CASE NO. 21-8177

IN THE UNITED STATES SUPREME COURT

October 2021, Term

MARLIN LARICE JOSEPH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

APPENDIX

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IN THE SUPREME COURT OF FLORIDA

MARLIN LARICE JOSEPH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.: SC20-1741

LOWER CASE NO.:
2017CF012413AXXXMB
15th Judicial Circuit

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

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STATEMENT OF THE FACTS

Late afternoon on December 28, 2017, nine members of the extended Crowell/Denson family were awake and at their home located at 822 3rd Street, West Palm Beach, Palm Beach County, Florida (r. 168, t. 1615, 1171). The nine persons at the home were Kaladaa Crowell (victim Count I); her eleven year old daughter, Kyra Inglett (victim Count II); her partner, Robin Denson, Appellant's mother; Mrs. Denson's children, Marlin, Parice, Patrick and Cordarius Joseph; Mrs. Denson's granddaughter, Marlin's daughter, Kamare Canty; and her goddaughter, Jeshima Tarver (t. 1164-65, 1171).

They had all been at the house for a while, and involved in differing activities. The three girls were on the couch talking and playing games (t. 1171-72). Patrick and Marlin shared a bedroom and were in it together (t. 1174). Marlin was reading the Bible. Parice and Cordarius were just outside the house on or near the porch.

Appellant/Defendant, Marlin Joseph, went to talk with his mother in the kitchen. The conversation was peaceful, but over time escalated to the point where Appellant used expletives in referring to the mother of his child (t. 1173-1188). Mrs. Denson felt her heart become heavy, particularly in light of the Appellant's behavioral and mental issues to which she

elucidated in this testimony, and she went outside as she did not want the three girls to hear Appellant using that language (t. 1188).

Apparently, a few minutes later, Jeshima Tarver was taking a shower in another part of the house. This State's witness (as were all members of the Crowell/Denson household) was asked when she first heard Appellant yelling about Kyra (t. 1611). Appellant objected and was overruled (t. 1611-1613). Jeshima Tarver then testified that she heard Appellant talking to Kyra Inglett's mother, Kaladaa Crowell, about an incident (t. 1614). She testified that Appellant said to Ms. Crowell "that Kyra has one more time to make me mad or to bother, she needs to leave my daughter alone" (t. 1614).

To go backwards a bit, while she was in the shower, Miss Tarver testified that she heard a "large bang", thinking a pot or something had been dropped (t. 1605). She turned off the shower, wrapped a towel around, and then opened the door (t. 1605). She testified that Kamare told her that "Kyra and Ms. Kaladaa got shot" (t. 1605). She then testified she heard three more bangs (t. 1606). She testified that she also "heard Ms. Kaladaa saying call 911, like she was screaming and crying" (t. 1606), and that this occurred before the last bang (t. 1607).

Mrs. Robin Denson testified at trial that she heard maybe five gunshots approximately three to five minutes after she was outside (t. 1193). She testified that she did not see Parice, Patrick or Cordarius with a gun (t. 1194). From her recollection, Cordarius helped her while she was outside; Patrick did likewise: she believes she heard Marlin "say something about Mom"; and she did not recollect what Parice was doing (t. 1194-96). She never testified that she saw Appellant with a gun.

Later, Mrs. Denson and her sons all went to the police station at the officer's request and spoke with two different officers, one of whom was Detective Creelman, speaking with her and two of her sons (t. 1196). At trial, she stated that she was testifying from her present recollection, as she had been in shock when she spoke to Detective Creelman that evening (t. 1197-98, 1178-79), and had no memory of the evidence from which the State was propounding its impeachment attempts.

When called by the State, Appellant's brother, Patrick Joseph, testified that "Kaladaa and Kyra" were killed on December 28, 2017 (t. 1243). He testified that he went to the police station and was interviewed by a detective (t. 1243-44). He remembered being picked up by Parice and his mother after work and going shopping (t. 1246). After that, his memory

from more than two years ago, and under the tragic events of that time, failed him (t. 1246-60).

Appellant objected to an attempt to impeach Mr. Patrick Joseph with a prior statement. As he had fully testified and had not provided inconsistent facts, merely a statement that he did not remember, Appellant objected that the State had put him on the stand with the only reason being to impeach the witness (t. 1261). Discussion followed. The trial court agreed to give an instruction that this examination was for the purpose of impeachment and not as substantive evidence. The trial court, however, did not make any finding that the State's own witness was hostile or adverse, nor had the State so moved. To note, as the hostile examination by the State of its own witness resumed, Mr. Patrick Joseph eventually was pressed to state, "You can't make me remember nothing I don't know" (t. 1265).

The State then continued and inquired about specific statements he had supposedly made in his ostensible statement to the police (t. 1271). However, the ostensible statement was never introduced into evidence. No police officer, nor any other witness, ever testified that Mr. Patrick Cordarius had ever made these statements. His testimony did not alter. This direct examination of the State's own witness was thoroughly improper

and erroneous. It was only ever put forward as evidence by the State for their thoroughly inflammatory and prejudicial purposes, and to deter from the State's apparent lack of relevant, material evidence.

Mr. Parice Joseph also was called to testify for the State (r. 1275). He testified that when he brought his mother and brother, Patrick, home that early evening, after bringing in the groceries, he went out to the porch (t. 1283). He testified that at this point everyone was home (t. 1283). Parice testified that he heard gunshots inside the house (t. 1284). He saw Kyra Inglett run outside (t. 1285). He saw his brother, Marlin Joseph, our Appellant, run outside (t. 1285). Mr. Parice Joseph tackled his brother and saw a gun in his hand (t. 1286). He then saw Appellant run back into the house (t. 1268). Before Appellant ran back into the house, the witness saw Kyra lying on the ground (t. 1289). He did not see her bleeding from anywhere on her body (t. 1289). He ran to check on his mother and brother, Cordarius, who were down the street (t. 1290). He also saw Appellant leave in Kaladaa's car (t. 1291-92). Mr. Parice Joseph also testified that he did not see any other of his brothers with a gun (t. 1296).

The witness testified that it took the police a long time to come after the shootings (t. 1296). While he testified that he did not remember the facts of to several of the State's direct examination questions to him, he did

testify that he went to the police department that same night (t. 1297). Mr. Parice Joseph also testified that the prosecutor, during their preparation for trial, did not let him read the statement he ostensibly gave on December 28, 2017. It apparently differed from what he testified to on February 20, 2020; however, the State did not try to impeach this in court witness with the out of court ostensible statement, which again they never moved into evidence. Mr. Parice Joseph also, though, testified that he never saw his brother shoot anyone (t. 1300-01). He had not previously been asked this significant question.

Mr. Cordarius Joseph testified next (t. 1305). That evening, he had gone outside the home, and down the street, waiting for his girlfriend (t. 1312). He testified that his girlfriend came to say that Appellant needed some help (t. 1313-14). Mr. Cordarius Joseph then heard gunshots coming out of the house (t. 1314). He testified that there was more than one shot, but he could not tell how many (t. 1314-15). He was in shock (t. 1315). He initially thought the shots came from somewhere other than his home (t. 1315), i.e. one of the other nearby homes. He testified that he stayed in shock on December 28, 2017, and never told his mother to run, which was contrary to her testimony (t. 1318). Mr. Cordarius Joseph did see Kyra

come outside and fall to the floor (t. 1318-19). And, he testified that he saw Appellant when he got in the car and "went off" (t. 1319).

The State inquired of Mr. Cordarius Joseph whether he had made a different statement to the police when "this happened" (t. 1320). Cordarius Joseph responded no, he did not so remember, and said he could review the ostensible statement. He did not change his testimony thereafter (t. 1321). The trial court, sua sponte, then instructed the jury that the (purported) inconsistent testimony was not for the truth of the matter, but for impeachment (t. 1321-22), thereby abandoning her role as impartial arbiter, as neither party had requested she make this instruction at this time. But, regardless, this was not lawful impeachment. And, yet again, the statement that was reputedly obtained the evening of the killings from this witness was never offered into evidence by the State. The trial court then authorized the State to keep impeaching the witness, although she had never declared him adverse or hostile, and he had not testified inconsistently. Lapse of memory is not inconsistent, adverse, or hostile, and does not lay a proper predicate for impeachment. Mr. Cordarius Joseph even testified that while preparing for his testimony with the State, he had told them that his purported statement was inaccurate (t. 1333-34). They knew, but had not taken the time to satisfy the requirements of law

which may have rendered this testimony lawful and proper, and not erroneous and harmful error. This was both prosecutorial misconduct and judicial error.

On or about December 28, 2017, an arrest/notice to appear and a probable cause affidavit were executed for the arrest of Marlin Joseph on two (2) counts of murder in the first degree, with a firearm (r. 167-68). The victims were detailed as Kyra Inglett and Kaladaa Crowell. A no contact order entered some time later (r. 171-72). An indictment on these two (2) counts of first degree murder with a firearm issued January 18, 2018 (r. 175-77). There was also a third count, but it was bifurcated from this trial.

Various discovery and motion hearings were held over the next two plus years. By August 17, 2018, the first of several motions and hearings regarding Mr. Marlin Joseph, your Defendant/Appellant's competency to stand trial was filed (r. 240-242). An expert was appointed on or about August 29, 2018 (r. 247-250). Appellant was adjudicated incompetent on or about February 1, 2019 (r. 293-96). More orders were issued and experts were appointed as to whether Appellant was competent (r. 366, 369-372, 381). He was declared competent later in the year. The issue raised itself again after trial, and he was re-examined prior to sentencing.

Trial on Counts 1 and 2 in this cause commenced on February 14, 2020. Count 3 had been bifurcated. The jury was sworn February 19, 2020 (t. 1062). Preliminary instructions were read then to the jurors, including the instructions "no talking about the case amongst yourselves or with anyone else" (t. 1062-1071).

The next morning, preliminary matters were handled. Among the issues discussed was one regarding possible impeachment and the firearms expert (t. 1087, 1089-1097). Included in Appellant's objection was whether the State's tool mark identification witness, Omar Felix, planned to offer testimony meeting a scientific standard, or a science accepted by anybody (t.1095). Also encompassed was Appellant's motion to exclude this witness, Mr. Omar Felix, as to unfair prejudice and a denial of due process. The trial court found a Richardson violation, determined it to be inadvertent and, after discussion, although it was fully cognizant of Appellant's lack of locating its own expert despite efforts to do so, denied the motion to exclude (t. 1100-1110).

The first witnesses called by the State in its prosecution of these charges were all immediate family members of Appellant. They were his mother, Robin Denson, and his three brothers, Patrick, Parice and Cordarius Joseph (t. 1149, 1240, 1275 and 1304, et seq.) With all of these

witnesses, as stated hereinabove, improper impeachment was permitted over Appellant/Defendant's objection, and due to non-harmless error by the trial court (see supra).

Law enforcement witnesses came next. Prior to calling Detective Creelman, there was further discussion as to the proposed instruction, which the trial court would read to the jury regarding the nature of his testimony (t. 1489). The Appellant objected (t. 1489-1493). The trial court overruled the objection (t. 1493). Please note that no documentation in support of Detective Creelman's testimony ever came into evidence, nor was published to the jury. No supporting documentation from the detective who took the third brother's statement ever was offered into evidence, either. Nor did that detective ever testify at trial.

More law enforcement witnesses followed. The State then called Jeshima Tarver, a member of Appellant's extended family. She was fifteen when these tragedies occurred, and had been staying at the Crowell/Denson home during the Christmas break (t. 1598). On December 28, 2017, she had been hanging out with Kyra Inglett, victim 2 and then eleven years old, and Kamare Canty, Appellant's daughter, then age eight (t. 1600). At some point, she took a shower late that afternoon (t. 1602). She came out of the bathroom to grab her phone to listen to music, saw

Appellant, and went and got in the shower (t. 1602-03). She testified that she heard Appellant and Kaladaa Crowell, victim 1, arguing (t. 1603).

She further testified that she could not hear what they were discussing, but that it was probably about the argument that happened earlier (t. 1604). This was objected to, and the objection was sustained (t. 1605). However, this was yet another of the long line of inflammatory and merely speculative assertions that came to the ears and thoughts of the jury.

Additionally, later in this examination of Miss Tarver, the State asked her "when was the first time you heard him yelling about Kyra?" (t. 1611). Appellant objected as to relevance (t. 1611) and as to speculation (t. 1613). This objection was denied as the trial court erroneously believed it was relevant to prove a motive (t. 1612-13). And further believed it was inextricably intertwined as it gave a motive (t. 1613). Miss Tarver also testified that she heard a shot while she was in the shower, came out of the shower, heard Ms. Crowell say call 911, and heard another shot (t. 1605-07).

Mr. Omar Felix was called next by the State (t. 1620). He was an employee of the Palm Beach County Sheriff's Office, working in the firearms identification unit of the crime lab. The trial court had earlier

denied Appellant's motion to exclude this witness. He provided testimony that, by a not thorough comparison, the nine casings he had very belatedly been given to examine were shot from the same gun, even though they were not identical (t. 1647). He had no gun to examine as none had been recovered, and had not received other casings to examine, nor projectiles (t. 1635). He did eventually acknowledge in cross-examination by Appellant that there were other methodologies than his utilized to determine whether different casings came from the same gun, and that his statement was his opinion (t. 1648-1653). The trial court then sua sponte decided that this and further testimony on this subject was irrelevant, over Appellant's objection. The trial court knew that she had failed to exclude this witness, even though Appellant, despite continuing efforts, had been unable to obtain his own appropriate expert for further examination, discovery, and testimony in this substantial and significant area (t. 1654). Due process and equal protection were violated herein.

Dr. Reinhard Motte, the State's last witness, testified that he could not tell the jury with any degree of certainty in what order Ms. Crowell, and then Ms. Inglett, received these gunshot wounds (t. 1713). Nor to what extent, or whether they felt pain (t. 1714). He testified that as to Ms. Crowell, once she received the head shot and she is unconscious, if she were to receive

the other gunshot wounds, she wouldn't feel them (t. 1714). Also, as to Miss Inglett, once she received the fatal gunshot wound to the head, there's no way she could have experienced -- well, let me back up. She was either -- well, she wasn't dead but she was unconscious and no longer able to experience pain (t. 1715).

Following this witness, a motion for judgment of acquittal was made, and denied (t. 1720-21). There was a colloquy directly with Appellant at which he decided not to testify in his own behalf (t. 1722-24). Appellant then asked that juror number two be stricken, for asking questions in the middle of an examination (t. 1728). The request was denied (t. 1729). The trial court reserved on the second J.O.A. (t. 1730). The trial court then proceeded to read the jury its instructions late in the Friday afternoon of the same day they had heard the last of the testimony (see t. 1733 et seq.). Appellant then did his second motion for judgment of acquittal, and the trial court denied it (t. 1769-70).

On February 24, 2020, closing arguments were heard (t. 1790-1867). The Court recessed at 11:30 a.m. (t. 1879). At 12:10 p.m., the jury had a question (t. 1879). The jury then asked for luncheon menus, and court reconvened at 2:00 p.m. (t. 1886). The jury had a verdict (t. 1867).

The jury found Defendant/Appellant guilty as charged on both counts (t. 1889).

During Phase II, the penalty phase, some fifteen witnesses testified (t. 1978-2288). Closing arguments began on the morning of February 26, 2020 (t. 2337-2382) and proceeded until Appellant objected that the State had made an improper comment on silence. That comment was:

> Some murders are just different. These ones certainly were. The effect that they had is different. And the person that committed them has provided no mitigation worthy to allow him to live out his days in jail and that's why we'll ask that when you go back there, read everything. Read those jury instructions.
>
> (t. 2382).

After discussion on this objection, Appellant also moved for mistrial (t. 2386), which was denied (t. 2387). Closings continued (t. 2388-2425). The trial court read its instructions to the jury (t. 2425-2453).

The jury was then advised that they would be given a fifteen minute break and that then there would be a lunch recess, all of which were taken commencing at 12:25 p.m. (t. 2454-2458).

At 3:00 p.m., court came back to session as the jury had reached its verdict on whether to impose life or death (t. 2461). The jury unanimously voted for imposition of the death sentence (t. 2468). The jury unanimously

found all the aggravating factors that had been presented to them for consideration; for each of Kaladaa Crowell (t. 2463-64) and as to Kyra Inglett (t. 2464-65). It found no mitigating factors to be present in either Count One or Two (t. 2467). After polling the jury, the jurors were excused.

On May 30, 2020, Robin Denson, who was the mother of Appellant, who testified at both the trial and the Spencer hearing, and was present during the jury selection proceedings, filed an affidavit, the contents of which stated that she was aware of several acts of juror misconduct (t. 1330-32). Appellant immediately filed his motion to interview jurors (r. 1327-29), predicated on the basis that the jurors' verdict was subject to challenge. This motion was denied (r. 1355-56).

The Spencer hearing was held October 16, 2020 at which ten witnesses were heard, both for the State and for Appellant (sp. t. 27-73).

Next was the sentencing hearing, first held November 19, 2020 (sentencing t. 2-41). The trial court found that:

> Marlin Larice Joseph, you have not only forfeited your right to live among us, but under this law of the State of Florida, you have forfeited your right to live at all.

(sentencing t. 38), and sentenced him to be executed on both counts (sentencing t. 38-39).

From that sentence, this appeal ensues.

SUMMARY OF THE ARGUMENT

Appellant respectfully asserts that non-harmless, prejudicial error was sufficiently rife and prevalent throughout the course of this trial that this cause should be reversed.

Among the many issues for this Court's review, following are those which are among the most significant.

The trial court should have excluded the testimony of Omar Felix, the State's forensic expert, who testified regarding the tool marks on those firearm casings he was given to examine on February 13, 2020, the day before the trial began. Appellant attempted to obtain a similar expert, but could not, in the abbreviated amount of time he had available. The trial court should have either excluded this witness, or fashioned a workable, acceptable remedy. And further, the trial court should not have cut off Appellant's cross-examination prematurely, and absent any objection from the State. These erroneous decisions resulted in a failure of due process and equal protection.

The trial court should not have authorized the State to impeach four of its own witnesses, without their having been declared hostile or adversarial, absent any inconsistent statements given by them, and/or

subject to the pains of perjury, and without offering or tendering into evidence any supporting evidence thereof.

The trial court should not have authorized the State to introduce testimony for the truth of the matter via out-of-court third party statements when the same witnesses provided in-court testimony. This testimony was obtained in violation of the hearsay rule, as the actual declarants did not testify inconsistently at trial. Further, as hearsay, the inquiry was technically directed not to the truth of the testimony, but rather whether the words were, in fact, spoken. But, plainly, the State introduced this statement for its truth and to identify Appellant as the perpetrator of this crime.

The trial court erred when it permitted the State's examination of Jeshima Tarver, over Appellant's objections, concerning matters that were conjecture and speculation. This line of testimony was sought to inflame the passions and prejudice the minds of the jurors.

The trial court erred when it took no actions on the affidavit Robin Denson filed May 30, 2020. This affidavit formulated a basis that the jury's verdict was subject to challenge on the grounds that the jurors had ignored the trial judge's instructions, imperiling due process and equal protection.

Appellant also respectfully asserts that this Court has erred in its reading of Pulley v. Harris, 465 U.S. 37 (1984) and its kin and progeny in its decision to overturn proportionality and sufficiency review, and requests this Court to review this case in light of those requirements.

Next, we suggest that both EHAC and CCP were erroneously determined by both the jury and then the trial court. Their decisions rested on faulty evidence, inflamed passions, and prosecutorial misconduct. In their penalty phase closing, the State was permitted to make egregious and improper exhortations of the jury, thoroughly insinuating beyond the determined aggravating factors that only death would be a proper sentence imposition.

Appellant also respectfully asserts that, as currently written, F.S. 921.141 is unconstitutional, both as to the United States and Florida Constitutions. Thus, reliance upon it was improper and erroneous.

Appellant also respectfully asserts that during the penalty phase, the jurors again either failed to follow the law or the trial court's instructions. Given the very small amount of time they took to consider and reach a verdict of such magnitude, given Mrs. Denson's affidavit, and given the nature of the testimony provided, their decision was not thorough, not

comprehensive, not well considered: it flouted their instructions. Appellant was denied a fair trial and deliberative process.

Last, Appellant's mental health issues should have received more than the perfunctory consideration that it did receive.

ISSUE I

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT/APPELLANT'S MOTION TO EXCLUDE WITNESSES, AS TO THE FIREARM WITNESSES.

Appellant respectfully asserts that the trial court erred when it denied his Motion to Exclude Witnesses (r. 527-28), particularly as to the firearms expert, after he had withdrawn his motion as to the fingerprint expert (t. 1088). Appellant stated on February 20, 2020, mid-trial, that he had only on February 13, 2020 (the trial commenced on February 14, 2020) received supplemental discovery from the State listing a firearms expert from the State (t. 1089). It then followed:

> MR. SUSANECK: Your Honor, and you were in Court with me and the State and we were all here talking about firearms. I got a firearms expert approved, we did JAC stuff, you issued an order allowing me to get a firearms expert and I got a firearms expert and we sent him the report and the firearms expert said you don't need a[n] firearms expert. This is not firearms, this is tool mark identification.
>
> THE COURT: Okay . . .
>
> MR. SUSANECK: We were told that the firearms expert is not a tool mark expert. A firearms expert can be a tool mark expert but not vice-versa, and our firearms expert was

not a tool mark expert and we can't find any tool mark expert.

THE COURT: Do you want to use Mr. Omar Felix?

MR. SUSANECK: No . . . So what I did was I had my investigator call the JAC and see whether or not we can find, they have a list of tool mark experts. They don't . . .

MR. SUSANECK: He contacted somebody in Orlando who used to be a tool mark expert who is retired and is far, far away and never coming back to a courtroom and he does not know of any tool mark experts in Florida or anywhere. So I can't find a tool mark expert, and the question here, nowhere up to the 13th, which is the day before we started jury selection, was there anything about a firearms expert, anything about tool marks, anything about anything. I took it upon myself to attempt to find out what I needed to know about a tool mark expert to properly prepare.
(t. 1090-93).

It is, at the very least, disingenuous that the trial court would ask the Defendant to use the States' expert witness as their own.

Appellant then went on further to state:

> "Also, I found out at his deposition that what was supplied to me was not all of the work done by our firearms expert."
> (t. 1093).

The trial court then decided to categorize the Motion to Exclude Witnesses additionally a Richardson hearing on the late disclosure of the

witness and his report and the tool marking (t. 1097). Appellant proffered that the purpose of the State's firearms expert was to show that there was only one firearm used (t. 1097), thus inferring that Defendant did indeed commit the crime alleged. And even though no firearm was ever recovered (t. 1097).

The trial court then did find that a Richardson violation occurred, given how late the supplemental discovery was provided (t. 1098). The trial court then erroneously, Appellant respectfully asserts, held it to be willful or inadvertent (t.1100). This was not harmless evidence: it went to identification of Appellant, Mr. Joseph, it went to proof of the indictment, and later it went to the determination of aggravating factors. Moreover, this was not harmless error.

The trial court then went on to decide whether the violation was trivial or substantial. The State was asked whether the Richardson violation had a prejudicial effect on defendant (t. 1102). The State replied that the casings had been in evidence since the date of the homicides (12/28/2017), and the only thing new was that they were examined on February 13, 2020, the day before the trial began (t. 1103). The trial court pointed out that this belated supplemental discovery had potential to

establish that the bullets were fired from the same versus a different gun (t. 1103).

When asked from Appellant's view, Appellant responded, in pertinent part:

> MR. SUSANECK: What if my firearms expert who examines it says, no, they weren't from the same gun. What the Court's asking me to do is accept their firearms expert as being correct. That's why I asked for an expert to try to analyze it. I will tell the Court that on December 20, 2019, we went down to the West Palm Beach Police Department and looked at all of the evidence, and at that point we saw that there were search warrants for the laptops or whatever they were, at which point we asked about it in court and the State gave us the contents of it. I don't believe it's my responsibility to ask the State why they didn't test their evidence. (t. 1108-09).

The trial court then asked Appellant if obtaining an expert would:

> THE COURT: ...change the theory of your case? The theory of your defense?
>
> MR. SUSANECK: Your Honor, yeah, yes, it would, Your Honor.
>
> THE COURT: How so?
>
> MR. SUSANECK: I'm not ... Your Honor, you're asking ...
>
> MR. SUSANECK: Your Honor, I'm not agreeing with the State's facts of how many shooters

there was who did the shooting."

(t. 1110).

The trial court then denied the Motion to Exclude Witnesses, in part, as she could not imagine that the Appellant would not be able to locate a tool mark expert before the trial's end (t. 1110-11).

Appellant was not able to locate such an expert. The jury entered its verdict of guilty of the first degree murders of Kalaada Crowell and Kyra Inglett on February 26, 2020, only six days later (r. 1151-54). Also, on February 26, 2020, Appellant filed his Motion for New Trial (r. 1161-62). The motion specifically addressed the trial court's failure to exclude State's witness Omar Felix, firearms expert, from testifying (r. 1161).

Although Appellant's counsels were highly skilled and highly effective attorneys, they were not also tool mark experts.

The trial court erred when it permitted this testimony and evidence to enter into the trial. State v. DiGuilio, 491 So.2d 1121 (1984).

The testimony of the tool mark expert was prejudicial and not harmless. F.S. 59.041 clearly states that judgment be reversed when it appears that the error complained of has resulted in a miscarriage of justice. The statute furthermore explicitly states that the statute itself shall be liberally construed.

The erroneously admitted evidence tended to establish that there was only one gun, therefore only one shooter. However, no gun was ever found, such that the admission of this evidence was for its prejudicial value only, as it added no new factually probative evidence to the State's case. Furthermore, the Appellant was deprived of the ability to enter expert contra-indicative evidence, by circumstance, but nonetheless deprived. And, the prejudicial but not probative evidence was admitted due to the trial court error, which constituted a miscarriage of justice.

The erroneous admission of this State's non-probative evidence caused the state of affairs of creating the situation that foreclosed Appellant's reasonable possibility of casting doubt on witness crime lab scientist Omar Felix's testimony, which should not have entered, and thus in consequence casting doubt on the verdict.

The State's crime lab scientist testified that he had been asked only the week previously to examine nine fired cartridge cases (t. 1624-25). He testified, under the State's direct examination, that all nine casings were fired in the same unknown firearm (t. 1628). He further testified that he did not know from what gun they had been shot (t. 1628). He also testified that the procedure used in the request was unusual because the trial was coming up so quickly (t. 1629). He acknowledged, pursuant to cross-

examination by Appellant, that he did not know whether he had been given all of the projectiles and casings that were gathered into evidence for this case for his examination (t. 1633). In fact, he only received the nine fired casings (t. 1634). Mr. Felix did not receive any of the projectiles the State had entered into evidence in this case. He was shown no pictures from the scene of the homicides (t. 1642). Appellant was able to establish that without an actual gun to examine, all the expert could do was to establish that as the casings were the same caliber, that they could have come from the same gun, not definitively that they had (t. 1638). Appellant was able to establish that the expert had not compared each of the casings to each of the others (t. 1644-45). Appellant was able to establish, again, based on his own skill and expertise, and absent the aid of an expert, that the spent casings were not, in fact, identical (t. 1647). Appellant was able to establish that there were differences among the casings (t. 1648). He was able to establish that there are other methodologies besides the criteria for identification standard utilized by Mr. Felix (t. 1650). Appellant could not, however, inquire at substantial depth about significant differences another methodology might reveal with the determinations of Mr. Felix, as he could not obtain an expert, and Mr. Felix's testimony had been erroneously admitted. Appellant was able to have the witness, Mr. Felix, acknowledge

that the method he used was just a standard that is used to determine similarity between pieces of evidence (t. 1650). Appellant was able to establish that there is also extant a database methodology of determining whether different spent cartridge casings come from the same gun, called NIBIN, an acronym standing for National Integrated Ballistic Information Network (t. 1652).

The trial court then cut the Appellant off (t. 1654-55), although the State had not objected. The trial court held, erroneously, that Appellant's line of questioning was not relevant. The trial court declined to understand Appellant's line of questioning, and simply cut it off. Despite this ruling, Appellant was able to establish that there are yet other methodologies accepted for the determination sought by the State in our case, and that they could yield different conclusions (t. 1656-1659). However, given what actually occurred in this cause, which is that the required expert could not be located within the allocated amount of time due to the State's Richardson error, the trial court erroneously failed to grant Defendant/Appellant's Motion to Exclude the tool mark expert, depriving Appellant, Mr. Joseph, of a fair trial and substantial, meaningful due process.

This error was not harmless. DiGuilio, id. There is reasonable possibility that this error contributed to the verdict, and to the imposition of the death penalty. There cannot be sufficient confidence that justice will be done, and that Appellant's rights were properly protected by the trial court throughout the course of both the guilt and penalty phases of this trial.

ISSUE II

THE TRIAL COURT ERRED IN ITS DETERMINATIONS REGARDING ADMISSIBILITY OF EVIDENCE FOR THE TRUTH OF THE MATTER VERSUS EVIDENCE TO IMPEACH A WITNESS OFFERED BY THE STATE. THIS ERROR WAS NOT HARMLESS.

> Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
>
> (2) Showing that the witness is biased.
>
> (3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.
>
> (4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.
>
> (5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.
>
> F.S. 608.1

Generally speaking, all witnesses who testify during a trial place their credibility in issue. Butler v. State, 842 So.2d 817 (Fla. 2003). However, as with all our jurisprudence, there are rules that apply to impeachment and most certainly as to impeachment evidence that may properly be admitted as evidence in the case-in-chief. Those rules were not complied with herein, to the undoubted prejudice of Appellant. Appellant, Mr. Joseph,

respectfully asserts that absent this erroneously obtained evidence, the verdict, with reasonable probability, should have been different.

The State attempted to impeach each member of Appellant's family, whom it had called as witnesses, with purported inconsistent statements which were not offered into evidence during its own initial direct examination; i.e. there was never proof provided that the witness had made inconsistent statements, only assertions to that effect. Shimko v. State, 883 So.2d 341, 343 (Fla. 4th DCA 2004) (error for prosecutor to "insinuate impeaching facts while questioning a defense witness without evidence to back up those facts"); see Marsh v. State, 202 So.2d 222 (Fla. 3d DCA 1967) (ordering new trial where State asked defendant on cross-examination whether it was true that he bragged to a barmaid about his plans to break into a building and then failed to present testimony of the barmaid to this effect). The alleged prior inconsistent statement was not offered into evidence during the State's examination of Ms. Denson, but various other exhibits were (t. 1156, 1157, 1190, 1212, 1214, 1215). With Ms. Denson and the attempted impeachment of her by ostensible prior inconsistent statements not introduced into evidence; so with Appellant's brothers.

This impeachment evidence was offered after the repeated objections of Appellant/Defendant, which were overruled (t. 1179-1181). Shortly thereafter, the trial court did state, "No, they can't put them on the stand purely for impeachment purposes", but then in effect ignored her own admonition (t. 1182).

The trial court never confirmatively found that the live testimony was affirmatively harmful to the State as is required. Nor does the fact that the witness may be unwilling or hostile render the witness adverse. Shere v. State, 579 So.2d 86, 91 (Fla. 1991) (if the witness proves adverse [which was not established in our case], the calling party may lead and impeach the witness with prior inconsistent statements, provided the trial court first finds that the live testimony was affirmatively harmful to the calling party".) Shere went on to hold, however, a "mere lapse of memory is insufficient to render a witness adverse "nor does the fact that the witness may be hostile or unwilling render the witness adverse", citing to Dudley v. State, 545 So.2d 857, 860 (Fla. 1989).

Moreover, and of paramount significance, the fact that a witness "cannot recall making prior inculpatory statements is insufficient for the witness to be found to have given prejudicial testimony and be an adverse witness under F.S. 90.608(2), Parnell v. State, 500 So.2d 558 (Fla. 4th

DCA 1986). The witnesses in this case were never shown to, nor did they, make actual inconsistent statements. They simply asserted confusion, shock, lapse of time and memory.

A prior inconsistent statement is not hearsay only because it is offered to prove the truth of the matter asserted in the (in our case merely alleged) prior statement. Castillo v. State, 217 So.3d 1110, 1115 (Fla. 3d DCA 2017) (prior inconsistent statement to police by defendant "was not given at a trial, hearing, or other proceeding or in a deposition. Accordingly, it cannot constitute admissible substantive evidence".)

Last, it is error to permit the State to impeach the testimony of its own witness who testified that she, and/or he, did not remember a fact by calling the police to testify to a statement made by the witness during a pre-trial interview. Brooks v. State, 918 So.2d 181, 200 (Fla. 2005) (Florida courts have held that a witness' inability to recall making a prior statement is not synonymous with providing trial testimony that is inconsistent with a prior statement.)

Rodriguez v. State, 65 So.3d 1133 (Fla. 4th DCA 2011) noted that "confusion often arises in this area due to a different but related fact pattern -- where a witness does not remember an earlier statement to the police, but does not give testimony inconsistent with it at trial.) And, "although the

court may allow impeachment when the witness appears to be fabricating his or her lack of memory, as Appellant has stated hereinabove, the trial court made no such finding." Pulcine v. State, 41 So.3d 338 (Fla. 4th DCA 2010). The trial court erred to the serious prejudice of Appellant. The result was not harmless error.

This cause should be reversed.

ISSUE III

THE TRIAL COURT ERRED WHEN IT PERMITTED OUT-OF-COURT IDENTIFICATIONS OF APPELLANT, MR. JOSEPH, TO BE ADMITTED AS SUBSTANTIVE EVIDENCE IN THE CASE-IN-CHIEF WHEN THE SAME WITNESSES PROVIDED IN COURT TESTIMONY.

As to permitting Detective Paul Creelman to testify to out-of-court statements made by Parice and/or Cordarius Joseph, where they had not themselves testified inconsistently in court; and where the State provided no in-court proof of same; as a consequence of various discussions before his testimony, and as to objections by Appellant/Defendant made when Detective Creelman was giving his testimony (t. 1448-48, 1489-1493, 1506, 1508 (motion for mistrial), 1510-11), the trial court reached an erroneous decision:

> THE COURT: All right. The prior out-of-court identifications will be allowed in-court as substantive evidence as a hearsay exception under 801.9. I do find that Parice and Cordarius were asked about the identity of the shooter, therefore, that they were at least asked about the identity at trial. And it seems to be that's what the line of cases say, like Deans v. State, 988 So. 2d 1271; Nielson v. State, 713 So.2d 1110. I'm getting this all from Ehrhardt, so it's not like I'm -- but I'm going to continue reading it.
>
> So, my initial, right now, after I've read

everything, is that it is going to be admissible. I am going to pull Richards though to read in a little bit more detail and I'll continue to read and if I have a concern I'll readdress it with everyone.

The Appellant/Defendant later moved for mistrial, based on the same objection, and was denied (t. 1508).

This hearsay statement came into evidence via a third party, not via the declarants who had ostensibly provided the statements to Detective Creelman while all were out-of-court.

F.S. 90.801, the hearsay rule, reads as follows:

(1) The following definitions apply under this chapter:

(a) A "statement" is:

1. An oral or written assertion; or

2. Nonverbal conduct of a person if it is intended by the person as an assertion.

(b) A "declarant" is a person who makes a statement.

(c) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(2) A statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is:

(a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

> (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; or
>
> (c) One of identification of a person made after perceiving the person.

This hearsay at all times came in as substantive evidence; as a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. The actual declarants, each of whom testified at trial, did not, in fact, testify inconsistently at trial. Also, it was never established that their pretrial statements were given subject to the penalty of perjury (t. 1506).

The testimony by Detective Creelman as to what Parice and Cordarius allegedly or presumably gave to him as statements on December 28, 2017 was only ever offered, in fact and erroneously, to prove the truths of the matter asserted in the indictment (r. 175).

Beatty v. State, 486 So.2d 59, 60 (Fla. 4th DCA 1986) ("the trial court admitted this hearsay testimony based upon the much overworked exception to the hearsay rule which allows such hearsay when the inquiry is directed not to the truth of the words spoken, but rather to whether the words were, in fact, spoken. No reasonable interpretation of the testimony

presented by the State in this cause would allow us to conclude that the State introduced this testimony for any other purpose than for the truth of the words spoken in order to identify Appellant as the perpetrator of the crime").

This cause should be reversed.

ISSUE IV

THE TRIAL COURT ERRED WHEN IT PERMITTED IRRELEVANT EVIDENCE TO BE ADMITTED, OVER APPELLANT/DEFENDANT'S OBJECTION.

Jeshima Tarver was fifteen years old and staying at the Crowell/Denson home at the time of this tragedy, December 28, 2017. She was called as a witness by the State (t. 1596). When she was asked by the State when she had first heard Appellant yelling about Kyra, she answered, "two days ago" (t. 1611). The Appellant objected on relevancy grounds (t. 1611). The trial court then held a bench conference (t. 1611-1613). The trial court then ruled that it was admitting this evidence as inextricably intertwined, as it provided a motive (t. 1613).

This ruling by the trial court was erroneous for several reasons, putting the reliability of the verdict and sentence into doubt, and increasing the likelihood that it was based in substantive part on arbitrariness, capriciousness, and a lack of competent, substantial evidence.

Kyra was an eleven year old living in the home. Without the two extra minor girls who were staying at the home only over the holidays, she was more ordinarily the only child in a home of six adults.

Defendant/Appellant could have been yelling about Kyra concerning anything under the sun, as familial adults often do about children, particularly pre-teenagers. This was not simply not relevant evidence.

> Relevant evidence is evidence tending to prove or disprove a material fact.
>
> F.S. 90.401

Nor was it material. It may have been asked artlessly. Nevertheless, admission of this evidence was erroneous.

Further, the trial court erroneously found this testimony to be inextricably intertwined, thus warranting admission into evidence. The question by the Assistant State Attorney had no time limitation included within it, and the objection and response itself was not directly linked by time or circumstance. Dorsett v. State, 944 So.2d 1207 (Fla. App. 2006); Ballard v. State, 66 So.3d 912 (Fla. 2011) (which found the evidence to be inextricably intertwined where the court held that collateral crime evidence that defendant was engaged in an illegal sexual relationship with his step-daughter's minor daughter was relevant to establish motive and inextricably intertwined with the testimony of the chain of events.)

In our case, this testimony involved no prior bad act, no collateral crime, no relevant evidence except in a conjecture and mere speculation. The testimony merely involved a man yelling about a child.

Yet this testimony was unlawfully used both to infer a motive, at the trial, or guilt, phase, and for evidence of heightened premeditation at the penalty and sentencing phase.

Defendant/Appellant was unfairly and substantively prejudiced by this evidence. Unfair prejudice is evidence which has "an undue tendency to suggest decision on an improper basis; commonly, though not necessarily, an emotional one." Brown v. State, 719 So.2d 882, 885 (Fla. 1998) (quoting Old Chief v. United States, 519 U.S. 172, 180 (1997). Unfair prejudice is directed at evidence which inflames the jury or appeals improperly to the jury's emotions. Steverson v. State, 695 So.2d 687 (Fla. 1997).

The trial court ought to have done a balancing test to determine whether the unfair prejudice would substantially outweigh the probative value of the evidence. Alston v. State, 723 So.2d 148 (Fla. 1998). The trial court should not have admitted this evidence as it increased the danger that the jury would convict Defendant/Appellant based upon reasons other than competent, substantial evidence establishing his guilt. Additionally, McDuffie v. State, 970 So.2d 312 (Fla. 2007).

It cannot be said that this erroneously admitted evidence did not contribute to the jury's recommendation of death and the trial court's

imposition of the death penalty. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). There was a reasonable possibility that the jury's trial verdict or penalty phase recommendation would not have been different absent the admission of this irrelevant testimony.

This cause should be reversed.

ISSUE V

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT APPELLANT/DEFENDANT'S MOTION TO DISMISS CHARGES IN THE ABOVE STYLED CASE AS A RESULT OF VIOLATION OF DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE EQUIVALENT AMENDMENT IN THE GREAT STATE OF FLORIDA CONSTITUTION.

The trial court erred when it failed to grant Appellant/Defendant's Motion to Dismiss Charges in the above styled case as a result of violation of Defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the equivalent amendment in the Great State of Florida Constitution (r. 380-383). The motion came on for hearing Monday, January 6, 2020 (s.r. 625), and began specifically to be addressed a little later (r. 636). It was predicated on the basis that Appellant/Defendant remained at the Treasure Coast Forensic Treatment Center for months after the treatment center indicated Appellant was competent, which occurred within literally days of his arrival (confidential unredacted (r. 566). It was also within days of the issuance of the Order of Incompetency (r. 293-96). During those months, the facility engaged in "training" Appellant "how to act in court" (r. 381). The facility and staff focused on behavior modification and not the actual ability to assist his

counsel with preparation of his defense. Appellant underwent mock trials. By May 14, 2019, it was reported:

> that he had completed at least 20 competency restoration classes, had participated in at least 4 mock courts, and had also attended at least 8 groups on illness management and recovery, and 4 groups on anger management.
>
> (confidential unredacted r. 568-69).

Facts of his case may very well have been discussed by Appellant with the Treasure Coast Forensic Team, by their questions to him, and his responses thereto, all in the name of "training Appellant to be competent", and all without benefit of his counsel. The Treasure Coast Forensic team staff arguably compelled him to be a witness against himself, clearly a non-harmless error. U.S. Constitution Amendment 5. Their conduct was a denial of due process of law; as well it denied Appellant, Mr. Joseph, the equal protection of the laws. U.S. Constitution Amendment 6.

The trial court denied the Motion to Dismiss Charges (s.r. 637).

Due process and equal protection are fundamental axioms of our constitutional systems, both federal and state. U.S. Constitution - A-14.

Nowhere on the record does it reflect that Appellant/Defendant waived nor certainly validly waived his right to counsel. State v. Kelly, 999

So.2d 1029 (Fla. 2008). Treasure Coast plainly was aware, not only that Appellant had counsel, but who counsel was. The trial court never inquired of the State. Moreover, with our Appellant there has been a sincere question -- certainly at the involved stages from which this issue is derived -- as to his competency and his intelligent understanding of when he, Appellant, Mr. Joseph, is entitled to the representation of appointed counsel. If we, as representatives of Florida jurisprudence, were not certain of his actual competency at that point in time, during which he was actually under an order of incompetency, then the Defendant/Appellant simply could not have effectively waived that right. Kelly, id. The State violated his fundamental constitutional rights and protections.

The trial court erred in denying this Motion to Dismiss Charges in this case peremptorily; or in failing to seek another, more lawful remedy for this flagrant due process and equal protection breach.

This cause should be reversed.

ISSUE VI

AS TO THE GUILT PHASE, THE JURORS FAILED TO FOLLOW THE TRIAL COURT'S OFTEN REPEATED PRELIMINARY INSTRUCTIONS, DEPRIVING APPELANT OF A FAIR TRIAL.

When the jury was empaneled, the trial court gave them initial instructions. For the sake of brevity, only portions of those instructions relevant to this issue will be cited herein:

> So, with that, I know that we're going to start going through this process with openings and then witnesses. I want to inform you that it's important not to form any definite or fixed opinions on the merits of the case until you have heard all of the evidence, the argument of the lawyers and, of course, my instruction on the law. Until that time, you should not discuss the case amongst yourselves. I know you all know that. I'll keep repeating that because it's very important.
>
> That same communication rule that I've been telling you about, to you apply during the entire trial, so no talking about the case amongst yourselves or with anyone else, no texting, tweeting, emailing or blogging about the case. Remember during recesses you're not allowed to talk to each other or let anyone talk to you about the case.
>
> You do have your juror badge so people should identify you as a juror. If, however, someone starts talking about the case in your presence, they may not realize you are an actual juror on the case, please tell them to stop, that you're a juror on the case and just walk away from that and then bring that to my attention. That rarely happens but if it does, that's okay; just bring that to my attention. Make sure you stop them and walk away.

(t. 1123-24).

-AND-

> Remember that the case must be tried by you only on the evidence presented during the trial in your presence and in the presence of the defendant, the attorneys and myself. You cannot conduct any investigation on your own. This includes reading newspapers, watching television or using a computer, cellphone, the internet or any other electronic device to get information related to this case or the people and places involved in this case. You are not allowed to research or look at maps about anything you hear. Again, I told you the importance of that because if you look at a map, I have no way of knowing if that's the correct map at the time that this happened. So, any evidence that you need to decide this case should be given to you by the State Attorney, okay? Because they have the burden.
>
> Remember, the rules are important. I don't just put them out there, there are reasons for it, so if you guys can abide by those, I appreciate that.

These instructions and relevant portions were often repeated to the jurors throughout the guilt and penalty phases.

On May 30, 2020, after both the guilt and penalty phases of the trial, but before the Spencer hearing or sentencing hearing in this case, Robin Denson, an essential witness in this case, the mother of your Appellant, and a regular attendee throughout the proceedings in this case, executed the following affidavit:

AFFIDAVIT OF ROBIN DENSON

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

COMES NOW, ROBIN DENSON, who being duly sworn, deposes and says:

1) I, Robin Denson, am over eighteen (18) years of age and have personal knowledge of the facts and circumstances contained herein.

2) I am the mother of the defendant, MARLIN LARICE JOSEPH.

3) I attended the recent trial in this matter, including all of the jury selection proceedings, which commenced on February 14, 2020.

4) On May 27, 2020, I was conversing with the mitigation specialist in this case, Wendy Murnan, relative to the upcoming hearing in this case on June 8, 2020.

5) At that time, I relayed the following information to Ms. Murnan relative to an encounter that I had with one of the members of the jury panel.

6) One of the members of the jury panel backed out. She was one of the last few jurors remaining. She raised her hand to speak to the judge. The judge called this juror to the bench. This juror then walked out of the courtroom. As she was walking out of the courtroom, this individual asked me to come out into the hallway with her.

7) This individual's name is Katrina Lyons.

8) Ms. Lyons proceeded to tell me that she knew that

I was Marlin's mother because he looked just like me, and because she saw me in court every day.

9) Lyons further advised that the reason she dropped out was because the judge asked the jury panel not to discuss the case with each other. However, all of the jury panelists did discuss the case amongst themselves. Lyons further stated that she did not want to be a part of a man fighting for his life.

10) Lyons also advised that she told the judge that she read a news article about what happened. She pulled up Marlin's name, and she read the story as she walked back to her car after court was over.

11) Lyons advised me that all of the prospective jurors wanted Marlin sentenced to death before they even sat and discussed it together.

12) Lyons further stated to me that the reason she did not want to be a part of the jury was because of what the other jurors were doing. She just saw a man fighting for his life, and he did not have a chance because they already had their minds made up of what they were going to ask for.

13) Further, I and my sister, Valerie Mitchell, had to tell the bailiff in the courtroom that we saw three males looking at a news article about the case during jury selection. One was sitting directly across from me in the chair that was on the side of the bench. The bailiff asked him to get off of his phone.

FURTHER AFFIANT SAITH NAUGHT.

/signed in the original/
Robin Denson

(r. 1330-32).

Appellant/Defendant immediately filed a Motion to Interview Jurors (r. 1327-1329) predicated on the basis that the jurors' verdict was subject to challenge, due to the sworn statements in the affidavit.

This motion was erroneously denied (r. 1355-56). Given the gravity of the charges and the verdict, the irretrievable nature of remediation once an erroneous death penalty is carried out, and that it would be yet months before the Spencer or sentencing hearings in this case, the trial court should have granted the Motion to Interview Jurors, thus protecting the reliability of the verdict and sentence, on the grounds of fair play and substantial justice. Appellant, Mr. Joseph, was entitled to an impartial jury, equal protection, and a guarantee of fundamental fairness. United States Constitution, Amendment 6. An impartial jury and fundamental fairness in his proceedings may very well literally be a matter of life and death.

Appellant has asserted specific juror misconduct. The claim was not untimely or otherwise procedurally barred. Johnson v. State, 804 So.2d 1218 (Fla. 2001) (rehearing denied December 31, 2001). It should have been granted.

This cause should be reversed.

ISSUE VII

ALTHOUGH THIS COURT HAS HELD THAT THE CONFORMITY CLAUSE OF THE FLORIDA CONSTITUTION FORBIDS PROPORTIONALITY REVIEW IN DEATH PENALTY CASES, IN REACHING THAT OPINION THIS COURT MISCONTRUED THE UNITED STATES SUPREME COURT'S DECISION IN PULLEY v. HARRIS, 465 U.S. 37 (1984), ET AL, AND RENDERED FLORIDA'S CAPITAL SENTENCING JURISPRUDENCE ARBITRARY, CAPRICIOUS, AND UNCONSTITUTIONAL.

Following his trial for two counts of first degree murder with a firearm, committed contemporaneously upon Kalaada Crowell and her eleven year old daughter, Kyra Inglett, Appellant was found guilty as charged on both counts (r. 1151, t. 1895).

At 2:00 p.m. on Friday, February 24, 2020, the same day that closing arguments in the guilt phase were heard, in addition to one or two other minor matters having been heard, and the verdict having been rendered, the jury reached its unanimous verdict of guilty of both counts as charged, in what thoroughly appears to have been no more, and possibly less than, two hours.

That same afternoon, Phase II began, sometime after 2:30 p.m. (t.1905). Some eighteen witnesses testified over the course of this and the next day (t. 1907-2316), many concerning mitigation and mitigating factors. During the morning of February 26, 2020, some housekeeping matters

were heard commencing at 9:30 a.m., the trial court held a colloquy with appellant, Mr. Joseph, absent the presence of the jury; a review, etc. was made of the instructions the trial court would give to the jury (t. 2325-2334); and then the jury entered the courtroom (t. 2334). Each side made its closing arguments (t. 2335-2425). The trial court then instructed the jury about the possible punishments appellant faced, and the aggravators and mitigators, if any, the jury must consider in recommending life imprisonment or death for Mr. Joseph, the various factors to which the jury needed to give their serious and well thought out consideration, and that they should give due regard to the gravity of the situation (t. 2436). The instructions concluded before a fifteen minute break was to be taken and also before the jury began its deliberations (t. 2453).

The break and then lunch was taken at 12:25 p.m. (t. 2458). Court was called into session at 3:00 p.m., with an announcement that the jury had reached its verdict in Phase II. The jury thereupon, via the foreperson, announced its verdict (t. 2463-2469). The jurors were then polled (t. 2469-2471).

It took this jury hardly any time at all to weigh and consider this, in fact, life or death matter, and its numerous components. There is no indication that serious, considered, thought provoking thinking and/or

discussion was had or had proper time even to have been had. The jury's decisions thoroughly appear to have been made in an arbitrary and capricious manner, almost in a knee-jerk emotional reaction to the State's fervent and melodramatic closing argument. Their decision was peremptory and impulsive, contrary to law, and entered only as a result of not following the law and/or not following the trial court's instructions (please see Issue VI and Issue XIV).

A. BRIEF DISCUSSION OF PROPORTIONALITY REVIEW

Furman v. Georgia, 408 U.S. 238 (1972) clearly established that the death penalty may not be imposed pursuant to sentencing procedures which create a substantial risk that it will be given in an arbitrary and capricious manner. It is also well established that there has to be a meaningful basis for distinguishing or separating the few cases in which death is imposed from the many in which it is not. Gregg v. Georgia, 428 U.S. 153, 169-173 (1976) (citing Justice White's concurring opinion in Furman). (The Eighth Amendment, which has been interpreted in a flexible and dynamic manner to accord with evolving standards of decency, forbids the use of punishment that is "excessive" either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime).

Our own Supreme Court recognized that "death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation", and therefore Florida correctly and appropriately chose to reserve application of the death sentence only to the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

This Court considered proportionality review to be a necessary "unique and highly serious function of the court, the purpose of which is to foster uniformity in death penalty law." Crook v. State, 908 So.2d 350 (Fla. 2005); Urbin v. State, 714 So.2d 411 (Fla. 1998).

The review was two-pronged. First, the Court compared the case under review to others such that it could determine whether the crime under review fell within the standards of most aggravated and of least mitigated of murders. This was undertaken so as to be able to impose death if satisfied and proven beyond reasonable doubt. Crook, 908 So.2d at 357. Both prongs were required to be satisfied. Where there is adequate mitigation, even when aggravation is met, imposing the death penalty is unjustified and improper. Crook, at 908 So.2d 357-358; Davis v. State, 121 So.2d 462, 499-502 (Fla. 2013).

Urbin, 714 So.2d at 416 held the "requirement that death be administered proportionally has a variety of sources in Florida law", which included, inter alia, our State's Constitution's prohibition against cruel and unusual punishments.

We continued this system of appellate review for many years, attempting to ensure that a decision on imposing death was consistent with other sentences imposed in similar circumstances. The United States Supreme Court itself stated that the Florida Supreme Court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed." Proffitt v. Florida, 428 U.S. 242, 253 (1976). See Olsen v. State, 67 P. 3d 536, 610 (Wyoming 2003) (as seen in Pulley v. Harris, 465 U.S. 37 (1984), the court considers a state supreme court's willingness to set aside death sentences when warranted as an important indication that constitutional safeguards are in place and effective.)

Pulley further held that in California, a comparative proportionality review was not required because California provided adequate safeguards to prevent arbitrary and capricious imposition of the death penalty. Pulley at 51-54). Pulley does not hold that proportionality review is never constitutionally required, nor does it hold that proportionality review may

never be required. It relies on the presence or absence of adequate other "checks on arbitrariness."

What is and remains necessary pursuant to constitutional considerations, both U.S. and Florida, "is that the overall system contain sufficient checks and safeguards against the arbitrary imposition of capital punishment", Walker v. Georgia, 555 U.S. 979 (2008).

Our Florida Constitution was amended to include the Conformity Clause in 2002. This clause provides that our prohibitions against cruel and unusual punishment shall be construed in conformity with decisions of the U.S. Supreme Court interpreting the Eighth Amendment's prohibition against cruel and unusual punishment. Art. 1, §17, Fla. Constitution; see Lightbourne v. McCollum, 969 So.2d 326, 334-35 (Fla. 2007); Lawrence v. State, No. SC18-2061 (October 29, 2020).

It does not prohibit, nor prevent, this Court from reestablishing or continuing the constitutional safeguard regarding reviewing the proportionality of imposing the death sentence, from which a reversal is not possible. The U.S. Supreme Court decision in Pulley is not, in fact, directly controlling and limiting law. Florida is not California. And even as to California, Pulley did not in any way prohibit proportionality review, it merely held that it was not required because of the safeguards in place.

For years after adoption of the Conformity Clause, this Court continued to undertake proportionality review even when it was not raised by a capital defendant on appeal. This review continued to be undertaken in order to withhold the death penalty from all but the most aggravated and least mitigated of first degree murders, and to ensure that the sentence was proportional, which is consistent with legislative intent.

Further, Florida's proportionality review arose from additional and other sources than the prohibition against cruel and unusual punishment. Yacob v. State, 136 So.3d 539 (Fla. 2014); Lawrence v. State, No. SC18-2061 (Fla. October 29, 2020) (Labarga, J. dissenting).

> "Until today, this Court has for decades carried out the solemn responsibility to evaluate each death sentence for both the sufficiency of the evidence on which the State relied to convict the defendant, and the proportionality of the death sentence when compared with other cases. We have consistently explained: "In death penalty cases, this Court conducts an independent review of the sufficiency of the evidence. . . (Caylor v. State, 78 So.3d 482, 500 (Fla. 2010). In capital cases, this Court compares the circumstances presented in the appellant's case with the circumstances of similar cases to determine whether death is a proportionate punishment.. Caylor, 78 So.3d at 498 (citing Wade v. State, 41 So.3d 857, 879 (Fla. 2010).
>
> In deciding whether death is a proportionate penalty, "we make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the

sentence. Offord v. State, 959 So.2d 187, 191 (Fla. 2007) (quoting Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003)."

It is essential to guard against the arbitrary imposition of the death penalty. Yacob at 549, n. 2.

B. THE REVERSAL OF PROPORTIONALITY REVIEW LAW RENDERS FLORIDA'S CAPITAL SENTENCING UNCONSTITUTIONAL, AS IT DOES NOT REQUIRE ADEQUATE SAFEGUARDS AGAINST ARBITRARY IMPOSITION OF THE DEATH PENALTY.

Significantly, Pulley v. Harris, 456 U.S. at 879-80 explicitly did not hold that proportionality review is never required by the Eighth Amendment, therefore fraying and unraveling the logic and analysis applied in Lawrence, Pulley v. Harris stated, "assuming there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without proportionality review, the 1977 California statute is not of that sort,". Id.

There clearly can be capital sentencing systems which lack sufficient safeguards against arbitrariness. Florida, it is respectfully asserted, is now in that sad category of states.

California had a narrow category under which someone could be sentenced to death. Their charging document itself required the State to allege one or more "special circumstances." These special circumstances

were tried along with the issue of guilt or innocence. A Phase II, or penalty phase, was only held if the defendant was found guilty of first degree murder and the existence of one or more of the special circumstances was also found beyond a reasonable doubt at the guilt phase. The U.S. Supreme Court concluded that California's system, at the time, was sufficient to limit the death sentence "to a small sub-class of capital eligible cases." Pulley v. Harris, 465 U.S. at 831 (emphasis added).

Nevertheless, we as a state have refused to agree that one or more aggravating circumstances must be made out in the indictment. Lott v. State, _____So. 3d_____ (SC19-1356) (September 17, 2020) (Fla. 2020) (2020 WL 5553844); Pham v. State, 70 So.3d 485 (Fla. 2011). No findings are required in the guilt phase which would narrow the class of death eligible defendants. We also now, since we have rejected Hurst, 202 So.3d 40 (Fla. 2016), and amended F.S. 921.141(2)(b)2 (2019), provide and require only that the jury find only at least one aggravating factor for the defendant to be eligible to be sentenced to death.

Is that sufficient under our constitution, or is it not. Appellant respectfully asserts that prohibiting proportionality review renders our law unconstitutional, as its safeguards against a wrongful imposition of the death sentence may now be arbitrary and capricious.

From eight statutory aggravating factors, State v. Dixon, 283 So.2d at 5-6, that number of aggravating factors has mushroomed into sixteen. F.S. 921.141(6)(a-p). Such a large number of aggravating factors only increases the number of murders in which the defendant could have a sentence of death imposed, enlarging and not narrowing the pool of consideration.

> "In their efforts to draft death penalty statutes that complied with Furman, most state legislatures adopted the Model Penal Code's guided discretion model, which specified eight aggravating factors and required the juries to find at least one such factor before a defendant could be death eligible. However, since the initial drafting of post-Furman statutes, aggravating factors "have been added to capital statutes. . .like Christmas tree ornaments", rendering more and more offenders eligible for the death penalty."

46 Harv. C.R. - C.L. L. Rev. 223, 232-33 (Winter, 2011).

Our system of sixteen aggravators is very different from the system upheld in Pulley v. Harris. And now, with the decision in Lawrence, and thus no proportionality review, we have dissipated ongoing viability of Florida's heretofore and longstanding death penalty sentencing scheme. With proportionality review lost in favor of minimalist protections, safeguards, and review, based on the flawed Conformity Clause analysis utilized in Lawrence, the meaningful safeguards we had for many years have been gutted. Florida death sentences may be imposed

disproportionally, and absent respect for and invocation of constitutional rights.

Florida continues to reverse longstanding death penalty law. It has upheld all recent death penalty appeals. Previously, we have consistently and routinely set aside death sentences when warranted, which has been considered an important indication that the constitutional safeguards are in place and effective. (See Proffitt v. Florida, 428 U.S. at 253, holding it significant that this Court in the mid-1970's had not hesitated to vacate death sentences when it determined that the sentence should not have been imposed.)

The decision under Lawrence renders this State's capital sentencing scheme unconstitutional as it does not require adequate safeguards or proportional review against arbitrary imposition of the death penalty.

This case should be reversed.

ISSUE VIII

AS THE AGGRAVATOR OF COLD, CALCULATED AND PRE-MEDITATED WAS ERRONEOUSLY FOUND, AND GREAT WEIGHT WAS PLACED UPON THIS FACTOR IN THE IMPOSITION OF THE DEATH SENTENCE, THE TRIAL COURT DID NOT PROPERLY WEIGHT THE SUFFICIENCY OF THE AGGRAVATING AND MITIGATING FACTORS SUCH THAT ITS DECISION WAS CONSTITUTIONALLY BEYOND REASONABLE DOUBT, NOR DID IT PROVIDE ADEQUATE SAFEGUARDS AND PROTECTIONS.

Any determination increasing the penalty, in a criminal case, such as herein imposing death rather than life, must be found beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99 (2013) (citing Apprendi v. New Jersey, 530 U.S. 466 (2000) (facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime, Id. at 450, and thus the Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt.)

In Florida, pursuant to our capital sentencing scheme, this means there must be a proper and lawful determination that the aggravating factors were sufficient to warrant and justify death; and that those aggravating factors lawfully outweigh the mitigating factors.

Here, there was harmful and fundamental error by each of the jury and the trial court in their determinations to impose the death sentence, such that their determinations were not sufficient. The consequence of

these insufficient determinations resulted in an imposition of death, where in actuality the burden of proof upon the State had been reduced by the faulty determinations, thus giving rise to a determination that was less than beyond a reasonable doubt.

Fundamental error "goes to the foundation of the case." F.B. v. State, 852 So.2d 226 (Fla. 2003). It is equivalent to a denial of due process, Id. at 229, and has been required in death penalty cases pursuant to rule and law, Fla. R. App. P. 9.140(i), Brooks v. State, 762 So.2d 879 (Fla. 2000), even where an objection was not contemporaneously made.

it is noted and acknowledged herein that this Court has held that the findings of aggravating factors are sufficient to impose death. It has also held that the aggravating factors need not outweigh the mitigating factors, such that these are not elements that can be subjected to the standard of proof beyond a reasonable doubt. Rogers v. State, 285 So.3d 872, 885-86 (Fla. 2019), pet. for cert. filed, case no. 19-8473 (U.S. May 11, 2020). This Court retreated from Perry v. State, 210 So.3d 610, 640 (Fla. 2016), which had held that these findings had to be made unanimously and beyond reasonable doubt.

Further, the decision to reinstate Poole, State v. Poole, 297 So.3d

487 (Fla. 2020), 2020 WL 3116597 (January 23, 2020), receded from Hurst, Hurst v. State, 202 So.3d 40 (Fla. 2016), going from holding that unanimous jury findings that aggravating factors were sufficient to justify death and that aggravating factors outweighed mitigating factors were required before a death sentence could be considered, to holding that any determinations beyond the existence of one or more aggravating factors were not elements of the criminal act that had to be proven beyond reasonable doubt.

Appellant respectfully asserts that this is flawed and pernicious reasoning. Moreover, the United States Supreme Court clearly confirms that any determination increasing the penalty for a crime must be found beyond reasonable doubt, whether it is called an element or not. Alleyne (finding that any fact that increased the prescribed statutory maximum sentence must be an "element" of the offense to be found). Appellant also thus respectfully asserts that Rogers and Poole are incompatible with U.S. Supreme Court precedent, and should be further reviewed and reversed. Sufficiency should remain, a necessary and automatic part of death penalty review.

Additionally, and in further support of the notion that sufficiency must be reviewed in this case, Caylor v. State, 78 So.3d 482, 500 (Fla. 2011)

determined that a de novo standard of review is applicable to the sufficiency of the evidence. We must independently evaluate each death case for sufficiency of the evidence relied upon to convict and sentence our defendant/appellant.

Much of the following issues will be or have been addressed more in depth and separately herein, but require summary argument herein as part of this issue as to sufficiency. The State's case as to cold, calculated and premeditated is largely based on circumstantial evidence and on conjecture. Heinous, atrocious and cruel is based on conjecture, certainly as to Kyra Inglett's death, even when viewed in the light most favorable to the State, which is the status of our law. However, also the status of our law is that this Court must ask whether a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt. Rogers v. State, quoting Bradley v. State, 787 So.2d 732 (Fla. 2001).

We, as a State and as part of U.S. and world society, have a strong interest in the reliability of verdicts at all times, but none more so than when in a capital case because of the "qualitative difference between death and other penalties". Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (reversing a

conviction where the jury was improperly instructed on the meaning of reasonable doubt.)

This cause should be reversed.

ISSUE IX

THE STATE DID NOT PROVE THE AGGRAVATOR OF ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL BEYOND REASONABLE DOUBT, THUS NEITHER THE JURY NOT THE TRIAL JUDGE PROPERLY FOUND IT. IT SHOULD NOT HAVE BEEN GIVEN GREAT, NOR ANY WEIGHT.

As with the immediately previous issue, the standard of review applicable herein to whether the trial court properly found HAC as an aggravating factor is "whether competent, substantial evidence supports the trial court's finding." Conde v. State, 860 So.2d 930, 953 (Fla. 2003), and as determined by statute. F.S. 921.141(6)(h). Further, the standard of review for the trial court to have properly instructed the jury about a possible aggravating factor, is whether the "evidence adduced at trial is legally sufficient to support a finding of that aggravating circumstance." Davis v. State, 2 So.3d 952, 962 n.4 (Fla. 2008) (quoting Ford v. State, 802 So.2d 1121, 1133 (Fla. 2001); Cole v. State, 36 So.3d 597 (Fla. 2010).

As stated in the sentencing order:

> "HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of the defendant, where a victim experiences the torturous anxiety and fear of impending death." Barnhill v. State, 834 So.2d 836, 849-50 (Fla. 2002) (citations omitted). However, the Court acknowledges that, "[g]enerally, shooting deaths do not qualify as HAC because they are instantaneous, or nearly so...unless the shooting is accompanied by additional acts

> resulting in mental or physical torture to the victim." Allred v. State, 55 So.3d 1267, 1280 (Fla. 2010) (alteration and omission in original). "[T]he fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony." Reynolds v. State, 934 So.2d 1128, 1154 (Fla. 2006) (quoting Francis v. State, 808 So.2d 110, 135 (Fla. 2001)). HAC is one of the weightiest of the aggravating factors. Carr v. State, 156 So.3d 1052, 1071 (Fla. 2015) (quoting King v. State, 89 So.3d 209, 232 (Fla. 2012)).
>
> (r. 1444).

Additional law establishes that for an especially heinous, atrocious, or cruel murder to also be considered as a proper aggravating factor, the crime must be "both conscienceless or pitiless, and unnecessarily torturous to the victim." Richardson v. State, 604 So.2d 1107; Nelson v. State, 748 So.2d 237, 245 (Fla. 1999); McGirth v. State, 48 So.3d 777, 794 (Fla. 2010) (quoting Victorino v. State, 23 So.3d 87 (Fla. 2009) (emphasis added.)

The facts of Kalaada Crowell's death as delivered by the trial court in its sentencing order is open to a different or divergent interpretation. We do not know at what point Ms. Crowell became unconscious; we do not know whether she was aware of her impending death. We do know that she cried out for help. We do not know whether she feared death was impending. We do not know that death was impending at any time she would have had a conscious awareness that it was. The State failed to

prove this. We do not know that this murder was either or both conscienceless or pitiless and unnecessarily torturous to the victim. We do not know this because the State's evidence failed to prove it to be so, i.e. their evidence failed to prove this aggravating factor as to Kalaada Crowell beyond a reasonable doubt. This instruction, the instruction on the aggravating factor necessary to be established beyond a reasonable doubt as an antecedent before it could properly be given by the trial court to the jury for its consideration, should not have been given. Great weight was assigned to this factor that should not have been so assigned. Error was committed that was not harmless in this death versus life review on appeal. F.S. 59.041; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Without either this aggravating factor and/or the cold, calculated, and premeditated factor, the jury may well, or within reasonable possibility, have chosen a life sentence rather than imposition of the death penalty.

As to Kyra Inglett, while we know she ran from the house after her mother was first shot, we do not know what Kyra heard or did not hear. That question was not specifically asked of the witnesses (see t. 1149-1616). We do not know whether she was running for her life from her point of view, or whether she ran out to get help or out of panic; as did Mrs. Denson. The difference between these potential reasons for running

creates a significant gap or lapse in the State's assertion that this was an especially heinous, atrocious, or cruel murder. We do not know the order of the shots as to either Mrs. Crowell or Miss Inglett (t. 1713). Particularly as to Miss Inglett, we do know that just one of the gunshots itself would have been fatal, and would render a person unconscious "pretty much right away." (t. 1702-03). That person would most likely have not suffered pain." (t. 1702-03). The testifying State's witness, Dr. Reinhard Motte, further stated that if the other shots came next, a person would not experience pain (t. 1703), even though it was only potentially immediately fatal (t. 1704). The order of the shots was not established (t. 1713). Thus, we do not know that this murder was both conscienceless or pitiless and unnecessarily torturous to the victim. McGirth v. State, 48 So.3d at 794 (Fla. 2010).

Accordingly, the elements of the aggravating factor of especially heinous, atrocious or cruel were not proven beyond a reasonable doubt as to the death of Kyra Inglett.

They were also not proven beyond a reasonable doubt as to Kalaada Crowell.

The aggravating factor of especially heinous, atrocious or cruel was not lawfully established. The evidence adduced at trial was not legally

sufficient to support a finding of this aggravating circumstance. Davis, at 2 So.3d 952. The jury and the trial court either misperceived the nature of this factor, or rendered an emotional decision, not a well-considered and thoughtful decision. EHAC was therefore also unlawfully assigned great weight by the trial court in its sentencing order (r. 1445, 1449). Had this factor not been given to the jury for its consideration as to whether impose life imprisonment or the death sentence for Appellant, Mr. Joseph, it is not beyond reasonable doubt that they would have determined differently.

This aggravating factor should not be supportable upon review. This cause should be reversed.

ISSUE X

THE STATE DID NOT PROVE THE AGGRAVATOR OF COLD, CALCULATED AND PRE-MEDITATED MANNER BEYOND REASONABLE DOUBT, THUS NEITHER THE JURY NOR THE TRIAL JUDGE PROPERLY FOUND IT. IT SHOULD NOT HAVE BEEN GIVEN ANY WEIGHT.

The State did not prove the aggravator cold, calculated and premeditated manner, without any pretense of moral or legal justification. The substantial part of the evidence offered by the State in proof of this aggravator was speculative conjecture and, at best, indirect inference. Thus, "to satisfy the burden of proof, the circumstantial evidence must be inconsistent with any reasonable hypotheses which might negate the aggravating factor. Mahn v. State, 714 So.2d 391, 398 (Fla. 1998). This standard was not met in our case.

The reasonable hypothesis in our case is that first degree murders, as found, were committed, but not that they were committed in a cold, calculated, premeditated manner: particularly given the required heightened premeditation which must be found before this aggravator can be found. And that CCP primarily pertains to the perpetrator's state of mind, intent and motivation. Mahn, Id. at 398, citing to Stano v. State, 460 So.2d 890 (Fla. 1984). These killings evidenced no planned analytical thinking -- they were committed in the joint home of the parties, and during

the day, while the "eye" witnesses were all home, awake, and participating actively in their daily events (t. 1152, 1153, 1162, 1165.) What kind of heightened premeditation does a shooting at this time and in this manner reasonably evince? Certainly not a conscious, thinking, and well-developed or premeditated plan to kill. The aggravating factor of cold, calculated and premeditated manner without any pretense of moral or legal justification should not be able to withstand review.

The first factor in a CCP determination is cold. The State must prove beyond a reasonable doubt "that the killing was the product of cool and calm reflection." Gordon v. State, 704 So.2d 107, 114 (Fla. 1997); quoting Jackson v. State, 648 So.2d 85 (Fla. 1994).

The testimony at trial reasonably suggested and hypothesized that appellant, Mr. Joseph, acted out of an explosive rage, more or less, immediately after he had been reading the Bible in his room (t. 1171, 1174), while all concerned were in the house (t. 1164-65, 1171), and certainly not as the product of cool and calm reflection. At some point, Mr. Joseph left his room and had a discussion with his mother about various matters (t. 1173 et seq.). Appellant did not appear upset to his mother, the witness, Robin Denson, until they talked about the mother of his daughter (t. 1177-1183). The State, in its direct examination of its witness, Ms.

Denson, then attempted to impeach its own witness, as it did with other witnesses throughout the course of this trial, although this will be addressed in more detail later herein. The trial court did rule that the State could not call witnesses purely for impeachment purposes (t. 1182), but then apparently ignored or misperceived that ruling.

Mrs. Denson acknowledged in her testimony that her son, our appellant, Mr. Joseph, became more upset about his daughter's mother during their conversation, eventually using vulgar epithets (t. 1186). She also testified that she needed him to calm down as she did not want them to hear the profanity (t. 1186-1188).

Apparently, Appellant was anything but cool and calm at this point. The witness felt her heart get heavy and she had to walk outside (t. 1188). Direct examination by the State continued, although its tone was much more that of cross-examination, looking for a "gotcha".

Appellant did not have a gun while conversing with his mother. However, just a few minutes later, three to five (t. 1193) gunshots were heard (t. 1193). This is not cool, not calm, not cold. This is spur of the moment.

Calculated is the second factor that must be established beyond a reasonable doubt in order for cold, calculated and premeditated murder

without moral or legal justification to become considered for an aggravating factor in the possible determination of imposition of the death penalty. For this element to come into consideration, the State is required to prove beyond reasonable doubt "that the defendant had a careful plan or pre-arranged design to commit murder before the fatal incident." Gordon v. State at 114, quoting Jackson v. State, 648 So.2d 85 (Fla. 1994); Nelson v. State, 850 So.2d 514 (Fla. 2003).

There was no direct evidence, at all, that Appellant had any such plan. Even if the State's unproven assertion that he was upset about an earlier incident between the two children, Kyra and Kamare, had been established, he had been in the home with Kyra, Kamare and Kalaada Crowell (Kyra and Ms. Crowell being the victims herein) for some time before the discussion with his mother took place.

The discussion set appellant off. We know from the testimony throughout the trial and at the penalty phase that appellant, Mr. Joseph, had some emotional and mental difficulties. There was simply no direct testimony that these tragic shootings were calculated or planned in any way. There was no direct evidence of intent or state of mind. There was only speculation and innuendo, inflamed by the State, and accepted by the jury who had no reason to understand that much of the State's direct

examination was an improper impeachment attempt, which did not and should not have constituted substantive evidence. The trial court should have known better and upheld the Defendant/Appellant's objections, but she may have been caught up in the inflamed emotions and passions of the senseless murder of a woman and her pre-teenaged daughter. This was not a calculated, careful plan or prearranged design to commit murder. There simply was not such provable and/or relevant evidence beyond a reasonable doubt.

The third factor the State was required to prove beyond reasonable doubt before the jury, and later such that the trial court could consider the element of heightened premeditated first degree murder to have been established in the aggravating factor of cold, calculated and premeditated murder, was also not satisfied. The State was required to prove beyond reasonable doubt "that the defendant exhibited heightened premeditation." Gordon; 704 So.2d at 114 (quoting Jackson v. State, 648 So.2d 85 (Fla. 1994). "Proof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction. Maxwell v. State, 443 So.2d 967 (Fla. 1984) (here the evidence showed the killing was intentional and deliberate, but there was no showing of an additional to establish that the murder was

committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification). Respectfully, appellant asserts that no such heightened premeditation was shown.

"Simple premeditation of the type necessary to support a conviction for first degree murder is not sufficient to sustain a finding that a killing was committed in a cold, calculated or premeditated manner and without any pretense of moral or legal justification." Hamblen v. State, 527 So.2d 800 (Fla. 1988), citing to Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied 457 U.S. 111 (1982).

Appellant respectfully asserts that no more than the simple premeditation necessary for a verdict of first degree murder was shown or properly established in this case such that it could be determined to formulate the aggravating factor of CCP.

Again, a CCP killing must be the product of cool and calm reflection, and not an act prompted by emotional frenzy, panic or fit of rage. It needs a careful plan or prearranged design to commit murder before the fatal incident, which establishes calculation, and that the defendant exhibited heightened premeditation and had no pretense of moral or legal justification. Wright v. State, 19 So. 3d 277 (Fla. 2009) (a cold-blooded intent to kill that is more contemplative, more methodical, more controlled

than that necessary to sustain a conviction for first degree murder. Id., citing to Evans v. State, 800 So.2d 182, 193 (Fla. 2001) (quoting Nibert v. State, 508 So.2d 1, 4 (Fla. 1987). There were no consistent admissions, no evidence leading ineluctably concluding that this tragedy was prearranged, no evidence that appellant was armed in advance, nothing that excludes any reasonable hypothesis of innocence inconsistent with and negating this aggravating factor. Thus, this factor was not lawfully established. Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert denied 471 U.S. 1045 (1985).

We do also know that Appellant/Defendant was experiencing mental health and/or emotional difficulties or disturbances and may have had a delusional disorder of the persecutory type (r. 1452-53). This condition would also have mitigated from the finding of CCP.

The aggravating factor of cold, calculated, and premeditated manner was not only not lawfully established. It can be fairly and reasonably argued that this aggravating factor of CCP was derived by the jury and the trial court from taking the results of the crime, and establishing the factors going backward, emotionally and without solid, rational and beyond a reasonable doubt legal footing. The necessary factors were thus found from a rearward interpretation, based in substantial part on emotion, and

the tragic results. The jury and the trial court misperceived the nature and elements of this aggravating factor.

Alternatively, at minimum, the evidence of heightened premeditation in this case is susceptible to divergent interpretation. Thus, appellant asserts the State failed to meet its burden of establishing beyond a reasonable doubt that either of these homicides were committed in a cold, calculated and premeditated manner. Therefore, the trial court erred in finding this aggravating circumstance. Geralds v. State, 601 So.2d 1157 (Fla. 1992).

This cause should be reversed.

ISSUE XI

LIFE IMPRISONMENT IS THE APPROPRIATE AND LAWFUL SENTENCE IN THIS CASE, AS THIS CASE WAS NOT THE MOST AGGRAVATED AND LEAST MITIGATED OF FIRST DEGREE MURDERS.

Pursuant to previously well-established Florida law, which Appellant has contended in this brief should be currently applicable also, which is more in compliance with U.S. constitutional law than is this Court's recent reversal decision of Lawrence, and is the status under which this Court should still review and determine life imprisonment or death penalty sentences, Lawrence v. State, 296 So.3d 892 (2020). Appellant respectfully asserts that this Court should make a two-part inquiry so as to "determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders." Davis v. State, 121 So.3d 462, 499 (Fla. 2018); Crook v. State, 808 So.2d 82 (Fla. 2005); Almeida v. State, 748 So.2d 922, 933 (Fla. 1999) (emphases in opinions). This Court has previously vacated sentences of death in cases where the capital crime was committed spontaneously and as a result of mental illness. Davis at 121 So.3d 462.

Consequently, even in cases where the most aggravated element has been met beyond a reasonable doubt, there must still be a determination that the crime also satisfies and additionally comes within the

purview of the least mitigated of murders. Crook, 908 So.2d at 357 (emphasis supplied).

We have asserted herein, supra, that proportionality review is not prohibited by our Conformity Clause. By reason of the Court's recent history of cases, other adequate safeguards against arbitrary imposition of the death penalty are, respectfully, not in place currently. Proportionality review is necessary to protect the required safeguards and the Appellant's fundamental rights pursuant to the Eighth and Fourteenth Amendments of the United States Constitution.

In furtherance of this contention, the United States Supreme Court has repeatedly held that the Eighth Amendment prescribes a heightened degree of reliability in capital cases:

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

Woodson v. North Carolina, 428 U.S. 280, 305 (plurality opinion) quoted in Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000).

As "state courts must consider all relevant mitigating evidence and weight it against the evidence of the aggravating circumstances, Eddings v.

Oklahoma, 455 U.S. 104, 116 (1982), this Court has, in compliance, "repeatedly held that all mitigating evidence, found anywhere in the record, must be considered and weighed by the trial court in its determination of whether to impose a sentence of death." Walker v. State, 707 So.2d 300, 318 (Fla. 1997) (emphasis supplied). This Court went on further to emphasize that "this bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of." Walker, 707 So.2d at 319.

The Walker decision also held:

> Clearly then, the "result of this weighing process" can only satisfy Campbell and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this court cannot be assured that is properly considered all mitigating evidence.

Id. at 319, referring to an earlier decision in Campbell v. State, 571 So.2d 415 (Fla. 1990); Jackson v. State, 704 So.2d 500 (Fla. 1997) (to ensure meaningful review, trial courts must provide a thoughtful and comprehensive analysis of the mitigating evidence); Woodel v. State, 804 So.2d 316, 326-27 (Fla. 2001) (sentencing order which "comprehensively addresses all mitigation" is absolutely essential in capital cases; also that

an order which "summarily dispose of mitigation" is inadequate); Griffin v. State, 820 So.2d 906, 914 n. 10 (Fla. 2002) (restating that it is important that there be a thorough written evaluation of the proposed mitigating circumstances. Where the order is made up of conclusory statements or otherwise reflects a perfunctory evaluation by the trial court, harmless error analysis will not save that order").

The reasoning and logic behind these requirements, simply put, is that:

> While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different.

Walker v. State, 707 So.2d at 318-319, emphasis in Walker, quoting Crump v. State, 654 So.2d 545, 547 (Fla. 1995).

The jury in our case found no mitigating factors, despite the trial court's instructions. It had been thoroughly inflamed by the State's running down various provocatory and emotional rabbit holes, as well as by the tone of its closing argument, both of which will be referred to in more detail later in this initial brief.

The trial court did, in her written sentencing order, find mitigating circumstances, many of them less than thoroughly and comprehensively,

i.e., in a perfunctory manner, which has been determined not to be harmless error.

Mitigating Circumstances as to Both Counts

1. The defendant has no significant history of prior criminal activity. §921.141(7)(a), Fla. Stat.

   Defendant was just 26 years old when he committed these two murders. At that young age, Defendant had already been to the Department of Corrections for two years and was on probation at the time these offenses were committed. However, because there was only one conviction, the Court finds this mitigating circumstance established, but nevertheless, accords it little weight.

2. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. §921.141(7)(b), Fla. Stat.

   To establish this mitigating factor, a defendant must show by the greater weight of the evidence that the mental disturbance was one which "interferes with but does not obviate the defendant's knowledge of right and wrong." Duncan v. State, 619 So.2d 279, 283 (Fla. 1993) (citation omitted). The Court agrees with the jury's rejection of this as a mitigating circumstance as there is no evidence to

support the conclusion that Defendant was under the influence of extreme mental or emotional disturbance at the time these murders were committed. Although there was testimony that Defendant may have had a delusional disorder of persecutory type, there was no evidence to support that this disorder interfered with Defendant's "knowledge of right and wrong," or otherwise contributed to these murders. In fact, defense witness Dr. Adam White opined that during the interview process, when Defendant exhibited intentional aggressive behaviors toward security staff, those behaviors demonstrated that Defendant knew what he was doing. The same could be said in this case. These murders were done with intentional and aggressive behavior, with no evidence that they were carried out for any other reason but for revenge or payback. Based on the evidence presented here, the Court finds there is insufficient evidence to show that this Defendant was acting under the influence of extreme mental or emotional disturbance when these murders were committed. As such, this Court does not find this mitigating circumstance

was established by the greater weight of the evidence, and therefore, accords it no weight.

However, as discussed *infra*, as a non-statutory mitigating circumstance, the Court concludes that there is evidence that Defendant may suffer from a delusional disorder of persecutory type, and gives that mitigating circumstance little weight.

3. The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. §921.141(7)(f), Fla. Stat.

The Court agrees with the jury's rejection of this as a mitigating circumstance as there was absolutely no evidence to support it. The evidence actually established the contrary. Immediately after he killed Kalaada Crowell and her daughter, he took flight by stealing the deceased's car. Shortly thereafter, he was seen on video altering his appearance by changing clothes, and then he avoided all communication with his family. The Court finds that Defendant's immediate actions thus establish that this Defendant had the capacity to -- and did -- appreciate the criminality of his conduct, and that there was nothing

presented that suggests Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

As such, the Court finds this mitigating circumstance was not established, and accords it no weight.

4. The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty (non-statutory mitigating circumstances). §921.141(7)(h), Fla. Stat.

a. Defendant's family background.

Defendant presented evidence that Robin Denson's husband left her and her children (including Defendant) when Defendant was very young. Thereafter, they had to move around quite a bit, causing them to frequently change schools and suffer instability. Because of financial circumstances, Defendant at times had to live with relatives and often lived in unsafe neighborhoods.

The Court finds this mitigating circumstance to have been established, and accords it little weight.

b. Defendant was a good employee with an excellent work ethic. He was also a talented football player who exhibited this work ethic on and off the field.

Defendant presented evidence that he was a good employee and a hard worker. His high school coach testified that during high school, he was a good player who worked hard and was known as "gentle giant." The defense also presented videos, pictures of Defendant playing football, as well as an article outlining his talents presented in the media.

This Court finds this mitigating circumstance to have been established, and accords it little weight.

c. Defendant was a caring and attentive parent.

Defendant presented evidence that he was a caring and involved parent for his three children. He supported his children and often had them stay with him on weekends or school breaks. In fact, although technically following the *Spencer* hearing, this Court heard direct testimony from his children regarding sentencing in this matter, and has read letters they wrote to their father as well. The Court has seen the family photos and videos showing he loves his family and they love him.

This Court finds this mitigating circumstance was established, and accords it moderate weight.

d. Defendant has the support of his family.

Defendant presented evidence that his family loves him and that they would be devastated by his execution.

The Court finds this mitigating circumstance was established, and gives it little weight.

e. Defendant regularly attended church and is a devout Christian.

Defendant presented evidence that he attended church while growing up and well into adulthood. He often read the Bible and instructed others as well. The testimony in trial also supported that he is a man of faith, as he was reading the Bible shortly before these homicides were committed.

The Court finds this mitigating circumstance was established; however, gives it little weight.

f. Defendant suffers from a delusional disorder of a persecutory type.

Dr. White opined that Defendant might suffer from a

delusional disorder of a persecutory type. Even though Defendant admitted during the mental evaluation process to another practitioner that he is not mentally ill and was just behaving like that for his case, the Court still finds the evidence was sufficient to support this as a mitigating circumstance and gives it little weight.

g. Defendant has a low IQ.

Although not specifically argued, this Court heard evidence that Defendant has a low IQ. The Court finds sufficient evidence to support this as a mitigating circumstance, and gives this mitigating circumstance little weight.

(r. 1452-1456).

These findings do not constitute a thorough and comprehensive analysis of the mitigating evidence. They were given some thought: however, they were not given more than desultory and conclusory deliberation. This mitigation analysis was inadequate and dismissive. It renders the death sentences constitutionally unreliable. This case should be remanded for imposition of a sentence of life imprisonment.

ISSUE XII

FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL PURSUANT TO BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS.

In our state, the range of cases eligible for the death penalty have substantially grown, not narrowed since Furman, contrary to the very intent and purpose of it. Furman v. Georgia, 408 U.S. 238 (1972). At the time of Furman, there were eight aggravating factors that could put a first degree murder within the category of those for which the death penalty could be a consideration. In the almost fifty years since, the Florida range has doubled. It has not narrowed.

> 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. --
>
> (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the

crime and the character of the defendant and shall include matters relating to any of the aggravating factors enumerated in subsection (6) and for which notice has been provided pursuant to s. 782.04(1)(b) or mitigating circumstances enumerated in subsection (7). Any such evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The State and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY. -- This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the State has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to

death. The recommendation shall be based on a weighing of all of the following:

a. Whether sufficient aggravating factors exist.

b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.

c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determined that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

(3) IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH. --

(a) If the jury has recommended a sentence of:

1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

(b) If the defendant waives his or her right to a sentencing proceeding by a jury, the court, after considering all aggravating factors and mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may impose a sentence of death only if the court finds that

at least one aggravating factor has been proven to exist beyond a reasonable doubt.

(4) ORDER OF THE COURT IN SUPPORT OF SENTENCE OF DEATH. -- In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence. If the court does not issue its order requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose a sentence of life imprisonment without the possibility of parole in accordance with s. 775.082.

(5) REVIEW OF JUDGMENT AND SENTENCE. -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court.

(6) AGGRAVATING FACTORS. -- Aggravating factors shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of

death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanently disability, or permanent disfigurement; arson, burglary, kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed to pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

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

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(7) MITIGATING CIRCUMSTANCES. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(8) VICTIM IMPACT EVIDENCE. -- Once the prosecution has provided evidence of the existence of one or more aggravating factors as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

(9) APPLICABILITY. -- This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

Appellant respectfully asserts that this wide ranging multiplication of factors which can invoke consideration of the death penalty is not the "narrowing" the U.S. Constitution commands. Narrowing typically means decreasing, shrinking, and diminishing. Narrowing is a "constitutionally necessary function at the stage of legislative definition", Zant v. Stephens, 462 U.S. 862, 878 (1983). "If a state has determined that death should be

an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and for those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984). The statute itself must limit the scope of those eligible for the death penalty beyond those who are convicted of murder. Lowenfeld v. Phelps, 482 U.S. 231, 246 (1988) (it is the legislature that must provide the means for narrowing the class of death eligible murderers).

This requirement implements the Eighth Amendment's demand that the death penalty be free from "arbitrary or irrational imposition", Parker v. Dugger, 498 U.S. 308, 321 (1991). Accordingly, a capital sentencing scheme, as our F.S. 921.141, falls afoul of the Eighth Amendment when it fails to provide objective criteria that limits the application of the death penalty to the worst of the worst, i.e. the most aggravated and least mitigated of murders. Furman v. Georgia, 408 U.S. at 239 (1972).

Our current sixteen aggravating factors and our other legislative changes, i.e. including, but not limited to, the current interpretation of the Conformity Clause, appear to comprise many additional fact patterns that could result in consideration of, as well as imposition of, the death penalty.

The class of eligible individuals is truly not narrow. Our law fails to comply with the U.S. constitutional requirement.

Florida Statute 921.141 should be declared unconstitutional as it violates the U.S. Eighth and Fourteenth Amendments to the U.S. Constitution. It fails to sufficiently narrow the class of cases eligible for consideration of imposition of the death penalty. Too many people could be put to death by the State, which acts in all our names.

This cause must be reversed.

ISSUE XIII

THE STATE'S PENALTY PHASE CLOSING ARGUMENT INCLUDED IMPROPER AND INFLAMMATORY EXHORTATIONS, SPECIFICALLY APPEALING TO THE PASSIONS OF THE JURY. THIS WAS ERROR, RENDERING THE SENTENCING PHASE FUNDAMENTALLY UNFAIR.

Appellant's counsel properly preserved this issue for review. Berger v. United States, 295 U.S. 78 (1934) ("it is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertion of personal knowledge, are apt to carry weight against the accused when they should properly carry none."). More recently, the U.S. Supreme Court has held:

> This Court has recognized that prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.

Greer v. Miller, 483 U.S. 756, 765 (1987). Penalty phase deliberations shall receive the same protections afforded to all criminal matters.

However, had Defendant/Appellant not preserved this issue, it would still be ripe for this Court's review pursuant to fundamental error. Tolin v. State, 95 So.3d 913, 917 (Fla. 1st DCA 2012) (citing State v. Murray, 443 So. 2d 955, 956 (Fla. 1984) (quoting Cobb v. State, 376 So.2d 230, 232 (Fla. 1979).

The State made several egregious, outrageous statements during his penalty phase closing argument. Amongst them were:

> There is no question, there is no question that he understood the . . . criminality. It's just he didn't care. Didn't care. He was on probation, ladies and gentlemen. You heard the probation officer say that any crime can violate you. Still doesn't. Doesn't care about jail. That's why that punishment is not appropriate.
>
> Now, the fourth, the existence of any other factors --
>
> (t. 2356).

This was immediately objected to by Defendant/Appellant.

> MR. WAGNER: I'm going to object to the last as improper argument. Aggravators are the only things that you can consider.
>
> (t. 2356).

After prolonged consideration, and a read-back by the Judge, the objection was sustained (t. 2362), and a curative instruction was given by the trial court (t. 2368-69). But Appellant respectfully asserts that the

damage had been done. The State improperly and abhorrently spoke to and inflamed the emotions and sentiments of the jury, providing them with yet another improper reason to find death as the appropriate penalty. Defendant/Appellant moved for mistrial, which was erroneously denied (t. 2362).

Later in this closing, the State went on to postulate:

> My father was a football coach. Said the only time you regret is when you didn't do everything you could. We're confident that you all are going to do everything that you've been asked to do and more. So when you come to that decision, do not be afraid that you're going to regret it, because remember, too, ladies and gentlemen, your unanimous recommendation of death is just that. It's saying, based on what we've seen, based on what we've heard, based on those jury instructions, based on the aggravating factors that were presented by the State in light of the mitigating factors that were presented by defense, the correct sentence, the proportionate sentence, is death. When that gets turned in, ladies and gentlemen, this doesn't happen unless she thinks it should.
>
> (t. 2377-78)

Defendant/Appellant immediately objected as the State, in addition to the error of diminishing the jurors' role, more than subliminally made the outrageous inference that their votes for imposition of the death sentence would be the courageous and correct sentence.

MR. WAGNER: Objection, it's diminishing

the jurors' roles.

(t. 2378)

The trial judge immediately attempted to cure the State's abhorrent statement (t. 2378). Defendant/Appellant then moved for mistrial, which was denied (t. 2378).

Yet, later in the same closing, the State went on to declare:

> December 28, 2017, he forfeited his right to those basic pleasures of life because that's what he stole away from Kalaada and Kyra. There's going to be no newspaper articles for Kyra, no sports to be played, because of him. The facts and the evidence, ladies and gentlemen, make it so that returning a recommendation of death is not going to be seen as disproportionate, it's not going to be seen as immoral, it's not going to be seen as wrong. Some murders are just different.
>
> These ones certainly were. The effect that they had is different. And the person that committed them has provided no mitigation worthy to allow him to live out his days in jail and that's why we'll ask that when you go back there, read everything. Read those jury instructions.
>
> (t. 2382).

Again, Defendant/Appellant immediately objected (t. 2382).

MR. WAGNER: Objection, Your Honor.

MR. SUSANECK: Your Honor, I believe he

> just made a comment on the defendant's right to remain silent by saying the person on trial or the man here didn't present any evidence. That's different from saying his attorneys didn't present any evidence. He commented on the defendant's right to remain silent and I believe that's inappropriate.
>
> (t. 2383).

Eventually, the trial court denied the motion (t. 2386-87), and the motion for mistrial (t. 2387). This was error, and only authorized the additional fanning of the jurors' emotions, which the State had unfairly further impassioned. The purpose of the penalty phase closing argument does not permit it to be used to inflame the minds and passions of the jurors, so that their verdict represents an emotional response to the crime or the defendant, rather than the logical and comprehensive analysis of the evidence in light of the applicable law. Cardona v. State, 185 So.3d 514 (Fla. 2016) (as we have stated for decades, we expect and require prosecutors, as representatives of the State, to refrain from engaging in inflammatory and abusive arguments, to maintain their objectivity, and to behave in a professional manner). These sorts of assertions ran throughout the course of the State's closing (t. 2337-2385).

Moreover, as a result of the continued egregious arguments by the State, their prejudicial effect only became amplified. It also implicitly placed the trial court's imprimatur of approval on the remarks. Cardona, id.

Due process is threatened where the State encourages a jury to take into account matters that are not legitimate sentencing considerations, and where there is a reasonable probability that the outcome was affected. Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985). As it was in our case. DePew v. Anderson, 311 F.3d 742, 749 (6th Cir. 2002). Our Florida courts hold: "if jurors are to remain fair decision-makers, the trial court must guard against a deliberate act of counsel that serves to put the jury center stage in the drama that should be the trial". Backer v. Glass, 874 So.2d 701 (Fla. 1st DCA 2004).

This was a calculated effort by the State to provide an additional, non-evidentiary basis for a death verdict. It significantly damaged the jury's disposition and ability to judge the evidence fairly.

Too, the need for heightened reliability in capital proceedings was not met; the Eighth Amendment was not satisfied. A reliable verdict is one in which the courts can be confident that the decision maker gave independent weight to the showing in mitigation. Beck v. Alabama, 447 U.S. 625, 638 n. 13 (1980).

This is not what happened in our case. Here, the State deliberately sought a verdict on non-evidentiary grounds. Therefore, the factors and conditions that ensure the heightened reliability necessary in order to impose a sentence of death are absent. The prosecutorial misconduct was of sufficient significance to result in the denial of the Defendant's right to a fair trial. Greer, supra. This Court should reverse the death sentence.

ISSUE XIV

AS TO THE PENALTY PHASE, THE JURORS EITHER FAILED TO FOLLOW THE LAW, OR THE COURT'S INSTRUCTIONS, DEPRIVING APPELLANT OF A FAIR TRIAL.

At the Spencer hearing held October 16, 2020, both at the Palm Beach County Courthouse and via Zoom, Defendant/Appellant began by standing on his written sentencing memorandum (r. 1199-1213), and by highlighting one concern (Sp. hrg. 14). Appellant asserted that either the jury did not follow the law; or it did not follow the trial court's instructions to the jury (Sp. hrg. 14).

Appellant asserted, and asserts again herein, that the jury acted out of emotion, misapprehension, or outright refusal to follow the law (Sp. hrg. 16).

The jurors made their decision as to life or death, at almost lightning speed, with very little time for reflection or grave and serious consideration as to the matter at hand (r. 1139-1141).

As reinforced in the Appellant/Defendant's sentencing memorandum, State v. Dixon, 283 So.2d 1 (Fla. 1973), pointed out that the Florida death sentencing scheme is actually a five step process. The first is the evidentiary penalty phase hearing. The second is the jury's penalty phase recommendation. Third is the trial judge's decision as to penalty. Fourth is

the requirement that the trial judge justify any sentence of death in writing, and fifth is this automatic review to ensure that there has not been an arbitrary or capricious imposition of the death penalty (r. 1200). Proffitt v. Florida, 428 U.S. 242 (1976). Step three is to ensure that an inflamed or impassioned jury does not override or ignore the protection of the defendant, who has the right to have such a sentence reliably, analogously, consistently, and proportionally imposed as to other first degree murders. It would appear that in our case, with the manifold graphic evidence concerning the deaths of Kalaada Crowell and her eleven year old daughter, Kyra Inglett, the erroneously admitted casing evidence, the erroneously admitted hearsay evidence concerning who the shooter was, the erroneously admitted impeachment evidence when the witnesses had not, in fact, placed themselves open to impeachment, the erroneous and inflammatory closing by the State asking for imposition of the death penalty rather than imposition of a just penalty, etc., all took a toll on this lay jury. They reached their decisions based on the emotions and passions the State had fanned, not on a careful, thoughtful, considered weighing of the actual evidence adduced, and not adduced, at trial.

This jury found every aggravating factor to exist (t. 2463-64) as to Count I and as to Count II (t. 2464-2465). They found no mitigating

circumstances (t. 2467). They unanimously found that Defendant/Appellant, Mr. Joseph, should be sentenced to death in each count (t. 2468-69). When polled, each juror acknowledged the verdict as their verdict (t. 2469-2471).

This verdict was taken at or about 3:00 p.m. on February 26, 2020 (t. 2462-71). The jurors began their deliberations after a break and lunch at 12:25 p.m. (t. 2452-2458). The trial court, amongst its many instructions to the jury (t. 2425-2452), instructed the jury not to act hastily or without due regard to the gravity of the proceedings (t. 2436); and that if they or any of them failed to follow the law, their decision would be a miscarriage of justice (t. 2439). The trial court informed the jurors that there is no reason for failing to follow the law in this case (t. 2439). And that "all of us are depending upon you to make a wise and legal decision in this matter" (t. 2439). The trial court went on further to instruct the jury that it is important that they follow the law spelled out in the instructions given to them (t. 2442), and that even if they do not like the laws that must be applied, they must use them (t. 2442).

The jurors, even if they deliberated while eating lunch, could not have given this life versus death decision more than two hours of consideration. The break alone was to be for fifteen minutes, during which time there

could be no deliberation (t. 2453). We all know that fifteen minutes seldom means only fifteen minutes.

These jurors simply did not give their deliberations even the minimal amount of time such weighty, grave, irretrievable considerations must take. They either did not follow the law, or did not follow the instructions. Plus, and not to be taken or considered lightly, the trial court, who heard the same evidence as the jury, found nine (9) mitigating circumstances as to each of both counts, however summarily (r. 1452-1456), and in direct contravention of the zero mitigating factors found by the jury. She found (1) that the Defendant has no significant history of prior criminal activity, F.S. 921.141(7); (2) the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance, F.S. 921.147(7)(b); (3) the existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty (non-statutory mitigating factors, F.S. 921.141(7)(h) - a) Defendant's family background; b) Defendant was a good employee with an excellent work ethic. He was also a talented football player who exhibited this work ethic on and off the field; c) Defendant was a caring and attentive parent; d) Defendant has the support of his family; e) Defendant has regularly

attended church and is a devout Christian; f) Defendant suffers from a delusional disorder of a persecutory type; g) Defendant has a low IQ.

The trial court further acknowledged that it must give great weight to the jury's recommendation of death (r. 1457), and stated that it wholly agreed with the jury's unanimous recommendations (r. 1457). It further found that it would impose these sentences irrespective of whether one or more of the aggravators were found not to have been proven or sufficient (r. 1457). Which, while not the focus of this issue, causes to arise a concern that the trial court also may have pre-judged this life and death matter; this would have been erroneous and seriously prejudicial on her part.

The trial court misplaced any reliance upon the giving of great weight to the jury's recommendations for imposition of the death penalty, given that they failed to follow, or ignored, the trial court's instructions, and given that the trial court committed error in determining that the aggravating factors had been proved beyond a reasonable doubt.

This case must be reversed.

ISSUE XV

DEFENDANT/APPELLANT WAS DENIED A FAIR TRIAL AND DUE PROCESS PURSUANT TO THE UNITED STATES AND FLORIDA CONSTITUTIONS, AS A RESULT OF CUMULATIVE ERROR.

McDuffie v. State, 970 So.2d 312 (Fla. 2007) held that errors during the course of the trial, when viewed cumulatively, were not harmless beyond a reasonable doubt.

> Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." Brooks v. State, 918 So.2d 181, 202 (Fla. 2005) (quoting Jackson v. State, 575 So.2d 181, 189 (Fla. 1991)); accord Penalver v. State, 926 So.2d 1118, 1137 (Fla. 2006).

McDuffie at 328. McDuffie went on to find that the evidence was sufficient to support the verdicts in the case.

But, it also found and held that the harmless error test is not a sufficiency of the evidence test. It then went on further to hold:

> "Notwithstanding the sufficiency of the evidence, we have concluded that cumulative error occurred that is not harmless beyond a reasonable doubt, thereby necessitating a new trial."

McDuffie, id.

This Court in that case reversed McDuffie's convictions, vacated his sentences and remanded for a new trial.

As stated throughout the course of this initial brief, numerous errors occurred in this case. They rendered this proceeding as fundamentally unfair and not impartial. If they did not do so individually, they did cumulatively. This cause should be reversed, Appellant/Defendant, Mr. Joseph's, sentences should be vacated, and for any and further proceedings consistent therewith.

CONCLUSION

Based on the assertions and authority cited hereinabove, Appellant respectfully requests that this Court conduct its review of this case, reverse Appellant's convictions, vacate his sentences, and take any and all further appropriate action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished to Rhonda Giger, Assistant Attorney General, Attorney General's Office, 1515 N. Flagler Drive, #900, West Palm Beach, FL 33409 (rhonda.giger@myfloridalegal.com); (CrimAppWPB@myfloridalegal.com); and a courtesy copy to Honorable Cheryl Caracuzzo, Circuit Judge, 15th Judicial Circuit, Palm Beach County, Florida (CAD-DivisionZ@pbcgov.org) this 25th day of March, 2021.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief was composed in Ariel 14 point font and word count limit requirements.

DESIGNATION OF E-MAIL ADDRESSES

Fredrick R. Susaneck, Esquire, representing the Petitioner in the instant case, hereby designates the following email address for the purpose of service of all documents required to be served, pursuant to Fla.R.Jud.Admin. 2.516; primary email address: Levine.Susaneck@gmail.com.

CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

I HEREBY CERTIFY that an electronic copy of the foregoing Petitioner's Brief has been efiled in searchable PDF format via the filing portal the following address: www.myflcourtaccess.com.

Respectfully submitted,

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