CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY W. FLETCHER,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW A
JUDGMENT OF THE SUPREME COURT
OF THE STATE OF FLORIDA

October, 2015 Term

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

I.

WHETHER THE AFFIRMANCE BY THE SUPREME COURT OF THE STATE OF FLORIDA OF DEFENDANT'S CONVICTION FOR FIRST DEGREE MURDER AND SENTENCE OF DEATH WAS CLEARLY ERRONEOUS AND VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, TIMOTHY W. FLETCHER, respectfully prays this Court issue a Writ of Certiorari to review the Judgment of the Supreme Court of the State of Florida entered in this case on June 25, 2015.

OPINIONS RENDERED IN THE COURTS BELOW

THE SUPREME COURT OF THE STATE OF FLORIDA

Timothy W. Fletcher v. The State of Florida, No.SC12-2468 (Fla., June 25, 2015).

STATEMENT OF JURISDICTION

On June 25, 2015, the Supreme Court of the State of Florida issued its decision in Timothy W. Fletcher v. The State of Florida, Case No. SC12-2468 (Fla., June 25, 2015).[1] The mandate was issued in the case on July 24, 2015. (**Appendix A**) The statutory provision which confers on this Court jurisdiction to review the above-described decision of the Supreme Court of the State of Florida by writ of certiorari is Section 1257 of Title 28, United States Code.

The Florida Supreme Court passed on issues concerning a violation of Defendant's right to a fair trial due to the prosecutor's improper arguments and due to improper references to Defendant's criminal past and sentence, which cumulatively deprived Defendant of a fair trial and a fair sentencing determination. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985); Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982)(O'Connor, J., concurring). The Florida Supreme Court passed on the constitutionality of Florida's death penalty statutory scheme. See Ring v. Arizona,

[1] Fletcher v. State, 168 So.3d 186 (Fla. 2015).

536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Florida Supreme Court ruled on Defendant's claim of disparate treatment. The trial court's death sentence imposed on Defendant when compared to the co-defendant's life sentence, violated Defendant's right to due process. See Edmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are quoted in **Appendix B**:

Section 1257 of Title 28, United States Code, 28 U.S.C. Section 1257.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

I.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT AND THE COURT OF APPEALS

Petitioner, TIMOTHY W. FLETCHER, was a defendant in the trial court and respondent, the State of Florida, was the prosecution. Record references will be made by referring to the page number as reflected in the record on appeal and the page number as reflected in the transcripts. The symbol "R" will designate the record on appeal, "T" will designate the trial transcripts, and "App" will designate

the appendix. The parties will be referred to as they appeared below. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

Guilt Phase

Defendant Timothy W. Fletcher was charged by Indictment with one count of escape, by unlawfully escaping from confinement while a prisoner at the Putnam County Jail on April 15, 2009, contrary to §944.40, Florida Statutes [**Count I**]; one count of grand theft of a motor vehicle, by taking a motor vehicle, the property of Todd Lewis, on April 15, 2009, contrary to §§812.014(1) and (2)(c)6, Florida Statutes [**Count II**]; one count of first degree murder by killing Helen Key Googe, by blunt trauma to the head and manual strangulation, on April 15, 2009, perpetrating the killing from a premeditated design and/or while engaged in the commission of a home invasion robbery, contrary to §782.04(1), Florida Statutes [**Count III**]; one count of home invasion robbery, by unlawfully entering a dwelling with an intent to commit a robbery and taking currency and other property from Helen Key Googe, on April 15, 2009, contrary to §812.135, Florida Statutes [**Count IV**]; and one count of grand theft of a motor vehicle, by taking a motor vehicle the property of Helen Key Googe, on April 15, 2009, contrary to §§812.014(1) and (2)(c)6, Florida Statutes. [**Count V**]. (R. 7-8; R. 44-45). The State filed a notice of intent to seek the death penalty. (R. 65).

Prior to trial, the defense filed a motion to suppress his post-arrest statement. (R. 490-491). The defense also objected to the consolidation of offenses for trial involving two separate automobile burglaries. (R. 493). The defense also filed a motion *in limine* requesting that no mention be made of the offenses on which Defendant was serving jail time when he escape from Putnam County Jail. (R. 495-496). Defendant also filed another motion *in limine* requesting that no mention be made of uncharged criminal activity, including grand theft auto allegations and plans by Defendant and Doni Brown to flee to Mexico. (R. 497-498). The defense amended this motion later to add that no mention should be made of the fact that Defendant and his co-defendant were in jail on an unrelated charge of robbery when they escaped. (R. 569-571). Defendant also filed a motion for severance of the counts charged in the Indictment. In particular, Defendant argued that he should be tried for the escape charge, in Count I, separately, and that he should be charged for grand theft, in Count II, separately. The events concerning these charged offenses in the Indictment were temporarily and physically separate from the other counts. (R. 499-500). Prior to trial, the defense also objected to the consolidation of offenses for trial involving the two separate automobile burglaries. Defendant maintained that severance was appropriate to promote a fair determination of his guilt or innocence. Moreover, the defense argued that the charges in the Indictment were temporarily and physically separate from the case

and from each other. (R. 493; R. 647-648). The defense also filed a memorandum on disputed sections of Defendant's police interview. The defense pointed out those sections of the statement which ought to be redacted. (R. 608-610; R. 698-700). One particular section dealt with Defendant having just been sentenced to 10 years prison. The defense pointed out that this was unduly prejudicial under §90.403, Florida Statutes. (R. 609; R. 700). The State filed a response to the motion on the disputed sections. (R. 668-670). As to Defendant's ten-year sentence, the State argued that the evidence was relevant to show Defendant's motive for escaping. (R. 670).

On May 10, 2012, the trial court conducted a hearing on the pre-trial motions. Det. Mark Andrews testified on Defendant's motion *in limine*. (R. 1414-1432). Subsequently, Det. Doug Schwall testified on Defendant's motion to suppress. (R. 1452-1464). The parties presented arguments on the motion to suppress. (R. 1465-1477). The Court entertained argument on Defendant's motion to sever. (R. 1481-1497). The Court also considered argument on Defendant's motion *in limine* regarding other crimes evidence. (R. 1506-1514). The Court, thereafter, entered an order denying Defendant's motion to sever offenses. (R. 684-686). The Court also entered an order denying Defendant's motion to suppress statement. (R. 687-689). Finally, the Court entered orders on the various motions

in limine. (R. 690-692). The defense also filed numerous penalty phase motions.[2] The Court entered several orders denying Defendant's motions. (R. 340-349).[3]

Trial commenced in the cause on May 21, 2012. The court began voir dire. (R. 1592). The jury was selected and sworn. (R. 2439). The court gave the jury preliminary instructions. (R. 2439-2448; R. 714-720). The State presented an opening statement. (R. 2448-2468). Defendant's counsel thereafter presented

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[2] These motions were: Memorandum of law and Argument concerning the unconstitutionality of Florida's death penalty under Ring v. Arizona (R. 158-185); Motion to Declare Florida's Death Penalty Unconstitutional (R. 186-201); Motion to Declare Florida's Death Penalty Unconstitutional because Section 921.141, Florida Statute, and the Standard Jury Instructions cast a heightened standard of persuasion on the Defendant to obtain a life sentence (R. 202-220); Motion to Declare Section 921.141(5)(h), Florida Statutes, Unconstitutional as written and as applied (R. 221-248); Motion to Declare Section 921.141(5)(d), Florida Statutes, Unconstitutional as written and applied (R. 249-253); Motion to Declare Section 921.141(5)(e), Florida Statutes, Unconstitutional as written and applied (R. 254-260); Motion to Declare Section 921.141(5)(f), Florida Statutes, Unconstitutional as written and applied (R. 290-294); Motion to Declare Florida's Death Penalty and Section 921.141, Florida Statute, Unconstitutional (Faulty Appellate Review) (R. 295-325); Motion to Declare Section 921.141(1), Florida Statute, Unconstitutional and to Bar State's Use of Hearsay Evidence at Penalty Phase (R. 326-330; R. 331-335); Motion for Interrogatory Penalty Phase Verdict (R. 336-339); Renewed Motion to Declare Florida Statute 921.141 Unconstitutional per Ring v. Arizona (R. 394-489); Objections to Standard Jury Penalty Phase Jury Instructions (R. 510-539); Motion to Declare §921.141(7), Florida Statutes, Unconstitutional and for Pretrial Determination of Admissibility of all victim impact evidence under §§90.104(2), 90.105, 90.403, Florida Statutes or, alternatively, that victim impact evidence be presented only at a Spencer hearing (R. 814-823); Motion to Declare Section 921.141(5)(a), Florida Statutes, Unconstitutional as applied (R. 824-828).

[3] On May 10, 2012, the Court considered Defendant's renewed motion on Ring grounds, relying on the federal district court's decision in Evans v. McNeil. The Court ruled that it was bound by rulings of the Florida Supreme Court and the rulings of the United States Supreme Court. (R. 1520-1523).

opening statement. (R. 2469-2475). At trial, the State called numerous witnesses in its case-in-chief. Following testimony of DNA examiner Maria Lam, the State rested its case. (R. 3257).

Defendant presented his arguments on motions for judgments of acquittal. (R. 3258-3259). The court denied the motion. (R. 3260). The defense announced it would not present any evidence. The court asked Defendant if he desired to testify and Defendant stated that he did not want to testify or call any witnesses. Defendant stated he was satisfied with the witnesses called. (R. 3160-3162; R. 3260-3261). The court conducted a charge conference. (R. 3141-3171). The defense rested its case. (R. 3265; R. 3266). Defendant's renewed motion for judgment of acquittal was denied. (R. 3265). Subsequently, counsel for the State presented closing argument. (R. 3267-3282). The defense then presented closing argument. (R. 3283-3290). Counsel for the State presented a rebuttal closing argument. (R. 3290-3302).

The court instructed the jury. (R. 3302-3357; R. 733-778). The jury retired to deliberate. (R. 3357). Thereafter, the court reconvened to consider the jury's verdicts. Defendant was found guilty on all counts as charged in the indictment and both informations. (R. 3364-3367; R. 728-732). The jury was polled. (R. 3367-3369). The court instructed the jury to return for the penalty phase. (R. 3369).

Penalty Phase

At the penalty phase, the Court gave the jury preliminary instructions. (R. 3386-3387). The State presented an opening statement. (R. 3387-3393). The defense presented its opening statement. (R. 3393-3398). The State called David Sanders, PCSD, who testified about comparing Defendant's fingerprints with the conviction record . (R. 3398-3403). The State also called Randall Key, the victim's brother, who read a letter on behalf of the family in connection with victim impact. (R. 3407-3409). Thereafter, the State rested its case. (R. 3409). The defense called Dr. Harry Krop, a licensed psychologist. (R. 3410). After Dr. Krop's testimony, the defense called Donna Bailey, a mental health specialist at Suwanne Correctional Institution. (R. 3477). After Ms. Bailey's testimony, the Court conducted a charge conference on the penalty phase instructions. The defense reiterated its objections to some of the instructions. (R. 3493-3499). The defense called Jeffrey Fletcher, Defendant's brother (R. 3506), and Ricky Fletcher, Defendant's father. (R. 3522). Thereafter, the defense rested its case. (R. 3537). Defendant was questioned by the court about his decision not to testify. (R. 3538; R. 3545). The State called Dr. Gregory Prichard, a licensed psychologist, in rebuttal. (R. 3547). At the conclusion of Dr. Prichard's testimony, the State rested its rebuttal case. (R. 3625). After the jury was excused for the day, the Court denied Defendant's pending motion against the prior felony/sentence of

imprisonment aggravating circumstance. (R. 3628-3629). The court completed the charge conference. The defense reiterated its constitutional objections to the instructions. The defense also objected to the giving of the financial gain and EHAC instructions. The Court overruled the defense objections. The defense also reiterated its objections to the verdict form on grounds that there needs to be a unanimous finding for an aggravating circumstance. Additionally, the defense requested that the life recommendation precede the death recommendation on the verdict form. The Court denied the objection and the request. (R. 3630-3641).

The prosecution presented a penalty phase argument. (R. 3649-3670). The defense presented its penalty phase argument. (R. 3670-3690). The court instructed the jury. (R. 3690-3706; R. 832-841). After deliberations, the jury returned an advisory verdict recommending a death sentence by a vote of 8-4 as to Count 3. The jury was polled. (R. 3707-3711; R. 813). The court ordered a pre-sentence investigation report. (R. 3715-3716; R. 843-844).

On July 25, 2012, the court conducted the final sentencing hearing, pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993). (R. 1387-1408). The State called Douglas Cruz, who read a victim impact statement from the victim's brother and nephew. (R. 1389-1393). Defendant read a prepared statement. (R. 1398-1404; R. 848-854; App. A: 19). The State presented a sentencing memorandum. (R. 863-887). The defense presented a sentencing memorandum. (R. 888-905; R. 906-

928). On October 12, 2012, the Court issued its sentencing order. (R. 929-954; App. A: 19-22). The Court sentenced Defendant to death on Count III, to run consecutive to any active sentences he was serving. The Court also sentenced Defendant to 15 years on Count I (escape), 5 years on Count II (grand theft of a motor vehicle), 30 years on Count IV (home invasion robbery), 5 years on Count V (grand theft of a motor vehicle), 5 years on Count I of the consolidated information in Case No. CF09-806 (burglary of a conveyance), and 5 years on Count I of the consolidated information in Case No. CF09-807). (R. 952-953; R. 1009-1017; R. 3718-3725). The Court ordered that the sentences in Counts I, II, IV and V of the indictment to run consecutive to any active sentence Defendant was serving, and ordered the sentences in Case Nos. CF09-806 and CF09-807 to run consecutive to any active sentence Defendant was serving. Moreover, the Court ordered all sentences in Count I-V of the Indictment and Count I of the consolidated informations to run concurrent with each other. (R. 953; R. 1009-1017; R. 3718-3725). The Court entered an order denying Defendant's motion for new trial. (R. 955-958).

STATEMENT OF THE FACTS

As detailed in the Florida Supreme Court's decision, Defendant and co-defendant Doni Ray Brown escaped from jail pursuant to a previously-discussed plan. In particular, Defendant had removed a car jack from the jail transportation

vehicle on a prior court hearing trip, and, thereafter, he appropriated the handle for the jack on a subsequent trip to the courthouse. Defendant and Brown used the jack and jack handle to pry the toilet away from the wall of their cell, which created a hole through which they escaped. (App. A: 2). Defendant and Brown were able to get out onto a field and eventually steal a pickup truck in a fenced-in yard of a business. Both defendants drove to the house of Helen Googe, the ex-wife of Defendant's grandfather, because it was the closest place where the defendants believed they could acquire money. (App. A: 2-3). In a post-arrest statement, Defendant provided varying accounts of subsequent events. Initially, Defendant stated that Googe voluntarily admitted him into the house. He described an altercation between Googe and Brown that ultimately led to Googe's death. He asserted that other than slapping Googe, he was either absent from the room during the altercations or nothing more than a passive bystander. Later, Defendant stated that he held Googe down during the altercation when the police informed him fingernail clippings had been collected from Googe to test for DNA evidence. (App. A: 3-4). Subsequently, Defendant gave a second version of events. In this version, Defendant stated that he and Brown entered the house through a firewood door that provided an opening to pass wood into the house from the outside. Defendant removed one of the guns from Googe's wall and gave it to Brown. The defendants changed into clothes belonging to Defendant's

grandfather that they found in the house. Defendant found Googe's purse which contained $37, car keys and a credit card. Thereafter, the defendants entered Googe's bedroom. Defendant tied a t-shirt around his face to block his identity and Brown pulled a baseball cap over his face. Brown woke Googe up at gunpoint. She was tied up with a phone cord. (App. A: 4-5). Defendant stated Googe denied having any money. After a physical struggle, Googe went with Defendant and Brown to her safe. She claimed she needed her glasses. She was escorted back to the bedroom and she said she needed to go to the bathroom. She shut the door and Brown pushed the door open and Googe hit him with a hairdryer. Brown pinned Googe to the bed with a pillow over her face as Googe fought back. Later, Defendant, Brown and Googe returned to the safe. (App. A: 5-6).

Defendant stated that Googe opened the safe. There was no money inside. Googe insisted she did not have any money other than the money in her purse. Brown pushed her to the floor and wrapped his arm around her neck. Defendant maintained he watched but did nothing. Brown tried to break Googe's neck. Defendant then secured his arm around Googe's neck and Brown tried to pick up her legs. During this struggle, Googe scratched Defendant. Defendant released her and then struck her in the head three times. (App. A: 7). Thereafter, Defendant stated Brown got on top of Googe and began choking her. Defendant held her legs down. When Googe stopped kicking, Defendant released her and looked through

her jewelry box. When he returned, Googe was laying on her side making snoring noises. Brown placed a bag over Googe's head and tied it around her neck. The bag became foggy. Brown later told Defendant that Googe was dead. (App. A: 8).

Defendant and Brown fled from Googe's residence. They discarded the stolen truck in the woods and left the plastic bag, telephone cord, prison clothing, purse and wallet in a retention pond. They drove through Georgia and Tennessee to Defendant's uncle's house in Kentucky. They returned to Florida and were arrested. (App. A: 8). The police verified that two vehicles were vandalized near the jail. (App. A: 9). The abandoned truck was found in the woods near Googe's residence. (App. A: 10). Additionally, a Clay County deputy sheriff spotted a vehicle with a Putnam County plate and took down the number. He was able to see the passenger, who was wearing a blue baseball cap with a red bill. Later, he discovered the vehicle belonging to Googe and recognized a television image of Brown as the passenger he had seen. (App. A: 10).

The police found Googe dead when they responded to her residence. A crime analyst at the scene located pliers above the firewood door, as well as a phone set in the master bedroom with the cord broken off and a hairdryer in the bathroom. Eyeglasses were found near the safe. (App. A: 11). The police also found out that Googe's credit card had been used at a Florida gas station and a Georgia gas station. Also, Brown's aunt had allowed Brown to use her computer

to look up directions. (App. A: 12). Later, a piece of paper was found in Googe's stolen car with handwritten directions. The paper had fingerprints and handprints belonging to Brown. Also, DNA swabs of the stolen car were analyzed. The swabs of the headlight switch and interior door handle matched Defendant's DNA profile. (App. A: 12). With respect to the fingernail scrapings taken from Googe, the analyst found a partial DNA profile that matched Defendant's known profile. (App. A: 13). The medical examiner testified that the victim died by manual strangulation. Additionally, the medical examiner found that the victim sustained blunt trauma over her upper eyelid and that she had fingertip contusions, which indicated she was restrained by someone. All of the victim's injuries occurred pre-death and during the same time frame. The medical examiner also determined that Googe was conscious when she sustained the injuries. (App. A: 13-14). Defendant was found guilty of first-degree murder, two counts of grand theft of a motor vehicle, home-invasion robbery, two counts of burglary (on the consolidated cases), and escape. (App. A: 14).

At the penalty phase, the Court considered the admissibility of victim impact evidence and the extent of such evidence. The defense maintained that no victim impact evidence be admitted, but rather, be deferred until the *Spencer* Hearing. (R. 3375-3376). The Court directed the State to pick one letter from the family and have it read to the jury. (R. 3378-3379).

The defense called Dr. Harry Krop, a licensed psychologist. Dr. Krop testified about his credentials. (R. 3410-3412). Dr. Krop first met with Defendant Fletcher on December 11, 2009 at the Clay County Jail. His assistant met Defendant on December 16, 2009 for testing and evaluation. Dr. Krop met Defendant again on May 19, 2012 and the previous night. (R. 3412-3413). Dr. Krop stated he reviewed numerous other items, including depositions, statements, medical records, police reports and jail records. He also reviewed a 2007 evaluation by Putnam Behavioral Healthcare. (R. 3414-3415). Based on his review, Krop testified that Defendant had suffered a number of head injuries. He drank a lot and used a lot of recreational drugs. (R. 3416). Additionally, Defendant from a fairly early age had impulse control problems. The neurological testing showed that Defendant had an average IQ, functioning in the top 40 percent of the population. He was an underachiever in school. (R. 3416; App. A: 16).[4] Krop did not see any evidence of brain damage. (R. 3417; App. A: 16). Based on his review and evaluation, Krop concluded that Defendant had prior symptoms of bipolar disorder, a significant mood disorder manifested by sudden mood changes, irritability, easy frustration and sometimes acting out. (R. 3418; App. A: 16-17). Additionally, Krop diagnosed him with post-traumatic stress disorder in the past.

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[4] Defendant was administered the MMPI. The results were invalid. Krop could not state the exact reason for invalid results. (R. 3443-3444). Because the results were invalid, the MMPI test was not interpreted. (R. 3446).

(R. 3419: App. A: 17). Presently, Defendant has a diagnosis of polysubstance dependence, from which he has suffered since he was 11 or 12 years of age. At that age, Defendant began drinking and using marijuana and many other drugs, including cocaine and meth, as well as prescription drugs. (R. 3419-3420; App. A: 16). Krop testified that Defendant also has a history of chronic insomnia and has depressive disorder. He pointed out that Defendant's use of drugs and alcohol was his method of self-medicating. According to Krop, Defendant's depression stemmed from his family environment and things he experienced in his family. (R. 3420; App. A: 17). Dr. Krop testified that Defendant also met the criteria for antisocial personality disorder, which is often seen in persons who get into trouble at a relatively early age. (R. 3421). Dr. Krop testified that Defendant got into trouble at school. He had suspensions in school and suffered behavioral outbursts in school. He started getting into the criminal system in his adolescent years. When he was 11 or 12, Defendant was using prescribed medication for depression and was seen by a psychiatrist because of depression. His adjustment issues were related to family difficulties. He was prescribed psychotropic medications when he was 11. This medication was Prozac. (R. 3423). Defendant did not take the medication for long because, apparently, Defendant's father was unwilling to pay for the medication and mental health professionals did not feel Defendant needed it or did not feel it was effective in modifying his behavior. (R. 3424). According to

Dr. Krop, polysubstance drug dependency involves a person's dependency on various drugs and alcohol. Defendant began using alcohol when he was 11 years old. Defendant's father was a severe alcoholic, so Defendant was introduced to alcohol early on. Eventually, Defendant moved on to drugs. He snorted powder cocaine and smoked crack cocaine. He used meth and abused pharmaceuticals, various prescription drugs, acid, mushrooms, and marijuana. (R. 3424-3426). According to Krop, Defendant reported using meth at the Putnam County Jail. Additionally, he was prescribed pain medications due to a fractured leg. Defendant stated another inmate was providing him with the unlawful drugs. (R. 3426-3427). Dr. Krop testified that Defendant reported taking large quantities of alcohol. He suffered from depression since the age of 11 when he was prescribed medication. (R. 3427). Krop identified various drugs from the records, including Effexor, Remeron, Risperdal, Trazodone, and Stelazine. Most of these medications are antidepressants or antianxiety drugs and help a person with insomnia and depression. (R. 3428). Additionally, Risperdal and Stelazine are antipsychotic medications. Krop explained that psychotic episodes or processes is a major mental illness, usually manifested by hallucinations and delusions. However, Krop did not see Defendant as psychotic or any diagnosis of schizophrenia. (R. 3428). Krop testified that the people at the Putnam Behavioral Healthcare in 2007 had prescribed medication for Defendant. (R. 3429). Krop

noted that Defendant had not been on any consistent medication regimen. (R. 3430). Krop testified that presently Defendant was doing well. His medication was changed recently. He is very depressed, but understandably so, given his present circumstances. Dr. Krop pointed out that Defendant has been one of the most cooperative individuals he has ever evaluated. He noted that Defendant's history was not particularly self-serving. (R. 3431-3432). Krop addressed Defendant's past bipolar disorder diagnosis. He indicated that attention deficit disorder has similar symptoms. Krop maintained, however, that Defendant had symptoms of bipolar disorder when he was young. (R. 3432-3433). Defendant described an extremely dysfunctional family environment, which included physical abuse, emotional abuse, domestic violence and abuse of children. There were fights between the parents, sometimes with a gun being involved. Defendant was used as an intermediary between both unfaithful parents. After his parents separated, Defendant and his brother moved in with his father. However, when the father returned, the siblings were separated. Defendant remained with the father, who physically and emotionally abused him. His father would hit him with a belt on his butt, his legs and lower back. His father would also use a paddle. The father struck him with his fist once and choked him. He pulled a gun on him on two different occasions. Still, Defendant was very protective of his father. (R. 3433-3436). Dr. Krop discussed the history of the father's physical abuse with

Melissa Googe, the sister of Defendant's mother. There were domestic violence incidents when law enforcement officers called. According to Defendant, the earliest incident of domestic violence he could remember occurred when he was six or seven. (R. 3436-3437; App. A: 17-18). Krop testified that Defendant's mother died of brain cancer in 2002. Her last six months were horrific and Defendant was present much of that time. He could not attend her funeral because he was incarcerated at the time. (R. 3438; App. A: 17). Dr. Krop addressed Defendant's prior suicide attempts. According to Dr. Krop, there was documentation of attempts at self-harm. Defendant told him that when he was 15 he cut himself. (R. 3439; App. A: 17). Dr. Krop testified that he diagnosed Defendant with antisocial personality disorder. (R. 3451). Defendant failed to conform to social norms with respect to lawful behavior as indicated by repeated arrests. (R. 3453-3454). Dr. Krop found that Defendant nearly met the second criteria of deceitfulness to the extent that he manipulated others. Additionally, Defendant met the third criteria of impulsivity or failure to plan ahead. Defendant nearly met the fourth criteria of irritability and aggressiveness, especially as to fights in school. Defendant met the fifth criteria of reckless disregard for safety of self or others, which was satisfied in the present case. Defendant also showed consistent irresponsibility and was indifferent to or rationalizing having hurt or mistreated or stolen from others. (R. 3454-3455). Dr. Krop also testified about the

psychopathy scale, which lists various criteria to determine whether an individual basically meets psychopathy traits. Dr. Krop explained that a psychopath is not a diagnosis, but rather, there are certain traits that are often seen with individuals with antisocial personality disorders. Dr. Krop did not conduct a psychopathy scale on Defendant because he met the criteria of antisocial personality disorder. (R. 3459-3461). Dr. Krop did opine that Defendant would score high with regard to psychopathic traits. (R. 3463). He explained that Defendant exhibited certain psychopathic traits such as manipulation, selfishness, insensitivity to other's needs, getting into trouble without looking at the consequences of actions, impulsivity and engaging in criminal acts. (R. 3464). Dr. Krop testified that Defendant told him he resented the victim because she would get upset with his grandfather, who would continue to be supportive of Defendant even though Defendant kept getting into trouble. (R. 3469-3470).

Following the presentation of other defense witnesses, the State called Dr. Gregory Prichard, a licensed psychologist, in rebuttal. Dr. Prichard testified that he worked in all areas of forensic psychology, including competency and sanity assessments, sexual predator assessments and mitigation/aggravation work. (R. 3550-3551). Dr. Prichard discussed his educational and professional background and credentials. (R. 3551-3553). He estimated he has done between 5,000 and 7,500 forensic evaluations in the last ten years. He has testified between 500 and

750 times across Florida. (R. 3553-3554). Dr. Prichard conducted an evaluation of Defendant. Prior to his evaluation, Dr. Prichard reviewed Corrections records, police reports, Defendant's statement, the co-defendant's statement, a letter from Defendant to his grandfather, pleadings, and case file documents from prior cases. (R. 3554-3555). After his evaluation of Defendant, Dr. Prichard reviewed additional materials. (R. 3555). According to Dr. Prichard, he talked to Dr. Martin, who evaluated Defendant in the Department of Corrections and Ms. Bailey, the psychological specialist who counseled Defendant. (R. 3556). Dr. Prichard met Defendant on May 30, 2012. He did not see from the records, nor did he conclude, that Defendant had any type of neurological problems or brain damage. In particular, Dr. Prichard stated that he reviewed a letter from Dr. Krop to defense counsel indicated that there did not appear to be any neurological issues. (R. 3556-3557; App. A: 18). Based on his evaluation of Defendant, Dr. Prichard concluded that Defendant was functioning at an average level around the 50th percentile. Defendant had good word usage and comprehended well. (R. 3558). Dr. Prichard's primary diagnosis of Defendant was that Defendant has an antisocial personality disorder. A secondary diagnosis is that Defendant had polysubstance dependence. The third diagnosis is that Defendant had a depressive disorder. (R. 3559; App. A: 18-19). Dr. Prichard came to the depressive conclusion on the basis of his review of prison records which showed Defendant had been treated with

antidepressants when he was in prison between 2003 and 2007. When he was released in 2007 he went to Putnam Behavioral on an outpatient basis and he was given a couple of antidepressants. However, Defendant returned to street-drug use. When he returned to jail, he was given antidepressant medications again. Dr. Martin confirmed the depressive disorder diagnosis in discussions with Dr. Prichard. Additionally, Dr. Martin stated that Defendant also had antisocial personality disorder. The records also showed a diagnosis of PTSD, but Dr. Martin did not know where that came from. Dr. Martin did not see any indication of bipolar disorder. (R. 3559-3561). Dr. Prichard did not see any indication of bipolar disorder when he evaluated Defendant, although he conceded the records did reflect such a diagnosis in 2007. (R. 3561-3562). He pointed out that there was no indication that Defendant received medications usually given for bipolar disorder and that one would expect to see episodic manifestations of the disorder while incarcerated. (R. 3563-3464). Dr. Prichard testified about the MMPI personality inventory, which was given to Defendant. Invalid results would indicate that the person filling out the test responded in an invalid way. As such, it cannot be interpreted. Dr. Prichard explained that in Defendant's case, he was either intentionally exaggerating mental illness or was crying out for help. (R. 3564-3565). Dr. Prichard testified that he diagnosed Defendant with antisocial personality disorder, which is not neurochemically driven such as a mental illness.

According to Dr. Prichard, persons with antisocial personality disorders usually tend to have them for their entire life and do not respond to medications. He pointed out that many people call this disorder the criminal personality. Basically, the disorder is a pervasive pattern of the violation of the rights of others in societal norms. (R. 3566-3568). Dr. Prichard explained that a person with this disorder continuously gets into trouble, breaks the rules, gets into criminal trouble, says he going to change things but does not, and gets into a lot of fights and steals things. (R. 3568). This disorder usually shows up in the early teens. (R. 3568). Further, Dr. Prichard testified there were four criterion (A through D) for the disorder. Under the first criteria there are seven symptom patterns of behaviors. All seven applied to Defendant. (R. 3570). The first criteria (A) involves failure to conform to social norms with respect to lawful behaviors indicated by repeatedly performing acts that are grounds for arrest. Dr. Prichard explained Defendant began criminally offending at age 13 or 14. He began stealing cars. He had ten juvenile arrests. He had ten school suspensions before finally being expelled in the 9th grade. He was first sent to prison as a youthful offender in 2000. (R. 3570-3571). Dr. Prichard reviewed the seven criteria for antisocial personality disorder. He testified Defendant met all seven criteria. (R. 3597-3598). In particular, he stated Defendant exhibited lack of remorse as indicated when Defendant stole a vehicle when keys were left in it. Additionally, this factor was established in

Defendant's post-arrest statement. In that statement, Defendant said the victim was ignorant because she wanted to fight over 37 dollars and all she had to do was hand over the 37 dollars and her PIN number for her credit card and she would only have been tied up. This was rationalization in that if the victim had only behaved herself there would have been a different outcome. (R. 3599-3600). Dr. Prichard explained antisocial personality disorder is chronic, beginning at age 13 until 28. (R. 3601). Dr. Prichard addressed the psychopathy checklist. He explained that a psychopath is a criminal variant that has a number of personality and behavioral characteristics. According to Dr. Prichard, it is "kind of the turbocharged antisocial personality disordered individual." (R. 3602-3604). The checklist consists of 20 items, on which a person can score up to 40, that is, a maximum of two on each point. A score of 2 on an item indicates that the characteristic is present without a doubt. (R. 3604). Dr. Prichard confirmed Defendant was prescribed antidepressant medications before any term of incarceration. (R. 3617-3618). He learned Defendant did not stay on his medications for very long. (R. 3617). Dr. Prichard agreed the records showed domestic violence occurring between Defendant's parents. Some of these incidents occurred in Defendant's presence. The first incident occurred when Defendant was six. He confirmed Defendant's mother died of brain cancer in 2002. (R. 3618-3619). Dr. Prichard had information that in addition to drug use

Defendant used excessive amounts of alcohol. He would use the alcohol along with drugs. (R. 3619-3620). Defendant was diagnosed with PTSD in 2007. (R. 3621). The records showed Defendant was ADHD (attention deficit disorder hyperactivity disorder) or ADD (attention deficit disorder) as a child. Both disorders involve problems maintaining focus and ADHD also involves excessive hyperactivity. (R. 3623-3624).

ARGUMENT

I.

THE AFFIRMANCE BY THE SUPREME COURT OF THE STATE OF FLORIDA OF DEFENDANT'S JUDGMENT OF CONVICTION FOR FIRST DEGREE MURDER AND SENTENCE OF DEATH WAS CLEARLY ERRONEOUS AND VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES

The Supreme Court of the State of Florida clearly erred in affirming the trial court's judgment of conviction of first degree murder and sentence of death. Defendant's due process rights under the U.S. Constitution were violated.

Right to Fair Trial- Prosecutorial Misconduct
A) Evidence of Prior Crimes

At trial, Officer Steven Faulkner, PCSD, testified as follows:

MR. JOHNSON (PROSECUTOR)- "Tell us a little bit—when you're there at the Putnam County Courthouse...
OFF. FAULKNER- When Mr. Kuleski told me that I had to go back, the juvenile, I was a little concerned about him... And as Mr. Kuleski and I were carrying them out to the van, I mentioned it to Mr. Kuleski. And I believe Mr. Fletcher told me that *he had been sentenced* for—

MR. WOOD (DEFENSE COUNSEL)- Objection.

THE COURT: Sustained." (R. 2542-2543)(emphasis supplied).[5]

Moreover, Det. Doug Schwall, PCSD, was called by the prosecution to testify about Defendant's post-arrest statement. The State introduced Defendant's video statement at trial accompanied by redacted copies of transcripts. During the course of the presentation of the statement, the following occurred:

> "THE DEFENDANT: No. I didn't really – I didn't fully plan on escaping before that, but I had talked about it. *And I had just got sentenced to the ten years*. My grandma just died, my – my real grandma, my grandpa's first wife—
>
> INVESTIGATOR BRENDEL: Right.
>
> THE DEFENDANT: -- just died in December. And I don't know. I just – *ten years is a long-ass time*. I thought it was before, but"—
>
> MR. WOOD: Judge, I need to take something out of the—
>
> THE COURT: All right.
>
> MR. WOOD: -- something with the Court.
>
> THE COURT: Can you stop it—stop." (R. 3073-3074)(emphasis supplied).

The defense objected to the foregoing comments and moved for mistrial. Florida Supreme Court agreed that the statements challenged by Defendant at trial were the subject of a motion in limine granted by the trial court and that the

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[5] Previously, Officer Charles Word had testified that B-pod, where Defendant was housed, was a felony area. The defense objected to this comment and the Court sustained the objection, instructing jurors to disregard the comment. (R. 2481).

prosecution has a duty to prepare its witnesses so as to avoid any violation of a court order. (App. A: 33-34). However, the Court concluded that the statements were brief and that any prejudice could have been cured by an instruction which defense counsel declined. (App. A: 34-35). Contrary to the Court's conclusion, Defendant submits that the admission of testimony and evidence that Defendant was serving a sentence and that the term of his sentence was ten years at the time of the charged escape was unduly prejudicial and deprived Defendant of a fair trial. The defense attempted to avoid any problems concerning his sentence by reaching a stipulation with the State on the issue of lawful custody, one of the elements of the escape charge. (R. 708). Defendant's efforts were to no avail. The jury was plainly informed that Defendant was a sentenced prisoner and was serving ten years. It was left to the jury's imagination as to what the offense or offenses were for which Defendant was incarcerated.

Right to Fair Trial- Prosecutorial Misconduct
B) Improper Evidence of Criminal Type

During the penalty phase, the State called Dr. Prichard, a forensic psychologist, who testified that he diagnosed Defendant with antisocial personality disorder, which is not neuro-chemically driven. Dr. Prichard said that persons with antisocial personality disorders usually tend to have them for their entire life and do not respond to medications. He pointed out that many people call this disorder

the criminal personality. Basically, the disorder is a pervasive pattern of the violation of the rights of others in societal norms. (R. 3566-3568). Dr. Prichard explained that as such a person with this disorder continuously gets into trouble, breaks the rules, gets into *criminal trouble*, says he going to change things but does not, and gets into a lot of fights and steals things. (R. 3568). Before the jury, Dr. Prichard stated that Defendant *exhibited lack of remorse* as indicated when Defendant stole a vehicle when keys were left in it. Time and again, Dr. Prichard made reference to Defendant's long criminal history. He continually and repeatedly labeled Defendant a psychopath while describing the psychopathy checklist. This testimony constituted a non-statutory aggravating circumstance and was a feature of the penalty phase. The State is not permitted to present evidence of a defendant's criminal history under the pretense that it is being admitted for some other purpose. Dr. Prichard addressed the psychopathy checklist. He explained that a psychopath is a criminal variant that has a number of personality and behavioral characteristics. According to Dr. Prichard, it is "kind of the *turbocharged* antisocial personality disordered individual." (R. 3602-3604) (emphasis supplied). The Florida Supreme Court ruled that Dr. Prichard's testimony did not constitute improper nonstatutory aggravation, but rather, was proper rebuttal. (App. A: 40; App. A: 41). However, it is clear that Dr. Prichard's testimony established without doubt that Defendant was a psychopath. He was not

rebutting anything Dr. Krop, the defense expert, had stated. The Court agreed that Dr. Prichard's testimony improperly brought Defendant's lack of remorse in front of the jury, but was harmless. In view of his other comments on psychopathy, his testimony cannot be considered harmless. (App. A: 43-47).

Right to Fair Trial- Prosecutorial Misconduct
B) Closing Arguments

In addition, Defendant is entitled to resentencing based upon the prosecutor's improper penalty phase arguments, which cumulatively deprived Defendant of due process and a fair sentencing determination pursuant to the 5th, 6th, 8th and 14th Amendments, United States Constitution. The courts must go to extraordinary measures to ensure that defendants sentenced to death are "afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982)(O'Connor, J., concurring).

Lack of Remorse: The assistant state attorney pointed to Defendant's lack of remorse. The prosecutor argued as follows:

> MR. JOHNSON:"What is the appropriate sentence for someone who, just *three days after her murder*, refers to her with – by terms such as bitch, ignorant, dumb-ass?" (emphasis supplied)(R. 3651).

The Florida Supreme Court ruled that the prosecutor never asserted that Defendant lacked remorse for the crime but only related what the appropriate

sentence would be in the context of the facts of the case. (App. A: 47-48). However, it is clear that the prosecutor was clearly referring to the fact that well after the killing of Ms. Googe, Defendant was bad-mouthing the victim; a clear indication that he lacked remorse for her death.

Denigration of Mitigation/Converting Mitigation into Aggravation: The following remarks were made by the assistant state attorney:

> MR. JOHNSON: "Number three, the defendant has suffered from a chronic addiction to drugs in the past. *I submit to you a lot of people have drug addictions. Most of them do not murder other people.*")(emphasis supplied)(R. 3663).
>
> MR. JOHNSON: "Number four, the defendant is depressed. *A lot of people are depressed, but they don't go and murder other people.*")(emphasis supplied)(R. 3663).
>
> MR. JOHNSON: "The defendant – number six, the defendant has witnessed his mother being physically abused by his father. Now, *there's a lot of people who come from tough circumstances, abusive families, but they, too, most of them, do not go and murder other people.*") (emphasis supplied)(R. 3664).
>
> MR. JOHNSON: "You will also hear the mitigation that will be presented to you that the defendant has artistic ability. *A lot of people have artistic ability.* You could ask why wasn't he putting it to good use? *A lot of people have artistic ability, but they don't murder other people.*")(emphasis supplied)(R. 3669).

The Florida Supreme Court ruled that the prosecutor was properly commenting on the validity of the mitigation evidence and that it should be afforded less weight. (App. A: 49-50). The Court stated that the comments did not characterize the mitigating evidence with negative terms. (App. A: 51). Moreover,

the Court found that the prosecutor did not compare life choices of the victim with the life choices of the defendant. (App. A: 52). In reality, the foregoing argument improperly converted mitigating circumstances into aggravating circumstances. A prosecutor may not attach aggravating labels to factors that actually should militate in favor of a lesser penalty. Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Additionally, the prosecutor improperly denigrated mitigating evidence. The prosecutor placed whole groups of persons in Defendant's mitigation categories and then asked jurors to compare their life choices and non-criminal activities with his. This was patently improper.

Consideration of Non-Statutory Aggravating Circumstances: The prosecutor improperly asked jurors to weigh non-statutory aggravating circumstances when he asked: "What is the appropriate sentence for *someone who murders someone who was essentially his step-grandmother*?" (emphasis supplied) (R. 3651). And when he asked: "What is the appropriate sentence for someone who, rather than recognizing the heinous crime that they have committed, instead *blames the victim* and says—essentially, says that it is her fault, that if she had not fight—fought them, that she – they would have left her alone." (emphasis supplied)(R. 3652). The prosecutor's request that jurors take these matters under consideration was impermissible. The State improperly injected consideration of non-statutory aggravation into the proceedings.

Violation of Due Process-Disparate Treatment of Co-Defendant

The trial court did not impose the death penalty on Defendant's co-defendant Doni Brown. The Florida Supreme Court ruled that the trial court properly sentenced Defendant to death, even though the co-defendant received a non-death sentence. The Court upheld the trial court's reasoning supporting this disparate treatment on grounds that Defendant was the mastermind of the plan and committed the actual murder. The Court pointed out that Defendant had a personal relationship with Googe, resented Googe, knew Googe's financial status and knew how to enter Googe's house. Additionally, the Court noted that Defendant's DNA, not Brown's, was found under Googe's fingernails. (App. A: 66). However, the evidence introduced at trial, through Defendant's statement, established that Doni Brown strangled the victim. While the State did present DNA evidence linking Defendant to the victim's fingernail scrapings, the DNA evidence was based on only 2 of 13 loci. (R. 3247). The fact that the DNA found under the victim's fingernails was consistent with Defendant's DNA suggests, at most, that Defendant, at some point, participated in the attack on the victim. It does not definitively establish that Defendant actually strangled the victim. Neither Defendant's DNA nor his fingerprints were found on the victim's neck. In addition, the State has never disputed that *both* defendants escaped from the jail, *both* defendants participated in the break-ins to the vehicles near the jail, *both*

defendants burglarized the victim's home, *both* defendants joined in the attack on the victim, *both* defendants took the victim's vehicle and fled to Kentucky,[6] *both* defendants returned to Florida, and *both* defendants attempted to evade the police. Under these circumstances, while it can be argued that both defendants committed the crimes charged in this case, it cannot be definitively concluded that Defendant was more culpable. Notably, the jury was not instructed to make findings satisfying the *Enmund/Tison* culpability requirement (Edmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Under these circumstances, the disparate treatment of his co-defendant violated Defendant's right to due process. The death sentence here violated Defendant's right to a fair trial under Art. I, §§9, 16 and 17, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution.

Constitutionality of Florida Death Penalty Statutory Scheme

The defense argued below that Florida's death penalty statutory scheme was unconstitutional, relying on this Court's decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Florida Supreme Court simply noted that it had previously held that Ring was inapplicable when the aggravating circumstance that the defendant committed the murder while under a sentence of imprisonment is applicable. (App. A: 62). The Court acknowledged that this Court

[6] In fact, it was Brown who stopped by her aunt's home and used MapQuest as the defendants fled north. (R. 2702-2704).

has granted certiorari to review the decision in Hurst v. State, 147 So.3d 435 (Fla. 2010), cert. granted, Hurst v. Florida, 135 S.Ct. 1531 (2015), and framed the issue to be decided in that case as follows: "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002)." (App. A: 62). The Florida Supreme Court noted, however, that Hurst did not involve the under-the-sentence-of-imprisonment aggravator, which the Florida Supreme Court's precedent clearly establishes does not implicate Ring. The Florida Supreme Court ruled that "until the Supreme Court issues a contrary decision, Fletcher's claim is without merit under established Florida precedent." (App. A: 63). Finally, the Florida Supreme Court found meritless, based on Florida Supreme Court precedent, Defendant's claims that victim impact evidence may not be presented to the jury; that the standard jury instructions do not properly instruct the jury on consideration of mitigating and aggravating factors; that aggravating circumstances must be charged in the indictment, and must be individually found; that the HAC (heinous, atrocious and cruel) aggravating circumstance is vague and overbroad; and that Florida's sentencing statute is unconstitutional because every person convicted of first degree felony murder automatically qualifies for the circumstance of commission during an enumerated felony. (App. A: 63).

It is submitted that Florida's capital sentencing scheme is unconstitutional under Ring, supra. This is especially so in this case because the jury's verdict for death was ***non-unanimous***. The death penalty scheme is unconstitutional because the law allows a *non-unanimous* jury to make sentencing *recommendations*, and not binding decisions. Also, the law permits the judge, not the jury, to make the findings necessary to impose the death sentence. Additionally, the indictment improperly failed to allege any of the aggravating circumstances; the jury is not required to render a specific verdict stating forth its findings as to aggravating circumstances; no meaningful appellate review is possible without these specific findings by a jury; the jury is not instructed on specific non-statutory mitigating circumstances; the jury is not given proper guidance on how the jury is to go about determining the existence of the sentencing factors or how to weigh them; the felony-murder aggravating circumstance amounts to an "automatic" aggravating factor creating a presumption for a death sentence; the jury is permitted to consider victim impact evidence, which is not relevant to any aggravating circumstance; and the HAC factor is vague and overbroad because the jury is not properly instructed on the precise meaning and application of HAC. Florida's capital punishment statute violates the decision in Ring v. Arizona, supra. Defendant raised Hurst before the Florida Supreme Court. The defense raised these issues at trial and the court ruled against Defendant. (R. 158-185; R. 186-201; R. 202-220; R. 221-248;

R. 249-253; R. 254-260; R. 290-294; R. 295-325; R. 326-330; R. 331-335; R. 336-339; R. 394-489; R. 510-539; R. 814-823; R. 824-828; R. 1520-1523; R. 340-349).

In Evans v. McNeil, Case No. 08-14402-CIV-MARTINEZ (S.D. Fla., June 20, 2011), rev., 699 F.3d 1249 (11th Cir. 2012), the district court found Florida's *death penalty statute was unconstitutional* as a matter of federal constitutional law in Mr. Evans's case. (Docket Entry 21). In Evans the court reviewed the statute in light of Ring, supra, and found, inter alia, that because the jury may not have reached a majority finding as to any one aggravating factor, the Florida sentencing statute leaves open the very real possibility that in substance the judge still makes the factual findings necessary for the imposition of the death penalty as opposed to the jury as required by Ring. Also, Florida's death scheme is unconstitutional under Ring because the jury's decision is simply a sentencing recommendation made without clear factual findings, and leaves only the judge's findings available for meaningful appellate review; an increase in a defendant's authorized punishment is contingent on a finding of fact and such findings *must* be made a jury beyond a reasonable doubt; a trial judge is unaware of the aggravating factor or factors found by a jury and, thus, he or she may find an aggravating factor *not* found by a jury in its death sentence; and a judge may reject a jury's life recommendation altogether, thus rendering a jury's recommendation meaningless as the judge may find the jury's decision unreasonable. The rationale of the Evans

decision supports defendant's claim that Florida's death penalty statute is unconstitutional as applied in this case. In reversing the district court, the Eleventh Circuit in Evans v. Secretary, Fla. Dept. of Corrections, 699 F.3d 1249 (11th Cir. 2012),), cert. den., __ U.S. __, 133 S.Ct. 2393, 185 L.Ed.2d 1105 (2013), relied on a series of decisions by this Court reviewing Florida's death penalty statutes *all of which pre-dated Ring*. The Eleventh Circuit candidly stated that this Court "has not decided whether the role that a Florida jury plays in the death-eligibility determination is different enough from the absence of any role, which was involved in Ring, for the Florida procedures to be distinguishable." Evans, supra, 699 F.3d at 1261. The appellate court noted this Court in Ring implied a retreat from the reasoning in Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989)[this Court's last word in a Florida capital case on the constitutionality of Florida's death sentencing procedures], but "nowhere in its Ring opinion did the Court say that it was overruling Hildwin." Evans, supra, 699 F.3d, at 1262. Because this Court has previously classified Florida as a "hybrid" state, the Eleventh Circuit concluded that the decision in Ring "might not be inconsistent with its earlier Hildwin decision." Id. at 1262. As such, the Eleventh Circuit ruled that the most that could be said was that while Ring did not explicitly overrule Hildwin its reasoning arguably conflicts with the Hildwin decision and it arguably was implicitly overruled. However, that was not enough for Evans to

prevail in the district court. Id., at 1262.[7] Defendant submits that this Court now has an opportunity to clearly and permanently settle the issue of the constitutionality of Florida's death penalty statutes. Defendant asserts that the string of cases beginning with Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and proceeding to Apprendi v. New Jersey, 530 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Ring, supra, undeniably supports the proposition that Florida's death penalty statutes are unconstitutional for the reasons previously stated. Moreover, these later cases have totally undermined the 1989 decision in Hildwin. That is to say, this Court's statement in Hildwin that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury [Hildwin, 490 U.S., at 640-641], clearly conflicts with this Court's subsequent reasoning in Ring that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. Ring, 536 U.S., at 589.[8]

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[7] In Evans, the Eleventh Circuit ultimately determined that it was bound by this Court's precedent, but made clear that this Court could make controlling precedent "uncontrolling" by overruling it. Id., at 1265.

[8] Federal district courts in Florida have recently stayed proceedings pending this Court's Hurst decision. See Byrd v. Sec'y Fla. Dept. of Corr., Case No. 8:96-cv-771-T-23TGW; Cherry v. Sec'y Fla. Dept. of Corr., Case No. 6:08-cv-1011-Orl-41KRS; Buzia v. Sec'y Fla. Dept. of Corr., Case No. 12-cv-595; Davis Mark Allen v. Sec'y Fla. Dept. of Corr., Case No. 8:07-cv-676-T-23TBM; Derrick v. Sec'y Fla. Dept. of Corr., Case No. 8:08-cv-1334-T-23TBM; Diaz v. Sec'y Fla. Dept. of

CONCLUSION

This petition presents an ideal opportunity for this Court to consider the foregoing violations of constitutional rights under the facts of this case.

WHEREFORE, TIMOTHY W. FLETCHER, respectfully prays that this Court issue its Writ of Certiorari to the Supreme Court of the State of Florida.

Respectfully submitted on this 11th day of September, 2015.

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FLA. BAR NO. 302007

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Corr., Case No. 2:14-cv-91-FtM-29DNF; Douglas v. Sec'y Fla. Dept. of Corr., Case No. 3:13-cv-346-J-39PDB; England v. Sec'y Fla. Dept. of Corr., Case No. 6:14-cv-1627-Orl-41DAB; Frances v. Sec'y Dept. of Corr., Case No. 6:14-cv-1347-Orl-37GJK; Johnson v. Sec'y Fla. Dept. of Corr., Case No. 8:13-cv-381-Orl-T-23TGW; Johnston Ray Lamar v. Sec'y Dept. of Corr., Case No. 8:11-cv-2327-T-23TBM; Lebron v. Sec'y Fla. Dept. of Corr., Case No. 6:14-cv-671-Orl-41TBS; McLean v. Sec'y Dept. of Corr., Case No. 6:14-cv-1463-Orl-40GJK; Miller v. Sec'y Dept. of Corr., Case No. 6:15-cv-950-Orl-40GJK; Mungin v. Sec'y Dept. of Corr., Case No. 3:06-cv-650-J-25JRK; Peterson v. Sec'y Fla. Dept. of Corr., Case No. 8:14-cv-03237; Stein v. Sec'y Dept. of Corr., Case No. 3:09-cv-1162-J-34PDB; Trease v. Sec'y Fla. Dept. of Corr., Case No. 8:11-cv-233-T-23TBM; Turner v. Sec'y Fla. Dept. of Corr., Case No. 8:14-cv-885; Valentine v. Sec'y Fla. Dept. of Corr., Case No. 8:13-cv-30-T-23TBM; Victorino v. Sec'y Fla. Dept. of Corr., Case No. 6:14-cv-188-Orl-37DAB; and Zommer v. Sec'y Fla. Dept. of Corr., Case No. 6:15-cv-615-Orl-41KRS. Additionally, in State of Florida v. Johnson, Case No. 11-1796A (Miami-Dade County), the circuit court has stayed a death penalty case pending the Hurst decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition was mailed to Stacey E. Kircher, Esq., Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 17th day of September, 2015.

J. RAFAEL RODRIGUEZ