Filing # 204505248 E-Filed 08/12/2024 12:09:31 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2023-1077

STEVEN WOLF,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE
SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MONROE COUNTY

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INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, imposed by the Honorable Mark H. Jones, Judge of the Sixteenth Judicial Circuit in and for Monroe County, Florida. In this brief, the clerk's record on appeal is cited as "R.," the transcript of the proceedings as "T."

ARGUMENT

I. THE STATE FAILED TO PROVE VENUE, AND THE TRIAL COURT ERRED IN DENYING MR. WOLF'S MOTION FOR JUDGMENT OF ACQUITTAL.

The State did not establish venue in Monroe County. As the State argued in the trial court, the evidence was that Ms. Osborne died before Mr. Wolf left Florida city. It is rank speculation that Ms. Osborne might have died in Monroe County, her body then taken to Miami-Dade County, and that body then returned to Monroe – the theory urged by the prosecution.

The only evidence presented was that Ms. Osborne died six to twelve hours before the body was moved at approximately five p.m. "and more towards that 12 hours or greater time frame." (T. 1633). Dr. Steckbauer reached this conclusion because his investigator, "who is trained to recognize these things" reported that lividity had begun to set. (T. 1642-43). This testimony was introduced by the prosecution and was not disputed by either party.

The State relied heavily on this testimony, dismissing the suggestion that Ms. Osborne had died after Mr. Wolf left Miami-Dade County. The prosecutor argued:

> But listen to what he said. He said it's closer to the 12 hours than it is to the shorter end of 6 hours or 4 hours, closer to the 12.
>
> Now, she's discovered at about 1:00 – no – about 1:30, something like that. Police arrive at 2:00 o'clock. Full investigation is well underway by 3:00. By 5:00 o'clock that afternoon Deputy Aguanna touches her. She's cold to the touch. He's there.
>
> So we're talking 12 hours prior to that is 5:00 o'clock in the morning, hours and hours before he says that she was dead near Long Boat Key – near Long Key. Long before that. She was killed before she – before he was seen on video at the Wal-Mart. And he felt very confident of being able to do that because he can change clothes.
>
> He's literally in his house. He changes clothes into something that wasn't associated with the events that had transpired.
>
> He goes into the Wal-Mart. He goes into the bathroom, washes his hands and walks out. None of the video, absolutely none of the video at Wal-Mart, where he says he encountered her outside of those doors, corroborates what he's saying.

(T. 2037).

Despite this position, the State now argues that venue was established by relying on part of one of the stories Mr. Wolf gave during interrogation (while rejecting the rest): That someone else killed Ms. Osborne near Key Largo. Jurors familiar with Keys would know that this location is about thirty miles or forty minutes from

Vaca Cut.[1] This theory – rejected by the prosecution – would be in even greater conflict with the evidence. As this Court has explained, "Evidence that is confirmed untruthful or nonexistent is not competent, substantial evidence … Competent, substantial evidence must be reasonable and logical …" *Wiggins v. Florida Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165 (Fla. 2017).

Ultimately, the question is whether the evidence permitted the jury to "reasonably infer" that Ms. Osborne died in Monroe County. *See McClellion v. State*, 858 So. 2d 379 (Fla. 4th DCA 2003). (This standard has also been stated as a "violent presumption." *Simmons v. State*, 934 So. 2d 1100 (Fla. 2006).) A jury, presented with evidence that a victim must have been dead before being brought into the county could at most only speculate that the murder happened on a particular side of the county border. Speculation or guesswork is not enough. *Pennick v. State*, 453 So. 2d 542 (Fla. 3d DCA 1984); *Powell v. State*, 181 So. 901, 901 (Fla. 1938).

[1] There was no testimony as to the distance, but as the State points out, venue may rely on landmarks known to the community. Answer Brief at 24.

Finally, the State argues that logic requires that jurisdiction be decided in its favor: "Also, it is unclear why Appellant would have murdered the victim in Miami-Dade County yet waited until his return to Marathon to wash his hands, dump the victim's body and dispose of evidence." Answer Brief at 26. At trial, the prosecution insisted that Mr. Wolf changed his clothes in the van and washed his hands at the Florida City Walmart, where the video showed him entering the restroom. (T. 2037; Ex. 39, 02:48-03:34). It is equally unclear why someone might have murdered a woman, taken her body from Monroe County to Dade County, the brought it back into Monroe.

II. THE TRIAL COURT ERRED IN STIKING JUROR KINNE BASED ON HER RESERVATIONS ABOUT THE DEATH PENALTY.

The State argues that it was proper to strike Ms. Kinne because her objections to the death penalty focused on how it was administered, and her answers about her ability to impose the death penalty were equivocal. Answer Brief, 28-37. The first of these reasons has nothing to do with the standard for excluding jurors who oppose the death penalty. The second is not supported by the record.

First, the reason a juror objects to the death penalty is irrelevant. The State points out that Ms. Kinne's concerns focused on the cost of the death penalty and a recent spate of botched executions. There is no authority holding that these reasons lie outside the rule of *Witherspoon*[2] and *Witt*.[3] The State offers none. If anything, it would seem harder to set aside religious or moral objections than objections based on practical considerations.

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[2] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[3] *Wainwright v. Witt*, 469 U.S. 412 (1985).

Second, Ms. Kinne was not equivocal about her ability to follow the law. The judge told the jury three things about the requirements to be a qualified juror:

- [Y]ou must … be open to make a recommendation for death if you believe it's been proven and you believe it's appropriate.
- [Y]ou must also be willing to recommend a life sentence if you believe that's what's appropriate under the circumstances.
- You have to be open to both ….

(T. 246-47).

Throughout voir dire, she consistently said she would be "open to both".

- Ms. Kinne's first response was: Never say never. I'm open. (T. 249).
- Asked if she would hesitate to make a recommendation, she said she would listen to both sides, but would be extremely careful. (T. 249).
- During individual voir dire, she was asked if she had said she didn't believe in the death penalty. She clarified that she wasn't saying she would never impose it, and she would listen to both sides though she had concerns. (T. 258-59).
- Asked if she would be reluctant, Ms. Kinne said she would listen to the evidence, she wasn't sure, but she didn't believe in "an eye for an eye," or "a tooth for a tooth." (T. 260).
- Asked again if she would have reservations, she said the execution might be botched and the death penalty is expensive. (T. 261).

- When the prosecutor tried to get her to agree her views would impair her ability to recommend the death penalty, she could give a *definite* yes because she wanted to hear both sides. (T. 261).

- Asked by the defense if she could consider death in a case of intentional murder where there was no self-defense and the defendant was not insane, she said a *life* sentence was "an option." (T. 262).

- Ms. Kinne volunteered there have been some caes where she had thought the death penalty made sense. (T. 263).

- When defense counsel asked if she could consider death as an appropriate penalty, she said yes. (R. 263).

The State asserts that Ms. Kinne's answers were equivocal, but it does not explain why. It reproduces her voir dire without analysis. But it emphasizes[4] the following answers:

- MS. KINNE: **Never say never. I would listen to both sides, but I have some real concerns with it**, because I listen to a lot of podcasts, and there have been a lot of issues where people were put to death and they shouldn't have been, **or they get botched**. I don't know about the State of Florida because I've only lived here for a few years.

- MS. KINNE: **If, ultimately, he was executed, that execution might be botched** or might be inappropriate for some reason. That, and I've heard that it's actually how do we say this – **a life sentence, I think, is a little bit easier on the community and the taxpayer**, just because of all the appeals that go on.

[4] The bold emphasis below is reproduced from the Answer Brief.

- MS. KINNE: [asked about her reservations] I'm not going [to] say a definite "yes" because I think I would want to listen to both sides, but **I just think it would be better not to have a death penalty.**

- MS. KINNE: I don't know what I'm going to hear, but, I mean, I think there have been some cases where I thought, **"Okay. Makes sense." But I still don't like it.**

Answer Brief, 31-33.

As explained above, questioning the death penalty because of botched executions or inefficiency is no more or less disqualifying than objections based on religious or moral beliefs. Notably, Ms. Kinne qualified her concerns about botched executions because she was unsure what happened in Florida. (T. 259).

The statements that "it would be better not to have a death penalty," and that Ms. Kinne didn't like the death penalty even though it might make sense in some cases only show that she opposed the death penalty. These remarks are not inconsistent with her willingness to consider the death penalty in an appropriate case.

Ms. Kinne did not equivocate; she was consistent. She was certainly more unequivocal than the juror in *Deviney*[5] who first said he would automatically vote for death, later said he would follow the law, and then reverted to saying he could not vote for a life sentence. Ms. Kinne never demonstrated "an unyielding conviction and rigidity toward the death penalty." *Allen v. State*, 261 So. 3d 1255, 1286 (Fla. 2019); *Barnhill v. State*, 834 So. 2d 836, 844 (Fla. 2002) and it was error to strike her for cause.

[5] *Deviney v. State*, 322 So. 3d 563 (Fla. 2021).

III. THE TRIAL COURT ERRED IN DENYING CAUSE CHALLENGES TO JURORS YOUNG, WHALEN, AND LETO.

"[J]urors should if possible be not only impartial, but beyond even the suspicion of partiality." *Matarranz v. State*, 133 So. 3d 473, 485 (Fla. 2013) (quoting *O'Connor v. State*, 9 Fla. 215, 222 (Fla. 1860)). "[I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict," she must be excused for cause. *Singer v. State*, 109 So. 2d 7, 23-24 (Fla. 1958); *accord Hamilton v. State*, 547 So. 2d 630 (Fla. 1989); *Hill v. State*, 477 So. 2d 553 (Fla. 1985).[6] Here the court erroneously denied challenges to jurors Young, Whalen, and Leto even though Whalen and Leto would require mitigation and Young said: **"And you know, if you did it, that's it."** (T. 630).

Juror Young

Juror Young stated that he would be "interested" in knowing what was going through what was going the minds of the victim and defendant. (T. 630). Nonetheless, he followed this statement by

[6] The Court reviews the denial of a cause strike for abuse of discretion. *See Singleton v. State*, 783 So. 2d 970, 973 (Fla. 2001).

adding, "if you did it, that's it." (T. 630). This qualification, made without coaxing by the parties or judge, expressed his personal opinion.

This opinion may have been the product of a misunderstanding of the law, thus ripe for rehabilitation by correcting that misunderstanding. *See Matarranz v. State*, 133 So. 3d 473, 486 (Fla. 2013). That is not what happened here. No one explained the law to Mr. Young. Instead, the judge accused Young of contradicting himself, causing him to backpedal. Young was never rehabilitated, and he should have been stricken for cause.

Juror Whalen

Asked if he believed the death penalty was the only appropriate penalty for first degree murder, Juror Whalen said he would "have no problem" voting for death. (T. 649). Asked what he would need to vote for life, he offered a severe scenario involving "mental factors" or medication, giving an example of someone who went of their medications at a nuclear facility. (T. 649).

If Juror Whalen had said he could consider life in a similarly limited or dire circumstance, this would have been insufficient to

show he could serve as a juror. *Miller v. State*, 42 So. 3d 204, 214 (Fla. 2010). And when he was asked if he could consider mercy, he said wasn't sure much mercy he could have on someone who took another's life. (T. 650).

This argument was preserved. Defense counsel objected because Mr. Whalen would require mitigation. (T. 733). In response the prosecutor said that Whalen had gone on a "kind of explanation of what he meant by that as far as somebody going off their meds," and pointed to the "nuclear incident." (T. 733). The prosecutor stated that Whalen said he could consider mitigation only if the law provided mitigation. (T. 733). He added (incorrectly) that Mr. Whalen had no problem having mercy. (T. 734). The question before the court was that Mr. Whalen required mitigation beyond mercy, and that mitigation would be extreme, and that is what the court decided.

On the merits, the Appellee relies on *Matarranz*, pointing out that Whalen may have misunderstood the law. As argued above, such a misunderstanding is ripe for rehabilitation. *Matarranz* at 486. This misunderstanding was never corrected.

Juror Leto

Juror Leto's answers showed that she would consider a life sentence *if* there were mitigating circumstances," or "other things that kind of soften the sentence." (T. 654-55). Thus, she could not consider life in the absence of mitigation. To the extent that this error could have been clarified under *Matarranz*, nobody did so.

IV. THE TRIAL COURT ADMITTED HEARSAY TYING MR. WOLF TO THE PLACE WHERE THE BODY WAS DISCOVERED.

The Appellee maintains that it was entirely appropriate for Lieutenant Sprinkle to tell jurors what unidentified, nontestifying witnesses told her out of court: Based on their experience and expertise the debris found at Vaca Cut matched a van like Mr. Wolfe's. The State argues this is so because the testimony was offered "to show why law enforcement stopped Appellant's conversion van." Answer Brief at 53.

But the State makes no effort to address this Court's decisions rejecting this argument. In *Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000), the Court explained that "an alleged sequence of events is not a material issue …" Because there is "no relevancy for such testimony to prove or establish such a nonissue," the only relevance is to prove the truth of the matter, and the testimony is "classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label." *Id. Keen* was consistent with other decisions from this Court standing for the same proposition. *See Wilding v. State*, 674 So. 2d 114, 119 (Fla. 1996) ("Even if the testimony was offered simply to show the logical

sequence of events regarding the murder investigation, its probative value clearly was outweighed by its prejudicial effect."); *Conley v. State*, 620 So. 2d 180, 119 (Fla. 1993); *Wright v. State*, 586 So. 2d 1024, 1030 (Fla. 1991); *State v. Baird*, 572 So. 2d 904, 907 (Fla. 1990).

The State has not proven beyond a reasonable doubt that this error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Even where the evidence is "overwhelming," an error may be harmful where the jury may have relied on the improper evidence in reaching its verdict, despite the existence of other evidence untainted by the error. *Id.* at 1136. This Court has deemed the error here "inherently prejudicial." *See Keen*, 270-71; *Conley* at 183; *Wilding* at 118; *Baird* at 908.

V. THE PROSECUTOR INVITED JURORS TO SHOW MR. WOLF THE SAME MERCY HE HAD SHOWN TO MS. OSBORNE, ARGUED NONSTATUTORY AGGRAVATION, AND RELIED ON FACTS NOT IN EVIDENCE.

A. The prosecutor invited the jury to show Mr. Wolf the same mercy he showed Ms. Osborne.

The prosecutor's argument was improper. The Appellee suggests that there was no error as the State is not "prohibited from addressing mercy," pointing to *Conahan v. State*, 844 So. 2d 629, 641 (Fla. 2003). *See* Answer Brief at 60. The State misses the point.

While it may not be improper to address the role of mercy in sentencing, it *is* improper to urge jurors to consider the mercy shown to the victim when deciding whether to show mercy to the defendant. The Court examined this distinction in *Ritchie v. State*, 344 So. 3d 369 (Fla. 2022), *reh'g denied*, SC20-1422, 2022 WL 3593821 (Fla. Aug. 23, 2022), *cert. denied sub nom. Ritchie v. Florida*, 143 S. Ct. 1005 (2023). Ritchie considered two arguments. In the first, the prosecutor argued in the context of the EHAC aggravator that the killing had been merciless. The Court found that this was appropriate. In the second argument, "after asking the jurors to consider whether Ritchie had extended mercy to the victim, the prosecutor also asked them to consider the lack of mercy

that Ritchie had showed to the victim 'when you're considering whether you should give him life and whether you should personally extend mercy to this defendant.'" Id. at 380. The Court held that this was improper. Id.

The State's arguments in this case were unlike those in *Conahan*, and were improper under *Ritchie*. In *Connahan* the prosecutor argued that Florida's capital sentencing scheme sought to balance mercy for the defendant and justice to the victim. *See* 844 So. 2d at 641. That is nothing like what happened in this case. Here, as in *Ritchie*, the prosecutor directly linked mercy for Mr. Wolf to the mercy he had shown and urged the jurors to think about that while contemplating their decision. (T. 2185-86).

B. The prosecutor argued nonstatutory aggravation.

The Appellee maintains that it was entirely appropriate to point out that Mr. Wolf had refused to confess and "wanted to avoid responsibility." This was proper, the State argues, in order to "anticipate[] the defense argument and address the proffered mitigating circumstance – a coerced plea, Appellant's lost youth and the effect of thirty years in prison." Answer Brief, 68-67. But the defense never suggested that that Mr. Wolf's 1978[7] Idaho plea had been coerced, or that Mr. Wolf was not guilty of that crime. And Mr. Wolf's failure to confess and take responsibility in this case in no way rebutted the invented coerced-plea argument or the argument that the effects of that plea might be mitigating.

The defense never suggested that Mr. Wolf's Idaho plea had been coerced or that he was innocent of that crime. In his penalty-phase opening, defense counsel agreed that Mr. Wolf "ha[d] a prior homicide in his history." (T. 2188). Mr. Wolf freely admitted his guilt during the plea colloquy published to the jury:

[7] The crime itself took place in 1976. (R. 1297).

> "Question: By the Court: Why do you wish to plead guilty to the charge at this time?
>
> Answer by the defendant: "Tired of waiting in jail, and that's mostly it right here.
>
> "Question: Okay."
>
> **Answer, by Mr. Wolf: "And I'm guilty of the charge."**

(T. 2223; R. 1347). The defense published portions of the record showing that Mr. Wolf's older codefendant had received a reduced sentence to testify against him, and republished Mr. Wolf's statement that he was pleading in part because he was tired of waiting in jail. (T. 2247-49). In closing (after the improper arguments) defense counsel never questioned the plea.

Even if the defense had argued that the plea had been coerced, the prosecutor's argument in no way rebutted that claim. The fact that Mr. Wolf did not confess to this crime has nothing to say about whether his 1978 plea was voluntary. The State offers no explanation of how it might do so.

Nor did Mr. Wolf's failure to confess rebut any argument about his youth at the time of the Idaho crime. Well after the comment challenged here, the prosecutor turned to potential mitigation. (T. 2286). Addressing Mr. Wolf's relative youth and immaturity in

1976, Mr. Castillo called it "legitimate, legitimate [m]itigation." (T. 2287). But, he argued, Mr. Wolf never learned anything from his 30 years in prison, that he went "right back to it," and this demonstrates that his criminality had nothing to do with his age, but it is "who he is." (T. 2287). The prosecutor did not attempt to link Mr. Wolf's failure confess to this argument rebutting the mitigating effect of his age. And the Attorney General does not explain how it could.

Likewise, the failure-to-take-responsibility argument was not a pre-rebuttal of the argument the defense actually made. Responding to the State's argument, defense counsel said:

> Mr. Wolf, Mr. Castillo would have you believe, he had a chance. He could have gotten out. He could have done something.
>
> Ladies and gentlemen, a 15-year-old being charged as an adult, a 16-year-old sitting in a preliminary hearing listening to his friend testify against him, a person two months after their 18th birthday accepting a deal to 30 years Florida State Prison because he wanted to get out of jail. He was tired of sitting in jail. Had no chance of being anything. None.
>
> When Mr. Wolf should have been trying out for high school baseball or high school sports teams, he was in jail.

> When Mr. Wolf should have been going to his high school senior prom, he was in jail.
>
> His formative years were in prison or jail. Where he learned his morals was in prison, from men older and much scarier, I'm sure, than him.
>
> Ladies and gentlemen, yes, Mr. Wolf has a prior conviction for murder. That prior conviction does not aggravate this crime. It mitigates this crime. He never had a chance.

(T. 2298-99). The Appellee does not explain how Mr. Wolf's failure to confess negated this argument. The suggestion may be that had Mr. Wolf been reformed by his time in prison he would have wanted to help the police. But that was not defense counsel's argument. To the contrary, he argued that a boy who spent his formative years in prison and learned his morals there did not have the chance the prosecutor claimed he did.

The Appellee further argues:

> In light of the implicit defense argument that Appellant's instant criminality was a product of his years in prison, the State's argument properly highlighted the similarities between Appellant's behavior prior to being sentenced to prison at the age of 18 and his instant actions. Prison did not transform an otherwise innocent person into the man who committed the instant crimes.

Answer Brief at 71. Again, the defense never argued that Mr. Wolf was innocent of the 1976 Idaho homicide. The Attorney General

does not explain how Mr. Wolf's failure to confess and take responsibility "highlighted the similarities" between his conduct before 1978 and the murder of Ms. Osborne. Even if it were relevant, there is no indication in the record that Mr. Wolf refused to confess to the Idaho crime.

Zack v. State, 911 So. 2d 1190 (Fla. 2005), does not support the State's position. Zack presented an expert who testified that he had low impulse control and "would lose control if someone pressed his "'hot button.'" *Id.* at 1208. The State called a rebuttal expert who testified that Zack exhibited hatred toward women as well as low impulse control. *Id.* This Court found that this testimony was rebuttal of mitigation, not nonstatutory aggravation. *Id.* In contrast, the State has yet to explain why a failure to confess rebutted any proffered mitigation.

C. The State relied on facts not in evidence to establish the Especially Heinous Atrocious and Cruel aggravator.

The State parses the improper argument to claim that the prosecutor was not *really* claiming Dr. Steckbauer testified that Ms. Osborne was conscious. Answer Brief at 74. It relies on the fact that Mr. Castillo used the words "could have." But what Castillo actually said was that Dr. Steckbauer's testimony contradicted the defense argument that Ms. Osborne was unconscious:

> Now, Mr. McCarthy, in his opening statement had talked about, well, perhaps Ms. Osborne was unconscious and unable to fully absorb the degree of pain and injury that were being inflicted upon her.
>
> That's not what the doctor said. The doctor said that she could have survived **and lived and did live for 20 minutes or more approximately for her to bleed out**, so she definitely was alive during this process.
>
> If the ligature had been placed on her neck and she was unconscious or dead from that, if she had been dead from the ligature, she would have not bled.

(T. 2280). The prosecutor went from "could have" to "did live for 20 minutes or more." Steckbauer never said Ms. Osborne definitely lived for at least twenty minutes. He testified that she could have died in as little as 4-5 minutes. (T. 1575).

The prosecutor told jurors that the testimony was that Ms. Osborne was conscious. Notwithstanding the use of the word "live," he said that this testimony showed that the defense was wrong in saying she was unconscious. And the prosecutor went on to say that if Ms. Osborne had been unconscious *or* dead, she would not have bled.

The State further argues that the misstated evidence was not necessary to prove the EHAC aggravator because Dr. Steckbauer testified that Ms. Osborne was "conscious for some part of the experience." (T. 1675). Steckbauer never testified as to what part of the "experience" that may have been. He could not say she was conscious at the time of the sexual battery. (T. 1650-51).

The State also points to the fact that strangulation of a *conscious* murder victim can establish EHAC. But Steckbauer testified that Ms. Osborne may have lost consciousness within forty-five seconds of the time the ligature was applied to her throat. (T. 1625). He gave no lower limit to the time "within" forty-five seconds, and the ligature collapsed the vertebral arteries. (T. 1624-27).

D. The improper arguments amounted to fundamental error.

Taken together or singly, the improper arguments were fundamental error. This Court has defined fundamental error as error which "goes to the foundation of the case or goes to the merits of the cause of action," *State v. Smith*, 241 So. 3d 53, 55 (Fla. 2018) (quoting *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994))[8]; *Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008); *Maddox v. State*, 760 So. 2d 89, 95 (Fla. 2000). The Court has also defined fundamental error as error "where the interests of justice present a compelling demand for its application." *Maddox* at 96 (quoting *Sochor v. State*, 619 So. 2d 285, 290 (Fla.1993)).[9] Alternatively, fundamental error may be "'error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'"

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[8] *Hopkins* in turn quotes *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970)

[9] *Sochor* quotes *Ray v. State*, 403 So. 2d 956, 960 (Fla.1981).

Maddox at 96 (quoting *Archer v. State*, 673 So.2d 17, 20 (Fla.1996)).[10]

The errors in this case went to the very foundations of the penalty-phase case. The weightiest aggravator was EHAC. The State was able to ensure that the jury found it by assuring jurors that Ms. Osborne was conscious during the crime, even though that is not what the evidence showed. The prosecution knew well that the defense's primary argument would be mercy, and it deliberately made an argument it knew was improper in order to negate it, urging the jurors to show Mr. Wolf the same mercy had shown to Ms. Osborne. And it introduced nonstatutory aggravation in the form of Mr. Wolf's failure to come clean and confess to police. These improper arguments took the key issues off the table, nearly mooting the penalty phase.

[10] *Archer* quoted *State v. Delva*, 575 So. 2d 643, 644–45 (Fla.1991).

VI. THE COURT ERRED IN DENYING THE REQUESTED INSTRUCTION ON MERCY.

The defense preserved the argument that the mercy instruction should have been given. It filed a motion requesting the instruction. (R. 595-96). It argued this motion, and the court denied it. (T. 2163, 2257-62). The defense raised the issue again in its motion for new trial, raising both to the failure to give the instruction and the State's denigration of mercy by arguing that Mr. Wolf did not show mercy to Ms. Osborne. (R. 1356-57). It argued this to the court, and the court denied it. (R. 1701-02, 1705).

The State argues that the defense failed to argue that the State's misconduct required the instruction. The Appellant's point is that this Court has held that it is not error to rely on the standard instruction because it does instruct the jurors on mercy even though it never uses the word. *Bevel v. State*, 376 So. 3d 587 (Fla. 2023), *reh'g denied,* SC2022-0210, 2023 WL 8664112 (Fla. Dec. 15, 2023), and *cert. denied sub nom. Bevel v. Florida*, 23-7024, 2024 WL 2262375 (U.S. May 20, 2024); *Woodbury v. State*, 320 So. 3d 631, 656 (Fla. 2021). In this case the standard instruction was

insufficient because the State negated the instruction's ability to imply that mercy is a legitimate consideration.

VII. THE STATE FAILED TO PROVE THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The State argues that this Court has stated that EHAC may be established by suffering lasting minutes or seconds, including death by strangulation. Answer Brief at 82. This is true. But the Court has often made this statement where there is evidence of additional suffering. In *Gonzalez v. State*, 136 So. 3d 1125, 1137 (Fla. 2014), the victims were murdered during a home invasion, and each received multiple non-lethal gunshots before they were killed. One of the victims was shot twice in the leg in an attempt to force him to reveal the location of a safe. *Id.* The other was forced to watch this as well the execution of her husband. *Id.* In *Lott v. State*, 695 So. 2d 1239, 1244 (Fla. 1997), the sentencing order stated that common sense dictated that the "torturous assault … could not have been brief."

In *Zommer v. State*, 31 So. 3d 733, 747-48 (Fla. 2010), the court emphasized that the evidence (including the defendant's statement) disproved any claim that the victim was unconscious. In *Gilliam v. State*, 582 So. 2d 610 (Fla. 1991), the victim could be

heard screaming. In *Tompkins v. State*, 502 So. 2d 415, 420-21 (Fla. 1986), the victim died while attempting to fight off her rapist.

To the extent these decisions are taken outside the context of their facts to create a rule that EHAC can be established within seconds, the Court's decisions would be inconsistent. In *Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994), the victim was beaten to death. The beating could have taken, "a minute, maybe less than a minute," and the victim sustained defensive wounds. The Court found that the evidence did not establish EHAC. *Id.*

The Initial Brief catalogs the facts relevant to the State's failure to prove EHAC. Initial Brief, 64-70. The Appellant will not repeat them here. But with respect to the State's discussion of the facts, Mr. Wolf would point out:

- The fact that certain injuries (*see* Answer Brief at 83) were inflicted while Ms. Osborne was alive, does not show she was conscious.
- Dr. Steckbauer's testimony that some of the injuries are evidence of a struggle did not establish how extensive any "struggle" may have been, or if it proved that Ms. Osborne did not die within seconds. (T. 1648).
- The existence of ligature marks and damage to the neck only support the fact that Ms. Osborne was unconscious. (T. 1625).

- Dr. Steckbauer testified that Ms. Osborne could have lost consciousness "within 45 seconds." He never stated a lower boundary or that consciousness would have continued for at least that long. (T. 1625).

The State cannot prove this error to be harmless. It points to *Knight v. State*, 746 So. 2d 423 (Fla. 1998), where the Court struck the EHAC aggravator and found the error harmless. But in *Knight*, while the court found the prior-violent-felony and felony murder aggravators, it also found the murder was committed to avoid arrest, and that it was cold, calculated, and premeditated. The Court has found that the CCP aggravator, like EHAC is one of the weightiest aggravators. *Wells v. State*, 364 So. 3d 1005, 1014 (Fla. 2023), *reh'g denied,* SC2021-1001, 2023 WL 3938086 (Fla. June 12, 2023), and *cert. denied sub nom.Wells v. Florida*, 144 S. Ct. 385 (2023). Here, the State argued that EHAC alone justified the death penalty, and the court gave it great weight.

VIII. THE TRIAL COURT RELIED ON FACTS NOT IN EVIDENCE TO FIND THE MURDER WAS ESPECIALLY HEINOUS ATROCIOUS AND CRUEL.

The State analogizes the voir dire of Dr. Steckbauer to post-trial testimony in a *Spencer* hearing. Answer Brief, 87-89. But *Spencer*-hearing testimony is presented for the purpose of supporting a life or death sentence. The purpose of the voir dire examination was to determine whether the defense should be permitted to question Steckbauer about the presence of alcohol and cocaine in Ms. Osborne's system. (T. 1657-58). Immediately after Dr. Steckbauer gave his new opinion regarding whether Ms. Osborne was conscious, the judge continued to ask how the substances might have affected her bloodflow. (T. 1666). Defense counsel's only motive to examine Steckbauer was to establish the admissibility of the substances in Ms. Osborne's blood.

Under the State's theory, every hearing from the indictment on is potentially a *Spencer* hearing. If there is a *Daubert*[11] hearing, a motion to suppress, or any other hearing, defense counsel must introduce testimony to rebut any evidence that might eventually be

[11] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

used to support aggravation or reject mitigation, even if the witnesses never testify at trial or the *Spencer* hearing.

The Court's error was not harmless. *See Consalvo v. State*, 697 So. 2d 805, 817 (Fla. 1996), *as revised on denial of reh'g* (Oct. 16, 1997) (reviewing for harmless error). The State says there was competent, substantial evidence to support the EHAC aggravator. Answer Brief at 89. As argued above, the remaining evidence was insufficient. *See* Argument VII, *supra*. And the cases in which the Court has declined to reverse despite *Gardiner*[12] error do not resemble this one. In *Lockhart v. State*, 655 So. 2d 69, 74 (Fla. 1995), for example, the defendant presented no mitigation. The judge reviewed the extra-record evidence in an attempt to establish mitigation on its own. In *Consalvo*, the court improperly relied on depositions, but equivalent testimony had been introduced at trial.

[12] *Gardner v. Florida,* 430 U.S. 349 (Fla. 1977).

IX. THE COURT ERRED IN DENYING MR. WOLF'S MOTION TO PRECLUDE DEATH PENALTY FOR FAILURE TO CHARGE AGGRAVATING FACTORS IN THE INDICTMENT.

The Initial Brief conceded that this Court has rejected this argument. *See* Initial Brief at 75 n.37(citing *Tai A. Pham v. State*, 70 So. 3d 485 (Fla. 2011)). The Court has not receded from its position between the filing of that brief and this reply. The Appellant would nonetheless point out that the filing of the Notice Of Intent To Seek The Death Penalty did not cure the violation of the constitutional right to indictment by grand jury. An information would provide notice, yet the constitutions' guarantee is that the charging decision be made by a grand jury. This is because the grand jury protects the defendant from a malicious or overzealous prosecutor. *See United States v. Williams*, 504 U.S. 36, 47 (1992) (The grand jury serves "as a kind of buffer or referee between the Government and the people."); *U. S. v. Mandujano*, 425 U.S. 564, 571 (1976) ("The Framers … accepted the grand jury as a basic guarantee of individual liberty … as a barrier to reckless or unfounded charges."); *Anderson v. State*, 574 So. 2d 87, 91 (Fla. 1991) ("the 'cardinal purpose' of the grand jury is to shield the defendant against prosecutorial excesses").

X. CUMULATIVE ERROR

As argued in the Initial Brief, the cumulative effect of the above errors deprived Steven Wolf of a fair trial, due process of law, and a reliable sentencing process. Cumulatively, these errors together with the other errors identified above undermine any confidence in the outcome of Mr. Wolf's trial and sentencing.

CONCLUSION

For the foregoing reasons, the convictions and sentence of death must be vacated, and this cause must be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served to counsel for the appellee Jennifer Davis, Assistant Attorney General, 1 SE 3rd Avenue, Miami, FL 33131, via the Court's e-filing portal on August 12, 2024.

/s/ Andrew Stanton
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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045 and 9.210.

/s/ Andrew Stanton
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