IN THE SUPREME COURT OF THE STATE OF FLORIDA

RODNEY TYRONE LOWE,
Appellant,

v.

STATE OF FLORIDA
Appellee.

FL Supreme Court Case No. SC12-263

L.T. Case No. 311990CF658A

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA [CRIMINAL DIVISION]

APPELLANT'S REPLY BRIEF

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Point 1. THE TRIAL COURT ERRED IN FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES

The state argues this issue is not preserved because appellant did not object to the "procedure below," or take issue with the state's memorandum, citing *Blackwelder v. State*, 851 So.2d 650, 652 (Fla. 2003) and *Ray v. State*, 755 So.2d 604, 611 (Fla. 2000). *AB* 20. But the procedure below was for each side to submit a memorandum, and not for each party to respond to the others' arguments or for the Court to adopt the state's memorandum as the sentencing order almost *in toto*. The issue raised here is not a challenge to the submission of memoranda or to a lack of a procedure for each party to respond to the memoranda of the other, but to the Court's abdication of its responsibility and totally inconsistent and arbitrary findings in the death sentencing order.

If the state means appellant failed to object after the sentencing order was filed, there is no such procedure for correcting a sentencing error in a capital case. *See* Rule 3.800 (b), *Fla.R.Crim.P., Motion to Correct Sentencing Error*. ("This subdivision shall not be applicable to those cases in which the death sentence has been imposed and direct appeal jurisdiction is in the Supreme Court under article V, section 3(b)(1) of the Florida Constitution.").

Blackwelder does not describe when the appellant there was given an opportunity to object. It relies on *Ray*; however, *Ray* does not reveal any facts showing how the appellant in that case should have objected, either. *Ray* also raised a different claim. In *Ray*, this Court said the claim was that "Ray argues the trial court erred in relying on the State in preparing its order." *Ray*, 755 So. 2d at 611. This Court found waiver because there was an absence of an objection to the state preparing the order, so there must have been a point at which Ray's counsel could have objected to that procedure. This Court also described the mandatory nature of the obligation to independently weigh and not abdicate its responsibility, which sounds a lot like fundamental error:

> Ray argues the trial court erred in relying on the State in preparing its order. This issue was not preserved for appellate review and is procedurally barred. We note, however, that this court has clearly stated sentencing orders must be rendered in compliance with *Spencer v. State*, 615 So.2d 688 (Fla.1993). As Justice Anstead recently reiterated in his concurring opinion in *Phillips v. State*, 705 So.2d 1320, 1323 (Fla.1997), "the *Spencer* rule is a mandatory one which must be followed in a death penalty sentencing." Ray correctly points out that the trial judge immediately submitted his written and oral pronouncement of death and that the order, with a few minor exceptions, was taken verbatim from the State's proposed order. In this regard Justice Anstead said:
>
> > While the trial court may not have actually abdicated its sentencing responsibility to the State in this case, its failure to follow the procedure set out in *Spencer*, coupled with its adoption of the State's sentencing memorandum, create both an appearance of partiality and a failure to carefully consider the contentions of both sides and to take seriously the independent judicial "obligation to think through [the] sentencing decision." *Gibson v. State*, 661 So.2d 288, 293 (Fla.1995).

Id. at 1324.

Ray, 755 So. 2d at 612.

On the merits, the state puts its game face on and tries to make the nonsensical sentencing order seem sensible when it is not. The state cites no cases in which the sentencing court's order is as internally inconsistent as the one here, actually ascribing different weight to mitigation in different parts of the order. *Compare* R520 (age given "little weight") with R525 (age given "little or no weight"); and R5201-21 ("good behavior while in confinement" should be given "moderate weight") with R526 (such behavior, among others, is "not mitigating in this case, and [ ] entitled to little or no weight."). The same inconsistent weights are attributed to "family relationships" and "maturity." *Compare* R521 with R526. In one section of its order the Court finds "low risk of future danger" should be given "little weight," R522, but in its "analysis," it finds the testimony supporting that factor "underwhelming." R526. "The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies." *Morton v. State*, 789 So. 2d 324, 333 (Fla. 2001). This Court cannot possibly conduct a proportionality review based on the sentencing order entered in this case. This order is the essence of arbitrary decisionmaking in the death sentencing process and violates Florida law as well as the eighth and fourteenth amendments. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

Point 2. ALL BUT ONE OF THE AGGRAVATING CIRCUMSTANCES ARE INAPPLICABLE OR INSUFFICIENTLY PROVED AND SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY OR RELIED UPON IN SUPPORT OF A DEATH SENTENCE

The state argues lack of objection to some of the challenged aggravators. At the charge conference the defense agreed there had been "some evidence" of the five aggravators sought by the state, T2419, and "concede[d] proof" of the community control aggravator, R455, but not that it was lawfully applied. *See Stephens v. State*, 975 So.2d 405, 417 (Fla.2007)(no concession by defense). The state does not cite any case in which this Court has used the contemporaneous objection rule to preclude review of the lawfulness of an aggravator. In any event, this Court cannot be bound by an incorrect concession of law in a death penalty case where it must independently review the bases for a death sentence.

In addition, the defense objected based on doubling to both the community control and prior violent felony aggravator, arising from the same conduct, T2419, and to the community control aggravator because it was *ex post facto*. T2420. The defense also objected to giving both robbery and pecuniary gain aggravators as doubling; the state argued to give both and a merger instruction to the jury. The defense objected to this procedure. T2422-26. The defense argued there was insufficient evidence to prove avoid arrest, and merely a stacking of inferences. T2427. The objections were overruled.

If the Court finds lack of preservation, the errors raised here are fundamental: "Error during the penalty phase is fundamental if it is 'so prejudicial as to taint the jury's recommended sentence.' " *Woodel v. State*, 985 So. 2d 524, 530 (Fla.2008) (*quoting Jones v. State*, 949 So. 2d 1021, 1037 (Fla.2006)). The errors here go "to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." *Bailey v. State*, 998 So.2d 545, 554 (Fla.2008) (*quoting Johnson v. State*, 969 So. 2d 938, 955 (Fla.2007).

A. (5)(a). The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation.

The state contends that due to the similar definitions of "community control" and "community control program," the latter must is included within its view of legislative intent "to recognize the aggravating nature of a murder committed while the defendant was under sentence of imprisonment." *AB* 28. (*citing Trotter v. State*, 690 So. 2d 1234 (Fla. 1996). The state argument ignores the plain language of the 1991 statutory amendment and principles of statutory construction. The legislature did not amend the statute to expand the imprisonment aggravator to include those in a "community control program," which is a youthful offender sentence. It specifically added only the adult sentence of "community control." As argued more fully in the Initial Brief, that plain language, which must be read in the light most favorable to appellant, is in accord with legislative intent to define the

imprisonment aggravator to reach only those serving adult community control, not a community control program imposed as part of a youthful offender sentence.

The state's harmless error argument is not in line with the law. Its reliance on this Court's reasoning in its affirmance of the sentence on the initial direct appeal, *AB* 28-29, ignores this Court's settled jurisprudence that "resentencing should proceed *de novo* on all issues bearing on the proper sentence." *Morton,* 789 So. 2d at 334 (*quoting Teffeteller v. State*, 495 So.2d 744, 745 (Fla.1986)). As described in the Initial Brief, the "community control" aggravator was improperly invoked in testimony and argument throughout the proceedings in the trial court and had to have tainted the jury's recommendation.

B. (5) (b) The defendant was previously convicted of a felony involving the use or threat of violence to the person.

Appellant relies on his Initial Brief.

C. (5)(e). The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The state's recitation of the trial court's and its own facts still shows no direct evidence the killing was committed with the motive of avoiding arrest. As reaffirmed recently in *Davis v. State*, 148 So. 3d 1261 (Fla. 2014), the avoid arrest aggravator cannot be based on a presumed motive, and there is insufficient evidence to prove it was the motive here.

Urging harmless error, the state again improperly relies in part on this Court's findings on the first direct appeal, *AB* 36, which do not apply in this *de novo* resentencing.

D. Fundamental Fairness and Improper Doubling.

As the state points out, *AB* 37 at note 13, appellant did not expand on the "improper doubling" portion of the title in the argument under this subheading. The argument should also include the preserved issue that the trial court improperly doubled the prior violent felony and imprisonment aggravators, though it is an argument this Court has previously rejected.

Point 3. THE SENTENCING COURT TREATED MITIGATION UNLAWFULLY, REQUIRED A NEXUS OF MITIGATION WITH THE CRIME, AND UNLAWFULLY RELIED ON THE PRIOR DEATH SENTENCE AFFIRMANCE

The state relies on one section of the sentencing order to describe the sentencing court's treatment of mitigation, *AB* 40, ignoring the inconsistencies in the Court's description of the weight elsewhere in its order, as described in Point 1.

A. Unlawful reliance on the prior affirmance.

Appellant relies on the Initial Brief.

B. Age.

"This Court has long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument." *Williamson v. State*, 994 So.2d

1000, 1014 (Fla.2008). Neither can a judge do so in sentencing someone to death. The state tries to reframe appellant's argument as one of evidence sufficiency. *AB* 43-44. It completely ignores the trial court's disparagement of Mr. Lowe's age as mitigating when it essentially says it is not because Mr. Lowe had to grow up fast on the streets, a finding directly contrary to eighth amendment jurisprudence treating youth as mitigating.

This Court has recognized that a trial court may not "enforce a nexus requirement" that results in the rejection of a mitigating circumstance absent a connection to the murder, though it permits putting mitigation "in context." *Cox v. State,* 819 So. 2d 705, 722-233 (Fla. 2002). This and the United States Supreme Court's standards in *Tennard v. Dretke,* 542 U.S. 274, 285–87 (2004) were violated by the trial court here when in addition to other improper reasons it essentially rejected age as a mitigator in part because of the lack of nexus to the crime ("Although his witnesses established that he was immature at that time, there was no testimony that his age somehow led him to commit this crime. . . ." R526.

C. The Finding of unproffered mitigation and analysis as aggravation, and lack of findings of exposure to an alcoholic father, brutal punishment as a child, homelessness, shunning in childhood and mental health mitigation.

D. The Use of other Unfound Aggravation.

The state restates these subsections as evidentiary support arguments, *AB* 46-48, and responds only summarily to the ones actually raised. It also invokes an

inapplicable standard of prejudice. The sentencing Court's distortion of mitigation into aggravation was plainly improper:

> Similarly, the reliance on improper nonstatutory aggravating circumstances by a judge when he or she conducts the required independent analysis of aggravating and mitigating circumstances is harmful. Just as a jury should not be exposed to evidence of impermissible aggravating factors, a judge should not be permitted to consider them as part of the evaluation process. It is clear that capital sentencing must proceed in accordance with section 921.141, *Florida Statutes*.
>
> As we have repeatedly stressed, a trial judge's weighing of statutory aggravating factors and statutory and nonstatutory mitigating circumstances is the essential ingredient in the constitutionality of our death penalty statute. [*Grossman v. State*, 525 So. 2d 833, 839 (Fla.1988)]. It is for this very reason that we have found it essential for trial judges to adequately set forth their weighing analyses in detailed written orders. *Walker v. State*, 707 So. 2d 300, 318–19 (Fla.1997); *Campbell v. State*, 571 So.2d 415, 419 (Fla.1990).
>
> *Porter v. State*, 723 So.2d 191, 196 (Fla.1998).

Olaya v. State, - So. 2d - , 2015 WL 686047, slip op. at 5 (Fla. Feb 19, 2015). As in *Olaya*, here "[t]roubling language permeates the sentencing order." The court completely remakes mitigation into nonstatutory aggravation.

When the sentencing court invokes nonstatutory aggravation (aside from a "stray remark"), the error is harmful:

> …. in the rare instance in which a sentencing order includes an invalid nonstatutory aggravating circumstance, this Court has held that the error cannot be harmless and has remanded for resentencing if there is any evidence that mitigates against the imposition of the death penalty. *See Riley v. State*, 366 So. 2d 19, 22 (Fla.1978) (*citing Elledge v. State*, 346 So. 2d 998, 1002–03 (Fla.1977)).

Olaya, slip op. at 4.[FN omitted]. The sentencing court's invocation of nonstatutory aggravation in the guise of discussing mitigation cannot be harmless here.

E. Failure to give any weight to mitigation.

The state tries to cobble together some rationale reframing the trial court's refusal to consider some mitigation into attributions of weight, *AB* 48-49, but that is not what the order says.

Point 4. THIS COURT SHOULD REVERSE FOR A NEW TRIAL BECAUSE THE RECORD IS INCOMPLETE

There is no good reason why juror questionnaires, computer simulation slides or videos, and photos of demonstrative exhibits are not included as a matter of course in the appellate record. There is certainly good reason to require a transcript to be certified as accurate. This Court should reverse and remand for a new trial on this issue alone. The state's contention appellant's argument is insufficient to raise this record issue, *AB* 55, ignores appellant's extensive argument in support of it.

Point 5. THE TRIAL COURT IMPROPERLY GRANTED THE STATE A CAUSE CHALLENGE TO A PROSPECTIVE JUROR

The state says the defense "suggested the state could use a peremptory against Simard," *AB* 59, and that means the issue is waived. This argument is not based on the actual facts or applicable law. This is the discussion the state refers to:

> MR. GARLAND: Your Honor, we disagree with the State's assertion. He's indicated he could follow the law, and if the State wants to use a peremptory that's up to them, but he has not risen to the level of a cause challenge.
>
> THE COURT: Again, these are the kind of cases where a cause challenge is going to be -- I'm not convinced, I think he's a challenge for cause so I'll excuse him.

T 272. The discussion cited by the state happened well before the state attorney tried to substitute a peremptory for a cause challenge at the end of jury selection, and cannot in any way be read to be a defense invitation for the state attorney to make that belated move. The state cites no case which stands for the waiver proposition it asserts. In any event, the issue is preserved because after the state said it switched from cause to peremptory as to Juror Simard, the defense renewed all of its objections. T1298.

The state inaccurately argues the substance of what was in the questionnaire is a matter of record, *AB* 57-9. It is not. The summary of answers related by the Assistant State Attorney is no substitute for the actual answers of Mr. Simard, and the questionnaire contained a number of questions not covered in *voir dire*, as set forth in the Initial Brief.

The state's attempt to distinguish *Ault v. State*, 866 So. 2d 674 (Fla. 2003), *AB* 59-60, does not survive analysis. In *Ault*, the Court held:

> The State argues that even if Reynolds was erroneously removed for cause, the error was harmless as the State had two peremptory challenges left at the end of voir dire questioning and could have used one of these to strike Reynolds. We conclude that such error is not subject to harmless error

analysis. *See Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); *Farina v. State*, 680 So. 2d 392, 396 (Fla.1996). As the United States Supreme Court explained in *Gray*,

> The unexercised peremptory argument assumes that the crucial question in the harmless-error analysis is whether a particular prospective juror is excluded from the jury due to the trial court's erroneous ruling. Rather, the relevant inquiry is "whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error."

Ault, 866 So. 2d at 686. The state argues the switch from cause to peremptory by the state did not change the composition of the jury, *AB* 59, ignoring the fact the improper cause challenge certainly did. Mr. Simard was a qualified juror for which the trial court improperly granted the state a cause challenge. A new penalty trial is required.

Point 6. THE JURY WAS PRECLUDED FROM CONSIDERING EVIDENCE OF APPELLANT'S LIMITED ROLE IN THE KILLING, DISPROPORTIONATE TREATMENT COMPARED TO OTHERS INVOLVED AND LAWFUL EVALUATION OF AGGRAVATORS

The profound error precluding role mitigation had to have tainted the jury's recommendation. *Woodel*, 985 So. 2d at 530.

Point 7. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE CULPABILITY FINDINGS IT HAD TO MAKE BEFORE IT COULD EVEN CONSIDER A DEATH SENTENCE

Contrary to the state argument, *AB* 63, failure to object does not in any way trump this Court's mandate that the *de novo* penalty proceeding include an *Enmund/Tison* instruction and analysis. Such a failing is of a fundamental nature.

Point 8. THE JURY WAS MISLED AS TO THE EFFECT OF A LIFE RECOMMENDATION AND WAS PREJUDICED BY STATE ARGUMENT RELYING ON THE PRIOR DEATH SENTENCE

Appellant relies on the Initial brief.

Point 9. IT WAS HARMFUL ERROR TO PERMIT THE COMMUNITY CONTROL OFFICER TO FALSELY TESTIFY APPELLANT WAS EXPOSED TO THIRTY YEARS IF HE VIOLATED COMMUNITY CONTROL WITH A NEW OFFENSE.

The state inaccurately contends the issue is not preserved when objection was made and overruled. T2142-43.

Point 10. THE TRIAL COURT ERRED IN RESTRICTING MITIGATING EVIDENCE AND LIMITING CROSS EXAMINATION

Appellant relies on his Initial Brief.

Point 11. THE TRIAL COURT IMPROPERLY EXCLUDED DEFENSE EVIDENCE OF UNLIKELIHOOD OF FUTURE VIOLENCE

Preservation.

The state argues the error was not preserved because the excluded evidence was not proffered, *AB* 81, but it was. The defense expert Dr. Reibsame told the jury the instrument considered a number of risk factors, and described it as similar to an actuarial assessment used by insurance agents. He said it would give a probability

of low, medium or high risk of reoffending or doing something violent again. T2376. He testified the instrument weighed specific demographic characteristics in Mr. Lowe's case, predicting the risk of being involved in a violent act across 3-10 years. T2376-77. The statistical tool was the "Violence Risk Appraisal Guide." He described several of the risk factors, and that they are scored on the tool. T2376-77. It was when defense counsel asked where Mr. Lowe fell on the scale that the state approached the bench and raised a discovery violation. T2377.

At the bench defense counsel further described the statistical analysis of likely future violence and said that the expert would attest to statistical data backing up the instrument's questions and that a score predictive of the likelihood of future violence could be produced. T2378. Plainly, the trial court understood what it was excluding, ruling it would not "permit him to testify about any tests he was – that were performed after the deposition taken…" T2385. While the Court would permit the expert to give his opinion, "he's just precluded from saying I conducted this test and on the basis of this test I'm concluding this." T2385. Any opinion about future dangerousness could not mention the test or calculations. T2386. The expert's subsequent opinion was that Mr. Lowe had a low risk of reoffending, but that opinion had to be offered to the jury and court without the scientific, statistical data to back it up. T2388-90.

The proffer was sufficient to preserve this issue. § 90.104, *Fla. Stat*. (2012) ("If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."). There was no dispute what the evidence would have been, and the testimonial and attorney description of the excluded evidence shows a "real error" was committed. *See Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188, 1191 n. 1 (Fla. 4th DCA 2005) ("[T]he traditional purpose of a proffer, or offer of proof, is to demonstrate to an appellate court a real error, not an imaginary or speculative one. Although the safest practice would be to proffer the actual evidence, an oral proffer may be sufficient, particularly if there is no dispute as to what the evidence would have been." (citations omitted).

Merits.

The state does not address the mitigating nature of the excluded evidence. In *United States v. Troya*, 733 F. 3d 1125 (11th Cir. 2013), the Court found error (though harmless) in the District Court's exclusion of evidence of future nondangerousness both because it was rebuttal and because it was mitigation under *Skipper v. South Carolina*, 476 U.S. 1, 5 n. 1, (1986), *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987), and subsequent cases. So it is here.

The state accurately describes its burden is to show the error was not harmless beyond a reasonable doubt. *Williams v. State*, 143 So. 3d 1120, 1121 (Fla. 4th DCA 2014)(exclusion of defense evidence due to discovery violation must be shown to be harmless beyond a reasonable doubt under *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986)). It argues the admission of the bare opinion of the expert cures any error, *AB* 83, but it cannot because an expert opinion is far less credible when the defense is not permitted to show the scientific data which confirms it.

The state also argues harmlessness because the sentencing court found a lack of future danger. *AB* 81, 83. However, the sentencing court's order is of two minds on this issue. In one section of its order the Court finds "low risk of future danger" should be given "little weight," R522, but in its "analysis," referring specifically to Dr. Reibsame, the Court finds "[e]ven the testimony that the defendant presented a low risk of future dangerous [sic] was underwhelming." R526. No doubt the Court's exclusion of the science supporting the defense expert's testimony contributed to its negative finding, as the exclusion also had to have affected the jury's recommendation.

Point 12. PREJUDICIAL EVIDENCE NOT INTRODUCED AT TRIAL WAS SENT TO THE JURY ROOM FOR CONSIDERATION DURING DELIBERATIONS

The state argues invited error, *AB* 84, but "[t][he record in the present case reflects nothing more than unknowing acquiescence." *Williams v. State*, 145 So. 3d 997 (Fla. 1st DCA 2014). Contrary to the state contention, the unadmitted letter contained prejudicial writings of Mr. Lowe's mother that were not attested to before the jury. This is fundamental error.

Point 13. USE OF AN UNDISCLOSED COMPUTER ANIMATION WITHOUT A *RICHARDSON* HEARING REQUIRES REVERSAL

Appellant relies on his Initial Brief.

Point 14. THE TRIAL COURT ERRED IN OVERRULING THE OBJECTION TO THE STATE'S USE OF A MANNEQUIN

Appellant relies on his Initial Brief.

Point 15. CLOSING ARGUMENT THAT FOCUSED ON COMPARISON OF THE WORTH OF THE VICTIM AGAINST MR. LOWE AND THE PRIOR DEATH SENTENCE WAS FUNDAMENTALLY UNFAIR

Appellant relies on his Initial Brief.

Point 16. DEATH IS DISPROPORTIONATE IN THIS CASE

The state relies extensively on the trial court's sentencing order to urge death is proportionate. *AB* 95-98. The Initial Brief describes at Point 1 how that order is a near reproduction of the state's memorandum, and how it is riddled with inconsistencies in its discussion of the weight that should be given mitigation, in particular. Most of the aggravators are improperly found, and the jury recommendation is tainted by a number of highly prejudicial errors described in

the Initial Brief. The state skips over these issues, the fact that this Court lacks a legitimate death sentencing order, the "foundation" of proportionality review, *Morton*, 789 So. 2d at 333, and that without one it cannot reliably conduct its required analysis. However, should this Court determine it can conduct a proportionality review at this time, it should reduce Mr. Lowe's sentence to life.

Completely missing from the state brief is any answer to this Court's recognition that the death penalty is reserved for the worst of the worst and only where it can justify a "total rejection of the possibility of rehabilitation." *Terry v. State*, 668 So.2d 954, 965 (Fla.1996)(*citing State v. Dixon*, 283 So.2d 1, 7 (Fla.1973)). The Initial Brief describes in detail the Mr. Lowe's transformation since the killing was committed, which was recognized by the sentencing court. *IB* 93-4. "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." *Cooper v. Dugger*, 526 So. 2d 900, 902 (Fla. 1988). The state makes no argument in opposition to this extraordinarily weighty mitigation, so it must concede it.

The state argues *Bell v. State*, 841 So. 2d 329 (Fla. 2002) does not apply because Mr. Lowe was not a minor at the time of the offense, *AB* 98, missing the point of this Court's legal analysis entirely. It is when a defendant is *not* a minor that this Court holds "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier [the age] statutory mitigator becomes."

Bell, 841 So. 2d at 335. Mr. Lowe's age of 20 at the time of the crime must be seen as very weighty. Likewise, the state misstates the law when it argues the fact HAC and CCP are not found in this case is "irrelevant." *AB* 96. This Court holds otherwise. *Larkins v. State*, 739 So. 2d 90, 95 (Fla.1999) ("These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is also not without some relevance to a proportionality analysis.").

The state says Mr. Lowe's death sentence should be affirmed because it is similar to *Bryant v. State*, 785 So. 2d 422 (Fla. 2001). However, this Court has already distinguished the seriousness of the prior violent felonies in *Bryant* from other cases in its proportionality review, finding "the *Phillips* and *Bryant* cases were more aggravated and involved prior violent felony aggravators established by qualitatively different offenses,…" *Scott v. State*, 66 So. 3d 923, 936 (Fla. 2011). Indeed, Bryant's prior offenses were "qualitatively" worse than Mr. Lowe's, and included separate convictions for "sexual battery, grand theft, robbery with a weapon, and aggravated assault with a mask" *Bryant*, 785 So. 2d at 436–37 & n. 12. *Bryant* is only comparable in its differences.

The state also invokes *Pope v. State*, 679 So. 2d 710 (Fla. 1996) as a comparable case, *AB* 97, though its facts could not be further from those in the case at bar. This Court describes Mr. Pope's crime:

> After midnight on February 17, 1992, Alice Mahaffey told police officer Ronald Wright, paramedic Venetia Giger, and neighbor William Tice, that *Horace Pope had beaten her, stabbed her, and kicked her in the head repeatedly with his cowboy boots. She added that he took her car keys, left her for dead, and drove away in her car with his eighteen-year-old niece Marsha Pope.* After Pope and Marsha left, Alice managed to drag herself across the street to William Tice's residence where she lay slumped on his sofa, covered in blood until the police and paramedics arrived. She died in the hospital eight days after surgery for her wounds and an ensuing infection.

Pope, 679 So. 2d at 712 (e.s.). Pope had previously "told Marsha that he was going to kill Alice for her car and money." *Ibid*. Marsha described the brutal beating she was forced to watch and Pope's threat to kill her as well:

> Pope summoned Marsha and forced her to watch him beat, kick, and stab Alice. Marsha witnessed Pope beat Alice's head against the sink and wall while Alice was sitting on the toilet after which he pushed her off the toilet and stomped on her head and back with his boots. While Alice was lying face down on the floor, Pope straddled and stabbed her. When Marsha tried to escape, Pope threatened to kill her if she attempted to leave. Pope then left Alice lying on the bathroom floor and went to the kitchen to wash his hands, after telling Marsha to see if Alice was dead.

Ibid. Marsha told Pope that Alice was dead when she was not. Pope drove Marsha to her brother's to try to borrow money, and there "[h]e said calmly, 'I hope I killed the bitch' and, as the officers were discussing Alice's condition, Pope said loudly, 'I hope I didn't go through all that for nothing. I hope she's dead as a doornail.'" *Ibid.* There is no rational way *Pope* can be used to justify a death sentence for Mr. Lowe, though it can be compared to distinguish the case at bar and reduce Mr. Lowe's sentence to life.

The state also points to *Melton v. State*, 638 So. 2d 927 (Fla.1994) as comparable. But in *Melton*, the prior violent felony was an unrelated armed robbery and *first degree murder*, *Melton*, 638 So. 2d at 929 & n. 2, plainly far more aggravating than the prior felony here. This Court has already distinguished these cases in *Scott*. As in *Scott*, also involving a "robbery gone bad," and which this Court even described as "not a case with substantial mitigation," *Id.* at 935, Mr. Lowe's sentence should be reduced to life.

The state's reliance on this Court's decision in Mr. Lowe's prior direct appeal to support its argument death is proportional here, *AB* 97, is contrary to this Court's holdings that resentencing at a new penalty phase is *de novo.*

The state tries to distinguish *Yacob v. State*, 136 So. 3d 539 (Fla. 2014), as a single aggravator case, but this Court looks to the quality, not quantity, of aggravation and mitigation in its proportionality review. *Offord v. State*, 959 So.2d 187, 191 (Fla.2007). For this reason the state's attempts to distinguish *Johnson v. State*, 720 So.2d 232, 238 (Fla.1998) and *Ballard v. State*, 66 So. 3d 912 (Fla. 2011) are also unavailing. Finally, contrary to the state argument, the disproportionate treatment of others who were not even charged counsels for a sentence less than death for Mr. Lowe. This Court should find Mr. Lowe's death sentence disproportionate.

Point 17.THE TRIAL COURT ERRED IN DENYING THE REQUESTED SPECIAL VERDICT FORM AND INSTRUCTIONS FOR FINDINGS ON AGGRAVATORS

The state does not argue this point is not preserved. *AB* 98-100. The Court has granted review on the issue of "[w]hether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U. S. 584 (2002)," in *Hurst v. State*, 147 So.3d 435 (Fla. 2014), *cert. granted*, *Hurst v. Florida*, 2015 WL 998606 (March 9, 2015).

Point 18. CUMULATIVE ERROR REQUIRES REVERSAL.

The state complains appellant has not sufficiently described the errors challenged in this point, *AB* 100, but any combination of errors found by this Court would trigger a cumulative error analysis.

CONCLUSION

Wherefore, this Court should reverse the death sentence and remand for a penalty phase before a jury or judge, or reduce the sentence to life with parole after a mandatory minimum of 25 years.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing has been furnished electronically to Leslie T. Campbell, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401, at capapp@myfloridalegal.com this 11th day of March, 2015.

_____/s/_____
Steven H. Malone

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief of Appellant complies with the font requirements of Rules 9.100(l) & 9.210(a)(2), *Fla.R.App.P.*, in that is computer-generated submitted in Times New Roman 14-Point.

_____/s/_____