IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO. 2012-CF-35337-A

STATE OF FLORIDA,

Plaintiff,

vs.

BRANDON LEE BRADLEY,

Defendant.
_____/

DEFENDANT'S REQUEST THE TRIAL COURT TO STATE BASIS OF ITS RULINGS

The Defendant, BRANDON LEE BRADLEY, moves this Court to state on the record and/or include in its written Orders the basis of each of its rulings when denying the motions and objections filed by the Defendant, including making specific findings of law and/or fact, based on the following:

1. The Defendant has been indicted for one count of first-degree premeditated murder.

2. The State has filed notice of its intent to seek the death penalty pursuant Fla.R.Crim.P. 3.202.

3. There is mandatory appeal of the imposition of capital punishment, and that appellate review cannot be waived. § 921.141(4), Florida Statutes. See ***Klokoc v. State***, 589 So.2d 219 (Fla. 1991) (Florida Supreme Court rejects defendant's attempt to dismiss the direct appeal of his death sentence and requires adversarial briefing by the defendant's counsel).

4. Under § 921.141(3), Florida Statutes, the trial court is required to make findings of fact when it imposes a sentence of death:

> **Findings in support of sentence of death.** -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) that sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and 6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.092.

Id. (Emphasis added).

5. The Eighth and Fourteenth Amendments to the United States Constitution proscribe arbitrary, capricious, whimsical and inconsistent imposition of capital punishment.

6. Defendants sentenced to capital punishment in Florida have a liberty interest in receiving Due Process under the Constitution of the State of Florida and Florida Statutes, and that liberty interest includes a meaningful direct appeal of a death sentence.

7. Meaningful, intelligent and consistent appellate review of the imposition of capital punishment includes review of the underlying basis of a trial court's rulings on the constitutionality of Florida's death penalty. Meaningful review cannot occur in the absence of expressly stated findings of fact and conclusions of law by the trial judge, where the Florida Supreme Court demands

that specific arguments be made to the trial courts to provide an opportunity for the trial court to cure the putative error. ***Harrell v. State***, 894 So.2d 935, 939-940 (Fla. 2005).

8. The heightened standard of due process and reliability for fact finding required under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16 and 17 of the Florida Constitution compel that trial courts, when timely asked, make specific findings of fact when denying motions contesting the constitutionality of Florida's death penalty and the conduct of the trial. See ***Gardner v. Florida***, 430 U.S. 349, 357 (1977); ***Beck v. Alabama***, 447 U.S. 625 (1980); ***Monge v. California***, 524 U.S. 721 (1998).

9. The refusal of a trial court, upon timely and specific request, to state the legal and/or factual basis of its rulings denies Due Process, is arbitrary and it causes unreliable and inconsistent imposition of capital punishment and prevents meaningful appellate review of trial court rulings in violation of article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Memorandum of Law and Argument

The United States Supreme Court has explained that "due process" is "flexible" and that it calls for such procedural protections as the particular situation demands:

> We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As Mr. Justice Blackmun has written recently, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.E.2d 534 (1971). Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed.2d 817 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). The question is not merely the

> "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "(C)onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union V. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). See also, ***Gagnon v. Scarpelli***, 411 U.S. 778, 786 (1973). Where a litigant's life is literally at stake, the highest procedural safeguards are required, as will be explained later. However, as a basic component of due process, every litigant is entitled to an unbiased fact-finder. In that regard, a tribunal that erroneously applies a principle of law to preclude relief is acting under a form of bias that denies due process.

The Florida Supreme Court, as required by Florida statutory law, demands that timely and specific objections be presented to the trial judge to provide an opportunity for error to be corrected in order for error to be preserved for appellate review:

B. The Preservation Requirement

> Both Florida Statutes and our own case law require a defendant to preserve issues for appellate review *by raising them first in the trial court*. Section 924.051, Florida Statutes (2000), addresses the "[t]erms and conditions of appeals and collateral review in criminal cases." It reads in part as follows:

> (3) *An appeal may not be taken from a judgment* or order of a trial court *unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.* A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court, or if not properly preserved, would constitute fundamental error.

§ 924.051(3), Fla. Stat. (2000) (emphasis added). Under the statute, "preserved" means an issue or legal argument *timely raised* and ruled on by the trial court, that is "*sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.*" § 924.051(1)(b), Fla. Stat. (2000) (emphasis added).

> These statutory provisions are consistent with our holdings requiring preservation of error. Moreover, we consistently have stated that proper preservation entails three components. First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, "[i]n order for an argument to be cognizable on appeal, *it must be the specific contention asserted as legal ground* for the objection, exception, or motion below." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (emphasis added); *accord* Rodriguez v. State, 609 SO.2d 493, 499 (Fla. 1992) (stating that "the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal"). The purpose of this rule is to "place[ ] the trial judge on notice that error may have been committed, and provide[ ] him an opportunity to correct it at an early stage of the proceedings." Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The sole exception to the rule is for fundamental error, which we discuss later.

Harrell v. State, 894 So.2d 935, 939-940 (Fla. 2005). Thus, even where a statute is clearly unconstitutional, the failure of the defendant to make a timely and specific objection on precise grounds waives the issue for direct appeal. See ***Hodges v. State***, 565 So.2d 929 (Fla. 1992) (CCP statute and instruction are not unconstitutionally vague); ***Hodges v. Florida***, 506 U.S. 803 (1992) (remanding case for reconsideration by Florida Supreme Court in light of ***Espinosa v. Florida***, 505

U.S. 1079 (1992); ***Hodges v. State***, 629 So.2d 272 (Fla. 1993) (constitutionality of CCP statute and instruction not preserved by contemporaneous objection, so issue previously rejected on the merits now deemed "waived" due to the absence of a specific objection).

Because the Florida Supreme Court and Florida statutes require that issues be presented to the trial judge, judges must have the authority to grant relief. Otherwise, the requirement to first present an issue to the trial court where no power existed to correct the error is arbitrary, capricious and whimsical in violation of the Eighth and Fourteenth Amendments to the United States Constitution. When a tribunal that has the authority to grant relief but makes a generic ruling of "denied," it is impossible for a reviewing court to determine the underlying basis of the ruling and/or whether it was an abuse of discretion, a ruling founded on an finding of unsupported fact, or an erroneous application of a legal principle that should not have controlled the exercise of judicial power.

Normally, "it is neither error nor an abuse of discretion for the trial court to fail to include either findings of fact or conclusions of law in its judgment, when not required by statute or rule." ***Harris v. National Judgment Recovery Agency, Inc.***, 819 So.2d 850, 854 (Fla. 4th DCA 2002). However, at issue here is the quality of appellate review of capital punishment. But, again, the concept of due process demands that the interests involved be weighed to correctly determine what amount of process is due. Findings of fact and conclusions of law have been required by the Florida Supreme Court to enable meaningful appellate review of far lesser interests than a citizen's life. For example, when the statutory right exists for an award of attorney's fees, e.g., Section 61.16, Florida Statutes, the amount awarded has to be accompanied by specific findings of fact that are mandated by the Florida Supreme Court and not by the statute. See **T.G.G. v. P.M.L.**, 661 So.2d 351, 351 (Fla.

1st DCA 1995) (reversing the judgment of attorney's fees and costs because the trial court failed to make a specific findings required by ***Florida Patient's Compensation Fund v. Rowe***, 472 So.2d 1145 (Fla. 1985) "[e]ven when there is competent, substantial evidence in the record to support a court's award of attorney's fees"); ***Jones v. Assocs. Fin. Inc. Inc.***, 565 So.2d 394, 394 (Fla. 1st DCA 1990) (same); ***Hoffay v. Hoffay***, 555 So.2d 1309, 1310 (Fla. 1st DCA 1990) (same); ***Manuel v. Manuel***, 498 So.2d 1369, 1370 (Fla. 1st DCA 1986) (reversing the trial court's order awarding attorney's fees for failure to set forth the specific findings mandated by *Rowe* notwithstanding the fact that the record appeared to contain sufficient evidence to support the trial court's award).

Simply said, appellate courts have required that the lower tribunal articulate findings of fact and conclusions of law because the quality of appellate review is enhanced:

> This case points out a request for assistance that we respectfully wish to make to the trial judges of this district because, uncharacteristically for this trial judge, there were no findings of fact nor conclusions of law in the final judgment. Our request is that findings of fact and conclusions of law be included when it is reasonable and feasible to do so. We base this request on our responsibility to provide meaningful appellate review, which is made much more difficult in their absence.

Banks v. Steinhardt, 427 So.2d 1054 (Fla. 4th DCA 1983) (emphasis added).

In the context of the death penalty, the Florida Supreme Court requires trial judges to give notice to defense counsel and to provide them a meaningful opportunity to object to the content of orders being signed by the trial court:

> We confine our review to the issue of whether the circuit court's treatment of Huff's 3.850 motion violated his due process rights. In view of the wide scope of issues raised below and the fact that the death penalty was involved as well as the other circumstances in this case, we agree with Huff that his due process rights were

violated. Huff should have been afforded an opportunity to raise objections and make alternative suggestions to the order *before* the judge signed it. As this Court explained in *Rose v. State*, 601 So.2d 1181, 1183 (Fla. 1992), "[t]he other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments."

The State argues that *Rose* is inapposite to this case because Huff's attorney received a copy of the proposed order. In *Rose*, the proposed order was sent to Rose's former counsel and his new counsel was never served a copy nor given notice of receipt of the order by the court. *Id.* at 1182 & n. 5. Consequently, Rose was never given an opportunity to review the order or to object to its contents before the court signed the order denying all relief. This Court reversed the order denying Rose's motion for relief. *Id.* at 1184.

Even though the factual circumstances of the instant case are somewhat different from those in *Rose*, we find that the same due process concerns expressed in *Rose* are also present in this case. Rose was denied due process of law because his counsel was never served a copy of the proposed order; thereby depriving Rose of the opportunity to review the order and to object to its contents. In the instant case, CCR received a copy of the proposed order on Friday before the court signed it on Monday. This did not afford Huff a sufficient opportunity to review the order, much less to object to its contents. In fact, according to CCR's presentation at oral argument, Huff's attorneys were in the process of preparing a response to the proposed order when they received the court's signed order. At oral argument, CCR also noted that Huff's attorneys had previously requested a status conference regarding the motion for postconviction relief, but that the court did not grant the conference. "The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Scull v. State*, 569 So.2d 1251, 1252 (Fla. 1990). We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard.

Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion. This does not mean that the judge must conduct an evidentiary hearing in all death penalty postconviction cases. Instead, the hearing before the judge is for the purpose of determining whether an evidentiary hearing is required

> and to hear legal argument relating to the motion. If this procedure had been followed in the instant case, this Court might not be faced with the issue of whether Huff's due process rights were violated.

Huff v. State, 622 So.2d 982, 983 (Fla. 1993) (All emphasis added) (Footnote omitted).

If a trial court rules incorrectly, the ruling when reviewed by an appellate court is presumed correct and will be disturbed only if it can be demonstrated that error occurred. A ruling can reach a "correct" result albeit through erroneous reasoning, otherwise known as "The Tipsy Coachman" rule. See ***Robertson v. State***, 829 So.2d 901 (Fla. 2002) (Reviewing court finds that the trial court's ruling was correct despite the use of faulty legal reasoning). However, in the absence of stated conclusions of law and findings of fact, an appellate court cannot determine the basis of the trial court's ruling. This denies due process in the first instance because defense counsel is not placed on notice of the reasoning of the trial court and given a meaningful opportunity to address error. Further, the absence of articulated findings of fact and conclusions of law defeats meaningful appellate review. This process denies Due Process and violates the Fifth and Fourteenth Amendments to the United States Constitution and article I, §§ 2, 9 and 16 of the Florida Constitution. Imposition of capital punishment is rendered unreliable contrary to the Eighth and Fourteenth Amendments to the United States Constitution and article I, § 17 of the Florida Constitution.

The Supreme Court of Florida early on expressly recognized the importance of written findings of fact in the context of imposition of capital punishment:

> The fourth step required by Fla. Stat. §§ 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). See ***Van Royal v. State***, 497 So.2d 625, 628 (Fla. 1986)

("A court's finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it."). Detailed findings of fact and law are now required for all evidentiary hearings in post conviction proceedings of capital cases:

> D) Procedures After Evidentiary Hearing. Immediately following an evidentiary hearing, the trial court shall order a transcript of the hearing which shall be filed within 30 days. Within 30 days of receipt of the transcript, the court shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion, *making detailed findings of fact and conclusions of law with respect to each claim*, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review. The order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal. The clerk of the trial court shall promptly serve upon the parties and the attorney general a copy of the final order, with a certificate of service.

Rule 3.851(f)(5)(D), Florida Rules of Criminal Procedure (emphasis added).

The Supreme Court of Florida emphasizes that the same facts should produce the same results. See ***Slater v. State***, 316 So.2d 539, 542 (Fla.1975) ("We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts."). When the underlying factual or legal basis of a court's ruling is not stated, arbitrary and inconsistent results occur.

Even when a trial judge is making *discretionary* rulings, the Supreme Court of Florida is cognizant of the principal that the same facts warrant the same ruling and that a trial court can abuse its discretion by failing to properly consider pertinent facts:

> We cite with favor the following statement of the test for review of a judge's discretionary power:
>
> > Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could

> differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.
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> The discretionary power that is exercised by a trial judge is not, however, without limitation, *and both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances*. The appellate courts have not been helpful in this regard. Our decisions and those of the district courts are difficult, if not impossible, to reconcile. *The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result*. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. *Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness*. In this regard, we note the cautionary words of Justice Cardozo concerning the discretionary power of judges:
>
> > The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.
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> B. Cardozo, The Nature of the Judicial Process 141 (1921).

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) (Emphasis added). See ***Files v. State***, 586 So.2d 352, 355-356 (Fla. 1st DCA 19910. Insofar as making the findings of fact or law, it is improper for a judge to simply delegate that task. See ***Patterson v. State***, 513 So.2d 1257, 1261 (Fla. 1978). So too, upon a proper request by defense counsel litigating a capital case, where heightened

due process is compelled, it becomes unreasonable for any judge to refuse to articulate the factual and legal basis of its rulings and provide defense counsel a meaningful opportunity to address those findings. See ***Gardner v. Florida***, 430 U.S. 349 (1977).

Stating the legal and/or factual basis of a ruling, when asked, is not an onerous task. If a trial court believes that its decision is required by controlling precedent, that precedent can easily be referenced by the court when a motion is granted or denied. If a matter has not been adequately proved to exist, that too can be easily stated. Doing so enables the reviewing court to determine whether the trial court made a correct ruling as a matter of fact or law. If the trial court did not make a correct ruling in the context of imposition of capital punishment, the error deserves meaningful appellate scrutiny and at a minimum the application of a meaningful harmless error analysis.

The Fifth and Fourteenth Amendments to the United States Constitution, article I, §§ 2, 9 and 16 of the Florida Constitution at a minimum guarantee a meaningful opportunity to be heard by an unbiased finder of fact:

> Fundamental to the concept of due process is the right to be heard. *See* Fuentes v. Shevin, [407 U.S. 67, 80 (1972)]. The right to be heard assures a full hearing before a court having jurisdiction of the matter, the right to introduce evidence at a meaningful time and in a meaningful manner, and judicial findings based upon that evidence. *See, e.g.*, Pine v. State, 921 S.W. 2d 866 (Tex. App.1996). "It includes also an opportunity to cross-examine witnesses, to be heard on questions of law, and the right to have judgment rendered after trial". *Id* at 873.

Brinkley v. County of Flagler, 769 So.2d 468 (Fla. 5th DCA 2000); See ***Mathews v. Eldridge***, 424 U.S. 319, 334 (1976) ("Due process is . . . not a technical conception with a fixed conception unrelated to time, place and circumstances."); ***Armstrong v. Manzo***, 380 U.S. 545 (1965). A meaningful opportunity to be heard is denied if a trial judge erroneously believes that, pursuant to ***Hoffman v. Jones***, 280 So.2d 431 (Fla. 1973) and as a matter of law, the court is bound by a case that is in actuality factually distinct from the one before the court. The defendant is prejudiced by the

unnecessary concealment of the fact that the judge who is to rule on an issue in a capital case, with the power to grant relief, is not neutral and is in fact biased. The bias is real because a court that erroneously concludes that it does not have the power to rule because of controlling precedent is absolutely biased against the argument being presented. The prejudice exists because appellate courts presume that trial courts rule correctly and the burden is on the appellant to demonstrate error. See ***City of West Palm Beach v. Ryder***, 73 Fla. 558, 563, 74 So. 603, 604 (1917) ("As we have also frequently held, 'Every presumption is in favor of an order or decree rendered by a circuit court, and the burden rests upon one appealing from such order or decree to overcome this presumption of law.") (Citation omitted).

The presumption of correctness on appeal denies Due Process where an incorrect application of law made by the trial court avoids meaningful appellate review because a finding of fact precluded by a mistake as a matter of law rather than by sufficiency of proof is affirmatively concealed by the presumption of correctness that attends trial court rulings. Insofar as determinations of fact, the trial judge is in the best position to determine the credibility of witnesses and/or apply the law to the facts it finds. The right to Due Process, a reliable sentence and meaningful appellate review is thwarted when the basis of the trial court's rulings are not articulated on the record when a timely and specific request is made that it be done. Even rulings of law that are erroneous, such as abuses of discretion or infringements on the exercise of constitutional rights, are affirmatively concealed by the absence of the reasons for the ruling being stated.

The heightened procedural due process concerns that attend imposition of capital punishment require that the trial court, when asked, articulate the legal and factual basis of its ruling. Specifically, the state and federal courts recognize that "death is different." See Amendments to

Fla.R.Crim.P. & Fla.R.App.P., 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); ***Chamberlain v. State***, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different.").

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977). Heightened standards of due process are undoubtedly required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution whenever a state seeks to impose capital punishment in order to insure reliable imposition of an irrevocable penalty:

> . . . *Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing proceedings.* See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998) (Emphasis added).

The Florida Supreme Court agrees that courts have a duty to adopt procedural safeguards that promote reliable and consistent imposition of capital punishment. See ***Arvelaez v. Butterworth***, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the

death penalty is administered in a fair, consistent *and reliable manner* . . . ") (emphasis added). The enhanced due process requirements apply to the proceedings that initially determine the question of guilt as well as to the proceedings that determine whether the death penalty should be imposed:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Beck v. Alabama, 447 U.S. 625, 637-638 (1980).

The United States Constitution and the Florida Constitution expressly guarantee that due process will be provided to citizens charged all crimes. Specifically, the Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

Article I, section 16(a) of the Florida Constitution states:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by an impartial jury nit he county were the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Article I, section 2, Florida Constitution (1976).

The foregoing are basic constitutional guarantees of due process for criminal defendants in Florida. Fundamental fairness and the increased need for reliability in the fact finding process driven by the Eighth and Fourteenth Amendments to the United States Constitution requires that other fundamental constitutional rights be provided as a component of Due Process in the context of imposition of capital punishment, such as the Sixth Amendment right to effective assistance of counsel. See ***Gideon v. Wainwright***, 372 U.S. 335, 341-345 (1963) (Right to counsel required by due process); see also ***Rompilla v. Beard***, 545 U.S. 374 (2005); ***Wiggins v. Smith***, 539 U.S. 510 (2003).

As noted, "due process" is not a static concept. Rather, it "is flexible and calls for such procedural protections as the particular situation demands." ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972). The need for heightened reliability in the context of capital punishment has therefore driven the evolution of proceedings and procedures that have become necessary to satisfy Due Process. For

example, in capital cases, states are constitutionally required to provide the jury with an option to convict a defendant of a lesser crime unless that procedure is knowingly, voluntarily and intentionally waived by the defendant. ***Beck v. Alabama***, 447 U.S. 625, 638 (1980). That procedure is not employed in non-capital cases. See ***Jones v. State***, 484 So.2d 577, 579 (Fla. 1986) ("While we acknowledged in *Harris* [*v. State*, 438 So.2d 787 (Fla. 1985)] the fundamentality of the right to such instructions to due process in the capital context, we here decline to apply that case's requirement of an express personal waiver outside of the context in which it was found necessary. As petitioner himself suggests, due process is not a technical conception of fixed content unrelated to time, place and circumstances.").

Unlike mandatory minimums, state legislatures cannot pass laws requiring the "automatic" imposition of capital punishment. ***Sumner v. Shuman***, 483 U.S. 66 (1987); ***Woodson v. North Carolina***, 428 U.S. 280 (1976). Defendants must be given notice and the opportunity to address all evidence upon which imposition of capital punishment is based. ***Gardner v. Florida***, 430 U.S. 349 (1977). The sentencing body cannot be precluded from considering relevant mitigation. See ***Smith v. Texas***, 543 U.S. 37, 45 (2004) (procedure unconstitutional where jury asked to answer "yes" or "no" to two questions in a manner where valid mitigating evidence was not considered); ***Skipper v. South Carolina***, 476 U.S. 1 (1976) (sentencing body cannot be precluded from considering defendant's potential for rehabilitation); ***Penry v. Lynaugh***, 492 U.S.302 (1989) (sentencing body cannot be precluded from considering defendant's mental retardation as mitigating circumstance).

The evolution of heightened Due Process and what constitutes fundamental fairness under the Fifth and Fourteenth Amendments to the United States Constitution and article I, §§ 2 and 9 of the Florida Constitution is inextricably tied to the heightened reliability demanded by the Eighth

Amendment to the United States Constitution. See ***Caldwell v. Mississippi***, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (Citation omitted) (Emphasis added).

Aside from heightened requirements of reliability required as a component of Due Process, the Eighth Amendment proscription against cruel and unusual punishments precludes capital punishment where imposition of the death penalty is arbitrary or capricious. See ***Furman v. Georgia***, 408 U.S. 349 (1977) (Arbitrary and capricious imposition of capital punishment is forbidden); ***Roper v. Simmons***, 543 U.S. 551 (2005) (Death penalty for person less than 18 years old unconstitutional); ***Atkins v. Virginia***, 536 U.S. 304(2002) (death penalty impermissible for mentally retarded); ***Stanford v. Kentucky***, 492 U.S. 361 (1989) (death penalty unconstitutional for person under seventeen years of age); ***Tison v. Arizona***, 481 U.S. 137 (1987) (death penalty unconstitutional for person who lacks sufficient moral culpability).

In summary, the law of capital punishment necessarily evolves, and the procedures necessary to provide due process of law must evolve also. Findings of fact and conclusions of law should be made by the trial court when requested by counsel because a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." ***Burger v. Kemp***, 483 U.S. 776, 785 (1987). In the context of imposition of capital punishment, procedures must be used to limit discretion. See ***Gregg v. Georgia***, 428 U.S. 153, 189 (1976) (plurality opinion) ("Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). The heightened due process that

attends imposition of capital punishment is necessary to avoid improper use of capital punishment. In that regard, capital punishment is only an issue here because the State seeks to extinguish human life:

> If the state wishes to authorize capital punishment it has a constitutional responsibility to *tailor* and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (emphasis added).

WHEREFORE, this Court is respectfully asked to state on the record the basis of its rulings and to make appropriate findings of fact to facilitate meaningful appellate review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Brevard County, Florida, this 8 day of November, 2013.

FBN: 0012414

J. Randall Moore
Chief Assistant Public Defender
Florida Bar No. 0357847
2725 Judge Fran Jamieson Way
Building E, Second Floor
Viera, FL 32940
321-617-7373
brevardfelony@pd18.net