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IN THE

SUPREME COURT OF FLORIDA

WADE STEVEN WILSON, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. SC2024-1345 Direct Criminal Appeal (Death Penalty) Twentieth Circuit/Lee County Lower Tribunal No.: 2019-CF-568

AMENDED INITIAL BRIEF OF APPELLANT

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1. Statement of the Case and Course of Proceedings Below.

Wade Steven Wilson (hereinafter "Appellant Wilson") was charged in Lee County with two counts of first-degree murder (counts 1 and 4), one count of grand theft of a motor vehicle (count 2), one count of battery (count 3), one count of burglary (count 5), and one count of petit theft (count 6). (R-70).[1] The offenses occurred on October 7, 2019. The victims of the two murder offenses were Kristine Melton and Diane Ruiz.[2]

At trial, Appellant Wilson was represented by Lee Hollander, Esquire, and Kevin Shirley, Esquire. The State was represented by

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[1] References to the record on appeal will be made by the designation "R" followed by the appropriate page number. References to the trial transcript will be made by the designation "T" followed by the appropriate page number (i.e., the number that appears in the upper right hand corner). References to the penalty phase transcript will be made by the designation "P" followed by the appropriate page number (i.e., the number that appears in the upper right hand corner).

[2] The grand theft of a motor vehicle count related to Ms. Melton's vehicle. The victim of the battery count was Melisa Montanez. The victim of the burglary and theft counts was Fanny Amlin.

Assistant State Attorneys Sara Miller and Andreas Gardiner. The Honorable Nicholas Thompson presided over the trial.

The trial began on June 3, 2024, and concluded on June 12, 2024. At the conclusion of the guilt phase, the jury found Appellant Wilson guilty as charged for all counts. (T-2106-2107; R-1337-1338).

The penalty phase began on June 24, 2024, and concluded on June 25, 2024. At the conclusion of the penalty phase, the jury recommended the death penalty. (R-1404-1407, 2632-2636). For the murder count relating to Ms. Melton, the jury (1) unanimously found that Appellant Wilson was previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation, (2) unanimously found that Appellant Wilson was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, and (3) unanimously found that the murder was especially heinous, atrocious, or cruel – and the jury found by a vote of 9-to-3 that Appellant Wilson should be sentenced to death. For the murder count relating to Ms. Ruiz, the jury (1) unanimously found that Appellant Wilson was previously

convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation, (2) unanimously found that Appellant Wilson was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, (3) unanimously found that the murder was especially heinous, atrocious, or cruel, (4) unanimously found that the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification – and the jury found by a vote of 10-to-2 that Appellant Wilson should be sentenced to death.

The *Spencer*[3]/sentencing hearing was held on August 27, 2024. (R-2105-2266). The trial court sentenced Appellant Wilson to death for both murder counts (R-2255-2262),[4] and the trial court rendered a detailed sentencing order that weighed the relevant aggravating and

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

[4] The trial court imposed the following sentences for the remaining counts: 5 years' imprisonment for the grand theft of a motor vehicle count; 364 days in jail for the battery count; 15 years' imprisonment for the burglary count; and 364 days in jail for the petit theft count. (R-1687).

mitigating circumstances. (R-1646).

2. Statement of the Facts.

a. Guilt Phase.

i. Jury Selection, Preliminary Instructions, and Opening Statements.

The jury was selected (T-39-1437), the trial court gave preliminary instructions to the jury (T-1453-1462), and the State gave an opening statement to the jury. (T-1462-1476).[5]

ii. The State's Case in Chief.

Joshua Lukitsch. Mr. Lukitsch stated that one of his friends previously introduced him to Appellant Wilson, and he said that on October 7, 2019, Appellant Wilson approached him at his business on Hancock Bridge Parkway. (T-1477-1479). Mr. Lukitsch testified that Appellant Wilson "was there trying to get a plane ticket or a bus ticket or – or whatever he could from me to leave town" and he said that Appellant Wilson "was wearing sweatpants only, no shoes, no shirt" and "[h]e was bloody, and he was missing a couple of teeth." (T-1479).

[5] Defense counsel initially reserved his opening statement until after the State rested (T-1476), but after the State rested, defense counsel did not give an opening statement. (T-1999-2000).

Mr. Lukitsch stated that Appellant Wilson's "demeanor was frantic and in a rush to leave as quickly as he could because he had just done something horrific and – and killed people" and "he rolled up someone in a – a carpet or bedding or whatever it was." (T-1479-1480). Mr. Lukitsch testified that he told Appellant Wilson that he needed to leave and pick up an employee – and he said that once he separated from Appellant Wilson, he called 911. (T-1481-1482). During Mr. Lukitsch's testimony, the State played the recording of the 911 call for the jury. (T-1485-1490).

Christopher Anzalone. Officer Anzalone with the Cape Coral Police Department stated that he responded to the 911 call that was made by Joshua Lukitsch. (T-1498-1499). Officer Anzalone testified that when he arrived at Mr. Lukitsch's business, he came into contact with Mr. Lukitsch and he subsequently searched the premises for Appellant Wilson – but he said that he was unable to locate Appellant Wilson. (T-1500-1501). However, Officer Anzalone stated that he was able to locate the vehicle that Appellant Wilson had been driving (a black Nissan Versa), and he said that (1) the vehicle appeared to have

blood on it, (2) the vehicle had front end damage, and (3) a records search established that the vehicle was registered to Kristine Melton. (T-1501). Officer Anzalone testified that law enforcement officials subsequently attempted to contact Ms. Melton. (T-1501).

Patricia Bell. Detective Bell with the Cape Coral Police Department testified that as part of her investigation in this case, she learned that Kristine Melton was out with Stephanie Johnson on the evening of October 6, 2019. (T-1511-1513).

Stephanie Johnson. Ms. Johnson, a friend of Kristine Melton, testified that on the evening of Sunday, October 6, 2019, she went to Ms. Melton's house and the two subsequently went to the Buddha bar in an Uber. (T-1521). Ms. Johnson stated that while they were at the bar, they were approached by Appellant Wilson (who referred to himself as "Junior"). (T-1524). Ms. Johnson testified that she and Ms. Melton then socialized with Appellant Wilson and a man named "Jayson" (Jayson Shepard) and she said that Ms. Melton and Appellant Wilson seemed to be "attracted" to each other. (T-1526). Ms. Johnson testified that when the bar closed, the four got into a

vehicle that she believed belonged to Appellant Wilson (a Dodge Hellcat) and Mr. Shepard drove[6] them to his house. (T-1528-1529). Ms. Johnson stated that when the four arrived at Mr. Shepard's house, they went to Mr. Shepard's bedroom and she said that Ms. Melton and Appellant Wilson engaged in consensual sex. (T-1531). Ms. Johnson testified that she, Ms. Melton, and Appellant Wilson then left Mr. Shepard's house and took an Uber to Ms. Melton's house (and they left the Dodge Hellcat near Mr. Shepard's house). (T-1534-1535). Ms. Johnson stated that after the three arrived at Ms. Melton's house, the three went inside – and she said that at approximately 6 a.m. she left Ms. Melton's house because she had to go home in order to get ready for work. (T-1536). Ms. Johnson testified that later that day (i.e., Monday, October 7, 2019), she attempted to text and call Ms. Melton, but she said that Ms. Melton did not respond. (T-1538-1541). Ms. Johnson stated that later that afternoon, she received a phone call from a police detective, and she said that based on that call, she

[6] The Dodge Hellcat had manual transmission, and Appellant Wilson did not drive the vehicle because he said that he could not drive a stick shift. (T-1570).

went to Ms. Melton's house – and she indicated that when she arrived at Ms. Melton's house, law enforcement officials were present and they had placed caution tape around the entrance of the house. (T-1550).

On cross-examination, Ms. Johnson stated that during the time she was with Ms. Melton, Appellant Wilson, and Mr. Shepard, she observed all three of them using cocaine, smoking marijuana, and drinking marijuana. (T-1562).

Jayson Shepard. Mr. Shepard stated that on the evening of October 6, 2019, he was at the Buddha bar and he met Stephanie Johnson, Kristine Melton, and Appellant Wilson (who referred to himself as "Junior"). (T-1566-1569). Mr. Shepard testified that when the bar closed, the four went back to his house. (T-1570). Mr. Shepard stated that when the four arrived at his house, Ms. Melton and Appellant Wilson went in his bedroom and engaged in consensual sex, and he said that he and Ms. Johnson went to the backyard and talked. (T-1571-1572). Mr. Shepard testified that between 3 a.m. and 4 a.m., the other three left his house. (T-1573).

Charles Caruso. Sergeant Caruso with the Cape Coral Police

Department testified that he and other law enforcement officials responded to Kristine Melton's house on October 7, 2019, and he said that after they entered the house, they discovered Ms. Melton's dead body under a large bundle of sheets and clothes. (T-1588-1590).

Nicholas Malone. Detective Malone with the Cape Coral Police Department testified that as part of his investigation in this case, he interviewed Appellant Wilson's parents (Steven and Melanie Testasecca). (T-1604).

Christina Potts. Ms. Potts, a forensic technician with the Cape Coral Police Department, testified that she responded to Kristine Melton's house on October 7, 2019, and she said that when she arrived at the house, she took photographs of the scene and collected evidence – and during Ms. Potts' testimony, the photographs and evidence were shown to the jury. (T-1610-1625). Ms. Potts stated that after processing Ms. Melton's house, she obtained buccal swabs from Appellant Wilson. (T-1625-1628).

Noelia Hernandez. Dr. Hernandez, a medical examiner, stated that she conducted the autopsy on Kristine Melton. (T-1636). Dr.

Hernandez gave the following conclusion regarding Ms. Melton's cause of death:

> [B]ased on what I was explaining earlier in the neck, how she had hemorrhage extending from the superficial muscles all the way to the deep muscles, as well as the bruises on the outside of her neck – and, also, she had petechiae on one of her eyelids and petechiae on her scalp – it's all – all of her autopsy findings taken together are consistent with death by asphyxia due to compression of the neck.

(T-1653).

Luis Taboada Rodriguez. Mr. Taboada Rodriguez stated that on October 7, 2019, he went to his daughter's elementary school, and he said that when he was at the school, he noticed a woman's purse laying in the middle of the road by the entrance of the school – and he explained that he retrieved the purse and turned it into the school. (T-1661-1662).

Dawn Griffin. Ms. Griffin stated that in October of 2019, she was working at Benson and Associates – an interior design company. (T-1665-1666). Ms. Griffin testified that on October 7, 2019, she arrived at work at 6:30 a.m., and she said that at approximately 7:30

a.m., she observed a man who was not wearing a shirt – and who had several tattoos – pass close by the door of her office building. (T-1666-1667). Ms. Griffin stated that she then heard a voice, and she said that when she looked outside, she could see the man and another person with blonde hair struggling with each other. (T-1668). Ms. Griffin testified that after observing the struggle, she called 911. (T-1669).

Amy Slobodzian. Ms. Slobodzian, a friend of Melisa Montanez, stated that on the evening of October 6, 2019, she went to the Buddha bar to meet Ms. Montanez. (T-1673-1674). Ms. Slobodzian testified that when she arrived at the bar, Ms. Montanez introduced her to Appellant Wilson. (T-1674). Ms. Slobodzian stated that when the bar closed, she observed Ms. Montanez standing outside, and she said that Ms. Montanez told her that Appellant Wilson took her vehicle (a Dodge Hellcat) and left. (T-1675). Ms. Slobodzian testified that she then offered to drive Ms. Montanez back to her house, and she said that when they arrived at her house, Ms. Montanez slept on her sofa. (T-1675). Ms. Slobodzian stated that the following morning, she drove

Ms. Montanez to the spa that she owned – where Ms. Montanez was going to meet Appellant Wilson and retrieve her vehicle. (T-1676). Ms. Slobodzian testified that when they arrived at the spa, she observed Appellant Wilson – but he was driving a different vehicle than the one that belongs to Ms. Montanez (i.e., he was driving Kristine Melton's black Nissan Versa). (T-1677-1678). Ms. Slobodzian stated that the following occurred when Ms. Montanez approached Appellant Wilson:

> [Ms. Montanez] got out [of my vehicle] and went to the driver's side window [of the vehicle Appellant Wilson was sitting in].
>
> Q. What did you see?
>
> A. She was just trying to get her stuff and they were – they were having just words back and forth, and then he tried to pull her in the window.
>
> Q. How did she respond?
>
> A. She started fighting immediately.
>
> Q. Okay. What else did she do?
>
> A. She wound up falling backwards.
>
> And then Wade got out of the vehicle after her, but the car wasn't in park. It was actually still rolling, so it almost ran them over. And then he slammed it in park and went

> after her immediately.
>
> He was ripping her dress off of her, he was pulling her hair, her extensions were everywhere all over the ground. And then he proceeded to drag her from the parking – the parking lot to the stairs, up the stairs.
>
> She was holding on to the banister like a monkey, trying to hold on, and he just kept ripping her more and more to the door upstairs.

(T-1679-1680). Ms. Slobodzian additionally claimed that (1) Appellant Wilson told her that he would kill her if she got out of her vehicle and (2) Appellant Wilson punched Ms. Montanez in the face. (T-1680). Ms. Slobodzian stated that she proceeded to call 911, and she said that when Appellant Wilson heard the sirens of the law enforcement vehicles, he got into the black Nissan Versa and drove away. (T-1680-1681).

Melisa Montanez. Ms. Montanez (a.k.a. "Mila") stated that on evening of October 6, 2019, she drove Appellant Wilson to the Buddha bar in her Dodge Hellcat (a vehicle that has manual transmission). (T-1685-1686). Ms. Montanez testified that when the bar closed, Appellant Wilson asked her to go with him to Jayson Shepard's house, but when Ms. Montanez declined, she said that Appellant Wilson stole her vehicle so that he and three other people could drive the vehicle

to Mr. Shepard's house. (T-1688). Ms. Montanez stated that Amy Slobodzian was also at the bar that evening, and she said that Ms. Slobodzian offered to let her spend the night at her house. (T-1689). Ms. Montanez testified that the following morning, she agreed to meet Appellant Wilson at the spa that she owned so that she could retrieve her vehicle. (T-1695). Ms. Montanez stated that when she arrived at the spa, she saw Appellant Wilson – but he was not driving her vehicle (i.e., he was in Kristine Melton's black Nissan Versa). (T-1695-1696). Ms. Montanez testified that she approached Appellant Wilson and questioned where her vehicle was, and she said that he asked her to get in the Nissan – and she explained that when she refused, he became violent (i.e., he punched and choked her). (T-1696-1700). Ms. Montanez stated that Appellant Wilson subsequently left the spa, and she said that law enforcement officials arrived at the spa shortly thereafter. (T-1700-1702).

Tyler Whidden. Officer Whidden with the Cape Coral Police Department testified that in October of 2019, he was assigned as a school resource officer at Hector Cafferata Elementary School. (T-

1713). Officer Whidden stated that on October 7, 2019, a parent (i.e., Luis Taboada Rodriguez) of one of the school's students turned in a purse that had been left in the road next to the school. (T-1714). Officer Whidden testified that after inspecting the purse, he learned that the purse belonged to Diane Ruiz. (T-1714-1715). Officer Whidden stated that he then learned that Ms. Ruiz' home address was close to the school, and therefore he went to Ms. Ruiz' house – and he said that Ms. Ruiz was not at the house, but her son (Branden Cuellar) was at the house, and therefore he left the purse with Mr. Cuellar. (T-1715-1718). Officer Whidden testified that Mr. Cuellar told him that Ms. Ruiz works at the Moose Lodge, and he subsequently went to the lodge to determine if Ms. Ruiz was at work, but he said that the other employees of the lodge informed him that Ms. Ruiz failed to show up for work that day. (T-1717-1718).

Branden Cuellar. Mr. Cuellar, Diane Ruiz' son, stated that in October of 2019, he lived with his mother and that his mother worked at the Moose Lodge, and he said that on the morning of October 7, 2019, his mother walked to work between 9:30 a.m. and 11 a.m. (T-

1721-1722). Mr. Cuellar testified that later that morning, law enforcement officials knocked on his door and informed him that his mother's purse had been found in the road by a nearby elementary school. (T-1730).

Scott Hannon. Mr. Hannon, the fiancé of Diane Ruiz, stated that he was living with Ms. Ruiz and her son (Branden Cuellar) in October of 2019. (T-1733). Mr. Hannon testified that at approximately noon on October 7, 2019, he received communications on his phone relating to Ms. Ruiz' purse being found and her possibly being missing. (T-1739-1740).

Patrick Power. Mr. Power stated that his house is located next to an empty lot (i.e., a lot with bushes and shrubs), and he said that on the morning of October 7, 2019, he observed a vehicle back out of the empty lot and then drive away. (T-1744). Mr. Power testified that three days later, he observed law enforcement officials gathered on the empty lot, and he said that he proceeded to tell the law enforcement officials what he had observed on October 7, 2019. (T-1745-1746).

Justin Derosso. Sergeant Derosso with the Cape Coral Police Department testified that on October 10, 2019, he assisted other law

enforcement officials in searching an empty lot in an effort to find Diane Ruiz. (T-1763). Sergeant Derosso stated that after searching the lot for approximately twenty minutes, he and the other law enforcement officials located Ms. Ruiz' body. (T-1764-1765).

Jaclyn Fordham. Ms. Fordham, a supervisor of the forensics and evidence units with the Cape Coral Police Department, testified that on October 10, 2019, she responded to the empty lot where Diane Ruiz' body was found, and she said that when she arrived at the lot, she supervised other law enforcement officials who took photographs of the scene and collected evidence – and during Ms. Fordham' testimony, the photographs and evidence were shown to the jury. (T-1778-1784).

Thomas Coyne. Dr. Coyne, a medical examiner, stated that he conducted the autopsy on Diane Ruiz. (T-1794). Dr. Coyne testified that Ms. Ruiz had multiple rib fractures that were consistent with being run over by a vehicle and she had injuries to her neck that were consistent with being strangled. (T-1812-1820).

Shanna Williamson. Ms. Williamson stated that in October of

2019, she was working at Benson and Associates. (T-1833). Ms. Williamson testified that there was a commotion outside her building on the morning of October 7, 2019, and she said that when she went outside to investigate, she observed another woman from the office complex (Melisa Montanez) in an altercation with a man, and she said that the man was grabbing Ms. Montanez by the throat and she heard Ms. Montanez scream "he's trying to kill me." (T-1835-1837). Ms. Williamson stated that she told the man to "stop," and she said that Ms. Montanez was able to run away – and she explained that both she and Ms. Montanez ran into Ms. Williamson's building and they locked the door. (T-1837-1838).

Timothy McCormick. Mr. McCormick stated that in October of 2019, he was an officer with the Fort Myers Police Department. (T-1841). Mr. McCormick stated that on October 17, 2019, he received information indicating that Appellant Wilson was at Joe's Crab Shack. (T-1842-1844). Mr. McCormick testified that he responded to Joe's Crab Shack and came into contact with Appellant Wilson – who was sitting in a vehicle, and Mr. McCormick explained that during his interaction with Appellant Wilson, he was wearing his body-worn

camera (and during Mr. McCormick's testimony, the recording of Mr. McCormick's interaction with Appellant Wilson was played for the jury). (T-1844-1853). Mr. McCormick stated that during his interaction with Appellant Wilson, Appellant Wilson "seemed nervous" and "a little defensive and uncooperative." (T-1847). Mr. McCormick testified that as he was attempting to detain Appellant Wilson, Appellant Wilson fled the scene (i.e., by driving away). (T-1854).

Fannie Amlin. Ms. Amlin stated that she lives in Cape Coral, and she said that she left her house on the morning of October 7, 2019, to go out of town – and she said that she later received a call from law enforcement officials informing her that Appellant Wilson had broken into her house. (T-1863-1865). During Ms. Amlin's testimony, the State presented pictures that were taken of her house after Appellant Wilson had been there, and the pictures established that Appellant Wilson drank five cans of White Claw seltzer. (T-1870-1871).

Steven Testasecca. Mr. Testasecca, Appellant Wilson's biological father, stated that he was "[f]ourteen or 15" when he found out he was going to be Appellant Wilson's father, and he said that

Appellant Wilson's biological mother was "[a] year younger than" him at the time. (T-1873-1874). Mr. Testasecca explained that due to their young age, he and Appellant Wilson's biological mother placed Appellant Wilson for adoption – and he said that Appellant Wilson was adopted by Candy and Steve Wilson. (T-1874). Mr. Testasecca stated that he reconnected/formed a relationship with Appellant Wilson when Appellant Wilson turned eighteen years old. (T-1875).

Mr. Testasecca testified that on the evening of October 7, 2019, Appellant Wilson called him and said the following:

> He just told me, you know, he did something. There was two people gone that would not be back. He – he said, "I'm a killer."

(T-1878). Mr. Testasecca stated that Appellant Wilson called him again and told him that he choked Kristine Melton at her house. (T-1879). Mr. Testasecca testified that during the second call, Appellant Wilson also made the following admission regarding Diane Ruiz:

> He said he saw her walking down the street and stopped and asked her for directions, and she got in the car with him.
>
> Q [by the prosecutor]. What did he say happened once she got in the car with him?

A. He said he reached over and choked her.

Q. And did he tell you that he choked her while he was driving?

A. Yes, ma'am.

Q. Now, what did he say happened after he choked her?

A. He said he was looking for a place to put her body.

Q. Did he find a place where he eventually dumped her body?

A. Yes, ma'am.

Q. What did he tell you about the situation when he got to the place where he was going to dump her body?

A. He said that he pulled her out the car and realized that she was still breathing.

Q. So what did he tell you he did when he realized she was still breathing?

A. He said he got back in the car and ran her over until she looked like spaghetti.

(T-1880-1881). Mr. Testasecca stated that he learned that at the time of the two phone calls, Appellant Wilson was in a house that he had broken into in order to escape from law enforcement officials (i.e., Fannie Amlin's house). (T-1883). Mr. Testasecca testified that he

decided that he needed to tell law enforcement officials about his phone calls with Appellant Wilson, and therefore – in an effort to learn the address from which Appellant Wilson was calling – he told Appellant Wilson that he would send an Uber driver to come pick him up and bring him to his house. (T-1883-1884). Mr. Testasecca stated that when Appellant Wilson gave him the address, he and his wife provided the address to law enforcement officials. (T-1884).

Matt Fordham. Detective Fordham with the Cape Coral Police Department stated that on October 7, 2019, he and other law enforcement officials located and apprehended Appellant Wilson after Steven Testasecca provided them with Appellant Wilson's address. (T-1889).

Daniel Baker. Mr. Baker, a criminalist with the Indian River Crime Laboratory, testified that he was assigned to conduct DNA testing on various pieces of evidence relating to Appellant Wilson's case. (T-1905). Mr. Baker stated that Appellant Wilson's DNA was found on clothing that was surrounding the area where Kristine Melton's body was found. (T-1920-1937). Mr. Baker further stated

that Diane Ruiz' DNA was found on the passenger door of Kristine Melton's black Nissan Versa (i.e., the vehicle that Appellant Wilson was driving on October 7, 2019). (T-1943-1946).

Jamison Lazenby. Sergeant Lazenby with the Lee County Sheriff's Office testified that he worked at the Lee County Jail in 2019. (T-1950). Sergeant Lazenby stated that in October of 2019, he came into contact with Appellant Wilson at the jail, and he said that Appellant Wilson asked him to arrange a meeting so that he could talk to the detectives who were investigating this case, and Sergeant Lazenby said that he subsequently arranged the meeting. (T-1950).

Nicolas Jones. Master Corporal Jones of the Cape Coral Police Department testified that on October 10, 2019, Sergeant Jamison Lazenby contacted him and told him that Appellant Wilson wanted to meet with him at the jail. (T-1953). Master Corporal Jones stated that he subsequently went to the jail and interviewed Appellant Wilson, and he said that he recorded the interview – and during Master Corporal Jones' testimony, the State played the recording of the interview for the jury. (T-1953-1995). During the interview,

Appellant Wilson said the following regarding Diane Ruiz:

> Truth is I picked the girl up (inaudible), but I picked her up somewhere by the school. You know, not far from the school. The street down.
>
> She brought me to the school, and I choked her out until she couldn't breathe anymore and she fell asleep, you know. She wasn't fully dead yet. Then I brought her (inaudible) and she was still alive, and pushed her of [sic] the car.
>
> And she tried to get out. I ran her over with the car. I ran her over like 10 times – 10, 20 times, her head and her body. I ran it over with the vehicle so she was not going anywhere. It was just disfigured, her whole body. She couldn't get up. She was dead for sure. Then I left.

(T-1961). During the interview, Appellant Wilson also admitted to killing Kristine Melton. (T-1971-1974). And during the interview, Appellant Wilson said that he was on drugs at the time of the murders. (T-1962, 1974-1978).

At the conclusion of Master Corporal Jones' testimony, the State rested. (T-1996). The defense rested without presenting any witnesses. (T-2000).

iii. Closing Arguments, Final Jury Instructions, and the Jury's Verdict.

The parties gave their closing arguments (T-2028-2057), and the trial court instructed the jury. (T-2061-2093). The jury found

Appellant Wilson guilty as charged for all counts. (T-2106-2107; R-1337-1338).

b. Penalty Phase.

i. Preliminary Instructions and Opening Statements.

The trial court gave preliminary instructions to the jury (P-11-21), and the parties gave opening statements to the jury. (P-23-45).

ii. The State's Case in Chief.

Lisa Lansky. Ms. Lansky testified that she is a forensic specialist with the Cape Coral Police Department, and during Ms. Lansky's testimony, Ms. Lansky confirmed that Appellant Wilson's fingerprints matched the fingerprints from two prior criminal judgments. (P-46-51).[7]

Samantha. Samantha, Kristine Melton's cousin, provided a victim impact statement relating to Ms. Melton. (P-53-60).

Zane Romero. Mr. Romero, Diane Ruiz's son, provided a victim impact statement relating to Ms. Ruiz. (P-61-68).

At the conclusion of Mr. Romero's testimony, the State rested.

[7] At the time of the offenses in this case, Appellant Wilson was on probation for a felony out of Palm Beach County. (P-35).

(P-68).

iii. Appellant Wilson's Case in Chief.

Hyman Eisenstein. Dr. Eisenstein, a licensed clinical psychologist with a specialty in clinical neuropsychology and forensic neuropsychology, stated that he conducted an evaluation of Appellant Wilson. (P-77-78). Dr. Eisenstein opined the following based on his evaluation:

> [M]y ultimate conclusion is that Mr. Wilson has neurocognitive brain impairments. Most likely right hemispheric and, also, frontal lobe involvement.
>
> There's enough data to support that his – his brain is not functioning like a normal, healthy individual. It's supported by the fact that he's had multiple head injuries, and this is a synergistic effect.
>
> Each one is – adds on more than just a cumulative, but it's exponentially gets worse. And throughout his life, he's had multiple head injuries. And brain scans have been performed, although these are just CT scans, nothing more than that.
>
> This is also complicated, certainly, by his drug usage over his life, as well as psychiatric conditions, which are numerous.
>
> And currently he's on medication. He's been on medication for many, many years to quiet his brain, to have his brain functioning, to try to have him, at least, at the state of ease in terms of his brain functioning, which he recognizes and certainly the family recognize recognizes is abnormal.

(P-113-114).

Mark Mills. Dr. Mills, a forensic psychiatrist, stated that he conducted an evaluation of Appellant Wilson. (P-162). Dr. Mills opined the following based on his evaluation:

> My diagnosis and belief is that Mr. Wilson has some kind of psychotic disorder. Sadly, because he was not particularly forthcoming with me, I can't characterize it very well.
>
> Generally, when I testify, I have more information, both from the evaluate – but from the defendant in a case like this, and I have more information from prior hospital records, from Baker Act hospitalizations, from other psychiatric hospitalizations, and I can characterize that disorder pretty [] well.
>
> Here we've heard about mood swings that could suggest bipolar disorder. We've heard about a diagnosis of schizoaffective disorder in the jail records.
>
> There's a good study going back to, really, my time in medical school called the Stages of Mania, which says – 1972 is the date of the study – you can't distinguish acutely between schizophrenia, bipolar disorder, and schizoaffective disorder.
>
> So I don't know exactly what Mr. Wilson has, but I think it is very significant, and I think it is a psychotic-level illness. And his degree of paranoia – we have come to all the examples yet, but some of the examples the parents told me about are quite striking.
>
> I'll give you one: That at some point, Mr. Wilson's mother, Candy's father, perished, and they moved – the family moved into his home.
>
> And in the morning everybody would get up and, I guess, people go to school, and she would – of course Mrs. Wilson would go up and make breakfast for the family and would open the curtains, and the house would sort of be

functioning.

Well, Mr. Wilson, as a kid – and he was 15 or –

Q. That's Wade Wilson?

A. That's Wade Wilson, yeah, as a kid, age 15 or16, would go around and systematically close the curtains. And at some point, probably, like, the first or second time, Mrs. Wilson would call him and say, well, why are you doing this, what's wrong, what's going

And he said, "There are people out there."

And she said, "Okay."

And he said, "They're going to harm me."

She said, "Are you sure?"

He said, "They're going to harm you, too, Mom. They're going to harm the family."

And he was very upset. And this happened more than once; that is, he had an apparent belief that others were intending to harm him and the family for reasons that were never specified.

Now, that sounds, frankly, not only paranoid but delusional. It isn't just that he was frightened or scared, but he had turned that fear into an entity or a group of entities who were planning to harm him and the family.

(P-179-181).

At the conclusion of Dr. Mills' testimony, the defense rested. (P-235).

iv. The State's Rebuttal.

Michael Herkov. Dr. Herkov, a psychologist and

neuropsychologist, testified that he conducted an evaluation of Appellant Wilson. (P-251-252). Dr. Herkov opined that (1) Appellant Wilson does not have any memory defects (P-292); (2) Appellant Wilson does not have frontal lobe impairment or brain injury (P-283, 289); (3) Appellant Wilson does not have executive function brain damage (P-293-294); and (4) Appellant Wilson does not suffer from a psychotic disorder like schizophrenia or psychoaffective disorder. (P-2407).

At the conclusion of Dr. Herkov's testimony, the State rested. (P-321-322).

v. Appellant Wilson's Surrebuttal.

Hyman Eisenstein (recalled). Dr. Eisenstein stated that he reviewed Appellant Wilson's jail records and he said that the records demonstrated that Appellant Wilson was prescribed the following medications:

> So, on 5/18/22 in the medical records, he was given Risperdal, one milligram; 5/18/22, Invega; 5/18/22, Zoloft; 12/23/22, notation of Depakote; 2/13/23, Cymbalta; 6/27/23, Abilify; currently, lithium.
>
> In 2021, he was diagnosed with bipolar and antisocial

> disorder. He was also given, in 2021, Lexapro, 20 milligrams; BuSpar, 15 milligram; lithium 600 milligram; Trileptal and Lamicdal; 3/8/22 bipolar versus schizoaffective was in the records.

(P-323-324).

Mark Mills (recalled). Dr. Mills testified that the medications that were given to Appellant Wilson during the time that he was in the jail are prescribed "are all antipsychotic medication[s]" and he said that "[t]hey are used either to treat schizophrenia, schizoaffective disorder, or bipolar disorder." (P-325).

At the conclusion of Dr. Mills' testimony, the defense rested. (P-325).

vi. Closing Arguments, Final Jury Instructions, and the Jury's Verdict.

The parties gave their closing arguments (P-360-410), and the trial court instructed the jury. (P-410-441, 445-479). The jury found by a vote of 9-to-3 that Appellant Wilson should be sentenced to death for the murder of Kristine Melton and the jury found by a vote of 10-to-2 that Appellant Wilson should be sentenced to death for the murder of Diane Ruiz. (P-489-493; R-1404-1407).

c. *Spencer*/Sentencing Hearing.

i. Appellant Wilson's Case in Chief.

Mark Rubino. Dr. Rubino, a medical doctor board certified in neurology, stated that he ordered and reviewed several brain scans of Appellant Wilson, including an MRI, DTI and CT scans. (R-2129). After reviewing the brain scans, Dr. Rubino opined that Appellant Wilson has a brain injury – and he stated that he believed that the crimes in this case are evidence of Appellant Wilson's brain impairment. (R-2133-2137).

Letter from Appellant Wilson's adoptive parents. Defense counsel read a letter from Appellant Wilson's adoptive parents. (R-2177-2180).

After the letter was read, the defense rested. (R-2180).

ii. The State's Case in Chief.

Thomas Coyne (recalled). Dr. Coyne, one of the medical examiners who testified during the guilt phase, stated that his conclusion, after looking Appellant Wilson's brain scans, was that Appellant Wilson's brain was completely normal and there was no

evidence of significant brain trauma. (R-2195-2223).

At the conclusion of Dr. Coyne's testimony, the State rested. (R-2234). The defense did not present any rebuttal witnesses.

iii. Closing Arguments and the Trial Court's Pronouncement of Sentence.

At the close of the evidence, the parties gave their closing arguments. (R-2240-2251). Ultimately, the trial court imposed the death sentence for both murder counts. (R-2255-2262).

D. SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

1. Summary of the Argument.

Appellant Wilson raises six claims on appeal. First, the application of the 2023 version of section 921.141, Florida Statutes (which eliminated the jury unanimity requirement) to Appellant Wilson's offenses (which occurred four years earlier in 2019) violates the *Ex Post Facto* Clauses of the United States and Florida Constitutions as well as Florida statutory law. The elimination of the unanimity requirement makes it substantially more difficult for a capital defendant to defend against the imposition of a death sentence than the pre-2023 sentencing statute. Moreover, section 775.022, Florida Statutes, expressly prohibits retroactive application of any statute "dealing in any way with a crime or its punishment."

Second, this Court's holding in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), that unanimity was not constitutionally required in capital sentencing, except for the finding of one or more aggravating factors, should be revisited in light of the Supreme Court's affirmation in *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020), of the right to a

unanimous verdict as inherent in the right to a jury trial.

Third, Florida's capital sentencing scheme does not satisfy Eighth Amendment standards because of the combined effect of the recent elimination of the unanimity requirement, the elimination of proportionality review, and the increase over time of the number and scope of aggravating factors. The current system does not adequately channel the sentencer's discretion and does not contain sufficient safeguards against arbitrary and inconsistent capital sentencing.

Finally, in claim 4, Appellant Wilson asserts that section 921.141(6)(h), Florida Statutes (the "heinous, atrocious, or cruel" aggravator) is unconstitutional; in claim 5, he asserts that section 921.141(6)(i), Florida Statutes (the "cold, calculated, and premeditated" aggravator) is unconstitutional; and in claim 6, he asserts that section 921.141(8), Florida Statutes (victim impact evidence) is unconstitutional.

2. Standard of Review.

Because all of the issues presented in this brief appeal constitutional and statutory interpretation of Florida's death penalty

law, this Court's review is *de novo*. *See Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 485 (Fla. 2008).

E. ARGUMENT AND CITATIONS OF AUTHORITY[8]

1. Application of the 2023 version of section 921.141, Florida Statutes, to Appellant Wilson's case violates the *Ex Post Facto* Clauses of the United States and Florida Constitutions as well as Florida statutory law.[9]

The two murder offenses in this case occurred on October 7, 2019. *After* the two murder offenses were committed, Senate Bill 450 was signed into law and immediately went into effect upon its signing on April 20, 2023. The bill amended section 921.141, Florida Statutes, and provided, in pertinent part, that a death sentence may be imposed if it is recommended by at least eight jurors as opposed to the unanimous recommendation of all twelve jurors that was required

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[8] Due to either lack of preservation or lack of merit, undersigned counsel are not raising any claims in this brief relating to the guilt phase of Appellant Wilson's trial. *See, e.g.,* (R-1108: motion to sever; T-1799: objection to autopsy photographs; T-1856: motion for mistrial).

[9] In drafting this claim, undersigned counsel have substantially relied on (1) the argument presented by Barbara J. Busharis, Esquire, in her briefs in *Hunt v. State*, case number SC24-0096 (and undersigned counsel also relied on Ms. Busharis' arguments for claims 2 and 3 of this brief), and (2) the reasoning of the Honorable Mark D. Kiser in his April 12, 2024, order in *State v. Adams*, case number 2023-CF-1904 (Thirteenth Circuit/Hillsborough County). Undersigned counsel further note that the issue presented in this claim is currently pending before the Court in *Hunt*.

by the prior version of the statute. *See* ch. 2023-23, § 1, Laws of Fla. *Compare* § 921.141, Fla. Stat. (2023), with § 921.141, Fla. Stat. (2021). As explained below, application of the 2023 version of section 921.141 to Appellant Wilson's case violates the *Ex Post Facto* Clauses of the United States and Florida Constitutions as well as Florida statutory law.

a. The 2023 statute abolishing unanimity violates the federal and state constitutions because it creates a substantial risk of increasing the punishment for capital crimes.

The *Ex Post Facto* Clause of the United States Constitution prohibits states from passing *ex post facto* laws. *See* U.S. Const. art. I, § 10. The Florida Constitution contains an identical prohibition. *See* art. I, § 10, Fla. Const. "To fall within the *ex post facto* prohibition, a law must be retrospective – that is, 'it must apply to events occurring before its enactment' – and it 'must disadvantage the offender affected by it,' by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (internal citations omitted). "[E]ven if a statute merely alters penal provisions accorded by the grace of the legislature,

it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver v. Graham*, 450 U.S. 24, 30-31 (1981) (holding a law limiting the opportunity to earn early release "makes more onerous the punishment for crimes committed before its enactment" and violates the *ex post facto* clause). The Clause "safeguards 'a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.'" *Peugh v. United States*, 569 U.S. 540, 544 (2013) (quoting *Carmell v. Texas*, 529 U.S. 513, 533 (2000)).

When a law inflicting punishment is challenged as violating the *Ex Post Facto* Clause, the issue is whether the "change in the law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh*, 569 U.S. at 539 (internal citations omitted). In *Peugh*, for example, the United States Supreme Court found an *ex post facto* violation "when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines

sentencing range than the version in place at the time of the offense." *Id.* at 533. The United States Supreme Court pointed to *Miller v. Florida*, 482 U.S. 423 (1987), as "[t]he most relevant of our prior decisions for assessing whether the requisite degree of risk is present here." *Peugh*, 569 U.S. at 540. In *Miller*, in turn, the United States Supreme Court had found an *ex post facto* violation where Florida had implemented sentencing guidelines that resulted in a higher sentencing range for the defendant's crime than those previously in place: while the sentence imposed under the pre-existing guidelines would have been reviewable on appeal, the same sentence under the new guidelines "required no explanation and was unreviewable." *Peugh*, 569 U.S. at 540. The United States Supreme Court explained that the "'. . . high hurdle that must be cleared before discretion [could] be exercised' was sufficient to render the changed guidelines an ex post facto law." *Id.*[10] *See also Leftwich v. Fla. Dep't of*

[10] The United States Supreme Court also explained why this issue is distinct from any Sixth Amendment issue about the burden of proof for findings increasing a sentence: "Our Sixth Amendment cases have focused on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty. Our ex post facto cases, in contrast, have focused on whether a change in law creates

Corrections, 148 So. 3d 79, 83 (Fla. 2014) (noting as a general rule that, "[i]f retroactive application of a statutory amendment results in additional punishment for a defendant, it violates the ex post facto clause.").

The elimination of the unanimity requirement creates sufficient risk that a death sentence will be imposed to satisfy the concerns identified in *Peugh* and *Miller*. Indeed, making it more likely that a death sentence can be imposed is *the reason* for the change in the law. Stated differently, the reason the law was enacted was to increase the possibility — the risk, from a capital defendant's point of view — that enough votes would be garnered to impose a death sentence, and to decrease the "risk" that one, two, or even three jurors would not be persuaded that death was an appropriate punishment in a given case. Under the 2023 statute, to receive a life sentence, a capital defendant must convince five jurors that death is not appropriate. This is a significant hurdle and was intended to be. The abrogation of

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a 'significant risk' of a higher sentence; here, whether a sentence in conformity with the new Guidelines is substantially likely." *Peugh*, 569 U.S. at 549-550.

unanimity was intended to result in the imposition of the death penalty on a greater number of defendants.

To the extent abolishing unanimity is a change in the "procedure" for obtaining a death verdict, moreover, the United States Supreme Court has stated the procedural label does not keep a law from violating the *Ex Post Facto* Clause. *See Collins v. Youngblood*, 497 U.S. 37, 46 (1990) ("by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause."). That holding calls into question any decisions predating *Collins* which may have relied on a distinction between procedural and substantive law. *See, e.g., Dobbert v. Florida*, 432 U.S. 282 (1977). In *Dobbert*, the United States Supreme Court rejected an argument that the post-*Furman*[11] change in the roles of judge and jury in capital sentencing created an *ex post facto* violation. The United States Supreme Court gave two independent reasons for its conclusion: that the changes in the law were procedural, and that they were

[11] *Furman v. Georgia*, 408 U.S. 238 (1972).

ameliorative. *See id.* at 292. The United States Supreme Court reasoned that "the change in the statute was clearly procedural" because the statute "simply altered the methods employed in determining whether the death penalty was to be imposed [with no] change in the quantum of punishment attached to the crime." *Id.* at 293. That rationale is no longer viable after *Collins*. What remains of *Dobbert* is the rationale that the post-*Furman* statute was not an *ex post facto* law because it was ameliorative, which meant "the new statute affords significantly more safeguards to the defendant than did the old." *Id.* at 296. Clearly, although its proponents see it as an improvement, the abolition of unanimity was not intended to be ameliorative in the sense that term was used in *Dobbert*.

This Court upheld Florida's post-*Hurst*[12] sentencing scheme against an *ex post facto* challenge in *Victorino v. State*, 241 So. 3d 48 (Fla. 2018). Relying on *Lynce*, the Court held the law was not an *ex post facto* law:

> Florida's new capital sentencing scheme, which requires the jury to unanimously and expressly find all the

[12] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

> aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, *see* § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable.

Victorino, 241 So. 3d at 50. However, *Victorino* did not address the risk of imposition of a higher punishment that is at issue here, and so *Victorino* does not control.[13]

b. Florida statutory law (§ 775.022, Fla. Stat.) expressly prohibits retroactive application of any statute "dealing in any way with a crime or its punishment."

In addition to the federal and state constitutional prohibitions against *ex post facto* laws, section 775.022, Florida Statutes, prohibits retroactive application of a criminal penalty. Section 775.022 states the following in relevant part:

> (2) As used in this section, the term "criminal statute"

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[13] The Fifth District Court of Appeal's subsequent opinion in *State v. Victorino*, 372 So. 3d 772 (Fla. 5th DCA), *reh'g denied* (Oct. 23, 2023), allowing the defendant in that case to be retried without the unanimity requirement after receiving *Hurst* relief, emphasized the characterization of the 2023 statute as procedural and did not cite *Peugh* or *Miller* at all.

> means a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.
>
> (3) Except as expressly provided in an act of the Legislature or as provided in subsections (4) and (5), the reenactment or amendment of a criminal statute operates prospectively and does not affect or abate any of the following:
>
> (a) The prior operation of the statute or a prosecution or enforcement thereunder.
>
> (b) A violation of the statute based on any act or omission occurring before the effective date of the act.

§ 775.022, Fla. Stat. (2024).

To derive the meaning of this statute, the Court must "look at the text itself, as understood in its context, not to any purported intent underlying the text." *State v. Crose*, 378 So. 3d 1217, 1234 (Fla. 2d DCA 2024). When construing a statute, the "'first (and often only) step . . . is to ask what the Legislature actually said in the statute, based upon the common meaning of the words used' when the statute was enacted." *Tsuji v. Fleet*, 366 So. 3d 1020, 1025 (Fla. 2023) (citing *Shepard v. State*, 259 So. 3d 701, 705 (Fla. 2018)).

Thus, the first step in analyzing the text at issue here is whether the amendment to section 921.141 is the "amendment of a criminal

statute" as included in section 775.022(3). Section 775.022(2) defines the term "criminal statute" as "a statute, *whether substantive or procedural*, dealing *in any way with a crime or its punishment*, defining a crime or a defense to a crime, or providing for the punishment of a crime." § 775.022(2), Fla. Stat. (2024) (emphasis added). Clearly the amendment to section 921.141 is a criminal statute within the meaning of section 775.022(2). Moreover, there is no question that section 921.141, which is titled "sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence," deals with the "punishment" of any crime that makes a defendant eligible for the death penalty. Hence, because the amendment to section 921.141 does constitute a "criminal statute" and, therefore, falls within the purview of section 775.022, the next step in the analysis is to focus on the language of section 775.022(3).

Section 775.022(3), in relevant part, states "the . . . amendment of a criminal statute operates prospectively and does not affect or abate . . . (a) [t]he . . . prosecution or enforcement thereunder" unless it is either "expressly provided in an act of the Legislature" or included

within sections 775.022(4) or (5). Appellant Wilson's prosecution had already begun at the time the amendments to section 921.141 went into effect. Appellant Wilson was arrested on October 7, 2019, and he was later indicted on November 19, 2019, for two counts of capital first-degree murder. The State filed its "Notice of Intent to Seek Death Penalty" on December 3, 2019. (R-84). All of these events took place *well before* Senate Bill 450's enactment date of April 20, 2023. Because of this, the language of section 775.022(3) prohibits section 921.141's amendments from "affect[ing] . . . the . . . prosecution" that had already begun in the instant case. Stated another way, Appellant Wilson's 2019 prosecution for capital first-degree murder requires the application and enforcement of section 921.141, thus making the 2023 amendment to the statute subject to the limitations in section 775.022(3)(a).[14]

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[14] When the Legislature amended section 921.141 – dispensing with the jury unanimity requirement and replacing it with an 8-4 vote – it did not attempt to apply the amendment retroactively. A statute that provides an unambiguous effective date is clear and controlling evidence of legislative intent. *See State Farm Mut. Auto. Ins. Co. v. W. Gables Open MRI Servs., Inc.*, 846 So. 2d 538, 540 (Fla. 3d DCA 2003). In amending the statute, the legislature stated that "[t]his act shall

* * * * * * *

Accordingly, for the reasons set forth above, the application of the 2023 version of section 921.141 to Appellant Wilson's case violates the *Ex Post Facto* Clauses of the United States and Florida Constitutions and section 775.022. Therefore, Appellant Wilson requests that that his sentence of death be vacated as unconstitutional and as violative of section 775.022.

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take effect upon becoming a law," which occurred when the Governor signed the bill into law on April 20, 2023. Ch. 2023-23, Laws of Fla. "[T]he Legislature's inclusion of an effective date for an amendment is considered to be evidence rebutting intent for retroactive application of a law." *Fla. Ins. Guar. Ass'n v. Devon Neighborhood Ass'n*, 67 So. 3d 187, 196 (Fla. 2011).

2. The Sixth and Eighth Amendments to the United States Constitution require a unanimous determination that death is the appropriate sentence, and this Court should reevaluate its precedent in light of *Ramos v. Louisiana*, 590 U.S. 83 (2020).

In *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020), the United States Supreme Court unequivocally stated that the Sixth Amendment right to a jury trial includes the right to a unanimous verdict:

> Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's adoption – whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward – the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

In light of the Court's clear holding and the reasoning behind it, Appellant Wilson respectfully suggests that this Court's decision in *State v. Poole*, 297 So. 3d 487, 504 (Fla. 2020), that the United States Constitution does not require jury unanimity on the verdict of death, requires reevaluation.

In *Ramos*, the United States Supreme Court struck down a Louisiana provision allowing convictions based on a nonunanimous (10-2) vote. *See Ramos*, 590 U.S. at 93. Beginning with the anomaly that only Louisiana and Oregon allowed nonunanimous convictions,

the United States Supreme Court explained the history of racial and ethnic bigotry underlying those provisions:

> . . . Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.
>
> Nor was it only the prospect of African-Americans voting that concerned the delegates. Just a week before the convention, the U.S. Senate passed a resolution calling for an investigation into whether Louisiana was systemically excluding African-Americans from juries. Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African-American juror service would be meaningless."
>
> Adopted in the 1930s, Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute "the influence of racial, ethnic, and religious minorities on Oregon juries." In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race

> was a motivating factor in the adoption of their States' respective nonunanimity rules.

Ramos, 590 U.S. at 87-88 (internal references omitted).

In other words, against a backdrop where the unanimity requirement was "firmly entrenched in America's jurisprudence," Raoul Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 30 (2009), that requirement was relaxed in two states to maintain the supremacy of the white majority. *See id.* at 31 ("The unanimity requirement also gives meaning to each juror's vote, thereby preventing a simple majority of the jury from ignoring an individual juror's voice when imposing a death sentence against a fellow citizen. Put another way, courts that allow a non-unanimous jury to render a verdict invariably empower superficial, narrow, and prejudiced arguments that appeal only to certain groups."). *See also* Jennifer Eisenberg, *Ramos, Race, and Juror Unanimity in Capital Sentencing*, 55 Loyola L.A. L. Rev. 1085, 1104-1105 (2022) ("Juror unanimity is required in federal capital sentencing, and as Justice Gorsuch reiterated in *Ramos*, the Sixth Amendment is not applied in a watered-down version against the

states. Because *Ramos* also emphasized that unanimity enhances the quality of juror deliberations, in addition to the racial concerns of non-unanimity, juror unanimity as to death should arguably be considered a requisite procedural safeguard per *Gregg v. Georgia* and the Eighth Amendment.").

The *Ramos* Court abrogated two earlier decisions allowing the Louisiana and Oregon provisions to stand: *Apodaca v. Oregon*, 406 U.S. 404 (1972), and a companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972). Justice Gorsuch, writing for the majority in *Ramos*, pointed out that those plurality decisions had been problematic from the beginning, as they were not grounded in the history of the unanimity requirement or in how it would have been understood when the Sixth Amendment was adopted, but instead was based on a "reframing" of the issue as "whether unanimity serves an important 'function' in 'contemporary society.'" *Ramos*, 590 U.S. at 93-94. That reframing, the United States Supreme Court stated, overlooked "the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury included a right to a unanimous verdict." *Id.* at 100.

Moreover, the historical rationale for the unanimity requirement – that a person's liberty should not be taken unless a jury unanimously agreed on the verdict – applies with equal or greater force in capital sentencing, where the jury returns separate verdicts on guilt and punishment. As the United States Supreme Court stated in *Jones v. United States*, 527 U.S. 373, 382 (1999), "in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'"

This Court's holding in *Poole* predated the *Ramos* decision by three months. *Poole* receded from the holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), that the Sixth and Eighth Amendments and state counterparts require unanimity as to the jury's finding that death is the appropriate sentence. In so doing, *Poole* relied heavily on *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), which held "there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed." The decision also cited *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (upholding a

provision allowing the trial judge, acting alone, to impose a capital sentence, and trusting the judge to give proper weight to a jury's advisory recommendation).[15] Because these cases involved statutory schemes giving more decision-making authority to the trial judge than Florida's scheme, they simply did not address unanimity. As Justice Sotomayor recognized when dissenting from the denial of certiorari in *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 407-08, 411 (Mem.) (2013), the United States Supreme Court's Sixth and Eighth Amendment jurisprudence has evolved since *Spaziano* and *Harris* were decided, and sentencing schemes that were acceptable earlier are constitutionally suspect now.

Florida's legislative abolition of unanimity makes Florida an outlier among outliers, allowing death sentences to be imposed even when four out of 12 carefully selected jurors – one-third of a group with the power to exercise the conscience of the community – have listened to both guilt and penalty phase evidence, have been instructed on the law, have deliberated, have exercised their moral

[15] *See Poole*, 297 So. 3d at 504.

judgment, and as a result have determined that a particular defendant is not among the small number of those for whom death is an appropriate punishment.

The reason for the 8-4 legislation is clear: three members of a Broward County jury did not vote for death in the case of Nikolas Cruz, who pled guilty to multiple counts of murder in the Parkland school shootings. The remarks contained in the April 20, 2023, news release from the Governor's Office[16] are candid:

> TALLAHASSEE, Fla. — Today, Governor Ron DeSantis was joined by parents of the victims of the Parkland mass murder to sign Senate Bill (SB) 450, which reforms Florida's death penalty statutes including reducing the number of jurors needed to administer capital punishment from unanimous to a supermajority of eight out of twelve.
>
> "Once a defendant in a capital case is found guilty by a unanimous jury, one juror should not be able to veto a capital sentence," said Governor Ron DeSantis. "I'm proud to sign legislation that will prevent families from having to endure what the Parkland families have and ensure proper justice will be served in the state of Florida."
>
> "A few months ago, we endured another tragic failure of the

[16] Governor DeSantis Signs Bill to Ensure Justice in Capital Cases (April 20, 2023), available at https://www.flgov.com/eog/news/press/2023/governor-desantis-signs-bill-ensure-justice-capital-cases.

justice system. Today's change in Florida law will hopefully save other families from the injustices we have suffered," said Ryan Petty, father of Alaina. "I'd like to thank Governor DeSantis and the Florida Legislature for this important legislation."

"Thank you, Governor DeSantis, Senator Ingoglia, and Representative Jacques for enacting this legislation that changes the death penalty law," said Hunter Pollack, brother of Meadow. "While we cannot go back and change the past, we can ensure that no community will ever have to endure the injustice and pain that we did when the Parkland shooter did not receive the death penalty."

"This bill is about victims' rights, plain and simple. It allows the victims of heinous crimes a chance to get justice and have the perpetrators punished to the full extent of the law," said Tony Montalto, father of Gina. "Thank you to everyone who worked so hard on this bill."

"Thank you, Governor DeSantis, Senator Ingoglia, and Representative Jacques for their passionate hard work on victims' rights," said Tom and Gena Hoyer, mother and father of Luke. "This bill will bring full accountability to the perpetrators of wicked crimes and help victims receive justice."

"The victims of the most evil crimes and their families deserve to see criminals punished to the full extent of the law," said Senator Blaise Ingoglia. "One rogue juror should not be the sole arbiter of justice. Thank you to the Parkland families, Governor DeSantis, and Representative Jacques for ensuring this doesn't happen again."

Florida will no longer allow a small handful of activist

> jurors to derail the full administration of justice when individuals are found guilty beyond a reasonable doubt and meet the qualifications for the death penalty," said Representative Bernie Jacques.

All this disregards the long-standing presumption that jurors follow instructions and take their jobs seriously. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (referencing "the almost invariable assumption of the law that jurors follow their instructions . . . which we have applied in many varying contexts"). *See also Joseph v. State*, 336 So. 3d 218, 243 (Fla. 2022) (rejecting claim that a jury failed to follow the law in a capital case where it deliberated for only two hours and found no mitigating circumstances); *Lowe v. State*, 259 So. 3d 23, 52 (Fla. 2018) ("[I]n the absence of evidence to the contrary, we presume that jurors follow the trial court's instructions.").

The reasoning of this Court's 2016 *Hurst* decision, particularly as it relates to unanimity in a death recommendation, was consistent with, and upheld principles validated in, *Ramos*:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating

> factors and mitigating circumstances. By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of society reflected in all these states and with federal law. Moreover, Florida's capital sentencing law will comport with these Eighth Amendment principles in order to more surely protect the rights of defendants guaranteed by the Florida and United States Constitutions. When all jurors must agree to a recommendation of death, their collective voice will be heard and will inform the final recommendation. This means that the voices of minority jurors cannot simply be disregarded by the majority, and that all jurors' views on the proof and sufficiency of the aggravating factors and the relative weight of the aggravating factors to the mitigating circumstances must be equally heard and considered.

Hurst, 202 So. 3d at 61–62.

The 2023 sentencing statute does not respect the historic role of the jury and its abolition of unanimity was intended specifically to deprive the jury of its most important function in capital sentencing because a high-profile case ended in an unpopular result. Accordingly, *Poole* should be revisited based on the reasoning of *Ramos* – as well as the fact that *Poole*'s underpinnings have been called into question. Ultimately, Appellant Wilson asserts that unanimity in a death recommendation is constitutionally required.

3. Florida's capital sentencing scheme violates the Eighth Amendment to the United States Constitution and its state counterpart, article I, section 17 of the Florida Constitution, because it does not meaningfully guard against arbitrary and capricious imposition of the death penalty.

The elimination of the requirement for a unanimous death recommendation, combined with this Court's elimination of proportionality review and the failure of the capital sentencing scheme to genuinely narrow the class of defendants who are eligible for the death penalty, renders Florida's capital sentencing scheme constitutionally deficient under the Eighth Amendment to the United States Constitution and the principles set out in *Furman v. Georgia*, 408 U.S. 238 (1972). The current scheme does not provide the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987) (citations omitted). Therefore, Appellant Wilson's death sentence violates his constitutional right to be free from cruel and unusual punishment. *See* U.S. Const. amend. VIII; art. I, § 17, Fla. Const.[17]

[17] This Court has previously rejected arguments that the pre-2023 capital sentencing scheme is deficient because of the

a. Dispensing with unanimity, in the context of Florida's current capital sentencing scheme, deprives capital defendants of constitutionally essential protection against arbitrary or capricious sentences.

Florida has struggled with unanimity for decades. In *State v. Steele*, 921 So. 2d 538, 548 (Fla. 2005), abrogated by *Hurst v. Florida*, 577 U.S. 92 (2016), where the Court held a trial court could not utilize a special penalty phase verdict form providing detailed information on the aggravating factors the jury found, the Court called for legislative action on unanimity:

> Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote. Of the 38 states that retain the death penalty, 35 require, at least, a unanimous jury finding of aggravators. Of these, 24 states require by statute both that the jury unanimously agree on the existence of aggravators and that it unanimously recommend the death penalty.

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elimination of proportionality review and proliferation of aggravating factors. *See, e.g., Loyd v. State*, 379 So. 3d 1080 (Fla. 2023) (petition for cert. filed, No. 23-7391 (May 6, 2024)). The Court has not yet holistically examined the effects of the 2023 statutory amendments.

Noting that "[m]any courts and scholars have recognized the value of unanimous verdicts," the Court quoted the Supreme Court of Connecticut's explanation that unanimity is a safeguard promoting reliability in capital sentencing:

> [W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate" convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid–1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

Steele, 921 So. 2d at 549 (quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) (internal citations omitted)).

However, unanimity was not required in capital sentencing in Florida until after *Hurst v. Florida* was decided in 2016. *See* Ch. 2016-13, § 3, Laws of Florida. Less than four years later, the Court held in *State v. Poole*, 297 So. 3d 487, 507 (2020), that the only

unanimous finding constitutionally required in capital sentencing is the existence of an aggravating factor – not the recommendation of death itself. The statutory sentencing scheme continued to require a unanimous recommendation of death before a death sentence could be imposed. *See id.* And then, in 2023, because a penalty phase jury did not return a unanimous recommendation of death for the defendant who shot 17 people at Marjory Stoneman Douglas High School, the statutory scheme was changed to remove the requirement of unanimity for the ultimate recommendation of death – allowing a death sentence to be imposed if only eight of twelve jurors voted for it. *See* ch. 2023-23, § 1, Laws of Florida.

Unanimity's limiting function is clear from *McKoy v. North Carolina*, 494 U.S. 433 (1990), where the United States Supreme Court invalidated a state statute requiring unanimity for mitigating factors before the jury could consider them in deciding whether to impose the death penalty. Justice Kennedy, concurring in the judgment, described jury unanimity as "an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and

that the jury's ultimate decision will reflect the conscience of the community." *Id.* at 452. The majority opinion explicitly concluded that the unanimity requirement impermissibly limited the consideration of mitigating evidence because a single juror who disagreed on the existence of a particular mitigator could prevent the entire jury from considering it when imposing sentence. *See id.* at 443-444.

More recently, in *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020), the United States Supreme Court reiterated that the Sixth Amendment to the United States Constitution requires unanimity before a defendant's liberty can be taken – tracing the history of the unanimity requirement from 14th century England through the present day: "As early as 1898, the Court said that a defendant enjoys a 'constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.'" *Id.* at 92. Part of that history, the United States Supreme Court noted, was that two jurisdictions, Louisiana and Oregon, created non-unanimous juries as a way of ensuring that

members of minority groups would not be able to prevent white jurors from voting to convict – in other words, to keep the juries from serving a limiting function. *See id.* at 88 ("In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules.").[18]

That Florida's capital sentencing scheme existed so long without unanimity being required, post-*Furman*, does not make it constitutional today. For purposes of this argument, however, what is important is not unanimity by itself, but unanimity – or the lack thereof – in connection with the lack of other meaningful limitations on the imposition of the death penalty. During the years Florida lacked the unanimity requirement, at least until the most recent statutory amendments, Florida employed proportionality review as a

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[18] But even those jurisdictions required unanimous verdicts in capital cases. *See State v. Hochstein*, 632 N.W.2d 273, 282 (Neb. 2001) ("The fact that even those jurisdictions that have eliminated or have proposed eliminating a requirement of unanimity in reaching some criminal convictions nevertheless require unanimity in capital cases reflects the understanding that such cases are qualitatively different and require an added measure of reliability.").

safeguard against arbitrary and inconsistent capital sentencing. That safeguard is no longer present.

b. The elimination of proportionality review has removed a necessary safeguard against arbitrary and inconsistent capital sentencing.

This Court originally established comparative proportionality review in Florida's post-*Furman* sentencing scheme "to ensure that the statute would be implemented in a way that would avoid the constitutional concerns articulated in *Furman*." *Lawrence v. State*, 308 So. 3d 544, 549 (Fla. 2020) (citing *State v. Dixon*, 283 So. 2d 1 (Fla. 1973)). The United States Supreme Court cited Florida's practice of reviewing the proportionality of death sentences favorably in its decision upholding Florida's post-*Furman* capital sentencing scheme. *See Proffit v. Florida*, 428 U.S. 242, 251 (1976).[19]

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[19] Proportionality review was repeatedly referenced in United States Supreme Court decisions upholding Florida's capital sentencing scheme against constitutional challenges. *See Spaziano v. Florida*, 468 U.S. 447, 465-466 (1984) (upholding Florida statute containing jury override provision, and noting "The Florida Supreme Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily or capriciously"); *Barclay v. Florida*, 463 U.S. 939, 953-955 (1983) (noting the Florida Supreme Court's practice of automatic review in a challenge based on the consideration

Then, the United States Supreme Court held in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), that comparative proportionality analysis is not the only way to limit the sentencer's discretion in imposing the death penalty. More than 35 years later, this Court relied on *Pulley* and the state's conformity clause when overruling *Dixon*, 283 So. 2d at 1, which had required comparative proportionality review since 1973. *See Lawrence*, 308 So. 3d at 548.

Abandoning proportionality review is a misapplication of *Pulley*. In *Pulley*, the United States Supreme Court approved of a California statute that did not require the California Supreme Court to compare the defendant's sentence with sentences imposed in similar cases. *See Pulley*, 465 U.S. at 44. The statute at issue required the finding of at least one special circumstance before the death penalty could be

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of non-statutory aggravation); *Dobbert v. Florida*, 432 U.S. 282, 295 (1977) (noting the Florida Supreme Court was required to review each death sentence in a process that was "by no means perfunctory"); *Proffit*, 428 U.S. at 253 (noting that any risk of arbitrary or capricious sentencing "is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'").

considered, limited the jury's sentencing discretion with a list of seven statutory factors, and required review by the California Supreme Court. *See id.* at 53. The United States Supreme Court held this was adequate to limit the death penalty to a small sub-class of capital-eligible cases and prevent the danger of arbitrary results. *See id.*

In reaching its conclusion, the United States Supreme Court reviewed three cases in which it had upheld state statutes both with and without a mandate to review proportionality. *See id.* at 45-48 (discussing *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976)). The United States Supreme Court cited the Georgia and Florida appellate review – which both included proportionality – approvingly. *See Pulley*, 465 U.S. at 45-48. *See also Gregg*, 428 U.S. at 198 ("Moreover, to guard further against a situation comparable to that present in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not

disproportionate."); *Proffitt*, 428 U.S. at 259-260 (noting the reasons for imposing a death sentence "are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law.").

In discussing the Texas sentencing scheme, which lacked a statutory or judicially created requirement of comparative proportionality review, the United States Supreme Court noted the "prompt judicial review of the jury's decision in a court with statewide jurisdiction." *Pulley*, 465 U.S. at 48-49 (quoting *Jurek v. Texas*, 428 U.S. at 276). The United States Supreme Court further noted that the Texas statute at issue effectively limited the sentencer's discretion by requiring the finding of one of five statutory aggravators to make a defendant eligible for a death sentence. *See id.* at 48 n.9. By narrowing its definition of capital murder, the Texas statute limited the death penalty to a "narrowly defined group of the most brutal crimes and aim[ed] at limiting its imposition to similar offenses under similar circumstances." *Id.* at 50 n.10 (quoting *Jurek*, 428 U.S. at

278-279).

In contrast, as discussed in more detail below, Florida's capital sentencing scheme now makes a defendant eligible for a death sentence if any one of 16 statutory aggravators is found. *See* § 921.141(6)(a)-(p), Fla. Stat. The Florida statute does not, on its face, meaningfully limit the number of persons who are subject to the death penalty or provide a meaningful basis for ensuring that death is imposed only for similar offenses occurring under similar circumstances. Florida's long-standing practice of comparative proportionality review did just that. *See Lawrence*, 308 So. 3d at 544-555 (Labarga, J., dissenting). *See also Yacob v. State*, 136 So. 3d 539, 546-547 (Fla. 2014) (receded from in *Lawrence*).

For example, 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.* Presumably, under *Lawrence*, Mr. Johnson's death sentence would be affirmed today despite the nature of the aggravating circumstance upon which it rested.

This arbitrary and inconsistent result is why the United States Supreme Court specifically recognized the safeguard created by proportionality review when upholding Florida's previous scheme against constitutional challenges. *See Proffitt*, 428 U.S. at 259-260; *Barclay v. Florida*, 463 U.S. 939, 958 (1983) (allowing a sentence to stand where the trial judge had considered a non-statutory aggravating factor along with statutory aggravating factors, and noting: "our decision is buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases…"). *See also Zant v. Stephens*, 462 U.S. 862, 890 (1983) (declining to vacate a death sentence after one of three aggravating circumstances was held invalid by the Supreme Court of Georgia, and explaining: "Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory

appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.").

c. Florida's sentencing scheme has significantly expanded the number of offenses eligible for a death sentence since the post-*Furman* scheme was enacted, and no longer serves the constitutional mandate of narrowing the class of those exposed to capital punishment.

It is well established that "channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). This requires meaningful narrowing of the class of individuals subject to capital punishment. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 303 (1987) ("a State must 'narrow the class of murderers subject to capital punishment' by providing 'specific and detailed guidance' to the sentencer.") (citations omitted). An aggravating circumstance making a defendant eligible for the death penalty "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." *Zant*, 462 U.S. at 877.

An aggravating circumstance is constitutionally deficient when it does not provide a "principled way" to distinguish cases in which death is an appropriate penalty from those in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 428, 433 (1980) (holding nothing in the phrase "outrageously or wantonly vile, horrible and inhuman" implied "any inherent restraint on the arbitrary and capricious infliction of the death sentence").

Under Florida's current capital sentencing statute, as interpreted by this Court, there is virtually no narrowing of death eligibility before the conclusion of a capital trial, as aggravating circumstances do not need to be alleged in an indictment. *E.g.*, *Pham v. State*, 70 So. 3d 485, 496 (Fla. 2011). Although this Court briefly interpreted the sentencing statute to require a finding of "sufficient" aggravating circumstances to justify a death sentence, *see Hurst v. State*, 202 So. 3d 40, 57-58 (Fla. 2016), this Court then receded from *Hurst* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt."

Poole, 297 So. 3d at 507.

When Florida's first post-*Furman* sentencing statute was enacted, it included eight statutory aggravating factors. *See State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). Florida's current capital sentencing scheme makes a defendant eligible for a death sentence if any one of 16 statutory aggravators is found. *See* § 921.141(6)(a)-(p), Fla. Stat. Beyond the addition of eight statutory aggravating factors, two factors have been amended to expand their scope since the original eight were enacted. Subsection (6)(a), which referred to "a person under sentence of imprisonment" when *Dixon* was decided, now encompasses "a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation" (an aggravator that was utilized in Appellant Wilson's case). Subsection (6)(d), the prior violent felony aggravator, has been amended since *Dixon* was decided to include additional felonies. *See* 273 So. 2d at 5. Since *Dixon*, 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).

This steady expansion of the number and scope of aggravating factors may be typical of states still maintaining the death penalty, but that does not make it any less problematic:

> In most states, a defendant cannot be eligible for the death penalty unless a jury finds that a statutorily enumerated aggravating factor applies to the defendant's case. However, the number and breadth of these aggravating factors have expanded over the last few decades, with most states listing more than ten factors, such that more than 90% of murderers are death eligible in many states. Thus, although most states sentence a small number of individuals to death each year, their death penalty statutes make it possible for nearly every murderer to be eligible for this penalty.
>
> When only a handful of offenders are sentenced to death despite expansive statutes that render most murderers eligible for the death penalty, it becomes more likely that those selected for death are being chosen arbitrarily.

Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing*

Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes, 46 Harv. C.R.-C.L.L. Rev. 223, 223–224 (2011) (footnotes omitted).

Given the breadth of the myriad statutory aggravators in Florida's death penalty statute, *see, e.g., Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992), it is impossible to say they "channel the sentencer's discretion by clear and objective standards" as required by, inter alia, *Godfrey*, 446 U.S. at 428. Moreover, the sheer number of aggravating factors in Florida's scheme serve a broadening – not a narrowing – function, resulting in nearly all first-degree murder cases being death-eligible. *See generally* Stephen K. Harper, *The False Promise of Proffitt*, 67 U. Miami L. Rev. 413, 417-423 (2013). A meaningful narrowing of the group of defendants who may face execution must involve more than a mechanical verification of whether the State proved one of 16 different aggravators.

Florida law no longer requires the entire jury to agree that death should be imposed, does not consider the nature and proof of aggravating circumstances in an individual case within the context of

the body of decisions in which death sentences have been upheld, and continues to add aggravating circumstances. In addition to expanding the potential aggravators – the factors making someone "eligible" for death – two separate mechanisms for guarding against arbitrary and inconsistent death sentences have now been eliminated. Taken as a whole, this capital sentencing scheme does not provide a meaningful limit on the sentencer's discretion or ensure that death is reserved for the "worst of the worst." This renders the Florida sentencing scheme unconstitutional under both the Eighth Amendment and article 1, section 17 of the Florida Constitution.

4. Section 921.141(6)(h), Florida Statutes – the "heinous, atrocious, or cruel" aggravator and/or its corresponding jury instruction is unconstitutional facially and as applied to Appellant Wilson.

Prior to trial, defense counsel filed a motion asserting that section 921.141(6)(h), Florida Statutes (i.e., the heinous, atrocious, or cruel – "HAC" aggravating factor) is unconstitutional:

> 1. The []HAC aggravator continued in § 921.141(6)(h), Fla. Stat. (2017) and its accompanying jury instruction are unconstitutionally vague and overbroad, are not capable of a constitutionally narrowing instruction, and can only be applied in an arbitrary and inconsistent manner.
>
> 2. The unconstitutional []HAC provision and its corresponding jury instruction continue to be used as a basis for imposing the death penalty in an unlawful manner which makes proportionality review arbitrary. As the provision's bare terms are all that are required to be read to sentencing juries, § 921.141, Fla. Stat. (2017) as a whole is unconstitutional. *See Herring v. State*, 446 So. 2d 1049, 1058 (Fla. 1984) (Erilch, J ., Dissenting in part).
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> 3. The terms "Heinous," "atrocious" and "cruel," either singularly or when combined, do not genuinely narrow the class of persons eligible for the death penalty and to be use in imposition of capital punishment.
>
> 4. This aggravating factor was written promotes arbitrary, capricious and un fettered imposition of the death penalty in Florida.
>
> 5. This aggravating factor, as written in § 921.141(6)(h), Fla. Stat. (2017), its corresponding jury instruction, and the death penalty as applied in Florida, violate Article I, Section 9 (due process), 16 (rights of the

> accused), 17 (Cruel and unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Fifth (due process), Sixth (Jury trial), Eighth (cruel and unusual punishment) and Fourteenth (due process and in incorporation) Amendments to the U.S. Constitution.
>
> 6. The vague statutory language of this aggravating factor and its corresponding jury instruction allows imposition of the death penalty for improper and unconstitutional reasons such as race, gender, ethnicity, religion and social status.

(R-1139-1140). In the instant case, the jury found that the HAC aggravating factor applied to both murders. For the reasons articulated by defense counsel below, Appellant Wilson asserts that section 921.141(6)(h) is unconstitutional.

5. Section 921.141(6)(i), Florida Statutes – the "cold, calculated, and premeditated" aggravator and/or its corresponding jury instruction is unconstitutional facially and as applied to Appellant Wilson.

Prior to trial, defense counsel filed a motion asserting that section 921.141(6)(i), Florida Statutes (i.e., the cold, calculated, and premeditated– "CCP" aggravating factor) is unconstitutional:

> The "cold, calculated, and premeditated without any pretense of moral or legal justification" circumstance has not been applied in a manner consistent with its legislative purpose.
>
> The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971). *See also Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932, 52 L.Ed.2d 531 (1977). This principle applies to criminal enactments. *See State v. Walker*, 461 So. 2d 108 (Fla. 1984). Thus a criminal statute "must bear a reasonable relationship to the legislative objective and must not be arbitrary." *Potts v. State*, 526 So. 2d 104 (Fla. 4th DCA 1987), *affd., State v. Potts*, 526 So. 2d 63 (Fla. 1988). Due process requires that criminal provisions, including those affecting penalties, be strictly construed. *Bifulco v. United States*, 447 U.S. 381 (1980); *Dunn v. United States*, 442 U.S. 100, 112 (1979). The instant circumstance has been applied in a manner inconsistent with these principles and is therefore unconstitutional.
>
> A. Failure to limit to "execution-type" killings.
>
> The Legislature promulgated the circumstance in 1979 "to

include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). *See also Barnard*, "Death Penalty (1988 Survey of Florida Law)," 13 Nova L. Rev. 907, 936-937 (1989). The standard construction is that it "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." *E.g. McCray v. State*, 416 So. 2d 804, 807 (Fla. 1982). The qualifier "ordinarily" saps the circumstance of power to narrow the class of death eligible persons, and has resulted in application to situations far afield from what the Legislature intended. *See, e.g., Duest v. State*, 462 So. 2d 446 (Fla. 1985) (killing during course of robbery without more); *Herring v. State*, 446 So. 2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984) (defendant shot store clerk who made threatening move); *Phillips v. State*, 476 So. 2d 194 (Fla. 1985) (defendant had to reload before firing final shot). Indeed, as of 1987, 80% of cases in which CCP was applied did not involve execution style killings. J. Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, XVII Stetson Law Review, 47, 96-97 (1987). Accordingly, it has been applied in a manner inconsistent with its legislative purpose and without regard to the requirement of strict construction of penal statutes.

B. Failure to limit to killings involving "heightened premeditation."

In *Porter v. State*, 564 So. 2d 1060, 1063-64 (Fla. 1990), the court wrote concerning the circumstance:

> To avoid arbitrary and capricious punishment, this aggravating circumstance '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.' *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

Notwithstanding this statement, the circumstance has seldom been applied such that it "ha[s] a different meaning" from mere premeditation. As shown in the next section of this memorandum, the circumstance has been sometimes construed to require "heightened" premeditation, but has also often been construed in a manner consistent with mere premeditation. It has not been strictly construed to conform to its legislative purpose, and has not been consistently interpreted or adequately narrowed.

2. The circumstance has been applied in such an inconsistent manner that it violates the Constitution.

The eighth amendment requires that aggravating circumstances "must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 110 S. Ct. 3092, 3099 (1990). Judicial construction of the instant circumstance does not meet this constitutional requirement.

In *Herring v. State*, 446 So. 2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984), the court upheld application of the circumstance where the defendant shot a store clerk who made an apparently threatening move and then shot the

clerk again after he fell to the floor. In dissent, Justice Ehrlich wrote that this holding could render the statute unconstitutional:

> The majority relies on the second shot, fired after the clerk was on the floor, as evidence of the heightened premeditation. But the record clearly shows the shot was fired within the same time-frame as the first. While I agree that more than enough time elapsed to allow for premeditation, I cannot agree that appellant had sufficient time for cold calculation. We have, since McCray and Combs, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.141(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Justice Ehrlich's words were heeded by the court in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), in which it specifically disapproved of Herring. The supreme court disapproved of the trial court's application of the circumstance where Rogers shot a man "playing hero" during an armed robbery. The court wrote:

> Where there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our

> holding in *Herring v. State*, 446 So. 2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S. Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question.

Id. at 533. But in *Swafford v. State*, 533 So.2d 270, 277 (Fla. 1988), the court resurrected *Herring*:

> The evidence showed, however, that Swafford shot the victim nine times including two shots to the head at close range and that he had to stop and reload his gun to finish carrying out the shootings. This aggravating factor can be found when the evidence shows such reloading, *Phillips v. State*, 476 So. 2d 194, 197 (Fla. 1985), because reloading demonstrates more time for reflection and therefore "heightened premeditation." *See Herring v. State*, 447 So. 2d 1049, 1057 (Fla.), *cert. denied*, 469 U.S. 989, 105 S. Ct. 396, 83 L.Ed.2d 330 (1984).

But the worm has turned again. In *Farinas v. State*, 569 So. 2d 425 (Fla. 1990), the court rejected *Phillips* and *Herring* (and, *sub silentio*, *Swafford*[20] on the issue of reloading,

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[20] On another occasion, the court indicated that there was no difference between *Herring* and *Rogers* and that they were entirely consistent. In *Schafer v. State*, 537 So. 2d 988, 991 (Fla. 1989), the court wrote:

> There was no evidence to illustrate any prior calculation or prearranged plan or design. We have previously explained the elements necessary for this aggravating circumstance in *Smith v. State*, 515 So. 2d 182 (Fla. 1987), *cert.*

writing footnote 8:

> The state's reliance upon *Phillips v. State*, 476 So. 2d 194 (Fla. 1985), is misplaced. In *Phillips*, this Court held that because appellant had to reload his revolver in order for all of the shots to be fired, he was afforded ample time to contemplate his actions and choose to kill his victim, and the record therefore amply supported the finding that the murder was cold, calculated, and premeditated. Our decision in *Phillips* however was predicated on *Herring v. State*, 446 So. 2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984). We receded from this portion of *Herring* in our decision in *Rogers v. State*, 511 So. 2d 526 (Fla. 1986), cert. denied, 108 S. Ct. 733 (1988).

These revolutions in the law are typical of the confused and tormented caselaw on this circumstance. Consider the following:

> (a) Regarding the question of whether CCP can apply to transferred intent, compare *Provenzano v. State*, 497 So. 2d 1177, 1183 (Fla. 1986) ("Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim." Circumstance applied to killing of bailiff who came out of courtroom while defendant was trying to kill two

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> *denied*, -- U.S. – 108 S. Ct. 1249, 99 L.Ed.2d 447 (1988); *Rogers v. State*, 511 So. 2d 526 (Fla.1987), *cert. denied*, -- U.S. --, 108 S. Ct. 733, 98 L.Ed.2d 681 (1988); *Herring v. State*, 501 So. 2d 1279 (Fla. 1986).

police officers), with *Amoros v. State*, 531 So. 2d 1256 (Fla. 1988) (circumstance improperly applied to killing of woman present when defendant sought to kill girlfriend).

(b) Regarding the question of whether bringing the weapon to the scene establishes the circumstance, compare *Swafford v. State*, 533 So. 2d 270 (Fla. 1988), *Lamb v. State*, 532 So. 2d 1051, 1053 (Fla. 1988), and *Huff v. State*, 495 So. 2d 145 (Fla. 1986)(weapon brought to scene; circumstance found) with *Amoros v. State*, 531 So. 2d 1256 (Fla. 1988), *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), and *Lloyd v. State*, 524 So. 2d 396 (Fla. 1988) (weapon brought to scene; circumstance rejected). In *Lloyd*, the defendant arrived at the victim's house with a .38 caliber pistol, demanding money and ordering the victim and her daughter into the bathroom. The victim was shot twice, the fatal shot being fired in contact with her head. The supreme court disapproved of the circumstance, writing that while there was a "suspicion that this was a contract killing," such was not proven beyond a reasonable doubt.

(c) As to the question of whether removing the decedent to a remote location establishes the circumstance, compare *Preston v. State*, 444 So. 2d 939 (Fla. 1984) (decedent store clerk moved one-and-a-half miles, then stabbed to death; HELD, trial court erred by applying circumstance) and *Cannady v. State*, 427 So. 2d 723 (Fla. 1983) (decedent hotel night auditor moved to remote location, then killed by five gunshots when he jumped up; HELD, trial court erred by applying circumstance), with *Card v.*

State, 453 So. 2d 17 (Fla. 1984) (trial court finding upheld where defendant drove office clerk eight miles to wooded area and cut her throat; "The appellant had ample time during this series of events to reflect on his actions and their attendant consequences.").[21]

(d) As to whether the purpose of eliminating a witness establishes the circumstance, compare *Wright v. State*, 473 So. 2d 1277 (Fla. 1985), *cert. denied*, 106 S. Ct. 870 (1986) (defendant killed bw-glary victim "because she recognized him and he did not want to go back to prison"; HELD, trial court erred by applying circumstance) and *Denick v. State*, 581 So. 2d 31 (Fla. 1991) (holding inconsistent findings of premeditation circumstance and witness elimination circumstance) with *Cooper v. State*, 492 So. 2d 1059 (Fla. 1986) (defendant killed robbery victims when one of them recognized co-defendant; application approved).

(e) Does arming oneself during a burglary establish the circumstance? One can choose between *Harris v. State*, 438 So. 2d 787 (Fla. 1983), cert. denied, 466 U.S. 963 (1984) (circumstance rejected because "the state presented no evidence that this murder was planned and, in fact, the instruments of death were all from the victim's premises") and *Mason*

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[21] The phrase in Card about reflecting on "his actions and their attendant consequences" is synonymous with the "premeditated design" element of first degree murder. *See Owen v. State*, 441 So. 2d 1111, 1113 n.4 (Fla. 3rd DCA 1983) (discussing "premeditation" and "deliberation").

v. State, 438 So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984).[22]

From the foregoing, the application of the circumstance in Florida does not meet the requirements set out by the Supreme Court in *Lewis*. Hence, the circumstance is unconstitutional. Because of its importance to the overall statutory scheme of section 921.141, it makes the Florida death penalty statute unconstitutional, as pointed out by Justice Ehrlich in *Herring*.

3. The "without any pretense of legal or moral justification" phrase renders the aggravating circumstance unconstitutional.

The cold calculated and premeditated factor is the only one that requires the jury and court to make a finding that two seemingly unrelated elements apply before it may be used to support a sentence of death. It reads in full:

> (i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

§ 921.141, Fla. Stat. (emphasis supplied). The "without any pretense of moral or legal justification" language is vague and incoherent, unrelated to the first part of the circumstance, incapable of a narrowing construction, and has not been consistently or narrowly construed. "Pretense" means "pretending, make-believe." *Oxford American Dictionary*. It tells judge and jury not to apply the

[22] For a detailed discussion of the inconsistencies between these two decisions (which were rendered on the same day), *see Kennedy* at 70 ff.

circumstance unless they find a false or half-baked reason for the killing which does not justify it on moral or legal grounds. In applying this circumstance, the Florida Supreme Court has had to stretch. *Compare Banda v. State*, 536 So. 2d 221, 224-25 (Fla. 1988) (claim of self-defense rejected at guilt phase, but testimony of prior threats by victim, when given by disinterested witnesses, sufficient to preclude finding of circumstance), with *Cannady v. State*, 427 So. 2d 723, 730-31 (Fla. 1983) (circumstance properly found where on ly self defense evidence came from defendant himself). *See also Williamson v. State*, 511 So. 2d 289, 293 (Fla. 1987). These distinctions are not sufficient under the eighth amendment, and in any event are never explained to jurors, who hear only the standard instruction.

4. The standard jury instruction on the CCP circumstance is unconstitutional and renders the death penalty unconstitutional as applied because it is subjected to the judgment of unguided juries.

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instruction on the instant circumstance assures arbitrariness and maximizes discretion in reaching the penalty verdict. The Florida Supreme Court has promulgated standard jury instructions for use in the trial courts of this state. Although the trial courts may substitute correct statements of the law when standard jury instructions are incorrect, the institutional effect of the standard instructions renders Florida's capital sentencing scheme unconstitutional. All jury recommendations in cases resulting in a death sentence in the trial court affect proportionality review, leading to arbitrary application of the death penalty in Florida where the jury's recommendation has been infected by the unconstitutional

circumstance. The Florida Supreme Court has been misled by the vague statutory language into applying this circumstance too broadly. *See Rogers v. State*, 511 So. 2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to make the same errors, so that the standard instruction invites arbitrary and uneven application. Its use necessarily results in improper application of the circumstance in case after case. Since the statutory language is subject to a variety of constructions,[23] the vague standard instruction ensures arbitrary application, and is unconstitutional. While the Florida Supreme Court has rejected this argument, there is a clear constitutional violation under the teachings of the United States Supreme Court. In *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990), the court wrote:

> Based on *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988), Brown also argues that the standard instruction on the cold, calculated, and premeditated aggravating circumstance is unconstitutional. In *Maynard* the court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found *Maynard* inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. *Smalley v. State*, 546 So. 2d 720 (Fla. 1989). We find Brown's attempt to transfer *Maynard* to this state and to a different aggravating factor misplaced. *See Jones v. Dugger*, 533 So. 2d 290 (Fla. 1988); *Daugherty v.*

[23] See the argument above that this circumstance has not been consistently construed in a constitutionally narrow manner.

State, 533 So. 2d 287 (Fla. 1988). We therefore find no error regarding the penalty instructions.

But in *Smalley* the Florida Supreme Court did not find *Maynard*[24] inapplicable to Florida. *Smalley* rejected a jury instruction claim on the ground that the issue was not preserved in the trial court, and wrote that Florida's heinousness circumstance was not facially unconstitutional under *Maynard* because the Florid a Supreme Court had given it a nan-owing construction. Although Cartwright did not concern the particular aggravating circumstance here, it applies full force: "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990). The instant circumstance is vague on its face, and the instruction based on it also is too vague to provide the constitutionally required guidance. It does not info1m the jury of the following limiting constructions of the circumstance:

1) The "calculated" element of the circumstance requires that there be "a careful plan or prearranged design" evidencing "heightened premeditation," *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), and that the defendant "planned or arranged to commit murder before the crime began." *McKinney v. State*, 579 So.

[24] In *Maynard*, the Court held unconstitutional a jury inst ruct ion virtually identical with Florida's jury instruction on the "heinous, atrocious or cruel" circumstance. The Court opined that the instruction was so vague that it could not be applied by juries in a consistent manner. The Court wrote that great care must be taken in defining aggravating circumstances.

2d 80, 85 (Fla. 1991).

2) The "cold" element precludes application of the circumstance to a killing "consummated by one in a rage." *Mitchell v. State*, 527 So. 2d 179, 182 (Fla. 1988).

3) The "without any pretense of moral or legal justification" element forbids application of the circumstance where there is "any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." *Banda v. State*, 536 So. 2d 221, 225 (Fla. 1988).

Any holding that jury instructions in Florida capital sentencing proceedings need not be definite directly conflicts with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. See *Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987) (sentence improper where "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances").

(R-1144-1152). In the instant case, the jury found that the CCP aggravating factor applied to the murder of Diane Ruiz. For the reasons articulated by defense counsel below, Appellant Wilson asserts that section 921.141(6)(i) is unconstitutional.

6. Section 921.141(8), Florida Statutes (victim impact evidence) is unconstitutional.

Prior to trial, defense counsel filed a motion asserting that section 921.141(8), Florida Statutes (victim impact evidence) is unconstitutional:

> 2. § 921.141(8)(2017), Florida Statute, is unconstitutional and violates the Fifth, Sixth, Eights and Fourteenth Amendments of the United States Constitution.
>
> 3. In making this motion the Defendant is aware of and acknowledges the cases of *Windom v. State*, 656 So. 2d 432 (Fla. 1995), and *Maxwell v. State*, 657 So. 2d 1157 (Fla. 1995), each of which found the use of victim impact evidence to be constitutional. The Defendant contends, however, that those cases were wrongly decided and the evolving standards of decency warrant the re-visitation and reversal of those cases. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") *Hurst v. Florida*, 20[2] So. 2d 40, 60 (Fla. 2016) ("Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury- a veritable microcosm of the community- the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with "evolving standards of decency."); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("[A]pplying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefor conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally [retarded] offender.").
>
> 4. The only factors that allow a defendant convicted

of Capital murder to be eligible for the death penalty are those contained in § 921.141(6). Victim impact is not one of these circumstances. The standard jury instruction in place prior to *Hurst v. Florida*, and the interim instructions adopted by the court subsequent to the enactment of the most recent death penalty statutory scheme in 2017, specifically state that the victim imp act evidence is NOT to be considered by the jury as aggravation of a first degree murder that could elevate it to the level of warranting the death penalty. As such, allowing the jury to hear, prior to rendering a verdict on the penalty, any such evidence, violates defendant's rights to a fair trial, due process, and to be free of cruel and unusual punishment.

5. This a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standard s of due process apply. *See Mills v. Maryland*, 108 S. Ct. 1860, 1866 (1988) ("in reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusion rested on proper grounds."); *Proffitt v. Wainwright*, 685 F. 2d 1227, 1253 (11th Cir. 1982)("Reliability in the fact finding aspect of [capital] sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."). "Where a defendant's life is at stake, the Court has been particularly sensitive to ensure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (citing cases).

6. In addition, unless this victim impact statement is reduced to writing and presented to defense counsel in advance of presentation to the jury or the court, the Defendant will be deprived of the opportunity to object to statements that are not confined to the sole purpose of victim impact on the community.

(R-1153-1155). In the instant case, the State presented impact

evidence during the penalty phase. For the reasons articulated by defense counsel below, Appellant Wilson asserts that section 921.141(8) is unconstitutional.

F. CONCLUSION

The appropriate remedy for all claims is reversal of the death sentences that were imposed in this case.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certify pursuant to Florida Rule of Appellate Procedure 9.045(b) that the Amended Initial Brief of Appellant complies with the type size and typeface requirement because this document has been prepared in a proportionally spaced typeface using WordPerfect X9 in Bookman Old Style 14-point font size. Undersigned counsel also certify pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Amended Initial Brief of Appellant complies with word count limit because this document contains 20,767 words.

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