IN THE SUPREME COURT OF FLORIDA

NORMAN BLAKE McKENZIE

Appellant,

vs. CASE NUMBER: SC20-243

STATE OF FLORIDA

Appellee.
_____/

On appeal from the Circuit Court of the
Seventh Judicial Circuit,
In and For St. Johns County, Florida

**INITIAL BRIEF OF APPELLANT**

JEFFREY DEEN
REGIONAL COUNSEL - 5th DISTRICT

MICHAEL P. REITER
ASSISTANT REGIONAL COUNSEL
Fla. Bar No. 320234
Office of the Criminal Conflict
and Civil Regional Counsel, 5th Dist.
307 N.W. 3rd Street
Ocala, Florida 34475
Phone: (352) 732-1230
Primary E-mail: rccmarion@rc5state.com
Secondary E-mail: mreiter@rc5state.com
ATTORNEY FOR APPELLANT

**TABLE OF CONTENTS**

**PAGE NO.**

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

## PRELIMINARY STATEMENT

Counsel will refer to the record on appeal using "R" and "T" for the transcript of the penalty phase trial. Counsel will refer to the Appellant as "Appellant" or "McKenzie."

## REQUEST FOR ORAL ARGUMENT

Mr. McKenzie has been sentenced to death. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. McKenzie, through undersigned counsel, urges that this Court permit oral argument.

## STATEMENT OF THE CASE

BACKGROUND

A jury convicted Norman Blake McKenzie of the first-degree murders of Andy Wayne Peacock and Charles Frank Johnston. *McKenzie v. State*, 29 So.3d 272, 277 (Fla. 2010). The jury recommended the death penalty by a vote of ten to two for each murder. *Id.* Following that recommendation, the trial court sentenced McKenzie to death for the murders. *Id.* at 277-78. After discharging counsel, McKenzie represented himself during both the guilt and penalty phases of trial, as well as during the *Spencer*[1] hearing. Id. at 277.

On direct appeal, McKenzie asserted the following issues: (1) the trial court departed from judicial neutrality when it *sua sponte* struck a juror for cause; (2) the *Faretta* and *Nelson*[2] inquiries were defective and, therefore, the trial court impermissibly allowed McKenzie to represent himself; (3) the trial court improperly restricted McKenzie's access to standby counsel; (4) the trial court erred when it prepared one sentencing order to address both murders; (5) the death sentences are not proportionate; (6) Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584 (2002); (7) the role of the

---

[1] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

[2] *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).

jury during the penalty phase was impermissibly diminished in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and (8) the death sentences are unconstitutional because the jury did not issue specific findings with regard to aggravating circumstances and, therefore, it is impossible to determine whether the jury determination was unanimous with regard to the aggravating circumstances that applied. *McKenzie*, 29 So.3d at 279. This Court denied relief on all claims and affirmed McKenzie's convictions and sentences. Id. at 288. The United States Supreme Court subsequently denied certiorari review. *McKenzie v. Florida*, 131 S.Ct. 116 (2010).

On September 15, 2011, McKenzie filed a motion to vacate the convictions and sentences pursuant to Florida Rule of Criminal Procedure 3.851, asserting four claims. The first claim alleged that due to State action, McKenzie was denied a full and fair capital sentencing phase, and the postconviction court should now consider McKenzie's mitigation evidence to determine whether his death sentences are constitutional. The "State action" in question was divided into multiple subparts and can be summarized as follows: (1) appointed counsel were ineffective during the time they represented McKenzie because they failed to properly visit him in custody and sufficiently consult with him before waiving his right to a speedy trial; counsel also failed

to adequately explain the capital sentencing process; (2) McKenzie was not offered the assistance of a mental health expert pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), and counsel were ineffective for failing to ask for the appointment of an expert prior to their discharge; (3) McKenzie had a constitutional right to compel witnesses to testify on his behalf but was not permitted to do so; (4) McKenzie was denied his right of access to courts because he was not given access to a law library; (5) McKenzie was denied the right to present mitigation when he attempted to model his defense after the presentation by the prosecution, but the prosecutor blocked introduction of the mitigation by objection; (6) the prosecutor's use of McKenzie's opening statement as substantive evidence violated the Confrontation Clause of the United States Constitution; (7) the prosecutor improperly visited McKenzie in jail without a court reporter present and, during the visit, falsely informed McKenzie that he could not introduce statements from his first recorded interrogation by law enforcement officers; (8) the prosecution's failure during trial to play two recorded interrogations of McKenzie prevented the jury and the trial court from considering existing mitigation, and McKenzie was never given copies of the interrogations; (9) the PSI prepared by the DOC was deficient; and (10) without full consideration of McKenzie's drug abuse, his

mental illness, and developmental factors, the death sentences are unconstitutional.

In his second claim, McKenzie reiterated that his counsel were ineffective, which led McKenzie to choose to represent himself. Under this claim, McKenzie quoted extensively from a report prepared by a clinical and forensic psychologist and listed twenty-five "distinct toxic formative influences and compromising factors" that should have been presented during the penalty phase.[3] According to the psychologist, each of these influences or factors presented "malignant implications for Mr. McKenzie's life trajectory and participation in the capital offense." McKenzie's third claim challenged the

[3] The twenty-five factors are: (1) trans-generational family dysfunction and distress; (2) hereditary predisposition to psychological disorder and personality pathology; (3) hereditary predisposition for alcohol and drug abuse/dependence; (4) fetal cigarette exposure; (5) fetal alcohol exposure; (6) pregnancy and birth complications; (7) childhood symptoms consistent with Attention Deficit Hyperactivity Disorder; (8) inhalant abuse; (9) alcohol and drug abuse; (10) chronic stress in childhood; (11) Hepatitis C and HIV status; (12) mother in midteens at parenting onset; (13) physical and psychological abuse; (14) functional abandonment by father; (15) physical and emotional neglect post-divorce; (16) perverse family sexuality and probable family-context sexual abuse; (17) observed family violence; (18) mother's alcohol abuse; (19) corruptive and alcoholic stepfather figures; (20) corruptive influence of siblings; (21) traumatic sexual exposures and abuse; (22) availability of alcohol and illicit drugs; (23) childhood onset alcohol and drug abuse; (24) substance-related offending and incarceration in early adulthood; and (25) cocaine-induced psychological decompensation and extended sleep deprivation at the time of the offense, in a temporal context of psychotic symptoms.

constitutionality of Florida's lethal injection procedure and statute. His final claim challenged the constitutionality of Florida's death penalty statute in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court affirmed the Trial Court's denial of McKenzie's 3.851 motion. *McKenzie v. State*, 153 So.2d 867 (Fla. 2014).

In 2016, the United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016) overturned *Hurst v. State*, 135 So.2d 435 (Fla. 2014)(Hurst I). As a result of the ruling in *Hurst v. Florida*, this Court entered its opinion in Hurst v. State, 202 So.3d 40 (Fla. 2016) (Hurst II): "Thus, we hold that in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." Id. at 54.

As a result of Hurst II, on January 9, 2017, McKenzie filed his First Successive Motion to Vacate Judgment and Sentence (R34-70). One of his claims was the Hurst II opinion. On June 19, 2017, the Trial Judge granted McKenzie's motion and order a new penalty phase trial (R233-235).

The second Penalty Phase Trial began on August 26, 2019. The jury returned is verdict on Count I (R784-785) and Count II (R787-790) recommending death by a unanimous vote. A Spencer hearing was conducted on November 22, 2019 (R1063-1157). The Sentencing Hearing was conducted on February 14, 2020 (R969-982). The Trial Court's Sentencing Order followed the jury's recommendation and sentenced McKenzie to death (R887-942). McKenzie filed his notice of appeal on February 18, 2020 (R942).

## STATEMENT OF FACTS

FACTS DURING GUILT PHASE OF TRIAL AS SET OUT BY THIS COURT ON DIRECT APPEAL

[O]n October 5, 2006, two Flagler Hospital employees became concerned when Randy Peacock . . . did not report to work. The two employees drove to the home that Peacock shared with Charles Johnston. Upon their arrival, they noticed that Peacock's vehicle, a green convertible, was not there. When the employees entered the residence, they found Peacock lying face down on the kitchen floor in a pool of blood. When deputies from the St. Johns County Sheriff's Office (SJSO) arrived, they . . . located the body of Charles Johnston in a shed that was also located on the property. . . . Deputies observed a gold sport utility vehicle (SUV) in the driveway and determined that it was registered to Norman Blake McKenzie.

The deputies subsequently spoke with a neighbor of the victims. The neighbor stated that on October 4, 2006, he went to the victims' home to assist Johnston with repairs on his vehicle. When the neighbor first arrived, Johnston was not there but Peacock was present and was speaking with a man whom the neighbor later identified in a photo lineup as McKenzie. . .

McKenzie subsequently had an encounter with a Citrus County sheriff's deputy during which Randy Peacock's wallet was recovered from one of McKenzie's pockets. Further, Charles

Johnston's wallet was located in a vehicle that McKenzie had recently operated. McKenzie agreed to speak with SJSO deputies on two separate occasions during which he confessed to the murders of Peacock and Johnston.

McKenzie explained that he went to the victims' residence on October 4, 2006, to borrow money from Johnston because of his drug addiction. . . . McKenzie then asked Johnston for a hammer and a piece of wood so that he could knock some "dings" out of the door of his SUV. Johnston could not locate a hammer and gave McKenzie a hatchet. While walking into the shed to locate a piece of wood, McKenzie struck Johnston in the head with the . . . hatchet. Johnston fell to the floor and McKenzie struck him again. McKenzie then entered the home, approached Peacock, who was cooking in the kitchen, and struck him with the hammer side of the hatchet approximately two times.

McKenzie returned to the shed, and when he observed that Johnston was still alive, he struck Johnston one or more times with the hatchet. McKenzie removed Johnston's wallet from his pocket . . . and re-entered the residence. McKenzie observed that Peacock was struggling to stand up, so he grabbed a knife and stabbed Peacock multiple times. McKenzie . . . took Peacock's wallet and car keys, and departed in Peacock's vehicle. . . .

During the guilt phase of the trial, McKenzie admitted that he went to the victims' home on October 4 with the intention of taking their money. McKenzie also admitted that he hit both Johnston and Peacock with the hatchet and stabbed Peacock with a knife. After the State rested its case, McKenzie stated that he would not offer any witness testimony and further declined to testify on his own behalf.

On August 21, 2007, the jury found McKenzie guilty of two counts of first-degree murder.

**SUMMARY OF SECOND PENALTY PAHASE TRIAL**

**STATE'S CASE**

Perry Privette testimony (T416)

Mr. Privette worked at the hospital as a respiratory therapist alongside Randy Peacock (victim)(T416}. Randy was Privette's respiratory instructor; after completing the course, he then worked at Flagler Hospital (T417). Privette worked with Randy for about 10 years doing pulmonary function tests for outpatients (T418). Randy was his co-worker and best friend (T419). They both loved football and politics (T419). Randy was jovial and excited about life (T420).

October 5, 2006, Randy was scheduled to work that morning (T422). They were both scheduled to work at 7:30 am (T423). When Randy did not show, Privette began making phone calls without

success (T424). At approximately 11-11:30 Privette and Julie Aubrey (supervisor) went to Randy's residence (T425-426).

Privette noticed Randy's car was not at his residence (T426). He banged on the front door and tried to look through the windows, but no one answered (T427). They went to the back of the house, knocked on the door and looked through the window (T428). When four or five dogs came up to them, he thought that was strange, so they entered the residence because the door was unlocked (T429-430).

When he got to the kitchen, he saw Randy lying on the floor in a large pool of blood (T432). He and Julie then left the house and went to the driveway and called 911 (T433). Privette was shown Exhibit 39, [a photo] which he identified as Charlie Johnson and Randy Peacock (T434).

Julie Aubrey testimony (T438)

She was the manager of the cardiopulmonary department at Flagler Hospital (T439-440}. She supervised Mr. Privette and Mr. Peacock (T440). Randy was scheduled to work on October 5, 2006, from seven to three (T442). Randy did not show up for work on that day (T443). After multiple phone calls, she and Privette went to Randy's residence (T444). She had never been there before (T445). They knocked on the door. After no answer they went around back, no answer. Four or five friendly dogs approached them and were not barking (T445). They then went

around back and entered the residence (T446). She observed Randy on the kitchen floor in a significant pool of blood (T446). She and Privette then left and called 911 (T447).

Timothy Burres testimony (T448)

Burres is a Commander for St. Johns County Sheriff's Office (T449). Sergeant Jay Lawing notified him of a double homicide (T450). The crime scene was in St. Johns County and multiple patrol units were on scene when he arrived (T451). He learned that the deceased were residents of the location; they were Randy Peacock and Charles Johnson (T451).

Mr. Johnson was found inside the shed by a patrol deputy (T452). The residence was a double-wide mobile home. It had a front porch, a rear porch. It has a small, detached cottage and a carport (T452). There were three vehicles on the property. A gold Kia was registered to Norman Black McKenzie (T453). A white Chrysler was registered to a Robert Mitchell (T453). Mr. Mitchell was in Rhode Island at that time (T453). Mr. Peacock owned a green Sebring (T454).

FDLE was called to process the crime scene (T454). Burres observed Randy with a trauma to the head, there was evidently cooking on the stove, a large amount of soup or stew all over the place (T45&). He went through the residence and observed a number of items out of place (T457-458).

Burres went to the shed and observed Charlie Johnson with facial trauma (T458). He identified Exhibit 20 as the hatchet he observed in the shed (T460). There was a knife located in the sink (T465).

Burres attended the autopsy of both victims (T467). The hatchet was compared to the injuries to Mr. Peacock's head and it matched perfectly (T467). Mr. McKenzie was taken into custody in Citrus County the same day (T467). McKenzie abandoned Mr. Peacock's vehicle in Gainesville and stole another vehicle (T468). That vehicle was disabled in Marion County. McKenzie obtained a ride and took that vehicle (T468). In Levy County, he stole another vehicle from a lady (T469). In Citrus County, he was taken into custody after a wreck during a pursuit (T468). In McKenzie's wallet, items belonging to Peacock and Johnson were found (T469).

Burres spoke with McKenzie on February 6, 2007 (T471). Detective Tim Rollins read McKenzie his rights from a form (T472). McKenzie signed the form indicating he understood (T473). The interview was recorded and played for the jury (T474).

During the interview, McKenzie agreed to speak with law enforcement (T479). McKenzie indicated that his previous statement of what happened was accurate (T480). McKenzie stated the murders happened exactly how I told you before (T480).

McKenzie stated he was on drugs while at Randy's house, and McKenzie was also low on drugs and money (T481). When he first arrived at the house, Randy was there, but Charlie wasn't (T482). McKenzie stated there was a kid who lives across the street (T483). McKenzie was waiting for Charlie because he had a deal with him (T483). McKenzie would paint and fix up the place in Green Cove Springs(T484). McKenzie was going to ask Charlie for money without Randy knowing (T484). He was afraid to ask for money. McKenzie shot coke, saw a dent in his car and asked Charlie for a hammer. (T485).

McKenzie watched Charlie and the other guy do the brake job on Charlie's car. (T487). Charlie had fronted McKenzie money in the past (T487). Charlie didn't find a hammer, but gave him a hatchet (T489). McKenzie and Charlie went into the shed to find a piece of wood, and McKenzie hit Charlie in the back of the head with the hatchet (T490). McKenzie was so high, he thought it was a lot of noise when Charlie fell (T490). Charlie was making noises, so he hit him again once or twice (T491).

McKenzie was paranoid, so he went into the house from the front and saw Randy making stew (T492). McKenzie walked up to Randy and hit him on the top of the head with the hatched (T492). Randy was knocked out and fell into the pot and stood there. He didn't fall over (T492). McKenzie then hit him again (T493). He didn't fall, so McKenzie pulled him to the floor

(T493). McKenzie was so high that day he didn't remember if he hit Randy with the blade side or flat side of the hatchet (T494). McKenzie did stab Randy with a knife (T494).

McKenzie went back outside to the shed to take Charlie's watch. Charlie was trying to stand and that is when McKenzie did a lot of damage to Charlie (T495). McKenzie stated Charlie might have live if he had called an ambulance (T496). McKenzie took Charlie's wallet (T496). McKenzie did another shot of cocaine (T499).

McKenzie went back into the house and Randy was struggling to get back up (T499). McKenzie took a long knife and tried to cut Randy's jugular. He also tried to stab Randy in the heart (T500-501). McKenzie was confused about how many times he stabbed Randy. McKenzie stated if he had bad dreams, it's about Randy because of the noise he made (T502). McKenzie believes that the stab to the abdomen is what killed Randy (T503). McKenzie stated he was scared and high and just wanted to get out of there (T503). McKenzie stated he looked throughout the house for rings and stuff (T403-504). McKenzie found a wallet inside a lunch box (T504). He said he wasn't a murderer, just a junkie wanting more drugs (T504),

McKenzie took something out of the refrigerator, a couple of bottles of water to shoot dope with, and took Randy's car keys (511). McKenzie knew the old lady who lived in the back,

but didn't want to do anyone any harm (T512). When he left it appeared to him that Randy and Charlie were deceased (T514).

McKenzie stabbed Randy in the back with the knife (T514). He cleaned off the knife and put it in the drain (T515). Randy didn't say anything, but McKenzie believed Randy was trying to stay alive (T516). McKenzie didn't know if Randy realized he was dying (T517). The next day McKenzie bought drugs and noticed blood on his toes (T518). McKenzie stated, after being asked, that he stabbed Randy in the head (T520). He stated that this shit eats me alive every night (T521). McKenzie stated he totally forgot he struggled with Randy because he wanted to, but remembered when the deputies asked (T523-524).

When McKenzie left Randy's residence, he thought about going to Savannah (T528), but he wound up at the Jacksonville airport (T531). McKenzie believes he bought 1,000 packs of cigarettes with Randy's credit card (T531). He thinks there was about $50 in both wallets (T532). He went to Gainesville to get more drugs (T537). He abandoned Randy's car midmorning (T537). He took the fisherman's car; the keys were in the ignition (538). He ran off the road with the vehicle (T540). He grabbed his drugs, cigarettes, and a box and ran out to I-75 (T542). He flagged down a vehicle and told the driver he had a gun (T542). McKenzie told the driver to get out of the car (T543). In Levy County, McKenzie took a woman's car at an intersection (T543).

He stated he was being pursued at a high rate of speed. During the chase he hit a rock and left the car. He put his drugs into his mouth and dove into the river (T546).

On Burres's cross-examination, he stated he was not present at the first interview. He remembered Mr. McKenzie stating he used extensive drugs for about nine days (T550). McKenzie had stated he was frequently using drugs and spent thousands of dollars supporting his habit. (T550). McKenzie had stated he went to the house to ask Charlie for money (T552).

McKenzie did not wear gloves and told police they would probably find his prints on the weapons. The weapons were not hidden, but in plain sight in the residence (T554-555). In one of the interviews, McKenzie stated a woman, whose house he went into, saw him shooting up drugs (T556).

Dr. Predrag Bulic testimony (T561)

Dr. Bulic is the chief medical examiner for three counties T562). Dr. Bulic reviewed the autopsies of Randy Peacock and Charles Johnson (T565). Dr. Steiner did the actual autopsies, who was deceased at the time of the trial (T566). Dr. Bulic stated that Charles Johnson's manner of death was homicide and the cause was multiple chop wounds to the head (T568). Dr. Bulic testified he was of the understanding that Mr. Johnson was trying to get up after the first blow, which would indicate he was in significant pain (T573).

Dr. Bulic testified that Randy Peacock's cause of death were multiple stab wounds to the torso (T574-575). He also testified that although he died as a result of loss of blood, Mr. Peacock may not have survived the multiple blunt-force injuries to the head (T575). He also testified that the manner of death was a homicide (T575). Dr. Bulic testified that the burns Randy sustained would have caused severe pain (T577; 581). Dr. Bulic indicated there were six stab wounds (T582). The defendant's explanation of the events is consistent with the injuries (T591).

On cross-examination, Dr. Bulic testified that the head injuries to both victims would have caused quick unconsciousness (T593). He also agreed that there would be no pain once someone is unconscious (593).

On redirect, Dr. Bulic testified that if Mr. Peacock regained consciousness, he would have felt pain (T594-595).

Samantha Otter testimony (T598)

Ms. Otter is a latent-print technician (T598). She compared eight judgment and sentences to known standards of Norman McKenzie (T605). Ms. Otter identified the Defendant, Noman McKenzie, as the person whose major-case prints she examined (T606). The eight judgment and sentences were introduced into evidence, Exhibits 44-51 (T610). She opined that all eight

judgment and sentence prints were from the same individual, Norman McKenzie (T611).

Each of the following testified and described their encounter with the Appellant regarding his prior violent felonies: Clarice Polczynski (T613), Amanda Hughes (T622), Chantel Wilson (T631), Charles Maguire (T643), Larry Van (T650), and Marquette Fredrick (T658).

Cesar Saldana testified by video (T686)

In 2006, he was a detective in Alachua County Sheriff's Office (T687). On September 28, 2006, he was called out to a reported kidnapping (T688). Saldana developed Norman Blake McKenzie as the kidnapper (T693). Saldana obtained McKenzie's taped interview where McKenzie confessed to kidnapping Mrs. Coffee (T694). McKenzie was later convicted of Armed Kidnapping (T695).

Timothy Rollins testified (T696)

Mr. Rollins is a Deputy Sheriff in St. Johns County (T697). He was working on October 5, 2006 (T698). He was directed to Citrus County to where Norman McKenzie was being held (T700). He conducted a recorded interview with Mr. McKenzie (T701). He read McKenzie his constitutional rights from a preprinted card on October 5, 2006 (T701-702). The interview was published to the jury (T705).

Defendant stated he was addicted; he was insane and high on drugs (T715). He took Randy's car because it had three quarter-ounce bags of dope in it (T716). McKenzie said he did three robberies before going to Georgia (T719). McKenzie began explaining what happened with Randy and Charlie (victims) (T741-769).

Kathy Whitman testified (T775)

Randy Peacock was her brother. She read an impact statement to the jury (T775-778).

David Brooks testified (T779)

Mr. Whitman is Randy Peacock's older brother. He read an impact statement to the jury that was written by Janet Luke, his older sister (T780-785).

Julianne Schneider from State's Attorney Office testified (T785)

Ms. Schneider is the victim advocate for the State Attorney. She read a victim impact statement from Charles Johnson's daughter—Cheryl Johnson. (786-789).

**DEFENSE'S CASE (T794)**

Tammy Kimball testified (T794)

In 2005 and 2006 Mr. Kimball lived in Gainesville. She was a prostitute and sold drugs (T795). She used drugs every day. She met McKenzie in 2005 (T795). McKenzie came with him to her motel room and used cocaine (T796-797). At first, they met two or three times a week and smoked a lot of cocaine (T797).

She visited McKenzie at his new apartment complex by the mall. McKenzie had a new motorcycle, had a good job, new furniture, and was doing well (T798). Their relationship was for drugs only (T799). McKenzie began to shoot cocaine and hang around with those type of people (T799).

In 2006, before the murders, McKenzie picked her up on 13th Street in Gainesville. McKenzie was really high and they went to Patty's house (T799). Kimball went upstairs to get some clothes, and McKenzie was gone. That was the last time she saw McKenzie (T801).

On cross, Kimball agreed that while McKenzie was high, he wasn't violent (T803). On redirect, Kimball agreed that McKenzie had money to buy drugs when they were together (T803).

Dr. Stephen Bloomfield testified (T805)

Dr. Bloomfield is a licensed psychologist in Florida and Massachusetts (T806). Dr. Bloomfield reviewed McKenzie's records from Department of Corrections; transcripts of hearings from original trial and original sentencing; and psychological testing. He spoke with McKenzie's mom and legal team. He met with McKenzie four times, and administered questionnaires and psychological instruments (T810-811). Each time he met with McKenzie he spent about two hours (T811).

Dr. Bloomfield opined that McKenzie had a chaotic childhood. He smoked marijuana at the age of five. His parents

divorced when he was about eight. He got in trouble at around ten. He stole food for the family after the divorce (T814).

McKenzie would describe his childhood as great because he didn't see it as chaotic (T814). McKenzie used methamphetamine at age ten for the first time (T816). His life was focused on drugs. Bloomfield opined that McKenzie suffers from substance-abuse disorder (T816). McKenzie explained that all of the trouble he got in to was with the use of drugs (T817).

McKenzie explained to Bloomfield that around the time of the murders he was in a heavy state of intoxication and had been awake for several days (T817). When people are awake for 48 hours or more, they start experiencing paranoia (T818).

Dr. Bloomfield observed McKenzie's bank statements around the time of the murders, which indicated significant amount of money being withdrawn, which fit with McKenzie's description of his drug use (T819). Bloomfield testified that due to his drug use, McKenzie was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law were impaired (T819).

Having viewed McKenzie's artwork, Bloomfield opined that he was an artist (T820). Defense Exhibit 5, a disc, was introduced; it contained was a compilation of McKenzie's artwork.

On cross-examination, Dr. Bloomfield testified that McKenzie scored 103 on his IQ test (T824). McKenzie thought his IQ would be higher (T824). McKenzie was given a Trauma Stress Inventory test to determine if he suffered from posttraumatic stress disorder (T925). He showed no signs or symptoms of posttraumatic stress disorder (T826).

Bloomfield also gave McKenzie a NAS-PI test (Novaco Anger Provocation Inventory) (T828). It measures anger under different circumstances. McKenzie scored low. He doesn't get angry (T829).

Dr. Bloomfield also administered the MMPI test (Minnesota Multiphasic Personality Inventory (T830). It is designed to determine if a person suffers from mental illness (T831). The test revealed that McKenzie does not suffer from any type of mental illness (T831).

Dr. Susan Skolly-Danziger testified (T855)

She testified as an expert in toxicology pharmacy and pharmacology. She also works as a clinical pharmacist (T856). Dr. Skolly was asked to review McKenzie's drug and medication use records and speak with him to see if it affected his behaviors and performance at the time of the offense (T869).

She had also reviewed other reports from 2007: several mental health experts, a report from Dr. Mark Cunningham (a gastroenterologist), and a presentence investigation report from September 26, 2007 (T870). She reviewed interviews with

McKenzie's stepmother, three arrest interviews, two videos, one audio that occurred on October 5, 2006 (T871). She reviewed some juvenile records, a report from Investigator Vickers, and Dr. Meadows's report, and an educational and medical report from prison (T871). She reviewed two letters written by McKenzie. She spoke with McKenzie's mother. She spoke with Tammy Kimball on August 14. She also met with McKenzie at St. Johns County Jail March 18 and August 8, 2019 (T872).

Dr. Skolly explained that McKenzie had abused many types of drugs continuously throughout his life: marijuana, hashish, cocaine (by snorting, smoking and by injection), methamphetamine, Quaaludes, use of inhalants, and breathing in fumes from paint agents, and drinking alcohol (T873-884).

McKenzie's use of drugs since childhood affected the function of his brain (T885-897). McKenzie also contracted HIV and Hepatitis C (T897). Dr. Skolly testified that McKenzie's lifelong drug addiction leaves him with no tools to control his drug use or his actions (T899).

She also testified that his drug use caused emotional stress, and he was hearing and seeing things that were not present (T900). The drugs also caused paranoia and delusions (T900).

On cross-examination, Dr. Skolly admitted she had not read the reports from Alachua, Broward, and Marion counties' prior

offenses (T902). She did not speak with McKenzie about his prior offenses (T903). She stated she didn't ask specifically about the homicides because it was her job to inquire only about the drug use (T904).

## Standard of Review

All of the issues below are either a combination of fact and law, or completely legal argument. The ruling on a conclusion of law would be a *de novo* review. See: *Florida Department of Revenue v. New Sea Escape Cruises*, 894 So.2d 954, 957 (Fla. 2005).

## SUMMARY OF ARGUMENT

**Argument I:** The United States Supreme Court held that it is the Jury and not the Judge who makes the authorized findings of fact to support the death penalty. Therefore, the Jury and not the Judge should have stated the facts in their verdict that they relied upon to support the recommendation of the death penalty.

**Argument II:** Because McKenzie's sentence was vacated, Section 782.04(1)(b) and Fla.R.Crim.P. 3.181 applied. Had the state argued excusable neglect, the trial court could have allowed the amended notice to include the new aggravator.

**Argument III:** Because you cannot unring a bell, reading impact statements to a jury—even after being instructed it cannot be used as an aggravator—prejudiced McKenzie's fair trial. There is no prohibition in reading the impact statement to the judge during a Spencer hearing.

**Argument IV:** Florida's capital sentencing scheme requires the finder of fact to make several determinations before the death penalty can be considered. These determinations include a finding that one or more aggravating factors are present, a finding that the aggravating factor or factors are sufficient to impose death as a penalty, and a finding that the aggravating factor or factors outweigh any mitigating evidence presented. *See* § 921.141(2), Fla. Stat. (2019).

These determinations are functional "elements" of the capital offense and, therefore, must be proven beyond a reasonable doubt. They are functional elements, although not elements of the underlying offense, because they increase the available penalty for the charged crime. The jury did not make these findings based on proof beyond a reasonable doubt.

**Argument V:** At the time of McKenzie's second penalty phase, Hurst II became substantive law. Because death is an enhanced penalty, all the requirements established by Hurst II were elements required to be found beyond a reasonable doubt.

**Argument VI:** Florida's sentencing scheme is unconstitutional because the aggravating factor of a previous conviction of a felony involving the use or threat of violence is vague, overly broad, violates due process, and does not channel the factfinder's discretion in a way that genuinely narrows the class of persons eligible for execution.

## ISSUE I

**WHETHER THE TRIAL COURT ERRED IN DENING DEFENDANT'S MOTION FOR INTERROGATORY PENALTY PHASE VERDICT IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH CONSITUTIONAL AMENDMENTS?**

On October 18, 2018[4], the Defendant filed a MOTION FOR INTERROGATORY PENALTY PHASE VERDICT (R334-337). Within the Motion the Defendant stated in paragraph 4:

> To provide Due Process, meaningful appellate review, the right to a jury determination of the statutory elements underlying punishment and the right to a reliable sentence under Article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the jury must determine the presence of the statutory elements upon which imposition of the death penalty is based. *Ring v. Arizona*, *536* U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973) (aggravating factors in Section 921.141 (6), Florida Statutes, actually "define the offenses" punishable by the death penalty.

The Defendant stated further in the motion that the Jury should be required to set out in their verdict the facts which were relied upon in finding that an aggravator was found beyond a reasonable doubt by a unanimous vote, the actual vote count the jury made to find the aggravator, and the mitigators found proven and their vote count on that mitigator. The Judge denied

[4] On the same date the Defendant also filed a MOTION FOR SPECIAL VERDICT FORM CONTAINING FINDINGS OF FACT BY THE JURY (R475-477). The contents of this motion contain similar requests as the motion above. This motion was denied by the Trial Court (R517).

the Defendant's motion without explanation, other than stating it would use the standard jury instruction (R 520).

As a result of that denial, the jury was not required to make those specific findings in their verdict. (See R784-790). The Trial Court's ruling was wrong.

The penalty phase trial in this case began on August 25, 2019, by empaneling a jury. The trial became final when the court entered its sentencing order on February 14, 2020. At that time *Hurst v. State*, 202 So.3d 40 (2016) was the law controlling this case.

In *Hildwin v. Florida*, 490 U.S. 638, 106 S.Ct. 2055, 104 L.Ed.2d 728 (1989), the United States Supreme Court held: "Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id at 640-641.

However, *Hildwin's* ruling was no longer true after *Hurst v. Florida*, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), specifically overruled *Hildwin, supra,* and *Spaziano v. Florida*, 468 US 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The Court in *Hurst* held the following regarding facts giving rise to supporting the death sentence:

> We now expressly overrule *Spaziano* and *Hildwin* in relevant part. *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the

> jury." *Hildwin,* 490 U.S., at 640–641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with *Apprendi*. 136 S.Ct. at 623.

This Court in *Hurst v State*, 202 So.3d 40 (2016) by stating:

> We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. Id at 44.

However, the Appellant contents that the *Hurst v. State (II)* Court incorrectly applied *Hurst v. Florida* ruling that the "specific finding **authorizing** the imposition of the sentence of death be made by the jury." (Emphasis added). What "authorizes" the jury to make a finding are FACTS. Therefore, the jury was required to specifically state in their verdict what facts they were relying upon beyond a reasonable doubt in order to find that an aggravator exists.

The next question becomes, what does "specific finding" mean? It is obvious that the trial court believes that by the jury checking the box on the verdict form finding an aggravator beyond a reasonable doubt is sufficient to satisfy *Hurst v. Florida*. (R894).

However, Appellant contends that argument is also wrong Why? Because without the jury listing facts on the verdict form, the judge, in effect, becomes the fact finder in violation of *Hurst v. Florida* when he lists his determination of the facts in his sentencing order.

For example: The Trial Court stated the following in its order on the aggravator that the capital felony was committed during the commission of a Robbery:

> During the recent penalty phase the State introduced the Defendant's two recorded statements made to SJSO detectives. During his initial statement made the day after the murders, the Defendant told detectives he went to the victims' residence in order to steal money from the victims so he could get more drugs. After attacking the victims, the Defendant took their wallets, money and credit cards. The Defendant also took Randy Peacock's SUV. When arrested in Citrus County the day after the murders, the Defendant was found in possession of Randy Peacock's wallet, and Charles Johnston's wallet was found in a vehicle the Defendant had operated that day.
>
> Although the State did not charge the Defendant with robbery, it was proved beyond a reasonable doubt during the recent penalty phase that the murder of Randy Peacock was committed while Defendant was engaged in the commission of a robbery. (R897).

However, the Trial Court stated the facts **he** relied upon in **every** aggravator the Trial Court found that existed beyond a reasonable doubt. In addition, the Trial Court stated the law supported the aggravator utilizing the facts **he** found to exist. (Emphasis added).

If the jury is required to make "specific findings authorizing the imposition of the sentence of death…" (*Hurst v. Florida* at 623), then why is the Trial Court doing it in his sentencing order? When the Trial Court made those factual findings, which authorized the imposition of the sentence of death, the Trial Court's order circumvented the holding of the United States Supreme Court; the United States Supreme Court required the jury to make those findings. In other words, it is counterintuitive to constitutionally require the jury to make the finding of facts, and then disregard them and have the judge make the findings. That is a direct contradiction to the ruling in *Hurst v. Florida.*

## ISSUE II

**WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO STRIKE STATE'S AMENDED NOTICE OF AGGRAVATING CIRCUMSTNACES IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION?**

On August 28, 2018, the State filed its Renewed Notice of Intent to Seek the Death Penalty and List of Aggravating Factors (R252-253), which included four aggravating factors. Heinous, Atrocious, and Cruel was not one of them.

On January 23, 2019, the State filed its Motion to Amend Notice of Aggravating Factors. (R542-543).

On February 20, 2019, the Appellant filed his Motion to Strike State's Amended Notice of Aggravating Factors as Untimely. (R555-556).

On March 13, 2019, the State filed its Memorandum of Law in Opposition to Defendant's Motion to Strike State's Amended Notice of Aggravating Factors. (R567-575).

On March 21, 2019, the Trial Court denied the Appellant's Motion. (R590-598).

Basically, the State's argument and the Trial Court's ruling were based upon the determination that neither Fla. Stat. §782.04(l)(b) (2016), nor Fla.R.Crim.P 3.181 are retroactive. In pertinent part, both argue the language of the statute and rule as follows:

> If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

Both the State and the Trial Court argue that since the Appellant was charged by indictment and arraigned before the effective date of both the Florida Statute and Rules of Criminal Procedure, there was no requirement for the State to list what aggravators would be sought and, therefore, no good cause need be shown. They are both wrong.

In the Appellant's Motion to Strike Amended Notice to Seek the Death Penalty, Appellant stated:

> 4. That on or about January 23, 2019, more than fifteen months after the Renewed Notice was filed, the state filed a motion to amend its notice of aggravating factors adding the aggravating factor of especially heinous, atrocious and cruel.
>
> 5. As a basis for the late filing, the state claims that the discovery of statements made by the defendant after his arrest provides the basis for this new aggravating factor.
>
> 6. Florida Rules of Criminal Procedure 3.181 states in pertinent part, " .... The court may allow the prosecutor to amend the notice upon a showing of good cause."
>
> 7. The reason given in the state's motion does not establish good cause as the information that the state relied on was in the state's possession since 2007 when the defendant was arrested and interviewed by law enforcement several times. The information was also available during the trial of defendant and was made a

> part of the trial through the testimony of detective Timothy Burres. (See Volume II of Trial Transcript) (R556).

Appellant argues that the Court erred in not striking the Amended Notice. The case *Hurst v. Florida*, 136 S.Ct. 616 (2016), fundamentally changed the sentencing scheme in the penalty phase. The *Hurst* standard created not only a procedural right for a defendant in a penalty phase trial but affirmed a defendant's due process substantive right to a unanimous verdict. See: *Aprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002). The change in the Florida Statute in response to *Hurst* now codifies the defendant's right to a Notice specifically listing the aggravators. Since the State did not timely refile a Notice specifying the aggravators, nor give good cause to amend the Notice within the specified time frame, the State's prior Notice is by rule quashed and the State cannot seek the death penalty. See*: State v. Chantiloupe*, 248 So.3d 1191 (Fla. DCA 4th 2018).

First: The Statute is clear as to the requirement the state is to comply with. In *Key v. State*, 45 Fla. L. Weekly D345a (4th DCA 2020) the court addressed this issue when it stated: "… Our goal in construing statutes is to ascertain and carry out the legislative purpose of the statute by applying clear statutory language as written, and not to seek out or construct an interpretation that necessarily favors one party or the

other…when a [criminal] *statute is open to more than one interpretation…the court may invoke the 'rule of lenity'."* See: *Kasischke v. State*, 991 So.2d 803, 814 (Fla. 2008). When there is any ambiguity the rule requires that the court treat the defendant more leniently. See: *State v. Byers*, 823 So.2d 740, 742 (Fla. 2002) ("The rule requires that [a]ny ambiguity or situations in which statutory language is susceptible to differing constructions *must* be resolved in favor of the person charged with an offense).

Second: There was no need for the statute to be retroactive, because this case was remanded for a new penalty phase and the sentence vacated after the effective date of the statute, thereby requiring no retroactivity. The rule applied to the State as written.

The State and the Court's argument that the statute is not retroactive is a red herring. After McKenzie's sentence was vacated, and the State filed a Renewed Notice to Seek the Death Penalty, the new statute and rule of criminal procedure applied to that Renewed Notice to Seek the Death Penalty.

But regardless of which argument is correct, the State and the Trial Court had a remedy to fix the late filing of the Notice to Seek the Death Penalty and list the aggravators. As in *Chantiloupe*, *supra*, the State could have sought the Court's

permission to amend based upon a showing of "good cause." They failed to do so, as in *Chantiloupe*.

Both the State and the Trial Court relied upon their belief that because the statute was not retroactive, and this case was initiated before the new statute and rule, there was no need to show good cause. Again, Appellant contends they are wrong.

## ISSUE III

**WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO ALLOW VICTIM IMPACT EVIDENCE BEFORE THE JUDGE ALONE IN VIOLATION OF APPELLANT'S FOURTH, FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSITUTION?**

On October 18, 2018, the Appellant filed his Motion to Allow Victim Impact to be put before the Judge alone. (368-374). On December 6, 2019, the Trial Court denied the motion (R528).

In support for requesting the Trial Court to grant his motion, the Appellant cited to the following statute:

Florida Statute 921.141(7) provides:

> (7) **Victim impact evidence—**Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This statute merely allows the prosecution to introduce victim impact evidence. It does not say whether this evidence is to be introduced to the judge or the jury. In Florida, both the judge and jury are involved in the sentencing process. Fla.Stat. 921.141; *State v. Dixon*, 283 So.2d 1 (Fla. 1973),

*Espinosa v. Florida*, 505 U.S. 1079, 120 L.Ed.2d 854, 112 S.Ct. 2926 (1992).

Victim impact evidence is more properly heard by the judge rather than the jury for several reasons. (1) This evidence is potentially highly inflammatory and improper. A judge can more easily keep such evidence within its proper limits. (2) In all other cases, only a judge hears such evidence. (3) This evidence could easily divert the jury from its proper role of weighing aggravating and mitigating circumstances.

The United States Supreme Court and Florida Supreme Court have held that some types of victim impact evidence are admissible. However, both courts have placed limits on what type of testimony is admissible as victim impact evidence: *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), *Windom v. State*, 656 So.2d 432 (Fla. 1995). Florida Statute 921.141(7) also prohibits certain types of victim impact evidence.

In *Payne*, *supra,* the majority opinion states:

> Our holding today is limited to the holdings of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence

> violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

*Payne*, *supra* 111 S.Ct. at 2611 n.2. Thus, *Payne* explicitly prohibits certain types of victim impact evidence.

Three members of the United States Supreme Court also stated that the Fourteenth Amendment imposed limits on the nature and quantity of victim impact evidence in addition to the Eighth Amendment's *per se* bar on certain types of victim impact evidence.

> Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.
>
> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment effects no *per se* bar." *Ante*, at 2609. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Id. at 2512 (Concurring opinion of Justices O'Connor, White, and Kennedy). Additionally, three members of the court would hold that **all** victim impact evidence is inadmissible. Id. at 2619-2631. Thus, it is clear that every member of the United States Supreme Court agrees that the Eighth Amendment bars certain types of victim impact evidence and at least six members of the

Court agree that victim impact evidence can be so extensive and/or inflammatory as to deny due process.

In *Windom*, *supra*, the Florida Supreme Court also imposed limits on this type of evidence. *Windom* dealt with the admissibility of the following evidence:

> *Windom* attacks the admissibility of testimony by a police officer during the sentencing phase of the trial. The police officer was assigned by her police department to teach an anti-drug program in an elementary school in the community in which the defendant and the three victims of the murders lived, and where the murders occurred. Two of the sons of one of the victims were students in the program. The police officer testified concerning her observation about one of these sons following the murder. Her testimony involved a discussion concerning an essay which the child wrote. She quoted the essay from memory: "Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE I would have killed myself." The police officer also described the effect of the shootings on the other children in the elementary school. She testified that a lot of the children were afraid.

656 So.2d at 434. The majority of the Court held that the officer's testimony concerning the impact on the victim's son was admissible. However, the Court held the rest of the testimony to be inadmissible.

> Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7). The testimony in which the police officer testified about the effect on children in the community other than the victim's two sons was erroneously

> admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death. Id.

Two members of the Florida Supreme Court wrote separately to note the danger of victim impact evidence.

> The use of victim-impact evidence can pose a constitutional problem if misused....I do not believe the courts can or should encourage the use of victim-impact evidence when it in effect may invite jurors to gauge the relative worth of particular victims' lives. All human life deserves dignity and respect, including in the penalty phase of a capital trial. This includes victims of high stature in the community as well as those in humbler circumstances. It would not be especially difficult for one or the other side in a criminal case to prey on the prejudices some jurors may harbor about particular classes of victims. Subtle appeals to racism, caste-based notions, or similar concerns clearly would undermine the fundamental objective of a criminal trial--achieving justice. If the effect is either to aggravate the case for one type of victim but mitigate it for another in similar circumstances, then the Constitution is violated. The victim's high stature in the community is not a legal aggravating factor, just as a victim's minority status does not lawfully mitigate the crime. In this sense, all human life stands at equal stature before the law. Courts must be vigilant to see that this equality is not undermined.

(Opinion of Justices Kogan and Anstead, concurring in part and dissenting in part). Thus, it is clear that every member of the Court feels certain types of victim impact evidence are inadmissible. At least two members of the Court feel that this

evidence is extremely risky and potentially dangerous. It is clear that the United States Supreme Court and the Florida Supreme Court have held that victim impact evidence must be strictly limited. The Courts also recognize that victim impact evidence is potentially inflammatory and improper. Given the tremendous dangers posed by this type of evidence, it makes far more sense to allow this evidence before the judge rather than the jury. A judge who is trained in the law has a much greater ability to disregard the inevitably emotional and inflammatory aspects of victim impact evidence and limit it to its proper role outlined in Fla.Stat. 921.141, and in *Payne* and *Windom*. It is extremely likely that a jury would be overwhelmed by such inevitably emotional testimony.

In all non-death cases, victims or their families, speak at a sentencing before a judge alone. Fla.Stat. 921.143. This procedure is even more important in a capital case given the inevitable emotional nature of a homicide case and the higher standard of due process and unique need for reliability required by Article I, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977); *Tillman v. State*, 591 So.2d 167 (Fla. 1991).

This evidence also has a significant danger of deflecting the jury from its proper role of weighing aggravating and

mitigating circumstances. In *Windom*, *supra*, the Court held that this evidence is neither an aggravating circumstance, nor a mitigating circumstance. 656 So.2d at 434. Fla.Stat. 921.141 outlines the jury's role as weighing aggravating factors and mitigating circumstances. Victim impact evidence would detract from this duty.

The Standard Jury Instructions also make clear to the jury that their sole function is to weigh aggravating and mitigating circumstances. The opening penalty phase instructions state:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that...this evidence is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

The closing penalty phase instructions contain several references to the fact that the jury is to make the decision based solely on the weighing of aggravating and mitigating circumstances:

> It is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and

> whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole....
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances....If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

It is clear that both the statute and the Standard Jury Instructions anticipate the jury's decision being made solely based on aggravating and mitigating circumstances. The only way to reconcile the Standard Jury Instructions, Fla.Stat. 921.141(3), and 921.141(8) (victim impact) is to allow victim impact evidence to be introduced solely before the judge. Any other solution would inevitably deflect the jury from its proper task of weighing aggravating and mitigating circumstances.

## ISSUE IV

**WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTORS WERE SUFFICIENT TO SUPPORT THE DEATH PENALTY WHEN THE JURY DID NOT FIND THE AGGRAVATORS WERE SUFFICIENT BEYOND A REASONABLE DOUBT, AND THE JURY WAS NOT INSTRUCTED ON WHAT CONSTITUTES SUFFICIENT IN ORDER TO SUPPORT THE DEATH PENALTY IN VIOLATIO OF McKENZIE'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSITUTION?**

Any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the finder of fact, which in this case is the jury. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490 (2000)). Under the Florida capital sentencing scheme, as discussed in more detail below, this includes the determinations that the aggravating factors were sufficient to justify death and that the aggravating factors outweigh the mitigating circumstances. The trial court's failure to provide a definition for "sufficient" before considering a death sentence reduced the burden of proof on the State and thus denied Mr. McKenzie due process of law, creating fundamental error.

Fundamental error "goes to the foundation of the case…and is equivalent to a denial of due process." *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003) (citation omitted). Fundamental error "is not subject to harmless error review." *Ramroop v. State*, 214 So.3d 657, 665 (Fla. 2017) ("By its very nature, fundamental error has to be considered harmful.")

This Court held in *Rogers v. State*, 285 So.3d 872, 885-86 (Fla. 2019), *pet. for cert. filed*, Case No. 19-8473 (U.S. May 11, 2020), that the findings that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances, are not "elements" that can be subjected to the standard of proof beyond a reasonable doubt. In so holding, the Court receded from language in *Perry v. State*, 210 So.3d 610, 640 (2016), indicating that these findings had to be made unanimously and beyond a reasonable doubt. The Court also held in *State v. Poole*, – So. 3d –, 2020 WL 3116597 (Fla. Jan. 23, 2020), *motion for reh'g denied*, 2020 WL 3116598 (Fla. Apr. 2, 2020), that any determinations beyond the existence of one or more aggravating factors were not "elements" that had to be proven beyond a reasonable doubt. In so holding the Court explicitly receded from *Hurst v. State*, 202 So.3d 40 (Fla. 2016), which required unanimous jury findings that aggravating factors were sufficient to justify imposing death and that aggravating factors outweighed mitigating circumstances before a death sentence could be considered.

However, United States Supreme Court jurisprudence is clear that any determination increasing the penalty for a crime must be found beyond a reasonable doubt by the factfinder, whether it is called an element or something else. *Alleyne*, 570 U.S. at 104 (citing *Apprendi*, 530 U.S. at 483 n.10, 490). For the reasons

set forth below, *Rogers* and *Poole* are incompatible with Supreme Court precedent, and those holdings should be revisited.

**A. Required findings increasing the penalty for a crime, including findings required to authorize the death penalty after a guilty verdict on the underlying offense, require the same degree of proof as the elements of the underlying offense — i.e., proof beyond a reasonable doubt.**

If the "required finding expose[s] the defendant to a greater verdict than that authorized by the [verdict]," the Sixth Amendment and Due Process clauses of the federal constitution require that the finding be subject to the standard of proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). That issue is "one not of form, but of effect." *Id.*; *cf. also Jones v. United States*, 526 U.S. 227, 232-33 (1999) (noting, in the context of a federal carjacking statute, "[t]he "look" of the statute, then, is not a reliable guide to congressional intentions").

The functional elements of a crime for sentencing purposes are not limited to the defined elements required for conviction. *See Apprendi*, 530 U.S. at 495-96. In addition, the distinction between conviction and sentencing is not what determines the burden of proof in a criminal trial. The legally significant distinction is whether a particular determination increases the available penalty for a crime. *Id.* (holding the placement of a hate crime sentence "enhancer" within the sentencing provisions of a criminal statute did not prevent the enhancer from

functioning as an element). In the context of capital sentencing, any factor that must be found before the death penalty can be selected for a particular defendant is the "functional equivalent" of an element of the charged offense, at least for sentencing purposes. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citing *Apprendi*, 530 U. S. at 494 n. 19). This does not prevent legislatures from creating sentencing "factors" or "considerations" to guide the exercise of a trial court's discretion in sentencing within an available range. *Alleyne*, 570 U.S. at 116.

The principles set out in *Apprendi* were applied in *Ring v. Arizona* to invalidate a state statute allowing a trial judge to determine the existence of aggravating factors so as to justify imposition of the death penalty. 536 U.S. at 589 (overruling *Walton v. Arizona*, 497 U. S. 639 (1990)). Under the statute at issue in *Ring*, the maximum punishment the defendant could have received based on the jury's verdict of guilt on a charge of first-degree murder was life in prison. *Id.* at 597. The Supreme Court considered, but rejected, an argument that "death or life imprisonment" were both sentencing options for first-degree murder under Arizona law, and that the defendant "was therefore sentenced within the range of punishment authorized by the jury verdict." *Id.* at 603-04. Because an aggravating circumstance had to be found before death could be imposed, the death penalty was

authorized "only in a formal sense." *Id.* at 604 (citations omitted). The Court reiterated *Apprendi*'s reasoning that the additional finding was the "functional equivalent" of an element of the offense. *Ring*, 536 U.S. at 609.

The central holding of *Apprendi* was reaffirmed in *Blakely v. Washington*, 542 U.S. 296, 305 (2004), which held a state statute allowing a trial court to impose an "exceptional" sentence in excess of a defined statutory range, and without a jury finding regarding the **reasons justifying the exceptional sentence**, violated the defendant's right to a trial by jury. (emphasis added). As it had in *Ring*, the Court rejected an argument that additional fact-finding did not expose the defendant to a higher penalty because the resulting sentence was theoretically within legal limits for that class of felony. *See Blakely*, 542 U.S. at 303-04. The Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (citation omitted). It did not matter that the exceptional sentence was under the statutory maximum; what mattered was that the trial court could not have imposed that sentence based on the defendant's plea alone. *Id.* at 303-04.

Similarly, in *Alleyne*, the Court held unconstitutional a statute imposing a mandatory minimum sentence on the basis of

judicial fact-finding. 570 U.S. at 103 (overruling *Harris v. United States*, 536 U.S. 545 (2002)). As it had done before, the Court rejected the argument that the sentence actually imposed in that case could have been imposed in theory even without additional fact-finding. *Id.* at 112-15.

More recently, the Court held a statute authorizing a mandatory minimum sentence for a violation of supervised release, without requiring jury findings or proof beyond a reasonable doubt, violated the Sixth Amendment and Due Process clause. *See United States v. Haymond*, 139 S.Ct. 2369 (2019). The defendant in *Haymond* was on supervised release following a conviction for possessing child pornography. *Id.* at 2373. An unannounced search of his computer found images that appeared to be child pornography; in a hearing conducted without a jury, using a preponderance of the evidence standard, a trial judge found it "more likely than not" that the defendant knowingly possessed some of those images. *Id.* at 2374. Normally, this finding would have subjected the defendant to as much as two additional years in prison, based on his original conviction. *Id.* However, a separate provision created a mandatory term of at least five years and as much as life in prison for the possession of child pornography, without regard to how much time had been authorized for the initial conviction. *Id.*

The Court held that subjecting the defendant to an increased sentencing range based on the trial court's fact-finding violated the Fifth and Sixth Amendments. *Id.* at 2378-79. The plurality rejected an argument that the Sixth Amendment does not apply to post-judgment sentencing proceedings, saying "any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise." *Id.* at 2379 (citing *Ring*, 536 U.S. at 602).

**B. Due process requires proof beyond a reasonable doubt of any determination that must be made before the death penalty can be imposed in a specific case.**

Due Process requires proof beyond a reasonable doubt to convict an individual of a crime. *E.g.*, *In re Winship*, 397 U.S. 358, 362 (1970). This means "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. The reasonable doubt standard "reflects a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (citation omitted). The requirement of proof beyond a reasonable doubt stands between the accused and a conviction based on factual error. *See id.* at 363. It "provides concrete substance for the presumption of innocence." *Id.* (citation omitted). In addition, the reasonable doubt standard has a vital role in maintaining public confidence in the court system. *Id.* at 364.

Society's interest in the reliability of the verdict is even stronger in capital cases than in other criminal cases because of the "qualitative difference between death and other penalties." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); see also *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (reversing a conviction where the jury was improperly instructed on the meaning of "reasonable doubt"). Therefore, as a matter of due process, required findings that expose the defendant to a greater punishment than that authorized by the conviction on the underlying offense must be proved beyond a reasonable doubt.

**C. Florida's capital sentencing scheme requires findings that aggravating factors are sufficient beyond a reasonable doubt to justify the death penalty before the finder of fact reaches the ultimate decision of whether a death sentence can be imposed.**

Under Florida's capital sentencing scheme, the determinations that the aggravating factors in a particular case are sufficient beyond a reasonable doubt to justify death and the aggravating factors outweigh the mitigating circumstances increase the maximum authorized penalty from life in prison to death. *See* § 921.141(2)-(3), Fla.Stat. (2019). The existence of one or more aggravators in Florida does not allow a death sentence to be imposed *until* other findings are made.

First-degree murder is a "capital felony" under section 782.04(1)(a), Florida Statutes (2019). Obtaining a conviction

for first-degree murder based on premeditation requires the State to establish the following elements: (1) a victim is dead; (2) the death was caused by the criminal act of the defendant; and (3) the killing was premeditated. *See* Fla. Std. Jury Instr. (Crim.) 7.2 (2018). Despite the statutory "capital felony" label, under Florida's capital sentencing scheme, the findings necessary to convict a defendant of first-degree premeditated murder are insufficient to sentence the defendant to death. *See* § 782.04(1)(b). A separate proceeding must be held, as provided in sections 775.082 and 921.141, Florida Statutes.

The provisions of section 921.141 create a system in which the jury (or court, in a bench trial) makes findings allowing the death penalty to be imposed. Only then does the jury make a recommendation about the sentence. Only then does the trial court exercise its discretion to choose between a life sentence and a death sentence. *See* § 921.141(2)-(3). Section 921.141(2)(b) sets out the specific findings required before a death sentence can be considered:

If the jury:

> […] 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all the following:
>
> a. Whether sufficient aggravating factors exist.

> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without parole or to death.

§ 921.141(2)(b).

The "eligibility" referred to in section 921.141(2)(b) is not dispositive of the available sentencing range, because section 921.141(2) must be read in its entirety, as well as together with section 921.141(3). Under the remaining language in section 921.141(2)(b), the court must make a recommendation by weighing additional factors, and those factors include two additional findings: whether the aggravating factors are sufficient, and whether aggravating factors outweigh the mitigating circumstances.

What this means is that a capital defendant in Florida is not "exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," *see Apprendi*, 530 U.S. at 483, merely because the finder of fact has determined beyond a reasonable doubt that at least one aggravating factor exists, even though that aggravating factor makes the defendant "eligible" for death. Without additional findings, the jury cannot make its recommendation, and the court has no discretion to impose the death penalty.

Therefore, for purposes of the burden of proof, these additional findings are treated as elements of the crime, whether they are called "elements" or something else, and require proof beyond a reasonable doubt.

**D. The trial court's instructions failed to define what "sufficient" means when making its findings.**

There can be no dispute that the term "sufficient" has to mean more than just a numerical sufficiency, but has a qualitative application. This must be true because there would be no reason for the legislature to include (2)(b)2.a. Whether sufficient aggravating factors exist, when it already indicated in paragraph (2)(b)2: …finds at least one aggravating factor, the defendant is eligible for a sentence of death…. Otherwise the term "sufficient" would be superfluous.

At no time during the Trial Court's instruction did he define "sufficient." As part of the Court's instructions to the venire the Court stated:

> There will be more detailed instructions on this if you are selected to serve as a juror in this case.
> The State and the defendant may present evidence relative to the nature of the crime and the defendant's character, background, or life. That evidence would be presented in order for the jury to determine, one, whether the aggravating factors alleged by the State have been proven beyond a reasonable doubt.
> Two, whether the aggravating factors found to exist beyond a reasonable doubt, **if any**, **are sufficient for imposition of the death penalty.**
> Three, whether mitigating circumstances are proven by the greater weight of the evidence.

> Four, whether the aggravating factors outweigh the mitigating circumstances.
>
> And, five, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death. (T115-116). (Emphasis added).

During the same instructions to the venire the Trial Court also stated:

> Before moving on to mitigating circumstances, which I'll explain to you in a moment, the jury must determine whether the aggravating factors proven beyond a reasonable doubt, if any, are **sufficient** to impose a sentence of death.
>
> If the jury does not unanimously agree that the aggravating factors are **sufficient** to impose death, it would not move on to consider the mitigating circumstance, and the sentence that would be imposed is life in prison without the possibility of parole. (T118). (Emphasis added).

Prior to the opening statements, the Trial Court again read an instruction to the sitting jurors:

> You are instructed that this evidence is presented in order for you to determine, as you will be instructed, whether each aggravating factor is proven beyond a reasonable doubt, whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty, whether mitigating circumstances are proven by the greater weight of the evidence, whether the aggravating factors outweigh the mitigating circumstances, and whether the defendant should be sentenced to life imprisonment without the possibility of parole or death. (T379).

Again, during the same instructions, the Trial Court repeats the sufficiency requirement:

> Before moving on to the mitigating circumstances, you must determine that the aggravating factors are sufficient to impose a sentence of death.
>
> If you do not unanimously agree that the aggravating factors are sufficient to impose death, you will not move on to consider the mitigating circumstances.
>
> Should you find sufficient aggravating factors do exist to justify the imposition of the death penalty, it will then be your duty to determine whether the aggravating factors that you have unanimously found to have been proven beyond a reasonable doubt outweigh the mitigating circumstances that you find to have been established. (T381-382).

Not only did the Court not provide a definition of "sufficient," the State's opening statement incorrectly informed the Jury that "sufficient" means a numerical, rather than a qualitative application of how "sufficient" applies.

> Ladies and gentlemen, when the State has rested its case, you will find that the evidence of each aggravating factor has been proven, not one, but all five, beyond a reasonable doubt, that they are sufficient, **one in -- one alone is sufficient to warrant the death penalty**, that they outweigh any mitigation that may be established by the defense in this case. (T402)(Emphasis added).

Appellant contends that failing to provide a definition of "sufficient" and telling the jury that finding only one aggravator is tantamount to being "sufficient" to warrant the death penalty is fundamental error.

## ISSUE V

**WHETHER THE STATUTORY CONSTRUCTION IN *HURST II* CONSTITUTES SUBSTANTIVE LAW, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT LAW, REQUIRES THAT THIS SUBSTANTIVE LAW GOVERN THE LAW THAT EXISTED AT THE TIME OF MR. MCKENZIE'S NEW PENALTY PHASE TRIAL?**[5]

A judicial decision construing substantive criminal law or identifying the elements of a criminal offense is substantive law. It is not a procedural rule. The analyses used to determine when a new procedural rule of constitutional law is to be applied retroactively do not apply to the judicial decisions construing statutes setting forth substantive criminal law. *Bousley v. United States*, 523 U.S. 614, 620 (1998)(Because *Teague v. Lane*, 489 U.S. 288 (1989) "by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.")

In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the U.S. Supreme Court indicated that substantive rulings regarding the scope of a criminal statute are to be applied retroactively

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, see *Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the

[5] The argument in this issue was totally borrowed and copied from the initial brief of Joel Dale Wright v. State, SC19-2123.

> State's power to punish, see *Saffle v. Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Bousley, supra*, at 620, 118 S.Ct. 1604 (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).

*Schriro*, 542 U.S. at 351-52 (footnote omitted).

> A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. See *Bousley*, 523 U.S., at 620-621, 118 S.Ct. 1604.

*Schriro*, 542 U.S. at 354.

In *Richardson v. United States*, 526 U.S. 813 (1999), the U.S. Supreme Court was called upon to construe a criminal statute and decide "whether the statute's phrase 'series of violations' refers to one element, namely a 'series,' . . . or whether those words create several elements, namely the several 'violations,' in respect to *each* of which the jury must agree unanimously and separately." *Id.* at 817-18 (The Court held that the latter applied when attempting to convict a defendant of a continuing criminal enterprise (CCE)). *Richardson*'s construction of the statute was subsequently found by the federal circuit courts to be a change in substantive law that applied retrospectively. *See Santana-Madera v. United States*, 260 F.3d

133, 139 (2nd Cir. 2001) ("By deciding that the jury had to agree unanimously on each of the offenses comprising the 'continuing series' in a CCE count, *Richardson* interpreted a federal criminal statute and, in doing so, changed the elements of the CCE offense. In other words, it altered the meaning of the substantive criminal law. *Bousley*, 523 U.S. at 620, 118 S.Ct. 1604."). *See Ross v. U.S.*, 289 F.3d 677, 681 (11th Cir. 2002) (per curiam).

While members of this Court disagreed with the majority's holding in *Hurst II*, the statutory construction contained therein constitutes Florida's substantive criminal law. It identified what statutorily identified facts were essentially elements of the greater offense and had to be found by a jury before a death sentence could be an authorized punishment.

When a court construes a statute and identifies the elements of a statutorily defined criminal offense, the ruling constitutes substantive law and dates to the statute's enactment. *Bousley*, 523 U.S. at 625 (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague* . . . because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted.") *See also Rivers v. Roadway Exp., Inc.*,

511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.")

Of course, what fact or facts must be found in order to increase the range of punishment to include a more severe sentence is a matter of a state's substantive criminal law. Establishing Florida's substantive criminal law is a legislative function:

> "Enacting laws—and especially criminal laws—is quintessentially a legislative function." *Fla. House of Representatives v. Crist*, 999 So.2d 601, 615 (Fla. 2008). "[T]he Legislature generally has broad authority to determine any requirement for intent or knowledge in the definition of a crime." *State v. Giorgetti*, 868 So.2d 512, 515 (Fla. 2004). We thus have recognized that generally "[i]t is within the power of the Legislature to declare an act a crime regardless of the intent or knowledge of the violation thereof." *Coleman v. State ex rel. Jackson*, 140 Fla. 772, 193 So. 84, 86 (1939).

*State v. Adkins*, 96 So.3d 412, 417 (Fla. 2012).

Likewise, identifying the facts necessary to increase an authorized sentence is regarded as a legislative function. *State v. Benitez,* 395 So.2d 514, 518 (Fla. 1981) (". . . the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law."). Section 921.002(1), *Florida Statutes*, i.e., The Criminal Punishment Code states:

> The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a sentencing policy.

§ 921.002(1), Fla.Stat.

Of course, construing the statutory language that the Legislature provided is a judicial function. A judicial decision that engages in statutory construction of a criminal statute identifying the facts that are necessary to increase the range of punishment constitutes substantive criminal law. The Legislature is presumed to have agreed with this Court's statutory construction when it does not express voiced disagreement:

> The Legislature is presumed to know the judicial constructions of a law when amending that law, and the Legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed.

*Florida Dept. of Children and Families v. F.L.*, 880 So.2d 602, 609 (Fla. 2004).

When it was issued, the statutory construction aspect of *Hurst II* constituted Florida's substantive criminal law. It construed the meaning of the statute certainly back to at least the date of the criminal offense given the Savings Clause in the

Florida Constitution that is located in Article X, Section 9 and specifically states that "[r]epeal of a criminal statute shall not affect prosecution for any crime committed before such repeal." Art. X, § 9, Fla. Const. As substantive criminal law, *Hurst II* was not subject to the retroactivity analysis of either *Witt v. State*, 387 So.2d 922 (Fla. 1980) or *Teague*.

After *Hurst II* was issued, the Florida Legislature did make changes to Section 921.141, Florida Statutes, but it did not express disagreement with the determination in *Hurst II* that the aggravating circumstances had to be found sufficient as a matter of fact before a death sentence could be authorized. This shows that the Legislature believed that this Court correctly construed the statute in *Hurst II*. *See Florida Dept. of Children and Families v. F.L.*, 880 So.2d at 609.

Under the Due Process Clause of the Fourteenth Amendment, the statutory construction set forth in *Hurst II* must be found to have been the governing law at the time of Ms. Smith's death in 1983. *See Fiore*, 531 U.S. 225; *see also Bunkley* 538 U.S. 835.

And because the Legislature specifically listed "sufficient" as an element before weighing aggravators against mitigators, "sufficient" must be found beyond a reasonable doubt and is qualitative and not quantitative.

## ISSUE VI

**WHETHER THE TRIAL COURT ERRED IN DENYING MR. McKENZIE'S MOTION TO FIND SECTION 921.141, FLORIDA STATUTES, AS UNCONSTITUTIONAL BECAUSE THE "PRIOR VIOLENT FELONY" AGGRAVATOR IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD?**

On October 18, 2018, Mr. McKenzie filed His Motion to Declare Florida Statute 921.141 unconstitutional because Section (6)(b) is vague and overbroad. (R429-434). On December 6, 2019, the Trial Court denied that motion. (R535).

Florida's capital sentencing scheme is unconstitutional, both facially and as applied in this case, because it includes an aggravating factor, the "prior violent felony" aggravator, which is unconstitutionally vague and overbroad. *See* § 921.141(6)(b), Fla. Stat. (2019) ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.").

The vagueness doctrine is rooted in due process: a statute is impermissibly vague "when, because of its imprecision, it fails to give adequate notice of what conduct is prohibited." *Sult v. State*, 906 So.2d 1013, 1020 (Fla. 2005). In the context of criminal punishment, due process requires strict construction of statutes and applying the rule of lenity to issues concerning their reach. *Dunn v. United States*, 442 U.S. 100, 112 (1979); *see also Trotter v. State*, 576 So.2d 691, 694 (Fla. 1990) (finding error where court considered a violation of community

control as an aggravating factor, and noting "[p]enal statutes must be strictly construed in favor of the one against whom a penalty is to be imposed").

A state maintaining capital punishment "has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). The sentencer's discretion must be channeled in a meaningful way. *See id.* "Aggravating circumstances" can be used to "genuinely narrow the class of death-eligible persons and thereby channel the jury's discretion," either by defining capital murder to include aggravating circumstances or by considering them during sentencing. *See Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988). When there is no principled way to distinguish cases in which the death penalty is imposed from the cases in which it is not, however, the sentencing scheme leading to that penalty is not constitutional. *See Godfrey*, 446 U.S. at 433. "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield*, 484 U.S. at 244 (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

The "prior violent felony" aggravator does not satisfy these constitutional principles. Cases applying that aggravator have upheld the use of convictions that were pending on appeal as "prior violent felonies." *E.g.*, *Peek v. State*, 395 So.2d 492, 499 (Fla. 1981) (superseded by statute on other grounds as stated in *Merck v. State*, 763 So.2d 295, 299 (Fla. 2000)). An offense occurring contemporaneously with the charged capital offense can be treated as a "prior violent felony" as long as it occurs before sentencing — which, by definition, it must. *See Lucas v. State*, 376 So.2d 1149, 1153 (Fla. 1979). In addition, the category of felonies that are "violent" felonies is overly broad because, unlike some sentencing provisions, there is no delineation of a finite list of felonies encompassed in the definition. In *Johnson v. State*, 720 So.2d 232, 238 (Fla. 1998), this Court invalidated a death sentence on proportionality grounds where the aggravating circumstances included a prior aggravated assault the defendant committed against his brother; his brother was not injured and testified the incident was a misunderstanding. The Court noted that the aggravating circumstance, "although properly found to be present, is not strong when the facts are considered." *Id.* However, proportionality review is not a substitute for a statute that appropriately narrows the class of defendants potentially exposed to the most severe penalty.

The standard instruction is unconstitutionally vague, and similarly misleads jurors into considering unlawful and constitutionally irrelevant factors in deciding whether death is the appropriate sentence. The standard instructions instruct the trial judge as follows:

> **Since the character of a crime involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court should instruct the jury of the following, as applicable**
>
> a. The crime of (previous crime) is a capital felony
>
> b. The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.

The trial court is thus required to direct the sentencing jurors to find a contemporaneous violent felony is actually "prior" under the Florida Supreme Court's case law, an instruction that is misleading, and unconstitutional, as discussed above. The (5) (b) standard instruction is thus also unconstitutional for the same reasons as is the circumstance, under the teachings of *Maynard v Cartwright*, 108 S.Ct. 1853, 1857-58 (1988), the Court wrote:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment

> interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

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

## CONCLUSION

Based on the foregoing argument, reasoning, and citation of authorities, the Appellant respectfully asks this Court to reverse the judgment and death sentence and remand for a new penalty phase trial.

JEFFREY DEEN
REGIONAL COUNSEL - 5th DISTRICT

/s/Michael P. Reiter
Michael P. Reiter
Fla. Bar #0320234
Assistant Regional Counsel

## CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Doris Meacham, doris.meacham@myfloridalegal.com and capapp@myfloridalegal.com Capital Appeals Division,444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118 on September 1, 2020. I certify that this brief has been prepared using Courier New 12-point font.

/s/Michael P. Reiter
Michael P. Reiter