender that the cumulative effect of the errors renders Defendant's convictions and sentence fundamentally unfair under Art. I, §§9, 16 and 17, Florida Constitution, and the 5th, 6th 8th and 14th Amendments, U.S. Constitution. This Court may consider the cumulative effect of errors. See Patrick v. State, 104 So. 3d 1046, 1068-1069 (Fla. 2012). These serious errors include but are not limited to: prejudicial closing remarks during the penalty phase, and improper admission of non-statutory aggravating circumstances.

Further, should this court find multiple errors containing a mix of preserved and unpreserved errors, Appellant prays that this Court apply fundamental error analysis to the claims. See Cromartie v. State, 70 So. 3d 559, 563 (Fla. 2011) ("[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.")

POINT VIII

SECTION 921.141 FLORIDA STATUTES IS UNCONSTITUTIONAL

I. Florida's death penalty scheme now fails to sufficiently reduce the risk of arbitrary infliction of death sentences. 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. The scope of Florida's capital-sentencing scheme has broadened over the years, and the scheme now fails to suitably narrow the class of eligible persons. Mr. Fletcher's death sentence is unconstitutionally arbitrary. (R2891-2893).

II. When Death is sought by the State, maximum due process must be applied. The State has the burden to create law that comports with the requirements of the United States Constitution:

> If the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing]

> discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). In the context of capital punishment, greater due process requirements are required than the Constitution commands for lesser punishments. See Amendments to Fla.R.Crim.P. & Fla.R.App.P., 875 So. 2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); Chamberlain v. State, 881 So. 2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different."). When the level of deprivation is low, minimal due process is required. Cf. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("(D)ue process is flexible and calls for such procedural protections as the particular situation demands.") In a death penalty context, everything is on the line and an accused is entitled to maximum due process. Death is different because of the "acute need" for reliability in carrying out a sentence unique in its severity and finality:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . .

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. 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." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977).

The "acute need for reliable decision making" was recognized early on by the United States Supreme Court:

> . . . The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "Because the death penalty is unique "in both its severity and its finality," [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668 (1984) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 731-732 (1998). See Arvelaez v. Butterworth, 738 So. 2d 326, 326-27 (Fla. 1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner . . . ").

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Beck v. Alabama, 447 U.S. 625, 637-638 (1980). The analysis to be applied by the courts is far more complex when death penalty statutes are being analyzed, for not only must the statute satisfy ordinary due process requirements, but it also must satisfy an Eighth Amendment analysis that compels heightened due process to ensure reliable sentencing:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may

> be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

Maynard v. Cartwright, 486 U.S. 356, 361-362 (1988).

When the State is asking this Court to impose the death penalty, heightened standards of due process apply. See Elledge v. State, 346 So. 2d 998 (Fla. 1977) ("heightened" standard of review), Mills v. Maryland, 486 U.S. 367, 376 (1988), ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Reliability in the fact finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and Beck v. Alabama, 447 U.S. 625, 638 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has

been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion) (citing cases).

Due Process and fundamental fairness considerations under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 9 of the Florida Constitution are inextricably tied to the heightened reliability demanded by the Eighth Amendment to the United States Constitution. See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (Citation omitted). Aside from heightened requirements of reliability required as a component of Due Process, the Eighth Amendment proscription against cruel and unusual punishments precludes capital punishment where imposition of the death penalty is contrary to contemporary standards of decency. See Roper v. Simmons, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional);

Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty impermissible for mentally retarded); Stanford v. Kentucky, 492 U.S. 361 (1989) (death penalty unconstitutional for person under seventeen years of age); Tison v. Arizona, 481 U.S. 137 (1987) (death penalty unconstitutional for person who lacks sufficient moral culpability). In summary, a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785 (1987). Arbitrary and capricious imposition of capital punishment is forbidden. See Furman v. Georgia, 408 U.S. 238 (1977). "Where discretion is afforded 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 wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

III. A death penalty scheme must genuinely narrow. Where discretion is afforded 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. See 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."[1]

In Furman v. Georgia, 408 U.S. 238, 309-10 (1972), Justice Potter Stewart famously declared the death penalty unconstitutional as administered in 1972 because it struck randomly, like lightning:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se] petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed.

[1] 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 Aneed for reliability in the determination that death is the appropriate punishment in a specific case).

Id. (Stewart, J., concurring); see also, Id. at 310 ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"); Id. at 313 (White J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and … there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"). The Supreme Court of the United States only permitted Florida and other states to reinstate the death penalty in 1976 with the understanding that the death penalty no longer would be "inflicted in an arbitrary and capricious manner." Gregg, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The Court in Pulley v. Harris, 465 U.S. 37 (1984) 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. "If a State has determined that death should be

an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984). Narrowing is a "constitutionally necessary function at the stage of legislative definition." Zant v. Stephens, 462 U.S. 862, 878 (1983). That is, the statute itself must limit the scope of those eligible for the death penalty beyond those who are convicted of murder. See Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (noting it is "the legislature" that must provide the means for "narrow[ing] the class of death-eligible murderers"). This requirement enforces the Eighth Amendment's demand that the death penalty be free from "arbitrary or irrational imposition." See Parker v. Dugger, 498 U.S. 308, 321 (1991) Put another way, a capital sentencing scheme violates the Eighth Amendment if it fails to provide objective criteria that would limit the application of the death penalty to the worst of the worst. See Furman v. Georgia, 408 U.S. 238, 239 (1972)

In recent years, Florida has eliminated or eroded multiple vital safeguards for its death penalty system. Presently, the current

Florida death penalty scheme is unconstitutional because it fails to adequately narrow the class of cases eligible for the death penalty. Further, Florida's capital sentencing system is so lacking in checks on arbitrariness that it does not pass constitutional muster.

IV. Florida's Abandonment of Proportionality. In Lawrence v. State, 308 So. 3d 544, 545 (Fla. 2020) and Cruz v. State, 48 Fla. L. Weekly S140 (Fla. July 6, 2023), this Court eliminated the safeguard of proportionality review. In Pulley, the Supreme Court of the United States 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." Pulley, 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, at 45 (quoting Gregg, 428 U.S., at 195). Relying on Pulley, this Court recently announced that it would no longer perform comparative proportionality review in death cases. See Lawrence v. State, 308 So. 3d 544 (Fla. 2020). 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.” Lawrence, 308 So. 3d at 552 (J. Labarga, dissenting). “The concept of proportionality is central to the Eighth Amendment.” Graham v. Florida, 560 U.S. 48, 59 (2010). In the face of this, Florida has abandoned proportionality analysis. The abandonment of proportionality analysis in Lawrence renders Florida's death penalty scheme unconstitutional.

In Lawrence, this Court held that the conformity clause of Article I, Section 17 of the Florida Constitution forbids the Court from analyzing death sentences for comparative proportionality in the absence of a statute establishing that review. The legislature has not responded by implementing legislation requiring proportionality analysis. As Justice LaBarga explained in dissent in that case, “[i]n capital cases, this Court compares the circumstances presented in the appellant's case with the circumstances of similar cases to determine whether death is a

proportionate punishment." Caylor v. State, 78 So. 3d 482 (2011) at 498 (citing Wade v. State, 41 So. 3d 857, 879 (Fla. 2010)). "In deciding whether death is a proportionate penalty, 'we make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.'" Offord v. State, 959 So. 2d 187, 191 (Fla. 2007) (quoting Anderson v. State, 841 So. 2d 390, 407-08 (Fla. 2003)).

The abandonment of proportionality analysis "severely undermines the reliability of this Court's decisions on direct appeal, and more broadly, Florida's death penalty jurisprudence." Lawrence v. State, 308 So. 3d 544, 554 (Fla. 2020) Justice Labarga in dissent.

In Gregg v. Georgia, 428 U.S. 153 (1976), Gregg's attorneys argued that the EHAC aggravating factor violated Furman because it was so broad "that capital punishment could be imposed in any murder case." Gregg at 201. The Supreme Court of the United States affirmed the Georgia death penalty noting,

"[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. See also Zant v. Stephens, 462 U.S. 862, 876 (1983). The same two factors were cited in Proffit v. Florida, 428 U.S. 242 (1976), where the Supreme Court rejected an 'arbitrary and capricious' challenge to Florida's post-Furman statute. See Id., at 254. In upholding the statute, the Court after noting that "the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed," Id., at 258. the Court 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.**

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

The case of Maynard v. Cartwright, 486 U.S. 356 (1988) commands that vague aggravators must be sufficiently narrowed to avoid arbitrary imposition of the death penalty. While it is true that the failure to instruct the sentencing jury properly with respect to an aggravator does not automatically render a defendant's sentence unconstitutional, the Court has repeatedly indicated that a sentencing jury's consideration of a vague aggravator can be cured by appellate review. See Lambrix v. Singletary, 520 U.S. 518 (1997). This presupposes that proportionality review is taking place. Without proportionality review, each death sentence stands on its own. Each death sentence is untethered from any check on uniform application towards individuals or consistency between districts. There is now no check on arbitrary application of the death penalty between different cases in Florida. Failure to consider the facts supporting a death sentence in context of other death penalty cases impairs the reliability of the Court's affirmation of that sentence.

Introduction

During the decades that have elapsed from the time the Supreme Court first upheld Florida's capital sentencing scheme in

Proffitt v. Florida, 428 U.S. 242, 252-53 (1976), the State of Florida has dismantled safeguards that protect against the imposition of unconstitutionally arbitrary death sentences in violation of the Eighth Amendment — as the U.S. Supreme Court long ago explained in Furman. This Court has abandoned comparative proportionality review in death penalty appeals. Meanwhile, the Legislature has adopted aggravating factors that have proliferated to the point where, as a practical matter, almost all first-degree murder scenarios contain at least one aggravator.

This Court has misread Pulley as holding that the Eighth and Fourteenth Amendments *never* require comparative proportionality review in death penalty appeals, when in fact Pulley contains no such sweeping holding. To the contrary, the Supreme Court held in the specific context of California's capital sentencing statute that proportionality review was not constitutionally mandated because the state's capital sentencing scheme *otherwise* provided sufficient safeguards against arbitrary imposition of the death penalty. Pulley expressly assumed that a state's system can be so lacking in checks on arbitrariness that it would not pass constitutional muster

without proportionality review, but "the 1977 California statute is not of that sort." 465 U.S. at 51. Florida's statute, as explained below, *is* of that sort. Florida's sentencing scheme makes Florida and extreme outlier, standing alone in its unchanneled death penalty process.

A. Proportionality Review Was an Important Safeguard Against Arbitrary Infliction of the Death Penalty.

When the Supreme Court upheld the constitutionality of Florida's post-Furman death penalty law in 1976, it emphasized that Florida's system of appellate proportionality review (determining whether the ultimate penalty was or was not warranted) minimized any risk of arbitrary or capricious execution. See Proffitt v. Florida, 428 U.S. 242, 252-53 (1976). Trial judges' decisions to impose death "are reviewed to ensure that that they are consistent with other sentences imposed in similar circumstances," and thus in Florida it was no longer true that there was "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." Id. at 25. The Court also found it noteworthy that this Court "has not hesitated to

vacate a death sentence when it has determined that the sentence should not have been imposed," having vacated 8 of the 21 death sentences it had reviewed to that date. Id. at 253; see Olsen v. State, 67 P. 3d 536, 610 (Wyo. 2003) ("As seen in Pulley, the Court continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective"); see also Gregg v. Georgia, 428 U.S. 153, 198 (1976) (citing Georgia's proportionality review procedure as a component that protected against arbitrary sentencing).

In 1984, the Court held in Pulley that comparative proportionality review was not required in California, because that state's 1977 statutory scheme provided other, adequate safeguards to prevent arbitrary and capricious imposition of the death penalty. 465 U.S. at 51-54. Pulley did not, however, categorically hold that proportionality review is never constitutionally required; whether it is required depends on the presence or absence of sufficient other "checks on arbitrariness." See Walker v. Georgia, 555 U.S. 979, 983 (2008) (Stevens, J., respecting denial of certiorari) (Pulley's

statement that Eighth Amendment does not require proportionality review "was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them"); State v. Welcome, 458 So. 2d 1235, 1249 (La. 1984) (in Pulley, the Supreme Court held that Eighth Amendment does not necessarily require proportionality review; "[t]he principal constitutional consideration is that the overall system contain sufficient checks and safeguards against the arbitrary imposition of capital punishment").

After Pulley, for nearly five decades, this Court considered proportionality review to be "a unique and highly serious function of [the] Court, the purpose of which is to foster uniformity in death-penalty law." Crook v. State, 908 So. 2d 350, 356-57 (Fla. 2005) (endorsing test that inquired whether crime was both among the most aggravated and among the least mitigated of murders); see also Davis v. State, 121 So. 3d 462, 499-502 (Fla. 2013); Cooper v. State, 739 So. 2d 82, 83-86 (Fla. 1999); Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998). A 2002 amendment to the Florida Constitution, Article 1, Section 17, provided that the state's

prohibition against cruel and unusual punishment shall be construed in conformity with Eighth Amendment decisions of the U.S. Supreme Court. This Court has construed an identical provision in article 1, section 12, as applying to decisions that are both "factually and legally on point" and "controlling." See Smallwood v. State, 113 So. 3d 724, 730 (Fla. 2013); see also State v. Michel, 257 So. 3d 3, 12 (Fla. 2018) (Pariente, J., dissenting) (applying Smallwood test to § 17 analysis); Lightbourne v. McCollum, 969 So. 2d 326, 334-35 (Fla. 2007) (acknowledging "conformity" clause and reviewing claim under both federal and Florida precedents). Even after this amendment, this Court continued to conduct proportionality review, in apparent recognition that Pulley had addressed California's very different statute and did not require any change in Florida.

However, in 2014, Florida Supreme Court Justices Canady and Polston announced their conclusion that proportionality review is prohibited in this state by the conformity clause, coupled with the Pulley decision. They would have denied relief to Yacob even though they agreed that his death sentence was disproportionate under the

Court's jurisprudence. Yacob v. State, 136 So. 3d 539, 557-63 (Fla. 2014) (Canady J., joined by Polston, C.J., concurring in part and dissenting in part); see also Delgado v. State, 162 So. 3d 971, 982-83 (Fla. 2015) (Canady, J., joined by Polston, C.J., concurring and reiterating views in Yacob). In Lawrence v. State, 308 So. 3d 544 (Fla. 2020), the Court receded from Yacob and adopted the position advocated by Justices Canady and Polston: the Court would no longer conduct proportionality review in capital cases.

B. This Court's Abandonment of Proportionality Review Leaves Florida's Scheme Unconstitutional.

The Supreme Court in Pulley conducted a holistic assessment of the California scheme in effect at the time, in 1977. Under that scheme, a conviction of first-degree murder resulted in a sentence of life imprisonment, unless the state alleged one or more "special circumstances" in the charging document. There were, at the time, only seven of these special circumstances, and they were tried, along with the issues of guilt or innocence, at the initial phase of the trial. Only if the jury found the defendant guilty of first-degree murder and found beyond a reasonable doubt the existence of one

or more special circumstances would the trial then proceed to a second phase to determine whether death or life imprisonment was the appropriate penalty. In the second phase, additional evidence could be presented, and the jury was given a list of additional factors it could consider. Pulley, 465 U.S. at 880. California's 1977 system, the Court concluded, was sufficient to limit the death penalty "to a small sub-class of capital-eligible cases." 465 U.S at 831.

This Court, in contrast, has repeatedly rejected the argument that one or more aggravating factors must be alleged in the indictment, see, e.g., Lott v. State, 303 So. 3d 165 (Fla. 2020); Pham v. State, 70 So. 3d 485, 496 (Fla. 2011), nor are any findings required in the first phase of the trial to narrow the class of death-eligible defendants. Moreover, while under Florida's earlier (i.e., pre-Hurst) incarnation of its capital sentencing system a defendant became death-eligible only upon (inter alia) findings by the penalty phase jury that the aggravating factors were sufficient to impose death (Hurst v. Florida, 577 U.S. 92, 99-100 (2016)), the now-revised statute explicitly provides that if the jury unanimously

"finds at least *one* aggravating factor, the defendant is eligible for a sentence of death." Section 921.141(2)(b)(2), Florida Statutes (2023) (emphasis supplied).

In Florida, the aggravating factors that previously helped limit the class of death-eligible offenders have expanded dramatically. In 1972, when Florida's post-Furman death penalty law was enacted, there were eight statutory aggravating factors. State v. Dixon, 283 So. 2d 1, 5-6 (1973). Since then, the number has doubled to sixteen. Section 921.141(6)(a-p), Florida Statutes. This results in what has been described as "aggravator creep," and it undermines the safeguards required by Furman against arbitrary imposition of the death penalty.[2]

Permitting death based on any one of sixteen aggravators, as

[2]See, e.g., Shatz, *The American Death Penalty: Past, Present, and Future*, 53 TULSA L. REV. 349, 355-56 (2018); Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L.L. REV. 223 (Winter, 2011) (aggravating factors in most state death penalty statutes are so numerous that they fail to perform [the] constitutionally required function designated for them by Furman and its progeny"); see also Carol Steiker & Jordan Steiker, *Courting Death: The Supreme Court and Capital Punishment*, 160-62 (2016) (arguing that Arizona's enumeration of numerous and broad aggravating factors in combination with state Supreme Court's minimalist policing subverted Furman)

Florida's statute now does, differs significantly from permitting death based on the 1977 California system the Court upheld in Pulley. Until Lawrence, proportionality review may have served as the safeguard that kept Florida's system constitutionally viable. See Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998). But now this Court has abandoned proportionality review in favor of minimalist policing (or no policing) based on a United States Supreme Court decision that addressed a very dissimilar state capital sentencing scheme. Through a series of legislative and judicial decisions made in isolation and without regard for their cumulative effects on Florida's capital sentencing scheme, Florida has eviscerated safeguards which previously helped to ensure Florida's system complied with the mandates of Furman.

The core purposes of proportionality review include minimizing the risk of arbitrariness and ameliorating the danger that racial prejudice, whether based on the race of the defendant or that of the victim[s], will infect the capital sentencing decision. In the early post-Furman case of Dixon, 283 So. 2d at 10, and later in Offord v. State, 959 So. 2d 187, 188 (Fla. 2007), this Court said:

"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*."

Id. (emphasis in Offord).[3] The abandonment of proportionality review left Florida's scheme unconstitutional because Florida's statute lacks other safeguards. The Court of Appeals for the Second Circuit, construing the federal death penalty statute, has recognized that under Pulley "comparative proportionality review may be constitutionally required only when a capital sentencing system lacks … adequate checks on arbitrariness." United States v. Aquart, 912 F.3d 1, 52 (2d Cir. 2016).

This Court has shown increasingly diminished interest in

[3] See also Turner v. Murray, 476 U.S. 28, 35 (1986) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence"); Robinson v. State, 520 So. 2d 1, 7-8 (Fla. 1988) ("Racial prejudice has no place in our system of justice and has long been condemned by this Court" and "the risk that the factor of race may enter the criminal justice process has required … increasing attention", especially in the context of a capital sentencing proceeding).

policing the capital punishment scheme's reliability and rationality. The Wyoming Supreme Court recognized in Olsen, 67 P. 3d at 610, that "the [U.S. Supreme] Court continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective." Since 2019, this Court has reviewed on direct appeal 29[4] death sentences and affirmed 27 of them. In contrast, in Proffitt, 428 U.S. at 253, the Supreme Court found it significant that this Court in the mid-1970s had not hesitated to vacate death sentences (8 of 21) when it determined that that sentence should not have been imposed. Importantly, of the eight reversals cited in Proffitt, six defendants received life sentences and two (Lamadline and Messer) received new jury penalty trials. In contrast, in both of the two (of 29) partial reversals

[4] Excluded from this analysis is this Court's reversal for a new guilt phase trial in Avsenew v. State, 334 So. 3d 590 (Fla. 2022), because the sole issue addressed in that appeal was the pretrial violation of a procedural rule governing perpetuated deposition testimony and as such there is no mention of how Avsenew's penalty phase was conducted or the legitimacy of his death sentence.

since Florida began dismantling its death penalty safeguards, Mosley v. State, 347 So. 3d 861 (Fla. 2022) and Cruz v. State, 320 So. 3d 695 (Fla. 2021), this Court found no error in the jury penalty trial which resulted in the death verdict, and made no comment on whether the death penalty was appropriate. In Mosley, the case was remanded for a new post-trial Spencer hearing before the judge alone, due to the trial court's failure to address Mosley's request for self-representation in that proceeding. In Cruz, the reversal was "for the limited purpose" of a new evaluation and sentencing order by the trial judge alone. So 27 out of 29 is actually 29 out of 29.

C. Erosion of Common Law Protections for the Innocent.

This Court recently eliminated the safeguard of the “reasonable hypothesis of innocence” motion for judgment of acquittal. See Bush v. State, 295 So. 3d 179, 216 (Fla. 2020) The circumstantial evidence rule developed under the common law, and was part of Florida law for many, many years, through evolving generations of politics and courts. See. i.e., Head v. State, 62 So. 2d 41 (Fla. 1952); Mayo v. State, 71 So. 2d 899 (Fla. 1954); Davis v. State, 90 So. 2d 629, 631 (Fla. 1956). The circumstantial evidence rule

articulated that when the State relies upon purely circumstantial evidence to convict an accused, such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. In his dissent in Bush, Justice Labarga criticized what he called the Court's "sweeping decision to abandon the heightened standard of review in all criminal cases that are based solely on circumstantial evidence." Id. "For more than one hundred years," Justice Labarga wrote, "this Court has applied a more stringent standard of review in reviewing convictions supported only by circumstantial evidence. ... Yet today, this Court eliminates another reasonable safeguard in our death penalty jurisprudence and in Florida's criminal law across the board."

D. Aggravator Creep generally. Practically every conceivable fact situation that would be charged as first-degree murder includes at least one of Florida's aggravating factors. The legislature has in effect created one aggravating factor, which could be stated as follows: "Any person convicted of first-degree murder in Florida is eligible for the death penalty unless the jury finds there is sufficient

mitigation to justify the imposition of a life sentence." The sixteen aggravating circumstances listed in the current statute must be construed together and, when combined, fail to narrow the class of cases of first-degree murder that are eligible for the death penalty. Florida's capital scheme has fallen victim to the "aggravator creep" problem.

Florida's post-Furman death penalty statute listed eight aggravating factors. The California capital scheme approved in Pulley v Harris, 465 U.S. 37 (1984) also contained eight aggravating factors. This was the case when Florida's scheme was approved by the Supreme Court in Proffitt v. Florida, 428 U.S. at 251. Pulley, at 46. Since then, however, the aggravating factors listed in the statute have ballooned to a total of sixteen (16). The expansion has occurred over the years as follows:

A. Victim a law enforcement officer was added in 1987.
B. Victim an elected official was added in 1988.
C. Victim Impact was added in 1990. (Not called an aggravating circumstance, but submitted to the jury in the penalty phase)
D. Defendant on probation or community control was added in 1991.
E. Victim under 12 years of age was added 1995
F. Victim elderly or vulnerable was added in 1996.
G. Defendant a member of a street gang was added in 1996.

H. Sexual predator was added in 2005.
I. Violation of an injunction for protection was added in 2010.

In addition, (1) the legislature has added aggravated child abuse to the list of felonies that trigger the felony murder rule; (2) the legislature has significantly expanded the common law definitions of robbery and burglary to include relatively minor criminal activity which would formerly have been petit theft or trespass; and (3) the distinction between principals in the first and second degree has been abolished. The effect of this legislation has been to widen the net, thereby ensnaring more defendants into the crime of first-degree murder. The conduct of these defendants generally involves a lower level of culpability than previously required for a capital crime.

"Aggravator creep" is of constitutional import and exists in Florida. Aggravator creep may be politically understandable, but it is constitutionally disallowed. The Founders anticipated the fact that a politically unpopular minority, or individual, would face targeting by the majority. To check this, the third branch, the judiciary, must be available to protect individuals from

constitutional overreach. A death penalty sentencing scheme must genuinely narrow. Florida's scheme fails to narrow the class of persons eligible for the death penalty.

Additionally, each aggravating factor, taken singly, must also narrow the eligible class. See Zant v Stevens, 462 U.S. 862 at 877 (1983). Florida's aggravating factors also fail individually because many of the categories are not tightly drawn.

A. Felony Murder Aggravator. In the present case, the State listed as its second statutory aggravator that the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, robbery pursuant to Section 921.141(6)(D) Florida Statutes. (R1751-1752, 3123-3126; T63-77) On December 6, 2021, Mr. Fletcher moved to declare Section 921.141(6)(D) Florida Statutes unconstitutional as written and as applied. (R3059-3087) The Court issued a written order on March 14, 2022 denying the defense motion. (R3129-3130) In its order, the Trial Court stated,

> "Justice Anstead in a special concurrence in Blanco v. State, 706 So. 2d 7 (Fla. 1997) should control this Court's decision. Detrimental to the Defendant's position is that special

> concurrence has never attracted a majority of either our Supreme Court or that of the US Supreme Court. Indeed, the majority in Blanco rejected the challenge to the felony murder aggravator.")

The statutory aggravating circumstance listed in Section 921.141(6)(d), Florida Statutes, provides as follows:

> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, abuse of an elderly or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement, arson, burglary, kidnapping, aircraft piracy or unlawful throwing, placing, or discharging of a destructive device or bomb.

The felony murder aggravating factor transforms the least culpable form of first-degree murder into a basis to aggravate a first-degree murder and impose capital punishment. This statutory aggravating circumstance is unconstitutional as written because the least culpable form of first-degree murder is being used as the sole basis to impose capital punishment in Florida. As written and applied, Section 921.141(6)(d), Florida Statutes violates article I, sections 2, 9, 16(a), 17, 21 and 22 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United

States Constitution.

Instead of genuinely narrowing the class of persons eligible for the death penalty, the felony murder circumstance automatically expands the class of those eligible for the death penalty. Cf. Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir. 1985) ("We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function."). Where the eligibility for the death penalty depends on finding "sufficient aggravating circumstances," the felony murder circumstance becomes an automatic factor following a conviction of first-degree felony murder. Cf. Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir. 1985)

The felony murder circumstance repeats an element of the offense of felony murder and creates an unlawful presumption that death is an appropriate sentence. See Jackson v. State, 502 So. 2d 409, 413 (Fla. 1986) ("When there are one or more valid factors in aggravation and none in mitigation, death is presumed to be the appropriate penalty"); compare Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988) ("Such a presumption, if employed at the

level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment"). Felony murder is the least aggravated form of first-degree murder since it does not entail a premeditated design to kill another unlawfully. Hence, the felony murder aggravating circumstance creates a presumption of death for the least aggravated form of first-degree murder. It does the opposite of what the Constitution requires of an aggravating circumstance. Felony murder is the prosecution's theory in many if not most first-degree murders. A killing during an enumerated felony will turn a manslaughter into a first-degree murder and will then (through the aggravating circumstance) turn the first-degree murder into a capital case. The circumstance thus does not serve the constitutionally mandated channeling function.

The felony murder aggravating circumstance, when applied to unpremeditated murder turns a mitigating circumstance into an aggravating circumstance. Lack of premeditation is a mitigating circumstance. See Lockett v. Ohio, 438 U.S. 586, 608 (1978) (death sentence set aside where state death penalty statute did not provide for full consideration of, inter alia, mitigating factor of lack of intent

to cause death). Because it prevents consideration of lack of intent to kill as mitigation, the felony murder circumstance violates Hitchcock v Dugger, 481 U.S. 983 (1987) (Florida death penalty statute improperly limited full consideration of mitigating circumstances despite being initially approved in Proffitt v Florida). State legislatures cannot require "automatic" imposition of capital punishment. See Sumner v. Shuman, 483 U.S. 66 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976). Defendants must be given notice and the opportunity to address all evidence upon which imposition of capital punishment is based. Gardner v. Florida, 430 U.S. 349 (1977). The sentencing body cannot be precluded from considering **and giving effect to** relevant mitigation. See Smith v. Texas, 543 U.S. 37 (2004) (emphasis added) (procedure unconstitutional where jury asked to answer "yes" or "no" to two questions in a manner where valid mitigating evidence was not considered); Skipper v. South Carolina, 476 U.S. 1 (1976) (sentencing body cannot be precluded from considering defendant's potential for rehabilitation); Penry v. Lynaugh, 492 U.S.302 (1989) (sentencing body cannot be precluded from considering defendant's

mental retardation as mitigating circumstance).

This analysis must be placed in the context of the Florida Legislature enacting a statute requiring that "sufficient aggravating circumstances" exist to justify imposition of the death penalty. The Florida Legislature could have stated that one or more factors should be weighed to determine whether capital punishment should be imposed. At least that would imply that the Florida Legislature made a conscious determination that a person who commits first-degree felony murder is as morally culpable as the person who commits first-degree premeditated murder. Yet, that factor is now used so that a person who commits a conscious, premeditated murder cannot receive the death penalty in the absence of an aggravating circumstance, yet felony murder is automatically punishable by capital punishment due to the existence of a built-in aggravating factor – a factor that creates a presumption in favor of death for the least aggravated form of first-degree murder. An accidental killing during the commission, attempted commission or escape after committing an enumerated felony converts a non-criminal act into a first-degree murder and automatically

authorizes imposition of capital punishment. The circumstance thus does not serve the constitutionally mandated channeling function required by the Eighth Amendment.

Florida's scheme treats as an aggravator the fact that a defendant was found guilty of felony murder, rather than premeditated murder. The Court justified this "automatic aggravator" by comparing the list of felonies in the felony murder statute to the list of felonies that can be used for the felony murder aggravator and noting the felony murder statute has a longer list. See Blanco v State, 706 So. 2d 7, 17-18 (Fla. 1998). The Court reasoned that since the felony murder statute has a longer list of felonies, the shorter list in the felony murder aggravating circumstance narrows the class of cases eligible for the death penalty in felony murder cases. That analysis fails to account for Florida's larger death penalty scheme. Each of the felonies contained in the felony murder statute (and missing from the list of felonies in the felony murder aggravating circumstance) provides for one or more separate aggravating circumstances. For example, carjacking always includes the pecuniary gain aggravator for the

auto theft. And every felony included within the list of felonies that qualify as an aggravating circumstance in the felony murder aggravating circumstance includes at least one aggravating circumstance that "doubles" with the felony murder aggravating circumstance. For example, burglary always includes pecuniary gain if the motive is theft, and cold, calculated, and premeditated or heinous, atrocious, and cruel if the motive is sexual battery or harm to another. Thus, every felony murder conviction in Florida contains at least one, if not more, aggravating circumstances. Since a high percentage of first-degree murders in Florida are felony murders, the felony murder aggravating circumstance actually increases, rather than decreases, the number of murders eligible for the death penalty. Further, an automatic aggravator unconstitutionally skews the harmless error analysis used by this Court to review constitutional error.

In his excellent concurrence, Justice Anstead detailed why the felony murder aggravator is unconstitutional in Blanco v State, 706 So. 2d 7, 12-13 (Fla. 1997). Appellant fully adopts and incorporates herein Justice Anstead's reasoning from Blanco. The fact that a

defendant has been convicted of a prior violent felony fails to narrow the eligible class in practice. This Court has construed "prior" broadly, to include violent crimes on other victims committed in connection with the murder. See, e.g., Stephens v State, 787 So. 2d 747, 761 (Fla. 2001). As Tennessee and North Carolina have held, doing so of necessity fails to narrow the death-eligible class. See 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). Notably, the conduct underlying common predicate felonies has broadened over the years. See Sparre v. State, 164 So. 3d 1183, 1200-01 (Fla. 2015) (burglary can occur after invitation is effectively rescinded); Rockmore v. State, 140 So. 3d 979, 982 (Fla. 2014) (robbery includes force used after taking); State v Dene, 533 So. 2d 265, 266-69 (Fla. 1988) (expansion includes significantly more participants).

Section 921.141(6)(d), Florida Statutes is unconstitutional under article I, sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. EHAC aggravator. In the present case, the State listed as its fourth aggravating factor that the murder was especially heinous, atrocious, or cruel (EHAC) pursuant to Section 921.141(6)(H) Florida Statutes. (R1751-1752, 3123-3126; T63-77) On August 24, 2021, the defense moved to declare section 921.141(6)(H) Florida Statutes unconstitutional as written and as applied. (EHAC) The trial court denied the motion by written order on March 14, 2022. (R3356-3357) In its order, the Court stated,

> "This issue was also explicitly ruled upon in the Florida Supreme Court's direct appeal review in this case. See Fletcher v. State, 168 So. 3d 186, 220 (Fla. 2015). The Florida Supreme Court summarily denied that motion. There remains no binding precedent supporting the Defendant's position."

The Trial Court afforded this factor great weight. (R4182-4183)

The Especially Heinous Atrocious and Cruel (EHAC) aggravating factor is also supposed to narrow the class of people eligible for the death penalty. Instead, because EHAC is vague and overbroad, this factor can be stretched to cover a vast swath of first-degree murder situations. The Supreme Court first deliberated the EHAC aggravating factor post-Furman in Gregg v Georgia, 428 U.S. 153 (1976). The Supreme Court reviewed the constitutionality

of Georgia's capital sentencing procedures after a hitchhiker who shot and killed two men was sentenced to death by a Georgian jury. Gregg's attorneys argued that the EHAC aggravating factor violated Furman because it was so broad "that capital punishment could be imposed in any murder case." Gregg at 201. The Court disagreed and upheld the use of the Georgia EHAC aggravator as constitutional because cases could be reviewed by state appellate courts to assess "whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Gregg* at 198. Maynard v Cartwright, 486 U.S. 356 (1988) further supports the proposition that vague aggravators must be sufficiently narrowed to avoid arbitrary imposition of the death penalty.

These cases demonstrate that the failure to instruct the sentencing jury properly with respect to an aggravator does not automatically render a defendant's sentence unconstitutional. The Court has repeatedly indicated that a sentencing jury's consideration of a vague aggravator can be cured by appellate review. See Lambrix v Singletary, 520 U.S. 518 (1997). However, this check is illusory in Florida. For example, in Colley v State, 310

So. 3d 2, 15 (Fla. 2020), the Court found EHAC existed with a single gunshot to the head resulting in immediate death. Thus, EHAC is an aggravator catchall that fails to narrow the class. Florida has failed in its mandate by the United States Supreme Court to cure the overbroad language of the EHAC aggravator by striking it down when misapplied by trial courts.

C. The under sentence of imprisonment factor. In the present case the State listed as its first aggravating factor was that the murder was committed by a person previously convicted of a felony and under a sentence of imprisonment pursuant to Section 921.141(6)(A) Florida Statutes. (R3123-3126)

On August 30, 2021, the defense moved to declare section 921.141 Florida Statutes unconstitutional as written and as applied, or to declare section 921.141(6)(A) Florida Statutes unconstitutional as applied. (under sentence of imprisonment factor) (R3050-3056) The Court denied the motion by written order on March 14, 2022. (R3358-3359) In its order, the Court stated,

> "This issue was also explicitly ruled upon in the Florida Supreme Court's direct appeal review in this case. See Fletcher v. State, 168 So. 3d 186, 220 (Fla. 2015). The Florida Supreme

> Court denied that portion of the appeal. There remains no binding precedent supporting the Defendant's position."

The corresponding jury instruction was also objected to and denied by the Trial Court. At sentencing, the Trial Court assigned this factor great weight. (R4181)

Counsel recognizes that in Fletcher v. State, 168 So. 3d 186 (Fla. 20 15), this Court upheld the applicability of this aggravating factor in this case. However, the Defendant now renews his objections to the applicability of this factor and the constitutionality of Section 921.141 (6)(a) Florida Statutes.

The "under sentence of imprisonment" aggravating factor of Section 921.141(6)(a) Florida Statutes, and the corresponding standard instruction are unconstitutionally vague and overbroad, are not capable of a constitutionally adequate narrowing construction. This factor has been applied in an overbroad manner that does not serve the limiting function required by the Constitution and has been interpreted in violation of the rule of lenity. Because this unconstitutional circumstance has been and continues to be used as a basis for imposing a number of death

sentences in this state, because its unlawful use makes proportionality review arbitrary, and because its bare terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes as a whole is unconstitutional. See Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing could occur. Godfrey v. Georgia, 446 U.S., 420 at 428 (1980) (plurality opinion). Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

> The provisions of this code and offenses de tined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100 (1979) (rule “is

rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. See Bifulco v. United States, 447 U.S. 381 (1980). Strict construction applies to Florida capital proceedings. See Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) (sentence of imprisonment aggravating circumstance).

Great care is needed in construing aggravating circumstances. In Maynard v. Cartwright, 486 U.S. 356, 361 (1988), the Court wrote:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness

> challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit]
> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

The Court held in Maynard that jury instructions which violate these principles are unconstitutional.

Substantive due process and equal protection require that provisions of law be rationally related to their purposes. Reed v. Reed, 404 U.S. 71 (1971). At the least, a criminal statute "must bear a reasonable relationship to the legislative objective and must not be arbitrary." Potts v. State, 526 So. 2d 104 (Fla. 4th DCA 1987), affirmed State v. Potts, 526 So. 2d 63 (Fla. 1988); See also State v. Walker, 461 So. 2d 108 (1984).

The "under sentence of imprisonment" circumstance has been construed in such a manner as to violate these basic constitutional principles. This Court initially held this aggravator applied to "prescribe the death penalty for a capital felony committed by a

prisoner ...," State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) (emphasis supplied), and escapees from prison. See Songer v. State, 322 So. 2d 481 (Fla. 1975). Departing from that constitutionally acceptable limiting construction, however, the Court has since held that it also applies to those released from prison and on parole, Aldridge v. State, 351 So. 2d 942 (Fla. 1977), and indicated it also applies to those in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So. 2d 492, 499 (Fla. 1981).

More recently, in Jackson v. State, 530 So. 2d 269 (Fla. 1988), this Court broadened the effect of the circumstance further by permitting evidence relating to the underlying offense for which the defendant was on parole to be admitted at capital sentencing hearings. Thus, even if the parole was on a nonviolent crime, evidence of that nonviolent crime is admissible in favor of a sentence of death where it would otherwise be inadmissible as a non-statutory aggravating circumstance. See Purdy v. State, 343 So. 2d 4, 6 (Fla. 1977); Elledge v. State, 346 So. 2d 998 (Fla. 1976). It also has expanded the circumstance to apply even where the

defendant has not yet begun to serve the sentence of imprisonment. See Gunsby v. State, 574 So. 2d 1 085 (Fla. 1991).

These judicial expansions of the circumstance have rendered it, and the statute as a whole, unconstitutional.

D. The pecuniary gain factor. The State listed as its third aggravating factor that the capital felony was committed for pecuniary gain pursuant to Section 921.141(6)(F) Florida Statutes. (R1751-1752, 3123-3126; T63-77)

On December 13, 2021, the defense moved to declare section 921.141(6)(F) Florida Statutes unconstitutional as written and as applied. (murder committed for pecuniary gain). (R3088-3092) The Court issued a written order on March 14, 2022 denying the defense motion. (R3127-3128)

The Trial Court merged the second and third aggravators (murder committed while committing robbery AND murder was committed for financial gain), affording the combined aggravator great weight. (R4181-4182)

The "murder committed for pecuniary gain" factor appears to be straightforward and has generally been strictly construed by this

Court. See Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982) (requiring proof of a pecuniary motivation beyond a reasonable doubt and holding "such proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance"). The ease with which jurors and the courts can decide whether this factor applies, though, does not cure, and in fact heightens, its unconstitutional expansion of the class of death eligible by repeating other circumstances.

The pecuniary gain circumstance doubles felonies listed in the felony murder circumstance by referring to the "same aspect of the defendant's crime." Provence v. State, 337 So. 2d 783, 786 (Fla. 1976). In cases in which the prior violent felony circumstance, applied as the contemporaneous felony, also includes financial motive (such as robbery in the present case), there is another repetition. Finally, pecuniary gain refers to the "same aspect" of the defendant's conduct in some instances where the killing is also cold, calculated and premeditated. E.g. Downs v. State, 572 So. 2d 895 (Fla. 1990); Rodriguez v. State, 753 So. 2d 29 (Fla. 2000)

(underlying burglary and theft).

Such doubling of factors calling for a sentence of death violates the eighth amendment requirement that death sentencing procedures must provide a "meaningful basis for distinguishing the few cases in which death is appropriate form the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). The existence of several aggravating factors calling for a sentence of death based on the same conduct of the defendant thus violates the Eighth amendment. See Lowenfield v. Phelps, 484 U.S. 231, 244 (1988); Zant v. Stephens, 462 U.S. 862, 877 (1983).

E. CCP aggravator. While not listed in the present case, the cold, calculating and premeditated ("CCP") aggravator has also evolved into a very broad and all-encompassing aggravator. In its early years that factor was applied in cases involving contract killings and execution-style killings. See Floyd v State, 497 So. 2d 1211, 1214 (Fla. 1986) and Garron v State, 528 So. 2d 353, 360-61 (Fla. 1988). 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 "even where there is evidence that the final decision to kill was not made until shortly before the murder itself." See Campbell v State, 159 So. 3rd 814, 830-31 (Fla. 2015). The Court recently upheld the CCP aggravator in an immediate death by gunshot to the head. See Colley v State, 310 So. 3d 2, 14 (Fla. 2020). Just looking at two factors together - CCP and EHAC - it would be hard to imagine a scenario in which one or the other were not present.

F. Florida's Need for Protection. Since 1973, thirty (30) innocent people have been exonerated from Florida's death row, the highest number of any state in the U.S. That calculates to nearly one (1) exoneration for every three (3) Florida executions. For the death penalty generally, the statistic is 1 in 8: that is, for every eight people executed, one person on death row has been exonerated. Innocent does not mean that they were found not guilty. This means that they were actually innocent but placed on death row. As a matter of statistics, there must be people who are innocent but have no evidentiary ability to prove their innocence (for example a case

with no exculpatory DNA). How many cases does this cover? There is really no way to know. In the face of these alarming statistics, and Florida's role as leader in capital exonerations, one would think that Florida would be strengthening its safeguards, not the opposite.

Conclusion. Florida's capital scheme fails to adequately reduce the risk of arbitrary infliction of death sentences as it has eliminated the safeguards of comparative proportionality review, the "reasonable hypothesis of innocence" judgment of acquittal, and fails to narrow the class of first-degree murderers eligible for death. The Appellant urges this Court to follow precedent from the United States Supreme Court and declare Florida Statute 921.141 unconstitutional because it violates the Eighth and Fourteenth Amendments to the United States Constitution by failing to sufficiently narrow the class of cases that are eligible for the death penalty. In the alternative, the appellant urges this Court to provide guidance for the Legislature on this issue. Specifically, the list of aggravators is too numerous and that the finding of one for death eligibility is insufficiently narrowing.

POINT IX

THIS CASE FAILS PROPORTIONALITY.

The Appellant's death sentence was disproportionate, and this Court should conduct a proportionality analysis, vacate the death sentence and remand for a life sentence.

Standard of Review. This Court should recede from Lawrence v. State, 308 So. 3d 544 (Fla. 2020) (receding from proportionality review requirement in death penalty direct appeal cases) and Cruz v. State, 48 Fla. L. Weekly S140 (Fla. July 6, 2023) as outlined in Point Two above. When determining whether death was a proportionate penalty, this Court considered the totality of the circumstances and compared the case with other cases. See Dessaure v. State, 891 So. 2d 455, 472 (Fla. 2004); See Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). The number of aggravating and mitigating factors were not dispositive of the proportionality question. Urbin, 714 So. 2d at 416. This Court deemed death to be a disproportional remedy where the case was not both one of the most aggravated, and least mitigated, cases to come before it for review. See Crook v. State, 908 So. 2d 350, 357 (Fla. 2005).

Argument. In capital cases, this Court must engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); overruled by Lawrence v. State, 308 So. 3d 544 (Fla. 2020) (receding from proportionality review requirement in death penalty direct appeal cases). Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny. Id.

Here, the trial court entered an order finding four (4) aggravating circumstances (with two merged) assigning the following weights to each aggravator:

1) First aggravator (prior felony under sentence of imprisonment). Great weight. (R4181)

2) Second and third aggravators (merged) (murder committed while committing robbery AND murder was committed for financial gain). Combined, great weight. (R4181-4182)

3) Fourth aggravator (EHAC). Great weight. (R4182-4183)

As for the mitigators presented, the Court found the following:

The fact that the co-defendant was given a life sentence was afforded great weight. (R4183-4185) In considering the totality of the other mitigation, the Court assigned moderate weight. (R4185-4187) Considering the mitigation produced at the Spencer hearing (that the defendant can serve the prison community), the Court assigned slight weight. (R4186-4187) Considering the defendant's anti-social personality disorder, it did not consider it as any kind of aggravator, but as a mitigator, and assigned it slight weight. (R4187-4188)

During its pronouncement of a death sentence, the Trial Court opined on the closeness of the death decision, stating:
"This is a close call in this case. It's made closer by the jury's erroneous surplus finding on the verdict form." (R4193)

The purpose of this Court's proportionality review "is to foster uniformity in death-penalty law" and to prevent the imposition of "unusual" punishments. The requirement that death be administered proportionately rests in part on the prohibition against unusual punishments in Article 1, Section 17, of the Florida

Constitution. As this Court explained in Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991), "[i]t clearly is 'unusual' to impose death based on facts similar to those in cases in which the death penalty previously was deemed improper." Thus, in deciding whether the death penalty is unusual in this sense, "'[w]e compare the case under review with all past capital cases."' Williams v. State, 437 So. 2d 133, 137 (Fla. 1983); Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998). In making this comparison, the Court considers several factors: Our proportionality review requires us "to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993).

The present case presents a long and heavy list of mitigating circumstances. The law reserves the death penalty only for the most aggravated and least mitigated murders. This Court's role is to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. See Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999).

The Court in Cooper gave numerous examples of cases where death was found to be an inappropriate sentence, despite the existence of aggravating circumstances. Here, the defense presented substantial mitigation. As such, Defendant's sentence of death was disproportionate.

When compared to similar cases, and when factoring in the relative culpability of the co-defendant who received a life sentence, Mr. Fletcher's death sentence is not proportionately warranted. Given the prior history of Mr. Fletcher, the substantial mitigation established in the present case should tip the scales of justice towards life. This Court should recede from Lawrence and Cruz, and conduct a proportionality analysis, and conclude that the death penalty is not proportional here.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse the sentences of death and order a new penalty phase trial with a new jury, or in the alternative reverse the sentences of death with directions that the appellant be sentenced to life in prison; declare the argued subsections of Section 921.141 Florida Statutes unconstitutional; or order other such relief as this Honorable Court would find appropriate.

Respectfully submitted,

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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; served on the Office of the Attorney General, Assistant Attorney General Patrick Albert Bobek, at capapp@myfloridalegal.com; and a copy thereof delivered by mail to Mr. Timothy Fletcher, V 14470, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 1st day of November, 2023.

CERTIFICATE OF FONT 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 does not exceed a word count of 25,000 words, as set out in the Rule 9.210(a)(2)(C), noting that page limits for computer-generated briefs were converted to word counts. Page limits are retained only for briefs that are handwritten or typewritten.

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