

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL WAYNE JONES,

Appellant,

vs.

SUPREME COURT CASE NO. SC23-0696

STATE OF FLORIDA,

Appellee.

_____/

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Michael Wayne Jones, was charged in this capital case by indictment with four counts of first-degree murder (Counts 1-4) and one count of second-degree murder (Count 5). The charges stemmed from several incidents in Marion County, Florida, in July (Count 5) and August (Counts 1-4) of 2019, which resulted in the deaths of his wife and four of his children, respectively. (R 55-57).

In October of 2019, contemporaneous with the filing of the indictment, the State sought the death penalty on Counts 1-4. (R 51-52). Shortly thereafter, in November of 2019, Appellant entered a plea of guilty to all five counts. (R 737-742). Accordingly, the proceedings below consisted only of the penalty phase, which began in December of 2022, and wherein the State sought to prove the following six aggravating factors for each Count:

- (i) the defendant was previously convicted of a violent felony;
- (ii) the murder was committed for the purpose of avoiding lawful arrest¹;

¹ Hereinafter, the “avoid arrest” aggravator.

- (iii) the murder was especially heinous, atrocious, or cruel;
- (iv) the murder was cold, calculated, and premeditated;
- (v) the victim was a person less than 12 years of age; and,
- (vi) the murder was committed by a person in a position of familial authority.

(T 1, 557; R 55-57).

Of these, only one – the “avoid arrest” aggravator – was in dispute before the jury. (T 2508). In addition to challenging this aggravator, the Defense sought to prove a total of 57 mitigating circumstances, the following three of which were statutory:

- (i) the defendant has no significant history of prior criminal activity;
- (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; and,
- (iii) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired.

(R 707-710).

In January of 2023, the penalty phase concluded with the jury’s recommendation of a sentence of death in each of Counts 1-

4. (R 2619-30). For each count, the jury found that the State had proven all six of the aggravators presented, and that the aggravating circumstances outweighed the mitigating circumstances. (R 2619-30). And for each count, one or more individual jurors found that one or more of the mitigating circumstances was established by the greater weight of the evidence. (R 2619-30).

In February of 2023, Appellant waived his right to a Spencer² hearing. (R 2632; T 2623-2624). The State and the Defense submitted their respective sentencing memorandums shortly thereafter. (R 2635-2665, 2712-2742).

On April 28, 2023, the trial court sentenced Appellant to death. (R 2824-2828). Contemporaneously, the court issued a written order detailing its consideration and weighing of the aggravating and mitigating circumstances in determining Appellant's sentence. (R 2745-2812). In all, the court found that 41 mitigating circumstances had been established and were entitled to weight. (R 2810). Specifically, the court found that:

- (i) Of the three statutory mitigating circumstances, only one (that Appellant had no significant history of

² Spencer v. State, 615 So. 2d 688 (Fla.1993).

prior criminal activity) had been established by the evidence;

(ii) Of the 54 non-statutory mitigating circumstances, 14 had not been established by the evidence; and,

(iii) Of the 41 established mitigating circumstances, seven were either not mitigating under the facts of this case, or entitled to 0 weight.

(R 2745-2810).

OVERVIEW OF THE TIMELINE

Appellant provided a detailed accounting of all five killings to law enforcement on the day of his arrest and entered a plea of guilty to all five counts shortly after his indictment. (R 737-742; T 964-1033, 1039-1052). As such, while issues relating to Appellant's mental health and potential motive (or lack thereof) were heavily contested during the penalty phase, the events themselves were not.

COUNT 5

Michael³ and Casei Jones were married in October of 2017. (T 637). By April of 2019, they had two children in common – Mercalli and Aiyana – and had moved into a small, mobile home in

³ Appellant.

Summerfield, Florida, along with two of Casei's children from a prior marriage: Cameron Bowers (Age 11) and Preston Bowers (Age 4). (T 637, 1721). All six were in the home when, in the evening hours of July 10th, 2019, an argument began between Michael and Casei. (T 969-973).

As the State described it, the argument turned violent when Casei:

[. . .] got a baseball bat and hit the Defendant in the chest with it. He took it away from her and started hitting her with the bat over and over and over again until she was dead. Then he wrapped her body up in a shower curtain, stuffed her body in a plastic tote, put the lid on it, and put it in that back bedroom that they shared together.

(T 578).

There were no witnesses to this incident, which would eventually be charged as second-degree murder in Count 5 of the indictment. (R 55-57, 971). The children were all asleep at the time, and the commotion did not rouse them. (T 971). While Cameron Bowers, the oldest of the four at age 11, would begin to ask where his mom was in the days and weeks that followed, there was no evidence that he, or any of the other children – ages 4, 2, and 1,

respectively – were ever aware of a struggle taking place that evening. (T 971, 1008).

DETECTIVE BARTLETT: What did you do from that point, what did do you with her that night?

THE DEFENDANT: I wrapped her up in some stuff and stuck her in a tote in the back room.

(T 973).

DETECTIVE BARTLETT: How long ago was, cause obviously you had to clean up at some point? Is this something you did really quickly or ...

THE DEFENDANT: I cleaned it a little bit that night, and then the next day. And I don't know how long I kept the trash with everything, the bat and all that in the bag. But I kept it for -- it was a while that I kept it.

(T 993).

Over the course of the next two months, Appellant used Casei's phone to impersonate her – both on social media and in text messages to friends and family – to maintain the appearance that she was still alive. (T 975, 988-89, 1041). Often, the posts and messages advanced a fabricated story that she was indisposed due to a back injury that required surgery and rehabilitation. (T 1045).

Despite these attempts to keep others from growing suspicious at Casei's absence, Appellant nevertheless permitted Cameron and

Preston to stay with their father, Richard Bowers, at a point when neither had seen their mother in two weeks. (T 684-85, 1046-47, 2061). Appellant dropped the two boys off on July 27, 2019, and picked them up again on Saturday, August 10, 2019. (T 684-85, 1046-47, 2061).

COUNTS 1 AND 2

The killings underlying Counts 1 and 2 occurred shortly thereafter.

THE DEFENDANT: One day I just realized school is starting. The boys are school age and I started to just choke them out.

(T 892, 2481).

At some point between August 10th and August 22nd of 2019, Appellant entered Cameron's room as he slept and, using his hands, strangled him to death. (T 1005-07). He then carried his body to another room and placed him inside a suitcase. (T 1008-09). This killing is contemplated by Count 1 of the indictment. (R 55-57).

The next night, Appellant killed Preston Bowers in a similar manner. Again Appellant entered the room as he slept, and again

he began to strangle him, this time doing so by fastening a zip tie around his neck. (T 1008-1012). Appellant then carried him into the bathroom, where a bath was already running, and held the boy's face under water until he drowned. (T 1008-1012). He placed the body in a large, black trash bag, and left it in the bathroom. (T 979-980). This killing is contemplated by Count 2 of the indictment. (R 55-57).

There were no witnesses to either murder. The only other person in the room during the killing of Cameron Bowers was his brother Preston, who slept through the incident. (T 1005-10). And the only other people in the home throughout the ordeal were Appellant's daughters, Mercalli and Aiyana, neither of whom were more than two years old. (T 1013-14).

Appellant kept the bodies, now three in number, inside the house for the next two weeks, taking minimal steps to conceal the odor:

DETECTIVE BARTLETT: Okay. So he stayed in the bathroom in the trailer and Cameron was in, you say, a suitcase?

THE DEFENDANT: Yeah.

DETECTIVE BARTLETT: Where did the suitcase go?
Where did you put the suitcase?

THE DEFENDANT: In the back bedroom.

DETECTIVE BARTLETT: With?

THE DEFENDANT: I mean, the front bedroom, the boys' bedroom.

DETECTIVE BARTLETT: Where at in the front bedroom?

THE DEFENDANT: Window, like right under where the window is.

DETECTIVE BARTLETT: I'm seeing some pretty heavy stains or something on that floor. Is that from him?

THE DEFENDANT: Yeah.

DETECTIVE BARTLETT: What did you do? Did you do anything to try to conceal that? Because, obviously, I mean, you've got three dead bodies in the house now. What are you doing to -- did you do anything to kind of clean that up or --

THE DEFENDANT: No. I had some kitty litter that I threw on it. Other than that ...

DETECTIVE BARTLETT: You guys don't own a cat, do you?

THE DEFENDANT: No. No, she had -- she was trying to get some of the stray cats that are around there.

DETECTIVE BARTLETT: What happens then? How long after the boys pass away?

THE DEFENDANT: In the meantime, I'm going between here and Jacksonville to see my other three kids.

DETECTIVE BARTLETT: I got information that leads me to believe that's true, yeah. Going back and forth every couple days, it seems like. A lot more frequently than you ever have.

(T 979-981).

Throughout this time, Appellant had been in contact with his ex-wife, Sarah Jones, with whom he had three children in common. (T 776-779). The two had divorced in 2015 and not spoken regularly since 2018. (T 777-779). When Appellant re-initiated contact on July 11th of 2019 – the day after the killing of Casei Jones – Sarah was living in Jacksonville, Florida, along with their three children – Jacob, Noah, and Ava – who were approximately 9, 7, and 4, respectively, at the time.⁴ (T 779).

Appellant told Sarah that he and Casei were breaking up. (T 779). “[T]hen,” as Sarah later recounted, “we just talked about the kids and our lives and we had basically a normal conversation.” (T 779). They also arranged for Appellant to watch their three kids for a few days. (T 779-782). Over the coming weeks and months, they

⁴ Sarah Jones testified as to their ages – at the time of her testimony in 2023 – were 13, 11, and 8, respectively.

began to speak more frequently as Appellant attempted to re-kindle their relationship. (T 779-792).

Appellant began to spend more time with his and Sarah's children as well. Jacob, Noah, and Ava began staying with Appellant more frequently in Summerfield, and Appellant began to spend more time with them in Jacksonville. (T 779-794). "And then came the eviction notice." (T 983).

COUNTS 3 AND 4

DETECTIVE BARTLETT: Did you take the babies up there with you?

THE DEFENDANT: Yes.

DETECTIVE BARTLETT: Okay.

THE DEFENDANT: Yeah, several times. And then came the eviction notice.

[. . .]

DETECTIVE BARTLETT: Like a civil process server?

THE DEFENDANT: Yeah.

DETECTIVE BARTLETT: So he comes. Anything?

THE DEFENDANT: Serves the papers. It was like five days to get out or whatever. After the last day being there, that was it. I just put the girls in the tub and strangled them.

(T 983).

The killings of Mercalli and Aiyana – which occurred at some point near the end of August 2019 – were committed in much the same manner as those of Cameron and Preston. (R 55-57; T 983-984). Appellant entered the living room where both were seated, picked up Mercalli, carried her to the bathtub, and drowned her before returning to the living room, picking up Aiyana, and delivering her to the same fate. (T 982). These killings are contemplated by Counts 3 and 4 of the indictment, respectively. (R 55-57).

FROM SUMMERFIELD TO JACKSONVILLE

Shortly thereafter, Appellant loaded all five bodies into his van and drove to Jacksonville to stay with Sarah Jones. (T 984).

DETECTIVE BARTLETT: Where do you go?

THE DEFENDANT: I went to Jacksonville.

DETECTIVE BARTLETT: To Sarah's?

THE DEFENDANT: Yeah. Stayed with the kids.

DETECTIVE BARTLETT: So where are the, were are all the bodies at that point? Are they in the van?

THE DEFENDANT: Yeah.

DETECTIVE BARTLETT: Today's the 15th. So from the end of August, beginning of September until now?

THE DEFENDANT: Yeah.

DETECTIVE BARTLETT: You don't take them out? You don't move them? You don't hide them?

THE DEFENDANT: No.

DETECTIVE BARTLETT: Do you go -- are you going to work still?

THE DEFENDANT: Yeah, I work, like, I work under the table for a guy right now.

DETECTIVE BARTLETT: Up in Jacksonville?

THE DEFENDANT: No, in The Villages.

DETECTIVE BARTLETT: So you're driving down here?

THE DEFENDANT: Yeah, for a couple of days, yeah.

DETECTIVE BARTLETT: Are you driving the van back and forth?

THE DEFENDANT: Yeah.

DETECTIVE BARTLETT: Are you driving Sarah's car or --

THE DEFENDANT: No. No. The van.

(T 984-985).

DETECTIVE BARTLETT: So you're staying with Sarah. Is Sarah asking about the babies and what's going on or ...

THE DEFENDANT: No, I mean, I would keep the kids and she would, you know, go to work. And on the weekends she would do Uber and stuff like that, so there wasn't much conversation about it, you know, here and there. But, you know, I would tell her that, you know, Casei and I are separated and she's with her mom right now, so.

(T 986-987).

Appellant stayed with Sarah in her apartment for roughly two weeks. (T 779-801). Though the noticeable odor within continued to worsen over this time, he continued to use his van – with the bodies still inside – during his stay. (T 983-984). On occasion, Sarah even rode in the vehicle. (T 1023, 1027-28).

By mid-September, Casei's family had grown suspicious and contacted law enforcement, who eventually left a voicemail with Sarah Jones in the early morning hours of September 15th, 2019, requesting she return their call. (T 720, 794). At around 9:30 that same morning, as Appellant stood nearby, Sarah returned the phone call. From her trial testimony:

Q. Okay. And during this phone call with Detective Bartlett, did Detective Bartlett ask you if you had seen Casei or the kids?

A. He did.

Q. Okay. And did the Defendant tell you how to answer that question?

A. He -- yes, he had a piece of paper on the counter in front of him. He wrote down a note about what I should say.

Q. Okay. And what did the note say?

A. That I'd seen him and Casei and the kids at the McDonald's in Palatka on Friday.

[. . .]

Q. Okay. Was that the truth?

A. It was not.

Q. Okay. Why did you tell the detective that?

A. I've had a long time to think about that. I'm still not a hundred percent sure. But I believe that I assumed if Michael was asking me to do that, that there was a legitimate reason for it.

(T 796-797).

Later that day, Sarah received another call from law enforcement, who informed her they were looking at the surveillance video from the McDonald's she referenced:

Q. And what did you do when the detective told you that?

A. I tried to tell him that I thought maybe I had been confused and it wasn't that day.

Q. So you told him you weren't actually sure about the day, you were confused?

A. Yes.

Q. Did you go over after you talked to the detective --

A. Yes.

Q. -- while you were [at] Target?

A. I did.

Q. And did you tell the Defendant about the phone call you had had with the detective while you were at Target?

A. I did, yes.

Q. And what else did you say to him, if anything, to the Defendant?

A. I told him that he needed to figure this out, that there was clearly something going on and he needed to talk to them.

Q. Okay. And what did he do when [you] told him that?

A. I think he did place a phone call to Detective Bartlett or one of the detectives with my son's cell phone and left a message. And then shortly thereafter he left with some clothes and said he'd be back soon.

(T 798-799).

FROM JACKSONVILLE TO GEORGIA

Appellant did not return. He drove north, the five bodies still in his van. (T 886). At some point after crossing into Georgia, he pulled off the road and retrieved three of the four bags – the three containing the remains of his children – from the back of the van. (T 891). Bags in hand, he set off down a dirt path into the surrounding Georgia pines. (T 891). Eventually, he turned off the path and left the bags in a heavily wooded area. (R 855, 871-872, 910). He walked back to the van and, with his wife’s body still inside⁵, began driving north. (T 901).

Soon thereafter, Appellant ran off the road and crashed into a concrete culvert. (T 901). He had avoided serious injury, but the crash had rendered the vehicle inoperable. (T 838-39, 845). And so – with his wife’s remains still in the van – Appellant called 911, reported the accident, and waited for police to arrive. (T 1021-22).

It was not long before the body was discovered. The first officer on the scene testified he smelled the distinct odor of a

⁵ DETECTIVE BARTLETT: What kept you from getting rid of her body?

THE DEFENDANT: I don't know.
(T 1020).

decaying body almost immediately after getting downwind of the van:

A. [. . .] When I walked around to the back to get the tag and was asking him that question, around the same time I noticed the tag, it was at that time I managed to get myself downwind of the vehicle, and that's when I smelled an odor of a decaying body. One that I had smelled before. And they're distinct. Anybody that's ever worked in a case like that, knows that's what they're smelling when they smell it.

Q. And where was that odor coming from?

A. As when I first caught scent of it, I was at the back driver corner, maybe 10, 15 yards behind the vehicle.

Q. When you smelled that odor, did you change your behavior or do anything?

A. I went semi defensively, just by practice and nature of the job, I put my hand on my service weapon and asked Mr. Jones what business did he have in and around Atlanta.

Q. How did he respond?

A. He didn't answer the first time. I asked him the second time and he didn't give me a depiction of why he was going to Atlanta, he just kind of turned his back to me, stuck his hands out to the side, and just said, yeah, you may want to put me in handcuffs.

Q. Did he elaborate why?

A. I asked him why would I want to put you in handcuffs? And he said, My wife's dead. And I said, How

did she get dead? And he said, I killed her. And I said, Is that her that I'm smelling? And he told me that it was.

(T 847-848).

Appellant was taken to the local police station for questioning, where he admitted to all five of the killings, and provided a detailed accounting of the surrounding events and circumstances. (T 964-1033, 1039-1052). Later that day, he led law enforcement to the heavily wooded area where he had left the children's remains. (T 855). His disposition remained predominantly unemotional throughout.

Q. Mr. Jones appeared very calm and matter of fact considering what he was arrested for and charged with, right?

A. Yes.

Q. Mr. Jones expressed himself very plainly, for the most part, unemotional?

A. I'd agree.

Q. The only time that Mr. Jones seemed to show any emotion is when he was speaking about the children?

A. Yes, I'd say at the beginning when he first admitted to that was the only time I really saw any emotion from him.

Q. Mr. Jones had the same flat affect when he was showing you guys around in the woods?

A. Yes.

Q. Not a whole lot of emotion from Mr. Jones out there in the woods?

A. No, about the same as what we saw on the video.

Q. The way that Mr. Jones was acting, you would have thought that you guys were talking about [] where someone had lost their wallet out there?

A. That's accurate.

(T 896-897).

When asked why he would kill his children, Appellant responded that he did not know. (T 979, 1016, 1019, 1044-45). He referenced the mounting pressure he felt following his fatal altercation with Casei, but did not know why he killed his children, nor what he thought it would have accomplished. (T 979, 1016, 1044-45). "I wish I had a answer for you, Detective." (T 1044-1045).

DETECTIVE BARTLETT: I got to ask, what were you trying to accomplish, do you think?

THE DEFENDANT: **I don't know.**

(T 979) (emphasis added).

DETECTIVE BARTLETT: I mean, I understand the whole, I understand completely, you know, getting mad at your wife, get into a fight, you know, going too far. I

understand that. But why on earth go get the boys – why not just leave them with dad?

THE DEFENDANT: **I don't know.** Like I said, I just, every step of the way I was hoping somebody would, would just kick the door in and come get me, take me the hell away.

(T 1016) (emphasis added).

Q. [. . .] Obviously the one question is, everybody's asked me why. I know -- I understand why Casei. Why the boys, why your daughters?

A. **I don't know.** It's just everything mounted up. Just seemed like no way out.

Q. You were right there. I mean, you were at the police department at one point, a couple feet, a little – a few steps away basically.

A. Yeah.

Q. Just everything mounted up and ...

A. Yeah. **I wish I had an answer.**

Q. You wish you had that answer too?

A. Uh-huh. Yeah, I do.

(T 1044-1045) (emphasis added).

Q. Okay. I mean, it baffles me and I know it baffles them. You had safe places for them, man. That's what – they were both, the boys were with dad, they were safe. The girls, you found -- I mean, you went out of your way to get them to a safe place. Why not just leave them there? I

mean, just do what you had to do. I mean, other part was done.

A. Yeah. **I wish I had a answer for you, Detective.**

(T 1044-1045) (emphasis added).

MENTAL HEALTH IN THE MARION COUNTY JAIL

Marion County jail records document a significant decline in Appellant's mental health following his arrest. (R 1631-2582). At various points of his stay, he would be diagnosed by the medical staff of the Marion County Sheriff's Office at the jail with major depression, major depression with anxiety, schizophrenia-bipolar, depression with psychotic disorder with delusions, and psychosis not otherwise specified. (T 1886; R 1631-2582).

In November of 2019, roughly two months after his arrest, Appellant was observed "running into his cell door repeatedly" in order to "make the voices stop." (R 1569, 1782). In December, jailhouse video recorded him "deliberately hit his head twice on the door then [stick] his finger in his open wound", and he later admitted he was hearing voices "that tell [him] to hurt himself." (R 1845). By the end of May of 2020, medical staff at the Marion County jail had diagnosed Appellant with several psychological

conditions -- “Psychosis NOS”⁶ among them – and had placed him on an anti-psychotic medication. (R 2400).

THE AVOID ARREST AGGRAVATOR

The “avoid arrest” aggravator was the only disputed aggravating factor before the jury. In the State’s view, the killings were motivated by a desire to avoid arrest for the murder of Casei Jones. The State’s theory, as the State described it in response to Appellant’s motion for judgment of acquittal, was as follows:

THE STATE: [. . .] The boys were asking about where their mother was. Preston was asking where his mother was and where his brother was after Cameron was killed. School was coming up. The Defendant realizes that he can't maintain this ruse of Casei just being gone with the children. People are asking about her. Then the children are going to be going to school, so the only way out at this point is for him to kill children and eliminate them as a witness as far as the problem is concerned for him remaining free.

(T 2414).

The State advanced this argument to the jury as well:

⁶ Per Dr. Harold Bursztajn, “Psychosis NOS” – or “not otherwise specified” – means that “whatever the specific subtype is of his psychosis relative to hallucinations and delusions, he is psychotic. There's no question about that. We can go ahead and fine tune potentially the diagnosis, but for treatment purposes, it's clear he is psychotic. He needs medications.” (T 2076).

THE STATE: [. . .] The first degree murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

What do we know? What's the reason he killed the children?

There's only one reason. School is getting ready to start. He mentions that many times. He knows school is getting ready to start. Cameron and Preston will be telling people they hadn't seen their mom. He said Cameron had been asking every couple of days where his mom was. When they go to school, they have an open house, the teacher asks where's your mom, what are they going to say? I haven't seen her in three months. I haven't seen her in a long time.

He told Detective Bartlett it seemed like the way out. He had to get rid of them.

He told Dr. Demery he hid the bodies of the children so the police wouldn't ask him about them when he was caught.

And if he hadn't told them where their bodies were, they may have never been found. There's no other reason to kill those children except for self-preservation, no other reason, because we've proven there was no psychosis.

(T 2480-2481).

The Defense countered that the State's explanation was unreasonable given how often Appellant took actions which significantly increased the risk that one or more of the bodies would be discovered. (T 2509-2512). The Defense noted, in relevant part:

that Appellant had brought his other children to the trailer while Casei's body was still inside; that for two weeks he drove his van around Jacksonville with five dead bodies inside it, at times with Sarah Jones and his living children as passengers; and that, after crashing his van, "he does what any criminal with their dead wife in a plastic box would do amongst the bugs and stench of putrefied decomposition, he calls 911 because he's had a traffic accident." (T 603, 2510-11).

The Defense posited that Appellant's actions were not the product of motive, but the tragic result of a psychotic episode; an episode made possible by factors including his underlying mental illnesses⁷ and vulnerability to psychosis⁸, triggered by his fatal altercation with Casei Jones⁹, and resulting in an ambulatory psychosis¹⁰ that grew worse in the weeks and months that followed.¹¹

⁷ Dr. Harold Bursztajn diagnosed Appellant with "PTSD; major depressive disorder; dissociative disorder; delusion disorder; delirium; and schizoaffective disorder." (T 1887, 2073-76). And Dr. John Fabian diagnosed Appellant diagnosed him "with depressive disorder; major depressive disorder, severe with psychotic features; [. . .] PTSD; neurocognitive disorder due to traumatic brain injury; and unspecified developmental disorder." (T 1887, 2073-76).

⁸ (T 1219-1220, 1831, 1836, 1885-86, 1902, 1996, 1998, 2088, 2093-94, 2125).

⁹ (T 1836) ("[Y]ou can have a genetic disposition to psychosis and

In support, Appellant relied, in relevant part, on extensive expert testimony and documentation concerning his impaired mental state at the time, the significant deterioration of his mental state in the months following his arrest, and the various mental illnesses he has since been diagnosed with. This testimony included that of Dr. Stephen Nelson, who diagnosed Appellant with a neurodevelopmental disorder and testified that, “[a]s a neurologist, I would say that his neurological imaging would make him prone to psychosis.” (T 2023).

Q. Have you diagnosed Michael with any type of neurological disorder?

A. Yes. I mean, I would say he has a neurodevelopmental disorder. A neurodevelopmental disorder is a very broad term, meaning that he has neurological dysfunction that has developmental origin, whether it's from genetics or from the various forms of abuse that he was exposed to.

never develop psychosis. What you usually see is an event, something that happened that now that person developed a psychosis or psychotic break, as we call it.” – Dr. Yenys Castillo, Clinical and Forensic Psychologist.)

¹⁰ (T 2072-73, 2076-77).

¹¹ Q. So he was suffering psychosis and psychotic in the jail and before that he was suffering from psychosis post Casei's death, correct?

A. Precisely. He was in the midst of an ambulatory psychosis and in jail he's psychotic in a structured environment. (T 2076-77).

At the end of the day, he's not -- his brain didn't develop the way his brain should have developed.

Q. Do you believe that at the time that Michael murdered all four children, all his childhood trauma, his traumatic brain injuries, and his genetic mutation, severely affected and negatively impacted the choices he made those days and weeks?

A. Yes. And if you combine that with withdrawal from the medications and increased alcohol intake, the combination of all that would have made it even worse.

(T 2003-04).

Q. Ultimately your entire neurological exam was normal, correct?

A. Yes. I mean, as I would expect it to be. And I'll just give you an example. If I see a patient with schizophrenia, and schizophrenia patients are fully psychotic and delusional, but their neurological exam is normal. The problem that they have is actually in same area as, honestly, that Michael has problems with, is problems with the limbic system and the connections between the orbitofrontal and hippocampus and thalami and all this emotional regulation. Again, these areas cause people to become psychotic.

Q. And you would defer any clinical diagnosis of psychosis to a psychologist or psychiatrist, correct?

A. Yes. As a neurologist, I would say that his neurological imaging would make him prone to psychosis, but whether he was psychotic or not, I would defer to a psychiatrist.

(T 2023).

The Defense also presented the testimony of Dr. John Fabian, a neuropsychologist, who diagnosed Appellant with, in relevant part, “major depressive order with psychotic features” and opined that Appellant underwent a psychotic break after his fatal altercation with Casei. (T 1501).

Q. Do people with psychosis always sort of act out and have psychosis? Do they always exhibit symptoms of it?

A. No. I mean, the chronically mentally ill, homeless people, you know, that we often see, that is a severe psychosis, no. He, in my opinion, had evidence of a psychotic break after the murder of Casei.

(T 1557).

As Dr. Harold Bursztajn, a neuropsychiatrist who met with Appellant 52 times in the three years preceding trial, summarized it:

Michael Jones' delusions and hallucinations are most consistent with an illness, what's called the schizoaffective spectrum.

[. . .]

By this we mean that the patient is suffering from both a mood disorder, but also a thought disorder. The mood disorder being depression, for example, or panic. The thought disorder being delusions and hallucinations. All of this is often accompanied by a lack of insight and an impairment in communication. A patient has a difficult

time reaching out and seeking the help they need because the problem solving is limited.

If you give them a routine thing, like going to work, patients can do that. Many of these patients have what we call, we'll touch on it maybe later, ambulatory psychosis. He's got a job still. But if you give them something that they're not used to, something that's not routine, something that's emotionally conflictual, something that makes them anxious or immobilized, at that time the problem solving goes.

(T 2072-73).

Q. So what is the diagnostic census?

A. The diagnostic census is suffering, was, and now medicated in this schizoaffective spectrum. That was the way it was. It included both, at different times, manic and depressive features, but it was compounded by the delusion, the delirium, and these command hallucinations, these voices which possessed him.

Q. If I can ask you, I think most people, obviously the jurors know, but the word intermittent, does that have any particular significance in the context of command hallucinations?

A. Yes, in the sense that if he was doing a routine task like driving or taking care of the children, they would be much less likely to be intense than when he was trying to do any emotional conflictual problem solving.

Q. If a person was suffering, the description here, if a person was suffering from that kind of significant mental illness, would it always be obvious to the naked eye of observers?

A. With most first break, evident break, of psychotic patients, it's not. That's why most psychosis that we see in the clinic, it's called ambulatory psychosis. It's not necessarily agitated. It's not necessarily vegetative. What you see usually are people who still can do routine types of tasks. It's when it stops being routine that it becomes possible. You can't [sic] creatively problem solve when you're psychotic.

(T 2094-95).

At its core, the Defense's position was, as Defense counsel noted during opening statements, that "applying common sense motives, like we see on Dateline, to Michael's behavior simply will not work." (T 601).

SUMMARY OF ARGUMENT

Point one. It is well-settled that where the victim is not a law enforcement officer, in order for the “Avoid Arrest” aggravator to apply “the State must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim [. . .] is the elimination of a witness.” Robertson v. State, 611 So.2d 1228, 1232 (Fla.1993). Here, Appellant requested a special jury instruction that informed the jury of this additional “sole or dominant motive” element. The trial court – despite conceding that the instruction correctly stated the applicable law – denied Appellant’s request. The omission of this legal requirement from the jury instructions rendered the instruction insufficient to guide the jury in their determination of the presence or absence of the “avoid arrest” aggravating factor and, as such, violated the Fifth, Sixth, and Eighth Amendments.

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

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

ARGUMENT

POINT ONE

THE LOWER COURT'S REFUSAL TO INCLUDE THE "SOLE OR DOMINANT MOTIVE" ELEMENT OF THE AVOID ARREST AGGRAVATOR WAS IMPROPER

A. Standard of Review.

Generally, a trial court's decision to give or withhold a proposed jury instruction is reviewed for an abuse of discretion. Stephens v. State, 787 So. 2d 747, 756-757 (Fla. 2001). "In a criminal proceeding the discretion of the trial court in this regard is rather narrow, however, because a criminal defendant is entitled to have the jury instructed on his or her theory of defense if there is any evidence to support this theory, and so long as the theory is recognized as valid under the law of the state." Worley v. State, 848 So. 2d 491 (Fla. 5th DCA 2003) citing Mora v. State, 814 So. 2d 322 (Fla.2002) (remaining citation omitted). *See also*, State v. Weller, 590 So. 2d 923 (Fla. 1991).

B. Where the victim was not a law enforcement officer, the avoid arrest aggravator contains an additional element.

The "avoid arrest" aggravator is set out by Section 921.141(6)(e), and has not been altered since its addition to

Florida’s criminal code in 1972. It read then, as it does now, as follows:

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Section 921.141(6)(e), Florida Statutes (Fla. 2022). *Accord* Section 921.141(3)(f), Florida Statutes (1972).

“In Riley v. State, 366 So. 2d 19 (Fla.1978),” this Court “first extended application of the aggravator of a murder committed for the purpose of avoiding or preventing a lawful arrest beyond those involving law enforcement personnel, to include other capital murders specifically involving witness elimination.” Urbin v. State, 714 So. 2d 411, 415 (Fla. 1998). Shortly thereafter, in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), this Court:

reaffirmed Riley and explained our holding there as to the requirements of this aggravator:

[A]n intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that *the dominant or only motive* for the murder was the elimination of witnesses.

Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979) (emphasis supplied).”

Urbin, at 415.

This Court has repeatedly reaffirmed this holding in the decades since.¹² Among those reaffirmances is this Court's decision in Consalvo v. State, 697 So. 2d 805 (Fla. 1996), which contains the following instructive summary of the aggravator's legal particulars:

Typically, this aggravator is applied to the murder of law enforcement personnel. However, the above provision has been applied to the murder of a witness to a crime as well. In this instance, "the mere fact of a death is not enough to invoke this factor.... Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." In other words, the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness. Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Likewise, the mere fact that the victim knew

¹² See, e.g., Consalvo v. State, 697 So. 2d 805 (Fla.1996) ("In other words, the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness."); Robertson v. State, 611 So. 2d 1228, 1232 (Fla.1993) ("[T]he State must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness."); Floyd v. State, 497 So. 2d 1211, 1215 (Fla.1986) ("The state must clearly show that the dominant or only motive for the murder was the elimination of a witness."); Bates v. State, 465 So. 2d 490, 492 (Fla.1985) (reasoning that "it must be clearly shown that the dominant or only motive for the murder was the elimination of the witness"); Pomeranz v. State, 703 So. 2d 465, 471 (Fla.1997) (The avoid arrest aggravator "cannot be found unless the evidence clearly shows that the elimination of the witness was the sole or dominant motive for the murder.").

and could identify defendant, without more, is insufficient to prove this aggravator.

Additionally, a motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance. And, it is not necessary that an arrest be imminent at the time of the murder. Finally, the avoid arrest aggravator can be supported by circumstantial evidence through inference from the facts shown.

Consalvo v. State, 697 So. 2d 805, 819 (Fla.1996)

C. The requested instruction, and the court’s denial thereof.

Prior to trial, Appellant submitted a written request – as required by Rule 3.390(c), Fla. R. Crim. P. (2022) – for a special jury instruction related to the “Avoid Arrest” aggravator. Specifically, Appellant requested the following supplemental language:

Where the victim of the homicide is not a law enforcement officer, the State must prove beyond a reasonable doubt that the sole or dominant motive for the murder was to avoid a lawful arrest.

(R 493).

Appellant renewed his request for the special instruction during the penalty phase, following the close of the state’s case.

MR. SPIVEY: [. . .] The next one, the capital felony was committed for the purpose of avoiding or preventing a lawful arrest for effecting escape from custody. I realize that the case that I provided in the jury instructions -- for a modification of the jury instruction, special instruction,

but **we believe that the jury should be instructed that where the victim of a homicide is not a law enforcement officer, the State must prove beyond a reasonable doubt that the sole or dominant motive for the murder was to avoid a lawful arrest.**

(T 2413) (emphasis added).

The trial court, despite conceding that the special instruction correctly stated the applicable law, denied Appellant's request in the following pronouncement:

THE COURT: All right. Well, I do believe there has been sufficient evidence for the aggravator to go before the jury.

The -- **while what you described with regard to that aggravator is absolutely accurate**, in my mind, that is the legal threshold to get it to the jury. **It's not a requirement of the instruction**, so it's I tend to agree that **the evidence presented during the trial leaves little other explanation** for the murder of the children other than to remove them as witnesses, **independent of your opinions of the Defendant's experts**, so I'm going to deny the request for the instruction and I'm going to instruct the jury on the avoiding arrest aggravator.

(T 2414-15) (emphasis added).

D. The lower court erred in denying Appellant's request for a special jury instruction.

"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 the defense; and
- (3) the special instruction was a correct statement of the law and not misleading or confusing.”

Hudson v. State, 992 So. 2d 96, 112 (Fla. 2008) citing Stephens v. State, 787 So. 2d 747, 756 (Fla.2001).

Appellant respectfully submits that the lower court erred in denying the requested instruction, as all three Stephens factors are readily established here. Indeed, despite its ruling, the lower court’s stated rationale impliedly concedes as much by acknowledging (1) that the instruction is an “absolutely accurate” statement of the law, and (2) that the defense presented evidence – in the form of expert opinion testimony – that the sole or dominant motive for the killing was *not* to avoid a lawful arrest via the elimination of a witness. In any event, even without the assistance of the lower court’s concessions, each of the three Stephens factors stand on their own merits.

Taken in order, the first Stephens factor requires that “the requested instruction was supported by the evidence.” Stephens, at 756-57. Here, the requested instruction reads:

Where the victim of the homicide is not a law enforcement officer, the State must prove beyond a reasonable doubt that the sole or dominant motive for the murder was to avoid a lawful arrest.

(R 493).

Accordingly, to satisfy the first Stephens factor there must have been both (1) evidence which could support a conclusion that the victims were not law enforcement officers, and (2) evidence which could support a conclusion that the sole or dominant motive for the killing was *not* to avoid a lawful arrest. Both are present here.

Regarding the former, it is readily apparent from the record – and was never in dispute below – that none of the victims in this case were law enforcement officers. Regarding the latter, it is also readily apparent – and was also undisputed below – that none of the victims in this case ever witnessed another’s killing, ever became aware of another’s killing, or ever witnessed Appellant commit any offense (murder or otherwise) prior to their own.

Moreover, Appellant presented evidence throughout the penalty phase in support of his contention that his actions were the product of a tragic psychotic episode.

The second Stephens factor requires that “the standard instruction did not adequately cover the theory of defense.” This factor is present here – and unavoidably so – because the standard instruction effectively omits an element which the state must prove beyond a reasonable doubt. As noted above, Appellant’s theory of defense throughout the penalty phase – both for this aggravator specifically, and for the imposition death penalty generally – posited that the killings were primarily caused, not by a motivation to kill “witnesses” to crimes they were never aware of, but by serious and overwhelming mental illness.

Finally, [t]he third Stephens factor requires that “the special instruction was a correct statement of the law and not misleading or confusing.” Stephens, at 756-57. Both components are present here. The requested instruction was a correct statement of the law, as the legion of cases set out above make clear. And the requested language is not misleading or confusing, as it is both plainly written

and all but a verbatim recitation of this Court's holdings in prior cases.

E. An instruction insufficient to guide the jury in their determination of the presence of an aggravating factor violates the Eighth Amendment.

“[T]here is Eighth Amendment error when the sentencer weighs an ‘invalid’ aggravating circumstance in reaching the ultimate decision to impose a death sentence.” Sochor v. Florida, 504 U.S. 527, 532 (1992) citing Clemons v. Mississippi, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990); *see also*, Espinosa v. Florida, 505 U.S. 1079,1081 (Fla. 1992); Stringer v. Black, 503 U.S. 222, 232, 112 S.Ct. 1130, 1140, 117 L.Ed.2d 367 (1992); Parker v. Dugger, 498 U.S. 308, 319-321, 111 S.Ct. 731, 738-740, 112 L.Ed.2d 812 (1991).

An aggravating circumstance is invalid in this sense if its description “leave[s] the sentencer without sufficient guidance for determining the presence or absence of the factor.” Espinosa v. Florida, 505 U.S. 1079,1081 (Fla. 1992) citing Stringer, *supra*, 503 U.S., at 235; *Cf.* Art. 1, Sec. 17, Fla. Const. (“The prohibition

against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.”).

As the Supreme Court explained in Sochor:

Employing an invalid aggravating factor in the weighing process “creates the possibility ... of randomness,” Stringer v. Black, 503 U.S. 222, 236, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a “thumb [on] death's side of the scale,” id., at 232, 112 S.Ct., at 1137, thus “creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty,” id., at 235, 112 S.Ct., at 1139. Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of “the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.” Clemons, *supra*, 494 U.S., at 752, 110 S.Ct., at 1450 (citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)); see Parker v. Dugger, 498 U.S. 308, 321, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991).

Sochor v. Florida, 504 U.S. 527, 532 (1992).

As noted above, it is well-settled that, where the victim was not a law enforcement officer, the State must prove beyond a reasonable doubt “that the sole or dominant motive for the killing

was to eliminate a witness”¹³ in order for the “avoid arrest” aggravator to apply. Here, despite there being no dispute that the victims were not law enforcement officers, despite the court’s acknowledgment that the law required the State prove beyond a reasonable doubt the “sole or dominant motive” element of the avoid arrest aggravator, and despite Appellant’s specific request for the jury to be informed of this requirement, the court refused to so instruct the jury. By omitting this requirement from the jury instructions, the jury was left with no more than the text of the aggravator itself. The omission of this legal requirement rendered the instruction insufficient to guide the jury in their determination of the presence or absence of the “avoid arrest” jury instruction and, as such, violated the Eighth Amendment.

Fifth and Sixth Amendment protections are implicated here as well, as “the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.” Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). The Sixth Amendment right to a trial by jury “includes, of

¹³ Consalvo v. State, 697 So. 2d 805, 819 (Fla.1996).

course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty.’” Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). “This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.” Hurst v. Florida, 577 U.S. 92, 97 (2016) citing Alleyne v. United States, 570 U.S. 99, 104-05 (2013). And these elements include aggravating circumstances in death penalty cases. Hurst v. Florida, 577 U.S. 92, 97-98 (2016); Ring v. Arizona, 536 U.S. 584 (2002).

In Sullivan, the jury instructions at issue included an erroneous definition of “reasonable doubt.” Specifically, the instruction was “essentially identical to the one held unconstitutional in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)”, which “suggest[ed] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard” such that “a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.” Sullivan, at 278 quoting Cage, at 41. Similarly, here the jury instructions omitted –

over objection – an element of an aggravating circumstance that State was required to prove beyond a reasonable doubt. This omission violated Appellant’s Fifth and Sixth Amendment rights, as it permitted the jury to find the presence of the “avoid arrest” aggravator absent proof beyond a reasonable doubt for one of its elements.

F. The submission of an invalid aggravating factor to the jury is subject to harmless-error analysis.

Where an aggravating factor improperly goes to the jury, this Court holds that whether the error warrants reversal depends on whether there is a reasonable probability that it contributed to the death sentence. Perez v. State, 919 So. 2d 347, 381 (Fla. 2005). This Court reviews a trial court’s erroneous refusal to give an instruction for harmless error. Burns v. State, 699 So. 2d 646, 652 (Fla. 1999). “We have held that reversal is not required if the State can show ‘beyond a reasonable doubt that the error complained of did not contribute to the [jury's recommendation] or, alternatively stated, that there is no reasonable possibility that the error contributed to the [outcome].’ ” Burns, at 652 quoting State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1997).

While the State now bears the burden of proving the error was harmless, Appellant respectfully submits that they cannot do so here. The Supreme Court has specifically held that, where an aggravator was improperly presented, the error “will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.” Brown v. Sanders, 546 U.S. 212, 220 (2006). Accordingly, because the jury in this case could not have assigned aggravating weight to the facts and circumstances of the “avoid arrest” aggravator under any of the other aggravating factors, reversal is required.

POINT TWO

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

A. Standard of review. Whether a statute is constitutional is a pure question of law, reviewed de novo. See, e.g., Jackson v. State, 191 So. 2d 423, 426 (Fla. 2016).

B. Acknowledgement. Appellant acknowledges this Court has recently rejected similar challenges to Florida's capital sentencing scheme, See Wells v. State, 364 So. 3d 1005 (Fla. 2023), and Loyd v. State, 2023 WL 7815783 (Fla. Nov. 2023), but nevertheless respectfully requests this Court reconsider its holding.

C. Argument. 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. 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.”¹⁴

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

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved Florida’s post-Furman capital sentencing scheme, which this Court had approved three years prior in State v. Dixon, 283 So.

¹⁴ 428 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 “need for reliability in the determination that death is the appropriate punishment in a specific case”).

2d 1 (Fla. 2010). Both this Court in Dixon and the Supreme Court in Proffitt presumed – in analyzing whether Florida’s capital sentencing scheme violated the Eighth Amendment – that the comparative proportionality review pronounced in Dixon would be conducted in every death penalty case. Indeed, both decisions lauded this protection as a guarantee that Florida’s system would sufficiently protect against the arbitrary and capricious imposition of the death penalty.

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

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

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

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

Florida, like Georgia, has responded to Furman by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. **If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law.** As in Georgia, this system serves to assure that sentences of death will not be “wantonly” or “freakishly” imposed. See Furman v. Georgia, 408 U.S., at 310, 92 S.Ct., at 2762 (Stewart, J., concurring). Accordingly, the judgment before us is affirmed.

Proffitt, at 259 (emphasis added).

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

The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, **to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system**, under which the evidence of **the aggravating and mitigating**

circumstances is reviewed and reweighed by the Supreme Court of Florida “to determine independently whether the imposition of the ultimate penalty is warranted.” Songer v. State, 322 So. 2d 481, 484 (1975). *See also* Sullivan v. State, 303 So. 2d 632, 637 (1974). The Supreme Court of **Florida**, like that of Georgia, **has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed.** Indeed, **it has vacated 8 of the 21 death sentences that it has reviewed to date.** *See* Taylor v. State, 294 So. 2d 648 (1974); Lamadline v. State, 303 So. 2d 17 (1974); Slater v. State, 316 So. 2d 539 (1975); Swan v. State, 322 So. 2d 485 (1975); Tedder v. State, 322 So. 2d 908 (1975); Halliwell v. State, 323 So. 2d 557 (1975); Thompson v. State, 328 So. 2d 1 (1976); Messer v. State, 330 So. 2d 137 (1976).

Proffitt, at 252-253 (emphasis added).

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

E. From Pulley and Henry to Lawrence and Cruz. Shortly after Pulley, this Court decided State v. Henry, 456 So. 2d 466 (Fla. 1984), wherein it acknowledged “that proportionality review is not a requirement of the federal constitution, Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), but rather a feature of state law, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Thus, the parameters of that duty are set forth in our cases interpreting that duty.” Henry, 456 So. 2d at 469.

In 2020, this Court – relying on Pulley – announced that it would no longer perform comparative proportionality review in death cases. Lawrence v. State, 308 So. 3d 544 (Fla. 2020). In 2023, this Court – relying on Lawrence – announced it would also no longer conduct “relative proportionality review” in death cases: the practice by which this Court reviewed the sentences of capital co-defendants to enforce “the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment.” Shere v. Moore, 830 So. 2d 56, 60-61 (Fla. 2002) citing Ray v. State, 755 So. 2d 604, 611 (Fla.2000). *See also* Jennings v. State, 718 So. 2d 144, 153 (Fla.1998) (“While the death

penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable.”) (citation omitted).

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

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

accomplish the former, and many of Florida's individual aggravators fail to accomplish the latter.

Both failures are due to Florida's "aggravator creep" problem.¹⁵ Since the Supreme Court's approval of Florida's system in Proffitt, the scope of Florida's original eight aggravators have broadened significantly, and the number of aggravating factors in Florida has doubled from eight to sixteen.^{16 17}

This doubling of the number of aggravators, in conjunction with the fact that many aggravators are not tightly drawn – and, consequently, have significantly broadened in scope over time – has resulted in a system under which, as of 2024, virtually all

¹⁵ In Hidalgo v. Arizona, 138 S. Ct. 1054 (2018), four Justices commented on the Court's denial of certiorari. The state court had held that Arizona's capital scheme is sufficiently narrowly drawn even if it assumed that 98% of Arizona's first-degree murder cases are automatically eligible for death-penalty proceedings. The four Justices recognized "a possible constitutional problem" which "warrants careful attention and evaluation." 138 S. Ct. at 1057. In Florida, the reported cases and the relevant statutes on their face establish that an "aggravator creep" problem exists.

¹⁶ Chapters 2010-120 '1, 2005-28 '7, 96-290 '5, 95-159 '1, 91-270 '1, 88- 381 '10, 87-368 '1, Laws of Florida.

¹⁷ Of these 16, the majority – specifically: a, b, d, j, l, m, n, o, & p – relate solely to the status of either the victim or the defendant.

conceivable murders fit at least one of the sixteen categories of eligibility.

For instance, Florida's scheme treats as an aggravator the fact that a defendant was found guilty of felony-murder – Section 921.141(6)(d) – rather than premeditated murder. As Tennessee, North Carolina, and Wyoming have held, doing so necessarily fails to narrow the death-eligible class.¹⁸ The conduct underlying common predicate felonies has also broadened over the years¹⁹, and the statute has been expanded to cover significantly more participants.²⁰

Section 921.141(6)(b) – which renders a defendant's prior conviction for a prior violent felony an aggravating circumstance – has also, in practice, failed to narrow the eligible class. This court has construed “prior” broadly, to include violent crimes on other victims committed in connection with the murder²¹, as well as to

¹⁸ State v. Middlebrooks, 840 S.W. 2d 317, 346-47 (Tenn. 1992); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (N.C. 1979); Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991).

¹⁹ 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).

²⁰ See State v. Dene, 533 So. 2d 265, 266-69 (Fla. 1988).

include offenses which occurred years *after* the offense for which the defendant faces the death penalty.²²

Section 921.141(6)(i) – the cold, calculating and premeditated ("CCP") aggravator – has similarly outgrown its ability to narrow the eligible class. In its early years, CCP was applied in cases involving contract killings and execution-style killings.²³ 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 control²⁴, “even where there is evidence that the final decision to kill was not made until shortly before the murder itself.”²⁵

²¹ *See, e.g., Stephens v. State*, 787 So. 2d 747, 761 (Fla. 2001).

²² *Brown v. State*, 473 So. 2d 1260, 1266 (Fla. 1985) (“Appellant's argument that his aggravated battery conviction could not be considered in support of the section 921.141(5)(b) aggravating circumstance because the offense occurred after the capital felony is without merit. The aggravated battery conviction was entered previous to the sentencing for the capital felony. *Lucas v. State*, 376 So. 2d 1149 (Fla.1979).”).

²³ *See Floyd v. State*, 497 So. 2d 1211, 1214 (Fla. 1986) and *Garron v. State*, 528 So. 2d 353, 360-61 (Fla. 1988).

²⁴ *Campbell v. State*, 159 So. 3d 814, 830-31 (Fla. 2015).

²⁵ *Gosciminski v. State*, 132 So. 2d 678, 712 (Fla. 2013).

Section 921.141(6)(a) – the “under sentence of imprisonment” aggravator – has also broadened significantly. At the time of Proffitt, this aggravator²⁶ was limited to murders committed “while under sentence of imprisonment.” See Proffitt v. Florida, 428 U.S. 242, n. 6 (1976) quoting Section 921.141(5) (Supp. 1976-1977) of the Florida Statutes. Since then, it has been expanded by the legislature to include murders committed by anyone on probation or community control. See Section 921.141(6)(a), Fla. Stat. (2022) (“The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation”).

Section 921.141(e) – the “avoid arrest” aggravator – has also been expanded beyond its original application. As discussed in Point One of this Initial Brief, and as this Court explained in Urbin, this aggravator originally applied to murders of law enforcement personnel. In Riley, this Court “first extended application of the aggravator of a murder committed for the purpose of avoiding or preventing a lawful arrest beyond those involving law enforcement

²⁶ Then, §921.141(5)(a).

personnel, to include other capital murders specifically involving witness elimination.” Urbin v. State, 714 So. 2d 411, 415 (Fla. 1998) citing Riley v. State, 366 So. 2d 19 (Fla.1978).

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.”²⁷ Appellant respectfully requests this Court recede from its decision in Lawrence, as what was accurately described as an “additional safeguard” to Florida’s scheme in 1976 has become essential to the version in place today; a system under which virtually all conceivable murders fit at least one of the sixteen categories of eligibility.

²⁷ Lawrence, 308 So. 3d at 552 (J. Labarga, dissenting) citing McCloud v. State, 208 So. 3d 668 (Fla. 2016); Phillips v. State, 207 So. 3d 212 (Fla. 2016); Yacob v. State, 136 So. 3d 539 (Fla. 2014); Scott v. State, 66 So. 3d 923 (Fla. 2011); Crook v. State, 908 So. 2d 350 (Fla. 2005); Williams v. State, 707 So. 2d 683 (Fla. 1998); Jones v. State, 705 So. 2d 1364 (Fla. 1998); Voorhees v. State, 699 So. 2d 602 (Fla. 1997); Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

POINT THREE

THE DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT

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

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

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

rises to 29. As of last year, *the majority of states now prohibit the death penalty.*²⁸

Further, it “ ‘is not so much the number of these States that is significant, but the consistency of the direction of change.’ ”²⁹ Here, the consistency and direction of change away from the death penalty is unambiguous. The number of death-penalty states has significantly declined over the last quarter-century – from 38 states in 1999, to 24 states in 2024, a shift of nearly a third of the Union – and not a single state has moved in the other direction.³⁰

Writing in 2015, Justice Breyer noted that “[s]even States have abolished the death penalty in the last decade.”³¹ Since that time, 5

²⁸ Death Penalty Information Center, State by State (Feb. 14th, 2024), <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>.

²⁹ Roper, 543 U.S., at 566, 125 S.Ct. 1183 (quoting Atkins, supra, at 315, 122 S.Ct. 2242) (finding significant that five States had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court's decision in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)).

³⁰ Death Penalty Information Center, State by State (Feb. 14th, 2024), <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>.

³¹ Glossip, at 942 (J. Breyer, dissenting) (citing Death Penalty Information Center, States With and Without the Death Penalty).

more states have joined the chorus. In 2016, Delaware’s Supreme Court declared their death penalty scheme unconstitutional, as did Washington’s in 2018. New Hampshire’s legislature abolished their death penalty in 2019, Colorado repealed its death penalty statute for future offenses in 2020, and Virginia repealed its death penalty statute in its entirety in 2021.

It is therefore evident – from the growing number of jurisdictions (including a majority of all states) that have abolished capital punishment, the declining number of death sentences imposed each year³², and the palpable reluctance to carry out executions in the states that still permit the death penalty^{33 34} –

³² In 2023, only five states conducted executions and only seven imposed new death sentences; the lowest number of states in 20 years. Florida and Texas accounted for more than half (58%) of the year’s total number of executions. Death Penalty Information Center (Dec. 01, 2023), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report>.

³³ “Only 41% of the 58 death warrants issued in 2023 were carried out.” See Id. at 18.

³⁴ “[M]ore than two-thirds of U.S. states—**37 out of 50**—have either abolished the death penalty or have not carried out an execution in at least 10 years. An additional 2 states have not had an execution in at least 5 years, for a total of **39 states** with no death penalty or no executions in that time. Two additional jurisdictions (the District of Columbia and the Military) have not had an execution in at least

that the “objective indicia of society's standards,” as expressed through legislation and state practice, is no longer compatible with “evolving standards of decency” and therefore violates the Eighth Amendment.³⁵

10 years.” Death Penalty Information Center (Feb. 15, 2024), Executions Overview, <https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions>.

³⁵ Graham v. Florida, 560 U.S. 48, 61, 58 (2010).

CONCLUSION

Appellant respectfully requests, as to the issues raised in Point 1, this Court vacate Appellant's death sentence and remand for a new penalty phase.

As to the issues in Points 2 and 3, Appellant requests this Court vacate his sentence and remand with directions to impose a sentence of life in prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, at www.myflcourtagency.com; e-mailed to the Office of the Attorney General, at capapp@myfloridalegal.com; and a true and correct copy thereof sent by mail to Mr. Michael Wayne Jones, Inmate #X90752, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 16th day of February, 2024.

CERTIFICATE OF COMPLIANCE

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

/s/ Robert Jackson Pearce III

Robert Jackson Pearce III
Assistant Public Defender