No. SC18-___

IN THE

Supreme Court of Florida

ERIC SCOTT BRANCH,
Petitioner,
v.
JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

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Petitioner respectfully requests that this Court grant its writ of habeas corpus, vacate his sentence, and remand for a new penalty phase. This Court should also issue a stay of execution pending resolution of this question.[1]

Petitioner's death sentence was based on the trial court's mistaken belief that he had been convicted of rape – a violent felony – in Indiana prior to his crimes in the present case. The trial court relied on that mistaken belief in instructing the jury as to the prior violent felony aggravator and then relied on additional information that led to a further misunderstanding of the nature of the crime—information the jury never saw—in making its own sentencing determination.

This petition for a writ of habeas corpus calls on the Court to review the constitutionality of a death sentence steeped in fundamental error. Fundamental error occurs when the error "has affected the proceedings to such an extent it equates to a violation of the defendant's right to due process of law." *Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010). As this petition describes, it is "axiomatic" that "fundamental error may be raised at any time, 'before trial, after trial, on appeal, or by habeas

[1] The record on appeal from Mr. Branch's trial shall be referred to as "R. _" followed by the appropriate page number. The transcript from Mr. Branch's proceedings in Indiana shall be referred to as "IN Tr. _" followed by the appropriate page number. References to the appendix shall be referred to as "A. _" followed by the appropriate page number.

corpus.'" *Tucker v. State*, 459 So. 2d 306, 307 (Fla. 1984) (quoting *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983)).

Such an error occurred here. First, the trial court erroneously instructed the jury as to the prior violent felony aggravator, a due process violation. *See Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982). Second, the judge and jury relied on an invalid aggravator in violation of the Fourteenth Amendment due process guarantees against the use of misinformation of constitutional magnitude proscribed by *Townsend v. Burke*, 334 U.S. 736 (1948), and *United States v. Tucker*, 404 U.S. 443 (1972); and the Eighth Amendment protection against cruel and unusual punishment as applied in *Johnson v. Mississippi*, 486 U.S. 578 (1988), and *Clemons v. Mississippi*, 494 U.S. 738 (1990). Those decisions make clear that Mr. Branch's death sentence, based on misinformation in the sentencing process, was obtained in violation of the United States Constitution. This death sentence also violates the Florida Constitution's due process clause, Fla. Const. Art. 1, § 9, and prohibition against cruel or unusual punishments, Fla. Const. Art. 1, § 17.

The trial court's error in instructing the jury as to the prior violent felony aggravator was fundamental error. This Court has previously held that errors in jury instructions are fundamental where the erroneous instruction is "pertinent or material to what the jury must consider". *Stewart*, 420 So. 2d at 863. Here, the trial court instructed the jury that Mr. Branch's conviction in Indiana was a violent felony. This

not only stripped the jury of its discretion in making such a determination, it was also an inaccurate conclusion about the prior conviction.

The trial court's second error, its own reliance on an invalid aggravator, also rises to the level of fundamental error. Under *Tucker* and *Townsend*, a court's mistaken belief about a prior conviction used to enhance the sentence can rise to such constitutional magnitude as to violate the Fourteenth Amendment right to due process. Additionally, *Johnson* and *Clemons* prohibit the use of invalid aggravating factors in the sentencing determination under the Eighth Amendment guarantee of non-arbitrary, reliable capital sentencing procedures.

Here, Mr. Branch's death sentence does not pass constitutional muster. It was based either on the erroneous finding that Mr. Branch had been convicted of rape in Indiana, or on the mistaken assumption that a prior sexual battery conviction in Indiana was comparable to Florida's sexual battery statute and amounted to a prior violent felony. In fact, Florida's sexual battery offense is more akin to Indiana's rape offense, a crime of which Mr. Branch *was never convicted*. Instead, Mr. Branch's sexual battery conviction in Indiana would likely have been charged under Florida's lewdness statute, which when used to support the prior violent felony aggravator, requires the State to prove violence. Because the trial court instructed the jury that Mr. Branch's Indiana conviction was a prior violent felony and then itself relied in

part on this erroneous conclusion to impose a death sentence, the court made a fundamental sentencing error of constitutional magnitude.

REQUEST FOR ORAL ARGUMENT

Petitioner respectfully requests oral argument so that Petitioner's counsel may address this important, yet rarely recurring, area of sentencing law. Oral argument will benefit the Court.

JURISDICTION

This Court has original jurisdiction to grant Petitioner a writ of habeas corpus under Article I, Section 13, and Article V, Section 3(b)(9) of the Florida Constitution. Notably, Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This proceeding is also authorized by Florida Rules of Appellate Procedure 9.030(a)(3). This petition complies with the Rule 9.100(a) requirements.

It is "axiomatic" that "fundamental error may be raised at any time, 'before trial, after trial, on appeal, or by habeas corpus.'" *Tucker v. State*, 459 So. 2d 306, 307 (Fla. 1984) (quoting *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983)). Thus, Mr. Branch is properly asserting the fundamental error that occurred at his sentencing in this habeas proceeding.

RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

On March 27, 1992, Mr. Branch pled guilty to the Class D felony of sexual battery in the Vanderburgh County Circuit Court in Indiana. IN Tr. 18. The actual crime Mr. Branch pled to was non-violent and, under Florida law, would not have qualified as a prior violent felony. As the First District Court of Appeals would hold years later in striking down a habitual felony offender finding made against Mr. Branch on the basis of his Indiana conviction, explaining that conviction does not count as a "predicate violent felony" for those purposes. *Branch v. State*, 671 So. 2d 224, 224 (Fla. 1st Dist. Ct. App. 1996).

In 1994, Mr. Branch was convicted of murder in the Circuit Court of the First Judicial Circuit, in and for Escambia County. At the advisory jury penalty phase, the State presented an abstract of judgment from Indiana. The State called Bruce Fairburn, an officer with the Florida Department of Law Enforcement, to testify that he had obtained the abstract and it had been certified in front of him. R. 976. No other testimony was provided. The abstract indicated Mr. Branch's guilty plea to sexual battery in Indiana. The State presented the abstract in support of the prior violent felony aggravator. Defense counsel, John L. Allbritton, objected on the basis that the State had not proven that the sexual battery conviction was violent. R. 974. He provided the court with a copy of the Indiana statute under which Mr. Branch had been convicted. R. 973. He argued that because there were two legal theories

that can support a sexual battery conviction in Indiana, one that required violence and one that did not, the State had not proven that Mr. Branch's conviction contained the violence necessary for the prior violent felony aggravator. R. 974. The trial court overruled the objection and admitted the abstract into evidence. R. 975. Trial counsel entered a copy of the Indiana statute for sexual battery into evidence. R. 981. R. 1020-25. During the State's closing argument to the jury, it referred to Mr. Branch's conviction "for the crime of sexual battery in Indiana." R. 1013. The trial court then instructed the jury:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: First, that the defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. *The crime of sexual battery is a felony involving the use or threat of violence to another person.*

R. 1027 (emphasis added). The jury recommended a death sentence by a vote of 10-2. R. 1032.

At the *Spencer* hearing, and without notice to the defense, the State "supplemented" the record with the entire court file from Indiana, much of which contained inadmissible police reports and witness statements. PCR. 418-22. Mr. Allbritton objected that this information should have been presented at the penalty phase, that the State had chosen to rely on the copy of the judgment, and that the unsworn police statements were hearsay. *Id.* The trial court admitted the file and told

counsel that it would make clear in its sentencing order which documents it would rely upon. *Id.*

In its sentencing order, the trial court specified that it relied only on the record of conviction and "the information (i.e., the charging document)." It did not make clear, however, whether it relied on the entire charging document, which included a total of five separate charges, four of which were dismissed by the State of Indiana, or solely on the charge of the crime for which Mr. Branch was actually convicted. Despite Mr. Branch's conviction for sexual battery, the trial court found that Mr. Branch's prior felony "was, in fact, a conviction of forcible rape." R. 450. The court found the State to have proven the prior violent felony aggravator as an aggravating factor. In its sentencing guidelines scoresheet, the court recorded that Mr. Branch's prior record included one count of sexual battery under Fla. Stat. 794, Florida's sexual battery statute.

Undersigned counsel note that objections to the invalid prior violent felony aggravator have been raised before in this litigation. While it is far too late to raise an ineffective assistance of counsel claim regarding prior counsels' lack of investigation into the Indiana case, Mr. Branch relies upon this Court's fundamental error precedents. Under that fundamental error precedent, this challenge to the use of misinformation of constitutional magnitude at a capital sentencing may be heard at this time on its merits, without the need to address "procedural bars."

ARGUMENT

I. Florida law permits fundamental error to be raised at any time

This Court has held that an error is fundamental "when [it] has affected the proceedings to such an extent it equates to a violation of the defendant's right to due process of law." *Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010); *see also J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998) ("An error is fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process."). Florida courts have explained that "[i]n [the] postconviction context, the inquiry focuses on whether a manifest injustice will occur if the error is not corrected." *Haliburton v. State*, 7 So. 3d 601, 606 (Fla. 4th Dist. Ct. App. 2009). It is "axiomatic" that fundamental error may be raised at any time, "before trial, after trial, on appeal, or by habeas corpus." *Tucker v. State*, 459 So. 2d 306, 307 (Fla. 1984) (quoting *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983)). As the Eleventh Circuit explained when it canvassed this Court's decisions on fundamental error: Florida appellate courts have held that "a fundamental error could be corrected whenever the issue was presented, on direct appeal, or in post-conviction proceedings." *Parker v. Sec'y for Dept. of Corr.*, 331 F.3d 764, 773 (11th Cir. 2003). This is true even in the absence of contemporaneous objection. *Id.* at 772-73.

As this Court succinctly summarized, a "previous waiver of the argument" can be overcome if it "pertain[s] to a matter of fundamental error." *Thomas v. Wainwright*, 486 So. 2d 574, 576 (Fla. 1986) (internal citation omitted).

This Court has not previously addressed misinformation used to support this death sentence as a matter of fundamental error. On direct appeal, appellate counsel merely made the same argument as trial counsel – that sexual battery in Indiana can be proven under two theories, and because one of those theories requires no violence at all, the State had not proven the violent nature of the prior conviction. *See Branch v. State*, No. 83805, Brief of Appellant at 55-57. This Court summarily denied the claim saying it was "without merit." *Branch v. State*, 685 So. 2d 1250, 1253 (Fla. 1996). There was no discussion of fundamental error or the fact that the Indiana conviction was actually not a violent felony. Post-conviction counsel made the argument that the prior conviction was not violent. He did not argue that the jury was presented with misinformation of constitutional magnitude, in violate of due process, under the Unites States Supreme Court's *Tucker*, 404 U.S. at 443, and *Townsend*, 334 U.S. at 736, line of cases. Nor did he argue fundamental error under the *Johnson*, 486 U.S. at 578, and *Clemons*, 494 U.S. at 738, line of cases. As a result, this Court stated that use of the abstract "did not rise to the level of fundamental error," *see Branch v. State*, 952 So. 2d 470, 482 (Fla. 2006), but did not

conduct a similar fundamental error analysis on the underlying use of the aggravator itself.

However, as the District Court of Appeals has held, the Indiana prior was not a violent felony and cannot support a finding that Mr. Branch is a habitual offender. *See Branch*, 671 So. 2d at 224. Plainly, the jury was provided with misinformation and an unconstitutional direction in the court's instruction that it *was* a violent felony. The court, receiving different, additional information than the jury at the *Spencer* hearing, then found the Indiana conviction was a prior violent felony. But it was not. This is a fundamental error that has not been previously addressed by this Court.

II. Mr. Branch's conviction in Indiana for sexual battery did not constitute a prior violent felony in Florida. The trial court's jury instruction to the contrary and its reliance on this ineligible conviction were fundamental error and renders the finding of the prior violent felony aggravator invalid, in violation of Mr. Branch's Fourteenth Amendment due process rights and Eighth Amendment protection against cruel and unusual punishment

Mr. Branch's conviction in Indiana for sexual battery did not constitute a prior violent felony in Florida. Yet, Mr. Branch's death sentence is predicated on the use of this conviction to support the prior violent felony aggravator. This constitutes fundamental error, and Mr. Branch's death sentence should be vacated.

The trial court erroneously assumed Mr. Branch had been convicted of "forcible rape" in Indiana. But the Indiana conviction does not even qualify as a

predicate violent felony for habitual felony offender sentencing, as the District Court of Appeals found in *Branch*, 671 So. 2d at 224.

In reality, Mr. Branch's prior conviction in Indiana never constituted a violent felony in the State of Florida. The prior violent felony aggravator applies when "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Fla. Stat. 921.141. The crime must be "life-threatening." *See Williams v. State*, 967 So. 2d 735, 762 (Fla. 2007). The information before the jury did not support such a conclusion, but the jury was instructed that the Indiana conviction was a violent felony. The additional information presented to the trial court, not the jury, on which the trial court relied in its sentencing order also could not have led to such a conclusion.

At the time of both Mr. Branch's offense in Indiana and his trial here in Florida, Indiana classified felonies by class. Sexual battery was a Class D felony. *See* Ind. Stat. 35-42-4-8. Those convicted of Class D felonies were entitled to certain privileges that offenders of more serious felonies did not have, including the option of petitioning the court to convert the conviction into a Class A misdemeanor. Ind. Stat. 35-50-2-7. Class D felonies were punishable by six months to three years in prison. Indiana treated prior Class D felonies differently in determining whether a person is a habitual offender. *See* Ind. Stat. 35-50-2-8.

Class D sexual battery in Indiana is not an enumerated felony that qualifies as an aggravator in capital sentencing proceedings in Indiana. *See* Ind. Stat. 35-50-2-9. Indiana does have a separate conviction for rape, *see* Ind. Stat. 35-42-4-1, which is a Class B felony that qualifies as an aggravating circumstance in Indiana, *see* Ind. Stat. 35-50-2-9. However, Mr. Branch was not convicted of rape in Indiana and should not have treated as such by the Florida courts.

The First District Court of Appeals determined in Mr. Branch's own case that the Indiana conviction does not count as a "predicate violent felony for purposes of habitual violent felony offender sentencing." *Branch v. State*, 671 So. 2d 224, 224 (Fla. 1st Dist. Ct. App. 1996). While this Court has previously held that the element-by-element analysis used to compare out-of-state convictions to Florida offenses for the purpose of habitual offender sentencing does not apply in the capital sentencing context, *see Carpenter v. State*, 785 So. 2d 1182, 1204 (Fla. 2001), it is inconceivable that an offense that could not justify increasing the term of years to which Mr. Branch could be sentenced could still qualify as an aggravator to make him eligible for death, the most severe sentence possible.

During the penalty phase, the State presented an abstract of the Indiana judgment of conviction. R. 976. The only information this abstract provided was that Mr. Branch was convicted of a Class D felony of sexual battery in Vanderburgh County, and that he received a two-year sentence and a year of probation. *Id.* This is

the only information the jury heard. Consequently, this is also the only relevant evidence that should have been considered. "The possible relevance of the conduct which gave rise to the [sexual battery] charge is of no significance here because the jury was not presented with any evidence describing that conduct – the document submitted to the jury proved only the facts of conviction and confinement, nothing more." *See Johnson v. Mississippi*, 486 U.S. 578, 586 (1988). The conviction in the abstract would have been comparable to lewd and lascivious conduct here in Florida. Lewd and lascivious conduct is not a crime of violence *per se*. *See Hess v. State*, 794 So. 2d 1249, 1264 (Fla. 2001). Accordingly, the facts of the conviction and confinement alone did not constitute a prior violent felony. *See id.*

The State then introduced unsworn police reports, witness statements, and the information at the *Spencer* hearing, information which the jury had not considered. These documents were not properly before the court, as they were unsworn statements that Mr. Branch did not have the opportunity to confront. *See, e.g., United States v. Rosales-Bruno*, 676 F.3d 1017, 1021 (11th Cir. 2012) (court reviewed plea colloquy and transcript in addition to conviction and charging document, but declined to review "police reports or other documents supporting the criminal complaint because a defendant generally does not admit the conduct described in those documents" to determine that plea to false imprisonment was not a crime of violence). The State did not provide notice to the defense before presenting these

additional documents. The file contained the information from Indiana, which included four other charges against Mr. Branch that the State of Indiana ultimately dismissed.

While Mr. Branch provided sworn testimony under oath describing the underlying facts during his Indiana plea colloquy, the trial court's capital sentencing order did *not* consider the colloquy transcript. R. 450. *Cf. Rosales-Bruno*, 676 F.3d at 1021 (courts may review "the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant") (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)). Had it done so, Mr. Branch's testimony would have shown that the Indiana conviction did not involve forced contact with Mr. Branch's sexual organs, *see Hess*, 794 So. 2d at 1249, or physical injury to a young child victim, *see Williams v. State*, 967 So. 2d 735, 762 (Fla. 2007). If the trial court was going to consider information about the Indiana court file, then it should have received and considered the transcript of Mr. Branch's testimony during the plea colloquy, which was accepted by the court in Indiana. Had it done so, it would have known that Mr. Branch's offense did not include the threat or use of violence.

Here, however, while the court should have received and considered the plea colloquy transcript, it seems that the trial court reviewed more than just the charging information for the crime Mr. Branch was ultimately convicted of. Mr. Branch only

pled guilty to sexual battery, but the information contained details about the other four initial charges. *The State of Indiana dismissed those other charges*. Based on what should have been a limited charge on the one non-violent count, the trial court found that Mr. Branch's "conviction was, in fact, a conviction of forcible rape." R. 450; *see also* R. 493 (the sentencing guidelines scoresheet indicates that the trial court calculated the Indiana conviction as a sexual battery under Fla. Stat. 794). There is absolutely nothing in the judgment or the charging document for the sexual battery conviction that supports that finding. It appears that the judge read the information for the other charges that were ultimately dropped. Mr. Branch was not convicted of these other crimes, and they should not have played a role in the trial court's sentencing determination.

No matter how one looks at the Indiana sexual battery conviction, whether on the bare facts of conviction and confinement as provided in the abstract–the only information provided to the jury–or by the description for the sexual battery charge in the information–evidence that only the judge considered, the Indiana conviction does not constitute a prior violent felony. The trial court's finding that this was "a conviction of forcible rape" and reliance on this finding to determine that the State had met the prior violent felony aggravator was in error.

III. The trial court's instruction to the jury that sexual battery was a violent crime was a fundamental error that requires relief

The trial court's instruction to the jury that Mr. Branch's sexual battery conviction was a violent crime was a fundamental error that requires reversal.

Based only on the State's presentation of the abstract of conviction and sentence, the trial court instructed the jury:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: First, that the defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. *The crime of sexual battery is a felony involving the use or threat of violence to another person.*

R. 1027.

This Court has held jury instructions can be fundamental error. *See Parker*, 331 F.3d at 773 (describing Florida Supreme Court precedent). Jury instruction error is fundamental where "the omission is pertinent or material to what the jury must consider in order to convict." *Stewart*, 420 So. 2d at 863. This is determined by whether the instruction concerns a material element in dispute. *See Reed v. State*, 837 So. 2d 366, 369 (Fla. 2002). An example of a fundamental jury instruction error includes any instruction where the trial court fails to "hold[] the State to the burden of proving each aggravating circumstance beyond a reasonable doubt." *Archer v. State*, 673 So. 2d 17, 20 (1996).

Here, the trial court's instruction was fundamental error. As previously discussed, if Mr. Branch had committed the same offense in Florida in 1991, he would have been convicted of "lewd, lascivious, or indecent assault or act upon or

in [the] presence of [a] child." Fla. Stat. 800.04. This Court has made clear that crimes under the lewdness statute, even those involving victims under sixteen, are not violent felonies *per se*. In *Hess*, this Court found that it was error for a trial court to "instruct the jury that [lewd assault on a child] was per se a crime of violence." *Hess*, 794 So. 2d at 1264. Instead, the State has the burden of proving that the offense involved violence. *Id.* The same error occurred here when the trial court expressly instructed the jury that the Indiana conviction was a prior violent felony, leaving the jury with no discretion to decide whether the State had met its burden in proving the prior violent felony aggravator.

The error here is fundamental error. The trial court's instruction concerned an element in dispute, *see Reed*, 837 So. 2d at 369, namely, whether the Indiana conviction was a violent crime. Thus, the error was "pertinent or material to what the jury must consider in order to convict." *Stewart*, 420 So. 2d at 863. Moreover, the instruction removed the State's burden of proving any underlying violence, so that it failed to "hold[] the State to the burden of proving each aggravating circumstance beyond a reasonable doubt." *See Archer*, 673 So. 2d at 20. For these reasons, the trial court's erroneous instruction was fundamental error.

Based on the court's instruction, it is inconceivable that the jury felt it had any discretion to even decide whether or not the prior conviction was a violent felony. Trial counsel's admission of a copy of the Indiana statute would have done nothing

to cure this error. The trial court had already told the jury that a "crime of sexual battery is a felony involving the use or threat of violence to another person." R. 1027. Additionally, trial counsel did not argue the Indiana definition during his closing argument, meaning that the jury would have needed to take it upon itself to realize the distinction. Considering that the sentencing judge who presided in Mr. Branch's case erroneously believed that Mr. Branch was convicted of rape, *see State v. Branch*, Sentencing Order at R. 450 (the trial court found that "defendant's conviction was, in fact, a conviction of forcible rape"), it is highly unlikely that the jury would have understood the nuances of the Indiana statute, especially when provided instructions to the contrary.

The error here was fundamental, so it is necessarily harmful; fundamental error is generally not subject to harmless error review. *See Reed v. State*, 837 So. 2d 366, 369-70. As this Court held in *Reed*, "By its very nature, fundamental error has to be considered harmful . . . . [A]ll fundamental error is harmful error." *Id.*

Even if this Court were to conduct a harmless error analysis, however, Mr. Branch can still establish that the erroneous jury instruction was not harmless. In *Hess*, this Court found that the trial court's jury instruction that lewd and lascivious conduct is a violent felony per se was harmless because the offense in question involved the use of force. 794 So. 2d at 1264. The trial court in *Hess* considered the information, which provided that the crime involved "lewd, lascivious, or an

indecent manner by *making*" the child victim massage the defendant's genital area "to ejaculation." *Id.* This Court explained that "this allegation of force by 'making' under which appellant was convicted provided a sufficient basis from which the trial court could have concluded that the crime involved the use or threat of violence." *Id.* Thus, any error in suggesting the crime was violent per se was harmless because "the State introduced the information which contained an allegation of the use or threat of violence." *Id.*

Here, in contrast, the State only introduced the abstract of the conviction. R. 976. This included only the information that Mr. Branch had been convicted of sexual battery, an Indiana Class D felony, and that he was sentenced to two years in prison and a year of probation. *Id.* Then, trial counsel offered the Indiana sexual battery statute into evidence, which included Indiana's definition of the offense. Neither the prosecution nor the defense elaborated further on the force used. Given this Court's law that not all lewd and lascivious conduct is violent, *see Hess*, 794 So. 2d at 1264, necessarily it is not *always* violent to "handle, fondle, or assault" the victim. Even the Indiana statute's reference to "force" does not equate to violence, as any nonconsensual touching is arguably forceful. As this Court has found, the prior violent felony aggravator pertains to "life-threatening" offenses. *See Williams*, 967 So. 2d at 762. Without any further evidence by the State, the mere conviction under Indiana's statute did not establish violence and did not establish that the

offense was life-threatening. Thus, the trial court's instruction to the jury was not harmless.

This Court has also found harmless error where multiple prior felonies support the prior violent felony aggravator, so that invalidating one of the convictions still leaves other evidence upon which the aggravator can be based. *See Daugherty v. State*, 533 So. 2d 287, 289 (1988). The State at Mr. Branch's trial only presented the Indiana conviction to support the prior violent felony aggravator, so invalidating the Indiana conviction invalidates the entire aggravator. Once again, the error was not harmless.

IV. The trial court's reliance on Mr. Branch's Indiana conviction to establish the prior violent felony aggravator constituted fundamental error

Regardless of whether the trial court erroneously determined that Mr. Branch had been convicted of or actually committed rape based on the details in the information, or if it erroneously analogized sexual battery in Indiana to sexual battery in Florida, the trial court's reliance on the Indiana conviction to establish the prior violent felony aggravator was fundamental error.

A. The trial court's misunderstanding about and reliance on the Indiana conviction to sentence Mr. Branch to death was a fundamental error

The trial court here relied on Mr. Branch's Indiana conviction to support the death sentence. The sentencing order bases the finding that Mr. Branch had a prior

violent felony on the Indiana conviction, and the court considered this aggravator when weighing the aggravating factors against the mitigating factors. The trial court also made a finding that Mr. Branch had been convicted of "forcible rape" in Indiana. However, while rape was one of the initial charges against Mr. Branch, it is not the charge on which he was ultimately convicted of. This means that either the court relied on an offense that Mr. Branch was never convicted of, or it mistakenly attributed violence to Indiana's sexual battery crime. Either way, this misinformation in the sentencing process amounts to fundamental error.

If the trial court based its decision on the dismissed rape charge, then this was fundamental error. This Court has previously found, "It is a fundamental principle of due process that a defendant may not be convicted of a crime that has not been charged by the state." *Jaimes*, 51 So. 3d at 448. "Therefore, an error that directly results in such a conviction is by definition fundamental." *Id.* at 449. It is no stretch to suggest, then, that where the State argues that a defendant has committed a prior violent felony based on a sexual battery conviction, and the trial court finds instead that the defendant has committed a prior violent felony based on a rape, that the court's reliance on a crime that the State never argued is also fundamental error. This is especially true where there was no conviction for any crime of rape.

Florida district courts of appeal overwhelmingly agree that it is fundamental error for the trial courts to base a sentence determination on what they think may

have happened rather than what a defendant has actually been convicted of. *See, e.g.*, *Challis v. State*, 157 So. 3d 393, 395 (Fla. 2d Dist. Ct. App. 2015) (finding fundamental error when the trial court "considers improper factors"); *Martinez v. State*, 123 So. 3d 701, 704 (Fla. 1st Dist. Ct. App. 2013) ("a sentence based on mere allegation or surmise violates the fundamental rights of the defendant"); *Yisrael v. State*, 65 So. 3d 1177, 1178 (Fla. 1st Dist. Ct. App. 2011) ("Fundamental error occurs where a trial court considers constitutionally impermissible factors when imposing a sentence"); *Reese v. State*, 639 So. 2d 1067, 1068 (Fla. 4th Dist. App. Ct. 1994) (remanding for resentencing because "the State argued at sentencing that Reese was a principal in other drug offenses for which he was not charged and the trial court stated that it would take that into consideration in deciding Reese's sentence"); *Epprecht v. State*, 488 So. 2d 129, 130-21 (Fla. 3d Dist. Ct. App. 1986) (remanding for resentencing where the trial court suggested that the defendant had so many convictions that he must have others that the State does not know about).

Thus, if the trial court decided in reviewing the information that Mr. Branch had actually committed a "forcible rape," as it suggested in its sentencing order, rather than the Class D felony of sexual battery that Mr. Branch was actually convicted of, then this was fundamental error. A rule so commonly justifying relief in non-capital cases must be applied the same in a capital case, where there is a heightened demand for reliability.

On the other hand, if the trial court mistakenly found that Mr. Branch's sexual battery felony was analogous to Florida sexual battery or a similar crime of rape, this was also fundamental error. As explained earlier, neither the abstract of conviction nor the description of the crime in the information provided a basis for finding a violent crime. This Court has held that a "complete failure of the evidence" to establish what it is intended to prove "reaches the foundation of the case and is equal to a denial of due process." *See F.B. v. State*, 852 So. 2d 226, 230-31 (Fla. 2003). In other words, it is fundamental error. *Id.* Because nothing the court could have permissibly reviewed would have established that the Indiana offense involved violence, *see* Section I.B, *supra*, there was a "complete failure of the evidence" to establish an element of the prior violent felony aggravator, and any determination by the trial court to the contrary was fundamental error.

B. The trial court's misunderstanding during the sentencing determination is a mistake of constitutional magnitude in violation of Mr. Branch's Fourteenth Amendment due process rights, rendering the error fundamental

A finding of fundamental error here based on the trial court's reliance on erroneous sentencing information would comport with the United States' Supreme Court's holdings that misinformation during sentencing amounts to error of constitutional magnitude. Long before Mr. Branch's trial, the United States Supreme Court made clear that "a requirement of fair play" is that "the conviction and

sentence were not predicated on misinformation or misreading of court records." *Townsend v. Burke*, 334 U.S. 736 (1948). In *Townsend*, the trial court relied on Townsend's prior convictions that had since been vacated to determine his sentence. The Supreme Court held, "Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." *Id.* at 741. Similarly, in *Tucker*, 459 So. 2d 306, 307 (Fla. 1984), the Supreme Court found that uncounseled guilty pleas prior to *Gideon v. Wainwright*, 404 U.S. 443 (1972) did not pass constitutional muster to serve as prior felonies in sentencing determinations. The *Tucker* Court acknowledged that judges have wide discretion in sentencing, but found itself dealing "not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude." *Tucker*, 404 U.S. at 447. The *Tucker* Court vacated the sentence based on this mistake. *Id.* at 449.

It is now well-established that "[d]ue process protects a defendant's right not to be sentenced on the basis of false information and invalid premises." *Parks v. United States*, 832 F.2d 1244, 1246 (11th Cir. 1987). *See also United States v. Darby*, 744 F. 2d 1508, 1532 (11th Cir. 1984) ("sentences based on erroneous and material information or assumptions violate due process.")

Such error may occur in a variety of contexts, and courts have declined to "articulate what might comprise the full scope of constitutional errors that renders a

conviction presumptively void." *United States v. Owens*, 15 F.3d 995, 1001 (11th Cir. 1994). It is clear, though, that misinformation about a prior criminal record falls within the ambit of constitutional error: "[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." *United States v. Malcolm*, 432 F. 2d 809, 816 (2d Cir. 1970); *see also United States v. Dean*, 752 F.2d 535 (11th Cir. 1985) (endorsing *Malcolm* for the proposition that "a sentencing court cannot rely on false assumptions without violating the due process clause.").

The primary concern is reliability. *See Owens*, 15 F.3d at 1001 (reliance on presumptively void convictions are "errors of such magnitude as to call into question the fundamental reliability of the conviction"); *United States v. Roman*, 989 F.2d 1117 (11th Cir. 1993) (Tjoflat, J., concurring) (*Tucker* "extended *Gideon*'s emphasis on reliable determinations of guilt to the sentencing context").

Avoiding such errors is especially important in the capital context, then, where due process requires heightened reliability concerns. As the Supreme Court has emphasized:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

To establish that misinformation during sentencing constitutes a due process violation, a petitioner must show: "(1) that the challenged evidence is materially false or unreliable, and (2) that it actually served as the basis for the sentence." *United States v. Rodriguez*, 765 F.2d 1546 (11th Cir. 1985). *See also Darby*, 744 F.2d at 1532 (petitioner must show the sentence was "based on erroneous and material information," and that "the trial court has relied on such information or assumptions").

The trial court's use of the prior violent felony falls squarely in line with these due process "misinformation" cases. As discussed previously, the prior conviction is materially false or unreliable: it does not equate to a prior violent felony here in Florida. Yet, despite the fact that Mr. Branch's plea was not to a rape charge, the trial court still found that he had committed "forcible rape." R. 450. Not only did the trial court make this inaccurate assumption, but it actually relied on this assumption. The trial court found that the State had proven the prior violent felony aggravator based solely on the Indiana conviction. R. 450-51. It then used that aggravator in weighing the aggravating factors against the mitigating circumstances. R. 452. Necessarily, the trial court's finding that the prior violent felony aggravator existed relied on its mistaken belief that Mr. Branch had committed "forcible rape." Because Mr. Branch can show both that the sentence was based on erroneous information,

and that the trial court actually relied on this information, this was a mistake of constitutional magnitude. *See Townsend*, 334 U.S. at 736; *Tucker*, 404 U.S. at 447; *Darby*, 744 F. 2d at 1532.

The trial court's mistaken belief about Mr. Branch's prior conviction infused prior sexual violence into the sentencing determination in a case involving a capital crime charging sexual violence. This mistake "affected the proceedings to such an extent it equates to a violation of the defendant's right to due process of law." *Jaimes*, 51 So. 3d at 448. As a result, this Court should find that the trial court's reliance on this improper information constituted fundamental error.

C. The trial court's reliance on an invalid aggravating factor violated Mr. Branch's Eighth Amendment protection against cruel and unusual punishment

As further evidence that the trial court's mistaken reliance on the prior conviction was fundamental error, this Court should also consider that any reliance on an invalid aggravating factor violated Mr. Branch's Eighth Amendment protection against cruel and unusual punishment.

As with the Fourteenth Amendment due process requirements, '"[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for heightened reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (quoting *Gardner v.*

Florida, 430 U.S. 349, 363-64 (1977) (in turn quoting *Woodson*, 428 U.S. at 305)). The *Johnson* Court held that it was a violation of the Eighth Amendment for a death sentence to rely on a reversed prior conviction. *Id.* at 586.

In *Johnson*, the conviction was "nonexistent" because it had been reversed. Here, the crime of "forcible rape" upon which the trial court relied was not the crime that Mr. Branch was actually convicted of and was thus similarly "nonexistent." Even if the trial court relied on the information for all five initial charges, which it should not have done, the State of Indiana dismissed the originally-included rape charge. IN Tr. at X. Instead, the offense Mr. Branch was convicted of, sexual battery, was not a violent felony, as addressed above. Mr. Branch's nonexistent "forcible rape" conviction is no more reliable than the vacated assault conviction at issue in *Johnson v. Mississippi*.

Since *Johnson*, the United States Supreme Court has continued to prohibit the use of invalid aggravators in the capital sentencing decision. *E.g.*, *Sochor v. Florida*, 504 U.S. 527, 539 (1992) (Eighth Amendment error to consider the cold, calculated, and premeditated aggravator after the State failed to provide sufficient evidence to meet its burden of proof); *Espinosa v. Florida*, 505 U.S. 1079, 1081 (Fla. 1992), ("Our cases establish that, in a State where the sentence weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment."); *Clemons v. Mississippi*, 494 U.S. 738, 741

(1990) (same as to heinous, atrocious, and cruel aggravator invalidated due to vagueness). The United States Supreme Court explained that it did not matter whether it was the jury and/or the judge who weighed the invalid aggravating circumstance, as when "a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." *Id.* at 1082.

Here, the Indiana conviction was the sole basis for the prior violent felony aggravator. Because it was not a crime of violence, it should not have been considered. The aggravating factor was invalid. The weighing of this invalid aggravator tainted the reliability of the trial court's sentencing determination and violated the Eighth Amendment. *See Johnson*, 428 U.S. at 586; *Espinosa*, 505 U.S. at 1079. As explained in Section I.C, this error "affected the proceedings to such an extent it equates to a violation of the defendant's right to due process of law," *see Jaimes*, 51 So. 3d at 448, and constituted fundamental error.

D. The fundamental error that occurred by imposing a death sentence based on an invalid aggravator was not harmless

As previously explained, under Florida law, "fundamental error is not subject to harmless error review." *Reed*, 837 So. 2d at 369-70. However, even if this Court were to follow the harmless error test as provided in *Clemons* for death sentences imposed on invalidated aggravators, Mr. Branch can still show that the error was not harmless. *See Clemons*, 494 U.S. 738 (finding that where courts relied on an invalid

aggravator, an appellate court can conduct a harmless error analysis). Harmless error analyses in this Court look to "whether there is a reasonable possibility that the error affected the [sentence]." *Mosley v. State*, 209 So. 3d 1248, 1284 (Fla. 2016). As this Court has explained, "It is clear . . . that [the United States Supreme] Court believes such an error is more likely to be harmful because evidence has been admitted which is later revealed to be materially inaccurate." *Preston v. State*, 564 So. 2d 120 (Fla. 1990). In fact, it is "the State [that] bears an extremely heavy burden in cases involving constitutional error." *See Mosley*, 209 So. 3d at 1283. The use of an invalid aggravator implicates the Eighth and Fourteenth Amendments. The State bears the burden of proving harmlessness, and the burden of proof is beyond a reasonable doubt. *See Armstrong*, 862 So. 2d at 718. So, for example, it is not enough for the Court to merely find that other aggravators exist. *See Jennings v. McDonough*, 490 F.3d 1230, 1249 (11th Cir. 2007) ("In a weighing state like Florida, the presence of an invalid aggravating factor in the weighing calculus renders a death sentence unconstitutional under the Eighth Amendment, and the sentence may not be automatically affirmed merely because 'other valid aggravating factors exist.'") (quoting *Sochor*, 504 U.S. at 532).[2]

[2] As described in *Barclay v. Florida*, 463 U.S. 939 (1983), this Court traditionally followed a harmless error approach where "[i]f the trial court found that some mitigating circumstances exist, the case [would] generally be remanded for resentencing. . . . If the trial court properly found that there are no mitigating circumstances, the Florida Supreme Court applies a harmless error analysis." *Id.* at

Moreover, when conducting the harmless error analysis, this Court must consider the entire record. *Marek v. State*, 14 So. 3d 985, 996 (Fla. 2009). This includes any new evidence presented in post-conviction proceedings. *Id.* In conducting its harmless error analysis, this Court should "conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Swafford v. State*, 125 So. 3d 760 (Fla. 2013). Thus, the Court must look not just at the evidence presented at trial, but also that presented during all post-conviction proceedings in this case, including that contained in the January 29, 2018 successive 3.851 motion.

This case bears far more resemblance to those cases where the consideration of an invalid aggravator was found to be prejudicial rather than harmless. For example, error has been found harmless where a prior violent felony was invalidated but there were multiple prior felonies to support the aggravator. *See Daugherty v. State*, 533 So. 2d 287, 289 (1988). The use of invalid aggravators have been upheld in other contexts where the evidence supporting the invalid aggravator would have been considered in the sentencing determination anyway because that same evidence was used to support a separate, valid aggravator. *See, e.g.*, *Brown v. Sanders*, 546 U.S. 212 (2006) ("An invalidated sentencing factor (whether an eligibility factor or

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955. Here, the trial court did find some mitigating circumstances, so Mr. Branch's case should be remanded for sentencing. *Id.*

not) 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 sentence to give aggravating weight to the same facts and circumstances."); *Zant v. Stephens*, 462 U.S. 862 (1983) (upholding use of evidence supporting an aggravator later struck invalid where that evidence was "properly before the jury and whose accuracy was unchallenged."). None of these conditions existed in Mr. Branch's case. The only use for the evidence supporting the prior violent felony was to support that aggravator. As it has been established that the Indiana sexual battery conviction could not qualify as a prior violent felony here in Florida, the evidence could not have been used for any other purpose. And unlike *Daugherty*, the Indiana conviction was the only one used to meet the aggravator. Thus, the disqualification of the Indiana conviction in Mr. Branch's case is not harmless.

Mr. Branch's invalidated aggravator is comparable to the one used in *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003), where the State used a prior conviction of indecent assault and battery on a 14-year-old girl to support the prior violent felony aggravator. *Id.* at 718. This conviction was later vacated. *Id.* This Court found that "[g]iven the nature of the crime underlying the vacated conviction – a sexual offense upon a child . . . [it could not] say that the consideration of *Armstrong*'s prior felony conviction of indecent assault and battery on a child of the

age of fourteen constituted harmless error beyond a reasonable doubt." *Id.* Mr. Branch's case is very similar. Because reviewing courts in Florida continue to assume that Mr. Branch pled guilty to some sort of rape or Florida-like sexual battery charge, the invalid aggravator in Mr. Branch's and Mr. Armstrong's case are nearly identical. For the same reason that the aggravated nature of a sexual offense against a 14-year-old is prejudicial in Mr. Armstrong's case, so too is it in Mr. Branch's. His sentence should similarly be vacated.

The harmfulness of the Indiana conviction is even more apparent when considering the entire record in this case. *See Swafford*, 679 So.2d at 776 (indicating review may consider the entire record). At trial, trial counsel's mitigation presentation was scant at best. During the closing argument, trial counsel summarized Mr. Branch's mitigating evidence:

> I think we can find that with the unfortunate background that he's had, and that is basically not being able to be with his father, his father and mother. More in particular, his brother who was very close with him, the feeling of not being wanted by them, being treated differently than Robert, his brother, I would suggest to you that these are all mitigating circumstances that you should consider.

R. 1025.

As the January 29, 2018, Rule 3.851 motion now before the Court in the accompanying appeal made clear, however, there was so much more to Mr. Branch's life story. Indeed, the Circuit Court acknowledged at the recent *Huff* hearing that Mr. Branch's childhood was "rather horrendous." SPCR. 1111. His childhood was

riddled with physical abuse and neglect. Mr. Branch was passed on from one relative to another, so that he constantly felt abandoned. And particularly pertinent in this case, one involving sexual violence, Mr. Branch was the victim of a brutal gang rape while in prison before his crimes in this case, and there are indications that he had been sexually abused in the past.[3] It is nearly impossible to suggest that by invalidating the prior violent felony aggravator, thereby subtracting from the calculus a sexually forceful crime that Mr. Branch was supposed to have committed, and by adding multiple instances of abuse *against* Mr. Branch to the mitigating evidence, that the inclusion of this invalidated prior violent felony aggravator may be deemed harmless.

CONCLUSION

The trial court mistakenly believed that Mr. Branch's sexual battery conviction in Indiana amounted to a sexual battery conviction in Florida, a serious sexual felony tantamount to rape. Instead, the Indiana conviction was a low-level, non-rape felony in Indiana, and it did not amount to a violent felony. However, the trial court erroneously instructed the jury that the prior conviction was violent, and it then relied on the Indiana conviction to support its prior violent felony aggravator

[3] Further discussion of the extensive mitigation evidence is available in Mr. Branch's 3.851 motion filed January 29, 2018 in the First Judicial Circuit Court, in and of Escambia County. *See Branch v. State*, Escambia Cty. No. 1993-CF-870-A, SPCR. 239-58.

finding. These were both fundamentally erroneous. This jury instruction went to an element in dispute, rendering the instruction fundamental error. *Stewart*, 420 So. 2d at 863. Then, the trial court's belief that either it could rely on the dismissed rape charge or Mr. Branch's Indiana conviction was a crime of violence allowed misinformation into the sentencing decision, another fundamental error. *See Jaimes*, 51 So. 3d at 449; *F.B.*, 852 So. 2d at 230-31. This misinformation was a mistake of constitutional magnitude in violation of Mr. Branch's Fourteenth Amendment due process rights, requiring that Mr. Branch's death sentence to be vacated under *Tucker* and *Townsend*. In addition, this constituted a violation of the Eighth Amendment mandate of heightened reliability in capital cases and similarly requires reversal under *Johnson* and *Clemons*.

For the foregoing reasons, Petitioner respectfully requests that this Court grant a writ of habeas corpus, vacate his death sentence, and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 8, 2018, the foregoing was served via the e-portal to Assistant Attorney General Charmaine Millsaps at cappapp@myfloridalegal.com and Assistant State Attorney John Molchan at jmolchan@sa01.org.

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated petition for a writ of habeas corpus is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.100(I).

/s/ Billy H. Nolas
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