No:___

IN THE
SUPREME COURT OF THE UNITED STATES

MARKEITH LOYD,

Petitioner,

v.

FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Where the court in a capital case allows the State to argue that the jury should, or must, try its best to reach a unanimous penalty phase verdict, is the jurors' sense of individual responsibility for the death-penalty decision impermissibly undermined in contravention of the Eighth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

The undersigned is aware of no pending cases directly related to this case.

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JURISDICTION

The decision of the Florida Supreme Court, affirming Petitioner's conviction and death sentence with a written opinion, is reported at Loyd v. State, 379 So. 3rd 1080 (Fla. 2023). The decision was issued November 16, 2023. A timely motion for rehearing was filed, and was denied on February 7, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII to the United States Constitution guarantees that "[e]xcessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishment inflicted."

Amendment XIV to the United States Constitution provides that "[n]o State shall…deprive any person of life, liberty, or property without due process of law."

INTRODUCTION

In enforcing the constitutional guarantee of freedom from cruel and unusual punishment, this Court in capital cases condemns practices that diminish the reliability of the sentencing determination. Specifically, this Court disallows argument that misleads jurors as to the role they play under local law in the capital sentencing process, and misleads them in a way that allows them to feel less responsible than they should for the life-or-death decision. Here that line was crossed. The prosecutor argued that the jurors should, or must, do their best to achieve unanimity as to the ultimate question before them, a position inconsistent with Florida's substantive law. Defense counsel's timely objection was overruled, and on direct appeal Petitioner's federal claim based on that ruling was rejected. This Court should enforce its decisions in Romano v. Oklahoma, 512 U.S. 1 (1994) and Caldwell v. Mississippi, 472 U.S. 320 (1985) by reversing the Florida Supreme Court's decision in this case.

STATEMENT OF THE CASE

Petitioner Markeith Loyd was convicted and sentenced to death in 2021, in Florida's Ninth Circuit Court, for the January 9, 2017 murder of police officer Deborah Clayton. In 2017 Florida law required a unanimous jury verdict supporting a death sentence as a precondition to imposition of that sentence. *See* Hurst v. State, 202 So. 3rd 40 (Fla. 2016), *receded from in* State v. Poole, 297 So. 2d 487 (Fla. 2020). During the penalty phase, near the beginning of the State's closing argument, counsel for the State told the jurors "I would suggest to you that as the instructions point out, you have an obligation to give meaningful consideration to everything. And not only that, but that you try your best to reach a unanimous verdict." Defense counsel's immediate objection to "misstatement of the law" was overruled in the jury's presence, and the prosecutor picked up with "I say that knowing that you-all may unanimously decide that Mr. Loyd deserves life in prison without parole. This is an important decision, and all I am suggesting is that you-all collaborate together, understanding that you will make an individualized decision." Both before and after the objected-to argument, the prosecutor referred to the jurors' responsibility to make an individual decision on the ultimate question before them. He did not clarify whether the additional collaborative step he recommended should take place before or after the jurors reached individual decisions.

Thereafter, in his closing argument, defense counsel urged the jurors to scrutinize their instructions and reject the State's incorrect advice that they should,

or must, "ac[t] as one" if they reached the death-or-life-sentence question. The State's objection to that argument was sustained in the jury's presence.

In his direct appeal to the Florida Supreme Court, Mr. Loyd argued *inter alia* that the court's rulings overruling his objection, and sustaining the State's objection to defense counsel's effort to right the ship, ran afoul of Romano v. Oklahoma, 512 U.S. 1 (1994). That court responded as follows:

> There was nothing improper about the State's remark. It did not misstate the law. [Given the full context of the State's closing], the State emphasized rather than minimized the jurors' individualized roles. The trial court did not abuse its discretion in allowing the statement.

Loyd v. State, 379 So. 3rd 1080 (Fla. 2023). The court affirmed Petitioner's conviction and

sentence.

REASONS FOR GRANTING THE WRIT

Romano v. Oklahoma, 512 U.S. 1, 8 (1994), is clear. This Court in Romano narrowed and clarified the rule of Caldwell v. Mississippi, 472 U.S. 320 (1985), holding that the Eighth Amendment does not permit the states to mislead juries in capital cases about their role in their state's system in a way that diminishes their sense of responsibility for the decision before them. Here the jury was so misled, notwithstanding the Florida Supreme Court's anodyne reading of the State's advice to the jury. Per that court, there was nothing improper about the objected-to argument, in that it was part of a larger argument which, by and large, encouraged individual decision-making. The State in fact clearly counseled the jurors *both* to reach an individual decision as to a life sentence or a death sentence, *and* to collaborate in an effort to achieve unanimity, then doubled down on that two-part advice after the defense's objection was overruled. As noted, the prosecutor did not suggest whether the collaboration should precede or follow the requisite individual soul-searching. Neither is appropriate under Florida's substantive law.

This Court has recognized that the States may reasonably enforce an interest in encouraging unanimity in the penalty phase of capital jury trials. Lowenfield v. Phelps, 484 U.S. 231 (1988). In Lowenfield, the jurors were initially charged, in Louisiana state court, with considering the views of others on the jury, but were warned against surrendering their own honest beliefs. 484 U.S. at 234. They were further charged, 22 hours into their deliberations, with the duty to consult with one another with the objective of reaching a just verdict, if they could do so without

doing violence to their individual judgment. Id. at 235. This Court approved the ensuing death verdict, rejecting the view that it had been inappropriately coerced. Id. Florida, in contrast, does not permit such an Allen charge in the penalty phase of a capital trial. Patten v. State, 467 So. 2d 975, 979-80 (Fla. 1985), distinguishing Allen v. United States, 164 U.S. 492 (1896). Thus Florida has not expressed a strong interest, or indeed any interest, in encouraging unanimity in penalty-phase deliberations. Id.

Oklahoma's capital sentencing scheme is similar to the Louisiana scheme at issue in Lowenfield, whereby a life sentence follows jury disagreement in penalty phase but an Allen charge may be given. *See* Hooks v. Workman, 606 F. 3rd 715 (10th Cir. 2010). In Hooks, prosecutors delivered a strongly worded closing argument which made the same point as the objected-to argument in this case; that closing was eventually followed by an Allen charge. *See* id. at n. 24. The Oklahoma appellate courts approved the ensuing death sentence, but were reversed by the Tenth Circuit Court of Appeals after a habeas corpus petition was filed in federal court. The/ Court of Appeals held that the closing argument improperly described the role assigned to the jury by Oklahoma law, and held that the prosecution team intentionally and impermissibly suggested that honestly held beliefs should be abandoned. Hooks at 744, 753. It did not reach the question whether the prosecutors' contribution alone, without the Allen charge, would have supported habeas corpus relief, but took the view that a strong argument had been made for such relief solely based on the closing argument. Id. at 746.

Clear violations of the narrowed-down rule articulated by this Court in Romano took place in Hooks's case and in this case. The Tenth Circuit appropriately took action; the Florida Supreme Court has not. This Court should accept jurisdiction of this case so as to enforce its holding in Romano.

CONCLUSION

The petition for a writ of certiorari should be granted, Petitioner's convictions and sentence should be reversed, and the case should be remanded for a new trial.

Respectfully submitted,

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APPENDIX A

Supreme Court of Florida

No. SC2022-0378

MARKEITH D. LOYD,
Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA,
Appellee/Cross-Appellant.

November 16, 2023

PER CURIAM.

Markeith Demangzlo Loyd was charged with and convicted of first-degree murder, attempted first-degree murder, aggravated assault with a deadly weapon, carjacking with a firearm, and possession of a firearm by a convicted felon. He appeals these convictions and his death sentence for the first-degree murder.[1] We affirm all convictions and his death sentence.

1. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

FACTS AND PROCEDURAL BACKGROUND

Guilt Phase

Early on January 9, 2017, Loyd—on the run for the murders of his girlfriend, Sade Dixon, and their unborn baby[2]—entered a Walmart where a witness familiar with Loyd and his previously committed murders spotted Loyd in the checkout line wearing a bulletproof vest. This witness immediately exited the store and alerted a uniformed police officer that Loyd was inside. The officer was Lieutenant Debra Clayton. Soon after, Lieutenant Clayton confronted Loyd as he exited the store into the parking lot. Lieutenant Clayton commanded that he "get on the ground." Loyd responded by rushing behind a pillar and then hastily reemerged with his gun drawn. Loyd fired at Lieutenant Clayton, and she returned fire. Lieutenant Clayton was shot and fell to the ground. Loyd then moved towards Lieutenant Clayton until he stood over her and delivered a fatal shot into her neck.

Loyd then fled the Walmart parking lot in his vehicle. After dispatch radioed the news of Lieutenant Clayton's shooting,

2. In 2019, before the trial in this case, Loyd was convicted of these murders and sentenced to life.

Captain Joseph Carter pursued Loyd into the parking lot of an apartment complex. As Captain Carter emerged from his vehicle, Loyd shot at him twice, but hit only his hubcap. Captain Carter then maneuvered his vehicle to block in Loyd's vehicle, and Loyd took off running. Loyd then approached a resident of the apartment complex, Antwyne Thomas, and pointed his gun at Thomas's face. Loyd demanded that Thomas hand over his car keys. Frightened, Thomas threw his keys into the air and ran into his apartment.

Loyd evaded arrest until law enforcement officers found him inside a house on January 17, 2017. At the scene of the arrest, law enforcement recovered a bulletproof vest, the gun used to murder Sade Dixon, her unborn child, and Lieutenant Clayton, and the gun used in the attempted murder of Captain Carter.

At trial, the State proved its case largely through eyewitness testimony. In his defense, Loyd offered alternative theories of self-defense and insanity. Loyd testified about his upbringing and history of mental health issues. He then presented his version of the Walmart shooting and confrontation with Captain Carter. Finally, a clinical and forensic psychologist testified that

Loyd met the legal definition of insanity at the time of the charged offenses.

On rebuttal, the State offered Loyd's Facebook posts that stressed Loyd's critical and hateful views on race and the police. The Facebook posts revealed that Loyd believes there is tension between the police and members of his race, and that physical violence against the police is justified. The State then called two experts to rebut Loyd's assertion that he was insane at the time of the charged offenses.

The jury found Loyd guilty as charged as to each of the five counts of the indictment.

Penalty Phase

During the penalty phase, the State relied on evidence from the guilt phase and presented new evidence about Loyd's history of criminal convictions. The State also presented victim impact evidence through four witnesses and a slide presentation with photographs of Lieutenant Clayton.

After the State rested, the defense called Loyd's friends and family members to discuss Loyd's generosity and devotion to family. Then the defense presented evidence of injuries Loyd sustained

during his arrest. Finally, the defense called four experts to opine on Loyd's mental condition. The State, on rebuttal, called a neuroradiologist who questioned the observations of one of Loyd's experts.

The jury heard closing arguments and, after deliberation, returned with a unanimous recommendation for death. The jury found beyond a reasonable doubt the existence of all the proposed aggravating factors.

Spencer[3] Hearing & Sentencing

After holding a *Spencer* hearing and considering all of the testimony and evidence, the trial court sentenced Loyd to death,[4] finding three aggravators: (1) the defendant was previously convicted of a felony and on felony probation when the first-degree murder was committed (slight weight); (2) the defendant was previously convicted of another capital felony or of a felony involving

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

4. The court also sentenced Loyd to life in prison for attempted first-degree murder; five years in prison for aggravated assault with a deadly weapon; life in prison for carjacking with a firearm; and fifteen years in prison for possession of a firearm by a convicted felon.

the use or threat of violence to the person (great weight); and (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest/the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws/the victim of the capital felony was a law enforcement officer engaged in the performance of her official duties (merged) (great weight). Regarding the statutory age mitigator, the court found that the defendant did prove the defendant's age at the time of the crime (forty-one years old) but gave the mitigator no weight. The court found five nonstatutory mitigators: the defendant's psychological and psychiatric mitigators (moderate weight); the defendant's childhood trauma (moderate weight); the defendant's trauma as an adult (some weight); the trauma of racism (minimal weight); and circumstances related to defendant's offer to surrender and his arrest (minimal weight).

This appeal followed.

ANALYSIS

Loyd raises thirteen challenges to his convictions and death sentence. No challenge warrants reversal. The State raises one

challenge on cross-appeal, which is moot based on this decision. We will address the claims in the order presented.

Loyd's Challenges

Issue I: Venire Members Removed for Cause. Before voir dire, the court, in response to a motion in limine filed by the State, excluded during the guilt phase and limited during the penalty phase any evidence of law enforcement's use of force during Loyd's arrest. Then, during voir dire, the trial judge granted three of the State's cause challenges to prospective jurors who were "in possession of information that ha[d] been ruled inadmissible," referring to the evidence of the use of force. The court mentioned that it was aware of a "long line of cases" establishing that it is reversible error to deny cause challenges to prospective jurors who know of facts that the court excluded.

Loyd argues that this was error, relying on *Ault v. State*, 866 So. 2d 674 (Fla. 2003), and *Gray v. Mississippi*, 481 U.S. 648 (1987). According to Loyd, these cases hold that there is no basis to strike a prospective juror for cause if the prospective juror affirms that he or she could set aside any bias and render a verdict impartially. Because two of the excluded venire members affirmed

that they could do so here and Loyd was precluded from asking the third whether he could do so, Loyd believes that the trial court manifestly erred by striking them for cause. The State responds that *Ault* and *Gray* are not on point and that the trial court properly excluded the prospective jurors. We agree with the State; the trial court did not err by excluding these potential jurors.

We defer to a trial judge's decision to exclude a prospective juror. *Johnson v. State*, 969 So. 2d 938, 946 (Fla. 2007). Indeed, we will overturn a trial court's ruling on a cause challenge only for manifest error, which is tantamount to an abuse of discretion. *Id.* An abuse of discretion occurs when the judge adopts a view that no other reasonable person would take. *Singleton v. State*, 783 So. 2d 970, 973 (Fla. 2001).

A reasonable judge should excuse a prospective juror for cause "if any reasonable doubt exists as to whether the [prospective] juror possesses an impartial state of mind." *Ault*, 866 So. 2d at 683. "[E]xposure to inadmissible and prejudicial information through pretrial publicity is a classic example of a valid ground for a cause challenge." *Hamdeh v. State*, 762 So. 2d 1030, 1032 (Fla. 3d DCA 2000). The trial court's decision to exclude the three prospective

jurors here fits within this standard. Thus, we conclude that the trial court did not abuse its discretion.

Loyd's reliance on *Ault* and *Gray* is misplaced. These cases address the rules for excluding a juror who has a preformed belief about the death penalty. In *Gray*, the trial court removed a potential juror for cause despite her statement that she could ultimately impose the death sentence. 481 U.S. at 654. The Supreme Court held that the trial judge erred, and this error is not subject to a harmless error analysis. *Id.* at 659, 668. *Ault* addressed the same issue and relied on *Gray* to conclude that "it is reversible error to exclude for cause a juror who can follow the instructions and oath in regard to the death penalty." *Ault*, 866 So. 2d at 686. The situation in *Gray* and *Ault* is not present here—the trial court did not excuse the jurors for their views on the death penalty. Instead, the trial court excused the jurors for their knowledge of inadmissible information.

For these reasons, we deny this claim.

Issue II: Jury Instruction on Insanity. Standard Criminal Jury Instruction 3.6(a) states: "[c]lear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such

weight that it produces a firm belief, without hesitation, about the matter in issue." This instruction, Loyd argues, confuses the clear and convincing standard with the beyond a reasonable doubt standard. Loyd believes that because the trial court did not modify the standard instruction to alleviate this confusion, we should remand for a new trial. We disagree.

We addressed the same argument in *Standard Jury Instructions-Criminal Cases (99-2)*, 777 So. 2d 366, 368 (Fla. 2000), in which we approved Standard Jury Instruction 2.03, which is used in Jimmy Ryce civil commitment proceedings and provides the same definition of clear and convincing evidence as Standard Criminal Jury Instruction 3.6(a). In that case, we expressly considered concerns that the proposed definition of clear and convincing evidence overstated "the applicable burden of proof to a level equal to, or even higher than, the 'beyond a reasonable doubt' standard." *Id.* at 368. In rejecting that argument, we concluded that the "proposed definition of 'clear and convincing evidence' is consistent with established caselaw definitions of that term." *Id.* (citing *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994); *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

Loyd's challenge offers no compelling reason why *Criminal Cases (99-2)* is incorrect. Thus, we deny this claim.

Issue III: The State's Remarks About Premeditation During Its Guilt Phase Closing. Because Loyd did not contemporaneously object to the challenged remarks, we review this argument for fundamental error. *Kaczmar v. State*, 228 So. 3d 1, 11 (Fla. 2017). Fundamental error reaches "down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991).

Loyd argues that the State misstated the law defining premeditation when it discussed with the jury the instructions regarding the attempted first-degree murder of Captain Carter. Specifically, Loyd complains that the State told the jury that "premeditated design" means a conscious intent to kill that "has to be present in the person's mind during the act" and that deciding to smack a mosquito on one's arm rather than brushing it off "is an intent to kill that was formed in your mind at the time and during the actual act." Loyd asserts that these unobjected-to statements rise to the level of fundamental error because while the

second sentence of Standard Jury Instruction 7.2 states that the decision to kill "must be present in the mind at the time of the killing," the first sentence of that instruction states that killing with premeditation means "killing after consciously deciding to do so."

At the time the State made the alleged erroneous statements, it was not discussing Standard Jury Instruction 7.2, titled, Murder – First Degree, but Standard Jury Instruction 6.2, titled, Attempted Murder – First Degree (Premeditated). The instructions read and provided to the jury regarding the attempted first-degree murder of Captain Carter were displayed on a screen visible to the jury at the time the State made the alleged erroneous statements. Those instructions were directly quoted from Standard Jury Instruction 6.2 and stated:

> A premeditated design to kill means that there was a conscious decision to kill. The decision must be present in the mind at the time the act was committed. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the act. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the act was committed.

Thus, while Loyd is correct that the premeditated intent to kill must be formed before the act was committed, the State was also

correct in telling the jury that a conscious intent to kill has to be present in the person's mind during the act in order to convict for attempted first-degree murder. The State's argument did not misstate the law and was not misleading when taken in context. The instruction stating that the premeditated intent to kill must be formed before the act was committed was displayed on screen at the time the State was discussing the instruction with the jury, and the trial court read that very instruction to the jury four times before the State's argument. And after the arguments, the court again instructed the jury to follow only the law spelled out in the jury instructions and that no other laws apply to this case. The court also distributed physical copies of the complete instructions to the jury.

Even if we were to conclude that the State's argument was misleading for failing to also tell the jury that the premeditated intent to kill must be formed before the act was committed, we certainly would not find that the alleged error rises to the level of fundamental error such that a verdict of guilty could not have been obtained without the assistance of the alleged error in light of the facts that the "before the act was committed" portion of the

instructions was simultaneously displayed to the jury during the alleged misleading statements and read to the jury four times by the trial court. Thus, Loyd is not entitled to relief on this claim.

Issue IV: Alleged Improper Argument During the State's Penalty Phase Closing. Loyd objects to three distinct comments that the State made during its penalty phase closing argument. We review "trial court rulings regarding the propriety of comments made during closing argument for an abuse of discretion." *Cardona v. State*, 185 So. 3d 514, 520 (Fla. 2016). If the comments were improper, and the court overruled the objections to them, we apply the harmless error standard of review. *Id.* We address each comment in turn.

A. The "obligation" remark

Loyd asserts that the State improperly remarked in its penalty phase closing that the jurors "ha[d] an obligation to . . . try [their] best to reach a unanimous verdict." But Loyd misstates the record. What the State actually said is: "I would suggest to you that as the instructions point out, you have an obligation to give meaningful consideration to everything. And not only that, but that you try your best to reach a unanimous verdict." Loyd argues that the trial

court erred in overruling his objection to this remark based on "misstatement of the law." Contrary to what Loyd first asserts, the State did not command the jurors that they had to reach a unanimous verdict. Although Loyd acknowledged his misstatement of the record in his reply brief, he still argues that it is "just as objectionable" that the State instructed the jurors to try their best to reach a unanimous verdict because it minimized their individualized roles. We disagree.

There was nothing improper about the State's remark. It did not misstate the law. Indeed, the trial court, in accordance with Standard Criminal Jury Instruction 3.10, instructed the jury, "Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict." Nor did the State minimize the jurors' individualized roles, especially when the remark is considered in the context of the State's entire closing argument, in which the State also made the following remarks:

> And while it is true, as you have been told several times, that your decision as to whether or not a sentence of death is appropriate is an individualized decision, that is nothing new to you. That is something you have already done, because what the instructions and the law tell you is that each of you reach an individualized decision, and

> only if you're unanimous that death is the appropriate punishment can it be imposed.
>
> . . .
>
> So you're going to be – it's going to be emphasized to you and I will emphasize to you that you're making an individualized decision.
>
> . . .
>
> This is an important decision and all I am suggesting is that you-all collaborate together understanding you will make an individualized decision to reach a decision that is commiserate [sic] with the task in front of you.

In those comments, the State emphasized rather than minimized the jurors' individualized roles. The trial court did not abuse its discretion in allowing the statement.

B. The remark about mitigating circumstances

Loyd next argues that the State told the jury that it had no need to consider the proffered mitigating circumstance of whether Loyd's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. But again, Loyd misstates the record. The State argued that when considering this mitigating circumstance, the jurors should consider, among other evidence, that they already determined that Loyd knew the difference between right and wrong when they rejected the insanity defense. "The finding of sanity . . .

does not eliminate consideration of the statutory mitigating factors concerning mental condition." *Mines v. State*, 390 So. 2d 332, 337 (Fla. 1980). But "no rule of law states that the [factfinder] must ignore the findings [of sanity] in weighing the mitigating factors." *Globe v. State*, 877 So. 2d 663, 676 (Fla. 2004). Thus, the State's remark was proper, and the trial court did not abuse its discretion.

C. The "piece of paper" remark

Loyd claims that the trial court erred in denying his motion for mistrial over the following remarks from the prosecutor:

> STATE: On the screen in front of you are the judgment and sentence for the Dixon murder. And they tell you what you already know, which is that Mr. Loyd got life sentences not just for the murders of Sade Dixon and her unborn child.
>
> DEFENSE COUNSEL: Objection, Judge.
>
> THE COURT: Overruled.
>
> DEFENSE COUNSEL: Argument.
>
> [STATE]: He was given life for the attempted murder of Ronald Stewart, the attempted murder of Stephanie Dixon Daniels, and the attempted murder of Dominique Daniels. Is another sentence of life appropriate in this case?
>
> DEFENSE COUNSEL: Objection. Improper argument.
>
> THE COURT: Overruled.
>
> STATE: The reality is, it would be another piece of paper in Mr. Loyd's file.
>
> DEFENSE COUNSEL: Objection. Improper argument.
>
> THE COURT: Sustained. Rephrase.

Following the sustained objection, Loyd preserved the issue for appeal when he moved for a mistrial, arguing that the State instructed the jury to rely on nonstatutory aggravation. The trial court denied the motion.

We review "a trial court's ruling on a motion for mistrial under an abuse of discretion standard." *Salazar v. State*, 991 So. 2d 364, 371 (Fla. 2008). A trial court should grant a mistrial only when the error is so prejudicial that it vitiates the whole trial. *Id.* at 372. This occurs when a prosecutor's comments "deprive the defendant of a fair and impartial trial, materially contribute to the [verdict], [are] so harmful or fundamentally tainted as to require a new trial, or [are] so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994). Under this exacting standard, we find that the trial court did not abuse its discretion in denying the motion for mistrial.

First, this was one comment in an otherwise long closing argument. The judge properly instructed the jury on the correct law and to follow only the law in the jury instructions. Additionally, the previous judgments and sentences that the State referenced

were in evidence for the jury to consider. Indeed, Loyd addressed the evidence and directly rebutted the State's closing remark:

> For you to say, Oh, oh, well, you know, just it's a piece of paper, if we don't give him anything but death, like [the State] suggested, is a serious problem with justice. . . . [Y]ou cannot decide that because he got [life] once before I'm going to give it to him again.

Overall, the court thoroughly considered the motion and did not believe that this remark rose to the level required to grant a mistrial. The trial court heard the remark and was best able to gauge its consequences. *See Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1023 (Fla. 2000).

In the end, none of the three remarks that Loyd challenges warrant reversal. We deny relief on this claim.

Issue V: The Burden to Prove Mitigating Circumstances.

Standard Criminal Jury Instruction 7.11 states, "It is the defendant's burden to prove that one or more mitigating circumstances exist. . . . [T]he defendant need only establish a mitigating circumstance by the greater weight of the evidence." Loyd asked the trial court to omit this language because "[t]here is nothing in [Florida's death penalty] statute that imposes a

burden . . . on [the defendant] to prove mitigating circumstances by any burden of proof." Now, to this Court, Loyd argues that the trial court erred in overruling the objection to the jury instruction on grounds well beyond those made to the trial court. Any argument besides the specific one made to the trial court was not preserved for our review. *Reynolds v. State*, 934 So. 2d 1128, 1150-51 (Fla. 2006) ("To challenge jury instructions, a party must object to the form of those instructions and specifically state the grounds upon which the objection is based." (citing Fla. R. Crim. P. 3.390(d))). Thus, we address only whether the trial court erred in reading the standard jury instruction because in Loyd's view it does not comport with section 921.141(2)(b), Florida Statutes (2021).

To recommend a death sentence, the jury must first weigh "[w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist." § 921.141(2)(b)2.b. Our case law has expounded on how a mitigating circumstance is "found to exist." We have stated that "a mitigating circumstance exists where it is established by the greater weight of the evidence." *Bright v. State*, 299 So. 3d 985, 1000 (Fla. 2020). This is not a novel principle, though; our case law has long recognized that a

mitigating circumstance is established by the greater weight of the evidence. *E.g.*, *Diaz v. State*, 132 So. 3d 93, 117 (Fla. 2013) (noting that it is established law that mitigating factors be proven by a greater weight of the evidence); *Coday v. State*, 946 So. 2d 988, 1000-01 (Fla. 2006) (discussing the evolution of this "basic principle"). In 2009, explicitly based on the case law, we incorporated this burden of proof for mitigating circumstances into the standard jury instructions. *In re Standard Jury Instructions in Crim. Cases-Rpt. No. 2005-2*, 22 So. 3d 17, 21 (Fla. 2009). The jury instruction language has slightly changed since 2009, but its foundation—that mitigating circumstances exist when established by the greater weight of the evidence—firmly remains. Thus, Loyd's argument is meritless, and we deny this claim.

Issue VI: Victim Impact Evidence. During the penalty phase, the State presented victim impact evidence. One piece of evidence that the State displayed was a slide presentation consisting of nineteen photographs of Lieutenant Clayton and one video clip of her speaking to the community. The presentation was set to instrumental music. The trial court overruled a defense objection

to the music. We find that the trial court abused its discretion in allowing the music to play but that the error was harmless.

Victim impact evidence is allowed once the prosecution has offered evidence "of the existence of one or more aggravating factors as described in subsection (6)." § 921.141(8), Fla. Stat. Victim impact evidence must show "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." *Id.* In other words, victim impact evidence must have some connection to the victim. Yet, as the State admitted at oral argument, the music here had no association with Lieutenant Clayton's uniqueness as a human—it was simply background music. Thus, allowing the irrelevant instrumental music to play was error.

This error does not automatically justify reversal. Improperly admitted evidence is subject to the harmless error analysis. *Davis v. State*, 347 So. 3d 315, 324 (Fla. 2022). Loyd "acknowledges that the montage was not maudlin[ ] and was not exploited by the State in argument."

Plus, the court read the jury instruction on victim impact evidence three times throughout the penalty phase, which advised

the jury that it could not consider victim impact evidence as an aggravating factor. As a result, we conclude that allowing the music was harmless and deny relief on this claim.

Also, the jurors were provided physical copies of the instructions. Finally, both the defense in its opening and the State in its charge to the jury repeated what the jurors already knew from the instructions. As a result, we conclude that allowing the music was harmless error, and we deny relief on this claim.

Issue VII: Loyd's Competency to Be Sentenced. Prior to sentencing the trial court conducted a competency hearing. The trial court determined that Loyd was competent to proceed. Now, Loyd argues that the trial court abused its discretion in reaching its conclusion. At the outset, we note that much of Loyd's argument asks this Court to reweigh the evidence, which we will not do. *See Mason v. State*, 597 So. 2d 776, 779 (Fla. 1992) ("It is the duty of the trial court to determine what weight should be given to conflicting testimony."). For the reasons below, we find that the trial court did not abuse its discretion.

"A trial court's decision regarding a determination of competency is subject to review for abuse of discretion, and the trial

court's resolution of factual disputes will be upheld if supported by competent, substantial evidence." *Larkin v. State*, 147 So. 3d 452, 464 (Fla. 2014). "The test for whether a defendant is competent to stand trial is 'whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " *Peede v. State*, 955 So. 2d 480, 488 (Fla. 2007) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

The trial court thoroughly explained the evidence it relied on to make its determination of competency. The trial court found that Dr. Danziger and Dr. Oses "both opined that the Defendant has a factual understanding of the proceedings against him, the charges against him, [and] the range and nature of the penalties, including the fact he might be sentenced to death." Dr. Danziger testified that "there is no issue with [Loyd's] intellectual ability and no issue with his factual understanding." Dr. Oses testified that Loyd's appreciation of the charges and allegations "was acceptable. [Loyd] understood that he was now looking at, you know, the sentencing

phase and that was in conjunction with him understanding that his attorneys were present and the seriousness of the case."

Next, when analyzing whether Loyd had a rational understanding of the proceedings, the trial court acknowledged that the experts presented conflicting testimony. So, the court turned to its own observations. The trial court noted that it had extensive interactions with Loyd over the course of his proceedings. But the court then turned its attention to the current trial because the competency test requires sufficient present ability. The court observed that Loyd "actively participated in his defense throughout the trial. He would object to lawyers ending their examination of a witness and confer with them as to further questions. . . . He constantly communicated with his attorneys at counsel table." Not once during the trial did the lawyers question his competence. The court also observed that Loyd spent hours on the stand testifying and answering questions about the case with ease. The court paid particular attention to the many times during his testimony when Loyd would pause to ask the court whether he could speak about certain issues that he thought were inadmissible based on previous rulings.

The rest of the trial court's order addressed certain observations "so that the record is clear." For example, the trial court found that it was always able to redirect Loyd to the relevant discussion if he ever strayed from such. And the trial court's observations of Loyd's behavior over three years, which never significantly changed, supported Dr. Oses's observations. Overall, the trial court's order made it clear that competent, substantial evidence supports its conclusion. Thus, we deny relief on this claim.

Issue VIII: Equal Protection Challenge to Statute Excluding Felons from the Jury. Before trial, Loyd challenged the entire jury panel on the basis that the statute that excludes felons from serving on a jury, section 40.013, Florida Statutes (2021), violates the Equal Protection Clause of the United States Constitution. The trial court denied this challenge. Loyd now argues that the trial court erred in denying this claim and that we should remand the matter for "further hearing." Loyd offers no authority to support remanding a case for "further hearing" on a pretrial motion without disturbing the convictions and sentences. Even if we could provide such relief, Loyd's argument fails on the merits.

To assess whether a facially neutral statute that allegedly has a disparate impact violates the Equal Protection Clause of the Fourteenth Amendment, courts apply "the rational relationship test unless some evidence of purposeful intent to discriminate has been shown." *United States v. Greene*, 995 F.2d 793, 796 (8th Cir. 1993). To show purposeful intent, Loyd cites two law review articles for the proposition that "Florida's juror disqualification law was enacted as part of an effort to keep Blacks oppressed in the wake of emancipation." In other words, Loyd argues that discriminatory intent underlies the statute because two authors said so. This is not evidence—this is instead a restatement of the conclusion that Loyd is attempting to prove. Repetition cannot substitute for evidence. Thus, Loyd has not met his burden, and the rational basis test applies.

As many courts across the country have found, laws of this sort pass a rational basis test. *See United States v. Barry*, 71 F.3d 1269, 1273 (7th Cir. 1995); *Greene*, 995 F.2d at 795-96 (citing a line of cases holding "that the exclusion from juror eligibility of persons charged with a felony is rationally related to the legitimate

governmental purpose of guaranteeing the probity of jurors"). We agree and deny this claim.

Issue IX: An Express Jury Instruction on Mercy. Loyd requested a special jury instruction and proposed two alternative instructions, each of which expressly told the jury that it could consider mercy in making its sentencing determination. The trial court denied the request and instead used Standard Criminal Jury Instruction 7.11, which stated, in relevant part: "Regardless of the results of each juror's individual weighing process . . . the law neither compels nor requires you to determine that the defendant should be sentenced to death." Loyd asserts that the trial court's denial of a special instruction amounts to structural error, yet Loyd acknowledges that there is contrary precedent from this Court on this issue, namely *Woodbury v. State*, 320 So. 3d 631 (Fla. 2021), *cert. denied*, 142 S. Ct. 1135 (2022). *See also Bush v. State*, 295 So. 3d 179, 210 (Fla. 2020) ("Bush's argument that he was entitled to a jury instruction on mercy is also without merit."); *Downs v. Moore*, 801 So. 2d 906, 913 (Fla. 2001); *Booker v. State*, 773 So. 2d 1079, 1091 (Fla. 2000); *Elledge v. State*, 706 So. 2d 1340, 1346 (Fla.

1997). And Loyd provides no compelling reason why we should overturn our precedent.

In *Woodbury*, the defendant requested similar special jury instructions on mercy. 320 So. 3d at 655-56. The trial court denied the request and read Standard Instruction 7.11 instead. *Id.* This Court affirmed the trial court's ruling "because the instruction that was read to the jury adequately informed the jurors of the applicable legal standard." *Id.* at 656. This Court has even referred to the relevant provision of Standard Instruction 7.11 as the "mercy instruction." *Id.* (quoting *Reynolds v. State*, 251 So. 3d 811, 816 n.5 (Fla. 2018)). "Thus, the court *did* read an instruction on mercy, and although Woodbury might have preferred the wording of his proposed instruction, Standard Jury Instruction 7.11 is not ambiguous when it comes to addressing the jurors' options." *Id.*

"[T]he failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards." *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001). Loyd did not show that "the standard instruction[s] did not adequately cover the theory [of mercy]." *Id.* at 756.

For these reasons, we deny relief on this claim.

Issue X: Death Qualification of Jury. Loyd argues that death qualifying the jury skews it towards guilt and violates the Sixth Amendment to the United States Constitution. Loyd concedes that this Court has rejected this claim before, yet raises it to preserve it for federal review. We have indeed repeatedly rejected this claim. *See Wade v. State*, 41 So. 3d 857, 873 (Fla. 2010); *Chamberlain v. State*, 881 So. 2d 1087, 1096 (Fla. 2004); *San Martin v. State*, 717 So. 2d 462, 467 (Fla. 1998); *San Martin v. State*, 705 So. 2d 1337, 1343 (Fla. 1997). So too has the United States Supreme Court. *See Lockhart v. McCree*, 476 U.S. 162, 173 (1986) ("[T]he Constitution does not prohibit the States from 'death qualifying' juries in capital cases."). We again deny this claim.

Issue XI: The Death Penalty's Constitutionality. Loyd asks this Court to find that the death penalty violates the Eighth Amendment to the United States Constitution. Loyd argues that four factors contribute to this violation: (1) the death penalty no longer matches society's standards of decency; (2) thirty people sentenced to death have been exonerated in Florida; (3) jurors from certain geographical areas are more inclined to recommend a death

sentence; and (4) there are long delays between the imposition of the sentence and the execution of the sentence. The last three factors come from Justice Breyer's dissent in *Glossip v. Gross*, 576 U.S. 863 (2015). We find none of them convincing.

To begin, we have recently rejected argument (4). In *Dillbeck v. State*, 357 So. 3d 94, 103 (Fla.), *cert. denied*, 143 S. Ct. 856 (2023), we emphasized our longstanding precedent that these claims "are 'facially invalid,' including when the defendant's stay on death row exceeded 30 years." Loyd has not persuaded us here to change our position on this argument.

We also can quickly dispose of argument (2). The State correctly notes that exonerations undermine not the sentence but the conviction. Responding directly to Justice Breyer's dissent in *Glossip*, Justice Scalia characterized this argument as internally contradictory and "gobbledy-gook." *Glossip*, 576 U.S. at 895 (Scalia, J., concurring). We too find it hard to understand how alleged issues in the guilt phase render a certain punishment unconstitutional. The same logic would make life imprisonment unconstitutional if enough people serving life are exonerated. This argument has no merit.

Turning to argument (3), we are persuaded by Justice Thomas's *Glossip* concurrence, which adequately explains why this argument is meritless. Justice Thomas stated that relying on the studies that conclude that locality plays too heavily a role in death sentencing "to determine the constitutionality of the death penalty fails to respect the values implicit in the Constitution's allocation of decisionmaking in this context." *Id.* at 901 (Thomas, J. concurring). Indeed, the two provisions in the Constitution memorializing that crimes are tried by a local jury "ensure that capital defendants are given the option to be sentenced by a jury of their peers who, collectively, are better situated to make the moral judgment between life and death than are the products of [these studies]." *Id.* at 902-03. Additionally, "the results of these studies are inherently unreliable because they purport to control for egregiousness by quantifying moral depravity in a process that is itself arbitrary" and dehumanizing. *Id.* at 903. For these reasons, Loyd's argument (3) is unconvincing.

Finally, Loyd's argument (1), that the death sentence is now inconsistent with our society's standard of decency, is similarly unavailing. Again, Loyd relies on Justice Breyer's dissent in

Glossip. The Court's opinion in *Glossip*, however, upheld the constitutionality of the death penalty. 576 U.S. at 867 (majority opinion); *see also id.* at 869 (recognizing that it is settled law that capital punishment is constitutional). Loyd argues that because other states have outlawed capital punishment, it is now unconstitutional. We addressed a similar argument in *Long v. State*, 271 So. 3d 938 (Fla. 2019). Responding to an argument that Florida's three-drug method of execution was unconstitutional because other states have adopted a one-drug protocol, this Court concluded that "Florida's current protocol does not violate the constitution simply because other states have altered their methods of lethal injection." *Id.* at 945 (quoting *Muhammad v. State*, 132 So. 3d 176, 196-97 (Fla. 2013)). In a similar vein, the death sentence is not unconstitutional just because other states have chosen to abolish it. At bottom, the Constitution itself contemplates, in the Fifth and Fourteenth Amendments, that the government may take a life if the government affords the person due process of law. Loyd falls well short of the hurdle it takes to prove that something the Constitution permits is at the same time unconstitutional.

Because none of Loyd's arguments are convincing, we deny this claim.

Issue XII: Extending Atkins v. Virginia*, 536 U.S. 304 (2002).* Loyd asks this Court to extend *Atkins*—which precludes the execution of the intellectually disabled—to prohibit the execution of the severely mentally ill. To start, there is no evidence that Loyd is severely mentally ill. There is evidence to the contrary, however. Regardless, we refused this same request recently in *Wells v. State*, 364 So. 3d 1005, 1016 (Fla. 2023). *Wells* joined a long line of Florida cases and other jurisdictions refusing to extend *Atkins*. *See id.* (citing cases). We adhere to our precedent and deny this claim.

Issue XIII: The Constitutionality of Florida's Death Penalty Scheme. Loyd argues that Florida's death penalty scheme is arbitrary and thus violates the Fourteenth Amendment to the United States Constitution under *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), and *Pulley v. Harris*, 465 U.S. 37 (1984). According to Loyd, the scheme is arbitrary for two reasons: (1) Florida eliminated both the safeguards of comparative proportionality review and the special standard of review that was previously applied in wholly

circumstantial evidence cases[5] and (2) Florida's scheme fails to narrow the class of first-degree murderers eligible for the death penalty.

Recently, in *Wells*, 364 So. 3d at 1015, this Court addressed whether the lack of proportionality review and the "sheer number of aggravating factors in the statute" amounted to an Eighth Amendment violation. We first recognized that we have "repeatedly rejected the argument that the death-penalty statute violates the Eighth Amendment because it fails to sufficiently narrow the class of murderers eligible for the death penalty." *Id.* Eliminating proportionality review did not change that analysis. *Id.* Proportionality review is not integral to the Eighth Amendment. *Id.*

5. In his initial brief, Loyd refers to this as "the 'reasonable hypothesis of innocence' motion for judgment of acquittal," but his citation to *Bush*, 295 So. 3d 179, makes clear that he is indeed referencing the elimination of the special standard of review that was previously applied in wholly circumstantial evidence cases, i.e., "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence," *id.* at 200 (quoting *Knight v. State*, 107 So. 3d 449, 457 (Fla. 5th DCA 2013)).

Loyd adds another alleged infirmity to the argument: the elimination of the special standard of review previously used in cases involving wholly circumstantial evidence. We note that Loyd does not at all explain how eliminating this leads to an arbitrary scheme. Loyd's argument is simply that because the special standard of review was a safeguard, eliminating it contributes to a constitutional violation. His failure to elaborate leaves us little to respond to. That said, this Court eliminated this special jury instruction reflecting this special standard in 1981, *Bush*, 295 So. 3d at 200, and stopped using it as an appellate standard of review in 2020, *id.* at 199. We concluded that it is confusing and incorrect as both a jury instruction and appellate standard of review. *Id.* at 200. Loyd does not show how the elimination of a confusing and incorrect jury instruction or standard of review creates a constitutional problem. Thus, we deny relief on this claim.

The State's Cross-Appeal

The State's Proposed Modification to Standard Criminal Jury Instructions 7.10 and 7.11 and Verdict Form 3.12(e). The State argues that *State v. Poole*, 297 So. 3d 487 (Fla. 2020), eliminated any requirement of "weighing" or "sufficiency" that *Hurst v. State*,

202 So. 3d 40 (Fla. 2016), originally declared and that was reflected in Standard Criminal Jury Instructions 7.10 and 7.11 and Verdict Form 3.12(e) at the time of Loyd's trial. Because we affirm Loyd's convictions and death sentence, we decline to address the merits of this cross-appeal. *See Davis v. State*, 207 So. 3d 142, 158 (Fla. 2016) ("[G]iven our resolution of this direct appeal, we decline to reach the State's cross-appeal.").

Sufficiency of the Evidence

On direct appeal of a death sentence, this Court independently reviews the record to determine whether the jury's verdict on the homicide charge is supported by competent, substantial evidence. Fla. R. App. P. 9.142(a)(5); *Gordon v. State*, 350 So. 3d 25, 38 (Fla. 2022), *cert. denied*, 143 S. Ct. 1092 (2023).

Three eyewitnesses testified at trial about the Walmart shooting. One witness saw Loyd shoot Lieutenant Clayton as he stood over her body on the ground. And another eyewitness testified that Loyd fired the first shot, that more shots were exchanged, and that eventually Lieutenant Clayton fell to the ground while Loyd continued to shoot her. The jury also saw many of Loyd's Facebook posts expressing his shrill animus towards law

enforcement, which the State used to support its premeditation argument.

Additionally, a sheriff's deputy testified that before Loyd's arrest, Loyd was inside a house and twice opened the door, tossing a firearm out each time. An FDLE firearm analyst testified that one of the guns thrown from the house was the handgun used by Loyd to kill Sade Dixon, her unborn child, and Lieutenant Clayton. The other gun was used in his attempt to kill Captain Carter.

We conclude that this is sufficient evidence to support the first-degree murder conviction.

CONCLUSION

We affirm Loyd's convictions and sentence of death.

It is so ordered.

MUÑIZ, C.J., and CANADY, COURIEL, and FRANCIS, JJ., concur.
LABARGA, J., concurs in result with an opinion.
GROSSHANS, J., recused.
SASSO, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LABARGA, J., concurring in result.

I continue to adhere to my dissent in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), wherein this Court abandoned this Court's

decades-long practice of comparative proportionality review in the direct appeals of sentences of death. For this reason, I can only concur in the result.

An Appeal from the Circuit Court in and for Orange County,
Leticia J. Marques, Judge
Case No. 482017CF000826000AOX

Matthew J. Metz, Public Defender, Nancy Ryan, Assistant Public Defender, and Robert Jackson Pearce, III, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida,

for Appellant/Cross-Appellee

Ashley Moody, Attorney General, Tallahassee, Florida, and Doris Meacham, Senior Assistant Attorney General, Daytona Beach, Florida,

for Appellee/Cross-Appellant

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

MARKEITH D. LOYD,

Appellant,

v. CASE NO. SC22-378

L.T. NO. 2017-CF-826

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING

Comes now the Appellant, pursuant to Rule 9.330, Florida Rules of Appellate Procedure, and moves this Court for rehearing of its decision issued November 16, 2023, in this matter. As grounds for this motion, the Appellant alleges:

1. This Court has held in this case that the trial court abused its discretion by allowing instrumental music to play while a montage of photos of the shooting victim was displayed. This Court has further held that the error was harmless. (Slip op. at 21-23) In applying harmless-error analysis to this penalty-phase issue, this Court may have overlooked the specific point of law set out below.

2. This Court cites Davis v. State, 347 So. 3rd 315 (Fla. 2022), where it recently noted that improper admission of evidence is a class of errors subject to harmless-error analysis. (Slip op. at 22, citing id. at 324.) In Davis, this Court relied on Czubak v. State, 570 So. 2d 925 (Fla. 1990) and Castro v. State, 547 So. 2d 111, 115 (Fla. 1989). *See* Davis at 324. Czubak involved an error that took place during the guilt-or-innocence phase of a capital trial. In Castro, this Court held that an evidentiary error was harmless as to the defendant's conviction. However, this Court reversed Castro's death sentence based on the same error.

3. As this Court wrote in Castro,

> [s]ubstantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless as to one is not necessarily harmless as to the other.… While the guilt phase asks the jury to determine whether the defendant committed the crime charged, the penalty phase asks the jury to recommend whether that defendant should be put to death or spend life in prison.

547 So. 2d 111, 115-16 (Fla. 1989). As this Court has similarly noted more recently, in a penalty phase "the ultimate question…is mostly a question of mercy. That stands in stark contrast to… purely factual determination[s]." State v. Poole, 297 So. 3rd 487,

503 (Fla. 2020). The jury's choice during penalty phase is "[a] subjective determination" which "cannot be analogized to" an "objectively verifiable" determination such as whether an element of a charged offense has been proved. Id.

4. This Court should adhere to Castro's holding that evidentiary errors in a penalty phase should not be subject to the same harmless-error analysis applied to trial errors.
5. As this Court correctly held in this case, the musical component of a memorial montage is irrelevant to proper consideration of victim-impact evidence. (Slip op. at 22) Appellant, in raising the victim-impact issue here, has relied on cases which hold that such an exhibit is calculated to appeal solely to emotion. (Initial brief at 79-80) *See* State v. Graham, 513 P. 3rd 1046, 1069 (Alaska 2022) and State v. Hess, 23 A. 3rd 373, 393-94 (N.J. 2011).
6. Given the uniquely subjective nature of penalty-phase decision-making, erroneous admission of evidence which appeals solely to emotion should be treated as *per se* reversible error. This is so because there is no way to calculate to what extent any individual juror's decision was affected by that evidence. As this Court has held, per se reversibility is called for in situations where the

appellate courts "would have to engage in pure speculation in order to attempt to determine the potential effect of the error." Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010).

WHEREFORE the Appellant requests this Court to reconsider the decision issued in this case, to reverse Appellant's death sentence based on the victim-impact issue, and to remand for a new penalty phase.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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APPENDIX C

Supreme Court of Florida

WEDNESDAY, FEBRUARY 7, 2024

Markeith D. Loyd,
Appellant(s)
v.

State of Florida,
Appellee(s)

SC2022-0378
Lower Tribunal No(s).:
482017CF000826000AOX

Appellant's Motion for Rehearing is hereby denied.

MUÑIZ, C.J., and CANADY, LABARGA, COURIEL, and FRANCIS, JJ., concur.
GROSSHANS, J., recused.
SASSO, J., did not participate.

A True Copy
Test:

SC2022-0378 2/7/2024

John A. Tomasino
Clerk, Supreme Court

SC2022-0378 2/7/2024

KC

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ORANGE CLERK
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DORIS MEACHAM
HON. LISA TAYLOR MUNYON
RYAN WILLIAMS

NANCY RYAN

APPENDIX D

IN THE SUPREME COURT OF STATE OF FLORIDA

MARKEITH LOYD,

Appellant,

vs. Supreme Court Case No. SC22-378

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

In this capital case the Appellant, Markeith Loyd, was charged by indictment with five felonies that all occurred on or about January 9, 2017. (R 173-76) Count I charged the premeditated murder of Debra Clayton, a law enforcement officer, while she was engaged in the lawful performance of a legal duty.[1] (R 173) Count II charged the attempted premeditated murder of a second law enforcement officer, Joe Carter, who was also engaged in the lawful performance of a legal duty.[2] (R 174) Counts III and IV charged assault with a firearm and armed carjacking, both committed against one Antwyne Thomas.[3] (R 174-75) Count V charged possession of a firearm while a convicted felon.[4] (R 176) The parties proceeded in 2021 to a jury trial before Circuit Judge Leticia Marques, where Appellant was convicted of all five charges. (R 4075-77) A penalty phase and Spencer hearing ensued, and Judge Marques ultimately sentenced Appellant to death on Count I with consecutive prison sentences on the other counts. (R 4793-98)

[1] Pursuant to Sections 782.04 and 775.0823, Florida Statutes (2017).
[2] Pursuant to Sections 782.04, 777.04, and 775.0823, Florida Statutes (2017).
[3] Pursuant to Sections 784.021, 812.133, and 775.087, Florida Statutes (2017).
[4] Pursuant to Section 790.23, Florida Statutes (2017).

As Judge Marques noted in her sentencing order, "intertwined" charges were filed in a 2016 case. (R 4806) In that other case ("the Dixon matter"), Mr. Loyd was convicted, after a jury trial, of fatally shooting his girlfriend Sade Dixon, of causing the death of her unborn child, and of attempting to kill three of her family members with a firearm.[5] (R 4807-08) The State sought the death penalty as to Ms. Dixon; the jury returned a verdict of life imprisonment. (R 4808) Appellant was sentenced to five consecutive life sentences by Judge Marques in the Dixon matter in 2019, and the Fifth District Court of Appeal affirmed the convictions and sentences. Loyd v. State, 311 So. 3rd 858 (Fla. 5th DCA 2021). (R 4808) In the Dixon trial Appellant admitted firing the fatal and near-fatal shots and argued he had fired in self-defense. (R 4808) The proof in the earlier case showed that Sade Dixon brought a gun to a verbal argument which preceded those shootings. (R 4807-08)

In its Notice of Intent to Seek Death Penalty in the Clayton case, the State announced that it intended to prove eight aggravating factors. (R 319-20) The allegations were that the victim was a law enforcement officer engaged in a legal duty, that the murder was committed to disrupt or hinder

[5] Ronald Stewart, Stephanie Dixon-Daniels, and Dominique Daniels.

the lawful exercise of a governmental function, and that the murder was committed for the purpose of avoiding arrest. (R 319) The jury eventually found that those three aggravating factors were proved beyond a reasonable doubt; their instructions specified that the three were to be treated as a single aggravator due to their overlapping content. (R 4860-61, 4493) The State's Notice also alleged that the defendant had committed a prior violent felony, and that he was on felony probation at the time Lt. Clayton was shot. (R 319) The jury found that those two aggravators were also proved beyond a reasonable doubt. (R 4860) The Notice alleged three additional aggravators, *i.e.*, that the defendant knowingly created a great risk of death to many persons; that the murder was especially heinous, atrocious, and cruel; and that the murder was committed in a cold, calculated, and premeditated manner. (R 319) The court found that the "great risk of death" and "especially heinous" aggravators were not proven beyond a reasonable doubt, and the State conceded before the jury was instructed in the penalty phase that it had not proved the "cold, calculated" aggravator beyond a reasonable doubt. (T 5945, 6024, 6036, 6402)

PRETRIAL LITIGATION

Before trial, the defense filed motions challenging the death penalty generally. (R 2220-29, 2248-61, 2663-2744) The motions argued that the death penalty no longer accords with evolving standards of decency, and that lengthy delays in its imposition constitute cruel and unusual punishment. The State filed written responses (R 2875-77, 2883-86) and the court denied the motions. (R 5409-10, 5799, 5802, 5860, 6490)

Also before trial, the defense moved the court to declare unconstitutional each of the aggravating factors which were eventually found proven in this case. (R 2212-15, 2233-38, 2277-79, 2309-12, 2411-14). The motions each argued that the respective aggravating factor was overbroad in its application and failed to narrow the class of persons eligible for the death penalty. Those motions were also responded to and denied. (R 2872-73, 2241-42, 5797-98, 6597, 2300-02, 6455, 2343-47, 5803, 2419-20, 5816).

The defense also filed motions objecting to death-qualifying the jury. (R 2268-74, 2275-76) Those motions argued that the United States Supreme Court should recede from its cases approving that practice, in light of that Court's recent history-based approach to construing the Sixth Amendment to the United States Constitution. (R 3579-81) The motions

also argued that contemporary research shows the practice has the effect of skewing juries towards guilt. (R 3582-83) Those motions were responded to and denied. (R 3577-85, 3594-95, 5409, 6711-12)

Other pretrial motions sought a ruling declaring unconstitutional Section 40.013(a) of the Florida Statutes. (R 2314-32, 2854-60) That statute disallows convicted felons from serving on juries. The defense position was that the statute both has racially disparate impact and was enacted with racially discriminatory intent, and that its enforcement violates the Sixth Amendment to the federal Constitution. (R 2332, 2855) The State opposed the motions, and the trial court agreed with the State. (R 2388-91, 2905, 5804-05, 5875)

JURY SELECTION

Between October 8 and October 25, 2021, the parties selected a jury to hear both phases of trial. (T 4-3815) The court granted individual voir dire regarding knowledge of pretrial publicity, attitudes toward the death penalty, and attitudes toward the insanity defense. (R 7360) The venire was split into ten panels; before individual questioning began, in order to jog the potential jurors' memories, each of those panels was read a statement of facts that had been agreed on by the parties, to wit:

> On the morning of January 9th, 2017, Defendant Markeith Loyd is alleged to have entered the Walmart store at 3101 West Princeton Street. Mr. Loyd had an active warrant for his arrest. Orlando Police Lieutenant Debra Clayton attempted to take Mr. Loyd into custody on the information she received regarding Mr. Loyd's involvement in the Dixon homicide when it is alleged Mr. Loyd shot and killed Lt. Clayton following an exchange of gunfire before fleeing the Walmart and eventually being apprehended about a week later. Mr. Loyd's trial for the killing of Sade Dixon and her unborn child began on September 27, 2019, and concluded on October 23, 2019. Mr. Loyd was convicted and sentenced to life without the possibility of parole.

(E.g., T 305-06) Venire members were then asked, in isolation, whether they could set aside knowledge of the Dixon shooting throughout the first phase of the Clayton trial. (E.g., T 503-04, 528, 549)

Three venire members were dismissed by the court for cause solely because they knew the defendant had been severely beaten by police at the time of his arrest. (T 1095-96, 1105-07, 1112-15, 1540-41, 1557-61, 1577-78, 1647-48, 2975, 2981-85) The State had moved, before jury selection, to exclude in both phases of trial any evidence of the officers' use of excessive force; the defense agreed as to first phase, but sought a ruling allowing it to prove up the beating during penalty phase. (R 3166-78, 6490-92, 6499, 6504-05) At the time the jury was selected, the judge had ruled the beating inadmissible in first phase, and had ruled it inadmissible in penalty phase except to the extent it was relevant to any forthcoming

expert testimony regarding when brain damage may have been inflicted.[6] (R 3691-92) Two of the venire members who were removed for cause for that reason stated they could set aside their knowledge of the events surrounding the arrest, and defense counsel sought unsuccessfully to ascertain from the third whether he could set the subject matter aside. (T 1106-07, 1558-59, 2984-85) At the close of jury selection, the defense preserved for appeal the question whether the court had erroneously granted the State's cause challenges over defense objection. (T 3814-15)

PROOF IN THE FIRST PHASE OF TRIAL

The shooting that gave rise to the capital charge in this case was captured on surveillance video, which was entered into evidence and played for the jury. (R 4809; T 3884-86, 3926-35, 4020-32; State's Exhibit 4) The case was defended on alternative bases of self-defense and insanity. (R T 3850-51, 5430) The State conceded in opening statement that it would not become clear, beyond a reasonable doubt, whether the defendant or Lt. Clayton fired first. (T 3844) The lead detective testified at

[6] The court later expanded that admissibility ruling, generally allowing proof during the penalty phase of the defendant's injuries and how they were caused.

trial that the shooting portion of the incident lasted six seconds. (T 4009, 4032, 4049)

Three eyewitnesses testified for the State about parts of the shooting. Takeshia Bryant testified that the defendant, on being confronted by Lt. Clayton, initially ducked behind a pillar, then re-emerged with his gun drawn. Ms. Bryant could not say at what juncture the officer drew her gun, and could not say who fired first, as she (Ms. Bryant) had taken shelter behind a car. (T 3899-3902, 3922-23) Ms. Bryant testified that after the shots she was hearing ceased, she saw the defendant fire a final shot while standing over the officer. (T 3903) At the time he was wearing a black T-shirt with “SECURITY” printed on it. (T 3889)

Julia Johnson testified that she heard the officer say “get on the ground;” that the officer had her gun out at that time; that she then saw the defendant bolt away from the officer; and that she saw the officer pursue him. (T 3945-47, 3953) Ms. Johnson’s view was obstructed from that point; she heard multiple shots, but did not see who fired first. (T 3947) She testified that she believed, from what she could hear, that it was the officer who fired first. (T 3948)

Monica Pridgeon testified that she also saw the start of the confrontation; what she recalled was that the officer had her hand on her holstered gun when she ordered the defendant to get down. (T 3966-67) Ms. Pridgeon also testified that she saw the defendant fire the first shot, and that "he just kept shooting her when she was on the ground." (T 3967-70) She admitted on cross-examination that it was important to her to help the prosecutors. (T 3973)

Medical examiner Dr. Joshua Stephany testified that Lt. Clayton died from one of four bullet wounds; the projectile that caused that wound entered her neck. (T 4225, 4246) One of the other bullets entered her leg, one caused a superficial wound to her abdomen, and the other caused a serious but non-fatal wound to her abdomen. (T 4231-39) The doctor's opinion was that Lt. Clayton could still have fired her gun after the three non-fatal wounds were inflicted. (T 4245) He could not establish how she and her assailant were positioned at the time the shots were fired, and could not testify in what order the shots were fired. (T 4237, 4225-26) There was no stippling associated with any of the wounds, indicating the shooter was at least three feet away when he fired each shot. (T 4228-29, 4231, 4235-36, 4238)

The State established that Lt. Clayton's gun was a 9-mm Sig Sauer 226 semiautomatic pistol, and that the gun the defendant had at Walmart was a .40-caliber Smith & Wesson semiautomatic pistol. (T 4262-63, 4332, 4339, 4342-44, 4459, 4471-73, 4478-79) Eight projectiles from each of those firearms were found in the Walmart parking lot. (T 4052-53, 4449-50, 4471-73, 4478-79)

Captain Joseph Carter of the Orange County Sheriff's Office testified that he joined the pursuit of the suspect after the news of Lt. Clayton's shooting was radioed. (T 4076, 4079-84) He spotted a car that matched the description of the suspect's vehicle and followed it, with lights and siren activated, until it parked in the Royal Oaks apartment complex. (T 4084-87) He parked behind it at an angle so as to give himself cover, and started to emerge from his vehicle when he saw the driver's hand come up, and heard two shots fired. (T 4089-90) He maneuvered his car so as to block the suspect's car in, whereupon the suspect fled the apartment complex on foot. (T 4090, 4094-95) A bullet hole was later discovered in a hubcap of Captain Carter's vehicle. (T 4097) A crime scene technician testified that she found one spent casing in the Royal Oaks parking lot. (T 4454-55) That casing, per an FDLE analyst, was expelled from a gun that was in the defendant's possession on the day he was arrested. (T 4474-75; see 4332-

45) The court, in its sentencing order, found that one round was fired toward Captain Carter. (R 4809)

Antwyne Thomas testified that he lived at Royal Oaks in 2017, and that on the morning of January 9 he arrived home about 7:15 a.m. (T 4102-03) As he mounted the stairs a black man in a black shirt that read "SECURITY" pointed a gun in his face and demanded his keys. (T 4111-14) Frightened, he complied by throwing his keys toward the man. (T 4114-15) Mr. Thomas identified the defendant in court as the man who confronted him. (T 4121)

Orange County Deputy Charles Ashworth testified that in January of 2017 he was assigned to a task force which apprehended fugitives wanted for violent crimes. (T 4188-90) He responded to 1157 Lescot Lane in Orlando on the night of January 17, 2017 to assist in apprehending the defendant. (T 4189-90) Agents surrounded the house; Ashworth estimated that more than a hundred officers responded to the scene. (T 4194, 4204) A person later identified as the defendant opened the front door and tossed two firearms out, then emerged and crawled toward the waiting officers with his hands raised. (T 4194, 4196-4201) The guns were recovered and came into evidence. (T 4332, 4339-46) An analyst from the Florida Department of Law Enforcement established that one of the guns thrown from the house

was the .40-caliber weapon used in both the Dixon and Clayton shootings. (T 4477-80; see T 4329-31) As noted, the other was used at the Royal Oaks complex. (T 4332-45, 4474-75) At the time of his arrest the defendant was wearing a bulletproof vest. (T 4211-12) The parties stipulated that the defendant is a convicted felon who has not had his civil rights restored. (T 4492)

The State introduced into evidence fourteen posts the defendant made on Facebook between 2014 and 2016. (R 3787-3804; T 4444) The Facebook posts appear in the record. (R 3792-3804) A 2014 post states "let's die fighting back…as long as they can continue to kill us and get away they will." (R 3793) Another 2014 post reads "tell on the police when they doing wrong…what do you owe them…death if anything crackers." (R 3793) A third 2014 post reads "F protesting…IT'S A TIME TO KILL and our killings will be in defense." (R 3793) In 2016, he posted "I HAVE NO SYMPATHY FOR THESE CRACKERS…They been killing us for hundreds of years and now supposedly some blacks kill four crackers …ALL THEM CRACKERS SHOULD HAVE DIED…Only good cop is a dead cop." (R 3798) Another 2016 post reads "Look how quickly they take a black life…I say eye for an eye life for a life…If we go die let's die on the battle field fighting for our kids to have a better place to live where they don't get shot

because they black." (R 3798) Later in 2016 he posted "I rather us die striking a blow than die on our knees…We need to kill back anything short of that we ain't nothing." (R 3799) More posts emphasized his views that "I rather die than live my life in [a] cell," (R 3802), and "Goals! To be on America's most wanted." (R 3804)

At the close of the State's case, the defense moved for judgment of acquittal, arguing "we believe that they have not proved premeditation." (T 4496) The motion was denied "as to all counts." (T 4497)

Appellant testified in his own defense. (T 4797-4981) He explained that police in the past participated in lynch mobs and that in his view, some of that is still happening. (T 4802) He explained that his intention in the Facebook posts was to encourage self-defense. (T 4818-27) He further explained that when someone looking for a buyer for a bulletproof vest came to a homeless camp where he was staying after the Dixon shooting, he took it as a sign from God. (T 4850-53) He gave his own version of the exchange of fire at Walmart, to wit: he was leaving the store with his head down when he was confronted by a gun in his face. (T 4861-62) He ducked behind his shopping cart and started to run in the direction of some woods; when he heard a shot he drew his gun, turned around, and returned fire. (T 4862-63, 4866-68, 4956, 4958) He described the incident as "a gun battle,"

and testified that the officer was still firing after she hit the ground, and that "when she stopped shooting I stopped shooting." (T 4868, 4871-72, 4960) He specified that he fired toward the officer's bulletproof vest. (T 4867-68, 4871, 4960) Mr. Loyd emphasized that his focus was on the officer's gun. (T 4968) Asked by counsel why he didn't just run from the scene, he answered "I just turned my back, and she just tried to shoot me. If I turn my back again, I'm gonna get shot in the back." (T 4969, 4959-60) In response to further questioning, he clarified that he believed his life was in danger and that he had to return fire to defend his life. (T 4870, 4959)

As to the confrontation with Captain Carter at the Royal Oaks apartments, the defendant's testimony was that he fired a warning shot before he turned and ran from the scene. (T 4873)

Asked on cross-examination if he had ever been prescribed drugs for any mental-health condition, the defendant responded "no, I don't believe in medication." (T 4912, 4922) Asked about the insanity defense, he responded "[t]his is the defense that my lawyer [and] the psych, that's what they came up with." (T 4945) Also during cross-examination, the following took place:

STATE: So [you acquired] guns to protect yourself, right?

DEFENDANT: Yes.

STATE: Now at this time you were a convicted felon, correct?

DEFENDANT: Yes.

STATE: And you knew that it was against the law for you to possess firearms?

DEFENDANT: Yes, but God's law, I can carry it.

STATE: Okay, so you disregarded the laws of the State of Florida for that decision, right?

DEFENDANT: God's law, I have a right to protect myself like anyone else…. You-all made a law saying my people wasn't humans. What that supposed to mean? Does that it make it right? Does that make the law right, when the law says I'm not human?

STATE: So you obey the laws that you think are appropriate, is that fair?

DEFENDANT: I follow God's law.

STATE: …so you knew it was unlawful to do what you were doing, right?

DEFENDANT: It was against the law.

STATE: …Did you tell your probation officer that you were carrying firearms?

DEFENDANT: Of course not.

STATE: Right, because you knew that was illegal? …So it's not as if you didn't know right from wrong. You knew right from wrong, right?

DEFENDANT: Who doesn't know right from wrong?

(T 4925-27)

Psychologist Dr. Jethro Toomer testified for the defense. (T 4983-5070) Dr. Toomer interviewed the defendant for six hours, and concluded

that while Mr. Loyd does not believe he is mentally ill, his presentation and his Facebook posts reveal an ongoing disconnection with reality which amounts to delusional thinking. (T 4993, 4998-99) He described the defendant's mood, during their interview, as "uneven," noting that when he spoke about the Dixon prosecution his mood would become elevated. (T 5005) He perceived a fixed belief on the defendant's part that black people have been, by design, the subject of degradation, harassment, and punishment by white people; that fixed belief is a filter through which Mr. Loyd views the world. (T 4999-5000)

Dr. Toomer testified that psychosis, which he described as a global term indicating a relatively rare break with reality, is present. (T 5019, 5043-44) He also diagnosed post-traumatic stress disorder, bipolar disorder, and schizophrenia, explaining that the symptoms of those disorders overlap to a significant extent. (T 5019, 5141-44) He concluded that although the defendant knew what he was doing at the time he shot Lt. Clayton, and knew the consequences of what he was doing, he did not know it was wrong because of the mental illnesses Toomer diagnosed. (T 5020-21)

The State called neuropsychologist Dr. Michael Gamache and psychiatrist Dr. Tonia Werner to rebut Dr. Toomer's testimony. (T 5170-5262, 5283-5317) The State also called psychiatrist Dr. Michael Maher in

its rebuttal case for a limited purpose. (T 5262-71) Dr. Gamache testified, on direct examination, that after a records review and a face-to-face interview he disagreed with Dr. Toomer's conclusion as to sanity. (T 5180-82, 5199-5200) That disagreement was based in part on his conclusion, based on Mr. Loyd's self-report, that he could not have suffered from any serious mental illness between 2014 and 2017 because during that time he functioned well socially and in work environments. (T 5192-96) On cross-examination, Dr. Gamache explained that he did not believe that a disorder on the delusional/schizophrenia spectrum is present, in that beliefs shared by one's subset of the population are not diagnosable as delusions. (T 5208-09, 5216-18) He elaborated that a Scientologist belief - that humans are immortal aliens encased in mortal shells – is not treated as delusional because Scientologists, worldwide, number in the hundreds of thousands.[7] (T 5261-62)

Dr. Gamache acknowledged that Mr. Loyd has a long-held belief that the criminal justice system is racist and corrupt, but noted that relating present-day racism to the history of slavery is "not uncommon at all. In fact,

[7] A doctor retained by the defense later in the case was asked by the State whether he shared Dr. Gamache's view that an irrational belief is not a delusion if enough people share it. That doctor, psychologist Xavier Amador, responded "you're wrong about that." (R 7140-41)

it's particularly prominent these days as there's been more, sort of, tribalism…about those kinds of things." (T 5215-17) He further noted that between the time of the Dixon shooting and the Clayton shooting, any perception that Mr. Loyd was at risk of death at the hands of police was "a rational perception on his part." (T 5215-16)

Dr. Werner, after a records review and an interview with the defendant, also disagreed with Dr. Toomer's conclusion as to insanity. (T 5289-95) Her disagreement was based on her own diagnoses, which included only anti-social personality disorder ("ASPD") and cannabis use disorder; she explained that an ASPD diagnosis precludes an insanity conclusion, and further explained that the fact Mr. Loyd evaded police after the Clayton shooting clearly indicates that he knew what he did was wrong. (T 5290-95)

As noted, psychiatrist Michael Maher was called in rebuttal for a limited purpose, in that he had formed no opinion whether Mr. Loyd was sane at the time of the Clayton shooting. (T 5263, 5269-71) The State was allowed to establish that Dr. Maher had concluded that Mr. Loyd was sane at the time of the Dixon shooting. (T 5265) On cross, the defense elicited Dr. Maher's views that Mr. Loyd suffers from a chronic psychotic condition in that he harbors delusions, and that he also suffers from post-traumatic

stress disorder. (T 5273) Dr. Maher also testified that he had reviewed the results of an MMPI-2 test administered in this case; the results indicated to him that Mr. Loyd under-reports, rather than exaggerates, his symptoms. (T 5275-77)

JURY INSTRUCTIONS AND CLOSING: PREMEDITATION

In its first-phase closing, the State argued as follows:

> …What exactly does "premeditated design" mean? …What it means is a conscious intent to kill. And that conscious intent has to be present in the person's mind during the act. So the example I would give you is – all being Floridians familiar with mosquitoes. You are sitting on your front porch, a mosquito lands on your arm. You look down and you see it and you have a decision to make. Do you brush it off? Do you smack it? There is a conscious choice in your mind to do one or the other, and it may take a matter of seconds to make that decision; but if you smack it down, that is an intent to kill that was formed in your mind at the time and during the actual act. And that is all that is necessary to prove premeditation in the State of Florida.

(T 5408-09) There was no objection to that argument. The jury had been instructed, pursuant to the standard instruction as to premeditation, as follows:

> Killing with premeditation is killing *after* consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of *time that must pass between the formation of a premeditated intent to kill and the killing*. The period of time must be *long enough to allow reflection* by the defendant. The premeditated intent to kill must be formed *before* the killing.

(T 5360-61; R 4020-21) (emphasis added)

JURY INSTRUCTIONS: INSANITY

The defense sought, by motion, to modify the standard criminal jury instruction on insanity, no. 3.6(a). (R 3782-85) The standard paragraph addressed by the motion provides that "[a]ll persons are presumed to be sane. The defendant has the burden of proving the defense of insanity by clear and convincing evidence. Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and *of such weight that it produces a firm belief, without hesitation, about the matter in issue*." The motion sought to delete the italicized clause, and replace it with "of such weight that it is sufficient to persuade you the Defendant's claim is highly probable." (R 3782) The motion also sought clarifying language to follow, to the effect that the "clear and convincing" standard occupies a middle ground between the "proof beyond a reasonable doubt" standard and a "greater weight of the evidence" standard. (R 3782) The State opposed the motion; it was denied, and the standard language was read to the jury. (T 3584-85, 5391)

The insanity instruction read by the court also included the following standard paragraphs:

> A defendant who believed that what he was doing was morally right is not insane if the defendant knew that what he was doing violated societal standards or was against the law.
>
> Unrestrained passion or ungovernable temper is not insanity, even though the normal judgment of the person is overcome by passion or temper.
>
> Although insanity is a defense, mental or psychiatric conditions not constituting insanity are not defenses to any crime in this case. Unless there is clear and convincing evidence that Markeith Loyd was insane at the time of the crimes alleged, any evidence of mental illness, a[n] abnormal mental condition, or diminished mental capacity may not be taken into consideration to show that he lacked the specific intent or did not have the state of mind essential to proving he committed the crimes charged or any lesser crime.

(T 5392; R 4057-58) The jury in first phase was otherwise instructed in accordance with the standard criminal instructions. (T 5356-5400; R 4016-4071)

DELIBERATIONS AND VERDICT IN FIRST PHASE

> After the jury retired, the court stated the following on the record:
>
> THE COURT: After the defense closing, a juror wrote a question, and the question is “Is the DSM-5 in evidence?” I’ve answered the question and my answer is “it is not,” and I’ve signed my name…I’m going to send [the note] back to them since they asked.

(T 5512)

After two hours of deliberations (see T 5510, 5540), the jury asked for a readback of testimony that would establish just what the eyewitnesses at Walmart had seen, and just what the medical examiner had said about Lt. Clayton's continued ability to fire after being shot. (T 5555-56) The jury sought a further readback of testimony that would establish the "exact interaction" between the defendant and Captain Carter. (T 5555) The requested testimony was read to the jurors. (T 5562-5621) After three more hours of deliberations, the jury reached a verdict of guilty as charged as to all counts. (T 5621-24; R 4078-86)

PENALTY PHASE: EVIDENCE

In its limited penalty-phase case, the State proved that on January 9, 2017, the defendant was on federal probation for a drug-related crime. (T 5973-79) As to the aggravating factor of commission of a prior violent felony, the State relied on its previous showing regarding the Dixon matter. (T 5855-79)

In penalty phase the State, in addition, called four victim-impact witnesses and played a slideshow of photos of the victim in life, set to music. Pretrial motions had challenged generally the use of victim impact evidence at all. (R 2283-86, 2449-2500) Specifically, the motions sought to exclude all victim-impact evidence and declare Section 921.141(8) of the

Florida Statutes unconstitutional. The State responded (R 2305-08, 2501-03), and the motions were denied. (R 5825). During penalty phase, the defense objected to the State's intention to use a musical soundtrack to accompany their presentation of a two-minute montage of photographs to the jury during the penalty phase. (T 5724-28). The Court denied the objection, and the State was permitted to present the montage with music. (T 5834).

The defense, in its case, called witnesses to testify to the defendant's generosity and devotion to family. (T 6151-6222, 6301-20, 6367-6401, 6433-46, 6668-90, 6743-64, 6841-6900, 7070-7112) The defense also called more mental health-related expert witnesses, and was permitted to put on proof regarding what it argued was disproportionate force used at the time of Mr. Loyd's arrest. Specifically, the court allowed videotaped footage from a helicopter camera of the beating the defendant took. (T 6085-88) A still photo of the defendant at the police station, depicting his injuries, came into evidence. (T 6295) A detective from the Sheriff's Office testified that the defendant sought medical attention before his interrogation, but that Orlando Police officers delayed a trip to the hospital until afterward. (T 6717-19) A medical doctor who reviewed the defendant's hospital records from January 17, 2017 testified that he had

suffered a “burst” fracture of one or more orbital bones, and that his eyeball had burst in the process. (T 6425-26)

As to mental health, the defense in penalty phase recalled Dr. Michael Maher, one of the psychiatrists who had testified in the first phase; called another M.D., neurologist Dr. Geoffrey Colina; and called two psychologists, Drs. James Campbell and Marvin Dunn.

Dr. Maher testified that a finding of sanity by no means precludes a finding that mental illness is present. (T 6909) After spending five hours interviewing Mr. Loyd, he diagnosed psychosis NOS (not otherwise specified) with delusional features, as well as traumatic brain injury. (T 6915, 6926) He explained that a diagnosis of psychosis means the individual is out of touch with reality, in that he experiences delusions, hallucinations, or disordered thought. (T 6926-27; see T 6915-16) Dr. Maher acknowledged that at times Mr. Loyd has the ability to act rationally. (T 6994, 6997-98) He explained that psychotic symptoms typically ebb and flow, sometimes dramatically, and that while some psychotic patients are disabled in the professional and social spheres, others can maintain a normal outward appearance. (T 6931-32)

Dr. Maher noted that Mr. Loyd does not believe he is mentally ill. (T 6929) The doctor disagreed, pointing to Mr. Loyd’s belief that he has a

special role to play in the Messiah's mission to save souls, and his related belief that he is being attacked and maligned by unseen powerful forces in the struggle to save those souls. (T 6938-39) Dr. Maher rejected the conclusion that Mr. Loyd suffers from ASPD, despite the criminal behavior the State had proved, because he can and does maintain good relationships. (T 6946-47)

On cross and redirect, Dr. Maher explained that the diagnoses given by the various defense experts in this case are not in fact inconsistent, in that "critically" they all feature a finding of a psychotic component. (T 6989-93, 7000-01) He also explained that the defendant's courtroom outbursts reflect poor impulse control, which he believes is consistent with his untreated mental problems. (T 7004)

Dr. Colino, the defense's neurologist, diagnosed the defendant with organic psychosis NOS, explaining that "organic" in this context means originating in the brain, rather than drug-induced. (T 6450, 6511-12) The defense displayed images of the defendant's brain while Dr. Colino pointed areas where he perceived scarring and other abnormalities. (T 6482-6510) He agreed with Dr. Maher that the defendant presents as "incredibly" tangential and obsessed, displaying hyper-religiosity, a grandiose self-image, and "persecutory" thought. (T 6459) Dr. Colino explained that those

symptoms, across cultures, can be found in patients with organic psychoses. (T 6511) He compared the defendant's multiple distorted perceptions to the view in a fun-house mirror, and testified that Mr. Loyd's inability to check those distorted perceptions leads him to be unable to conform his behavior to the requirements of law. (T 6512-13)

Psychologist Dr. James Campbell diagnosed the defendant with post-traumatic stress disorder, citing various violent events the defendant had experienced and witnessed. (T 6591-96) He described the symptoms of that disorder as intense emotional reactivity and a heightened "fight or flight" response to events. (T 6613) Like Dr. Maher, he rejected an ASPD diagnosis, because in his view Mr. Loyd does not lack empathy. (T 6619)

The other defense psychologist at the penalty phase, Dr. Marvin Dunn, is a retired psychology professor from FIU who currently specializes in "community psychology." (T 6768-69, 6779-80) He described that field as focusing on external actors – both institutions and individuals – that influence emotional development. (T 6779-80) He gave his opinion that Mr. Loyd experiences an extreme degree of "cultural paranoia" focused on police abuses, to a degree Dr. Dunn has never come in contact with. (T 6803) He described Mr. Loyd's perceptions as "so distorted, so dysfunctional, so beyond the pale… [he harbors] an extraordinary amount

of bias" regarding race relations. (T 6803) Dr. Dunn concluded that the defendant's beliefs are not a product of rational thought, but instead constitute a delusional belief system. (T 6827)

In rebuttal, the State called neuro-radiologist Dr. Geoffrey Negin, who disagreed with most of the observations Dr. Colina had made regarding the brain scans they had both analyzed. (T 7226-65)

PENALTY PHASE: ARGUMENT OF COUNSEL

The defense filed a motion seeking to limit argument by the State in its penalty-phase closing. (R 2927-31) The motion objected, *inter alia*, to any argument that would misstate the law, ask the jury to send a message to the community, inflame the passions of the jury, or rely on a non-statutory aggravating circumstance. (R 2928-31) When the motion was called, the court announced "State, both sides need to follow the rules in closing arguments. Everybody clear on that?" The State responded "we are." (R 5876-77)

Early in its penalty phase closing, the State told the jurors "you have an obligation to…try your best to reach a unanimous verdict." (T 7439) The defense immediately responded "objection. Misstatement of the law." (T 7439) The trial court overruled that objection in the jury's presence. (T 7440) In defense counsel's closing, he argued that the prosecutor "was

trying to shift the law into his favor, about going back there and… acting as one…. That's all incorrect. If you read the jury instructions, I'm right, he's wrong." (T 7503) A State objection was sustained, again in the jury's presence. (T 7504)

In his penalty-phase opening, defense counsel stated "I don't want you to discount Dr. Toomer because you voted against the insanity. I respect your decision…. What I want you to focus on with Dr. Toomer is that "delusional thinking" definition that he gave." (T 5785-86) At the penalty phase charge conference, counsel for the State acknowledged that the proof supported an instruction on the statutory mitigating factor that the defendant's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired. *See* Section 921.141(7)(f), Florida Statutes. (T 7347-48) However the State, in its penalty-phase closing, argued as to the "conform his conduct" statutory mitigator, "you-all have already made this determination by rejecting his insanity defense. You determined that he knew the difference between right or wrong." (T 7464) Defense counsel responded "objection, misstatement;" the court overruled the objection. (T 7464).

Near the end of the penalty-phase closing, the following took place:

> STATE: [T]he defense has on several occasions, in fact, I believe every single witness that they called, they brought up the fact that Mr.

Loyd was serving two life sentences in prison. And they believe, I suppose, that that is mitigating.

DEFENSE: Objection.

THE COURT: Sustained, rephrase.

STATE: What I would submit to you is that the fact that Markeith Loyd is already serving a life sentence in this case –

DEFENSE: Objection, may we approach?

THE COURT: Overruled. Go ahead.

STATE: - is no punishment at all.

DEFENSE: Objection.

THE COURT: Overruled.

STATE: That is the evidence and reality before you…. Mr. Loyd got life sentences not just for the murders of Sade Dixon and her unborn child, he was given life for the attempted murder of Ronald Stewart, the attempted murder of Stephanie Dixon Daniels, and the attempted murder of Dominique Daniels. Is another sentence of life appropriate in this case?

DEFENSE: Objection, improper argument.

THE COURT: Overruled.

STATE: The reality is, it would be another piece of paper in Mr. Loyd's file.

DEFENSE: Objection, improper argument.

THE COURT: Sustained, rephrase.

STATE: The question is, is the murder of Lieutenant Clayton the same, or is it so much more? [Video played]

(T 7484-87)

Moments later, at the end of the State's argument, the defense sought a mistrial with regard to the "no punishment at all" line of argument. (T 7491) The judge responded "I sustained that objection," and defense counsel replied "so I'm moving for a mistrial." (T 7491-92) The prosecutor argued "it is no error at all. The defense counsel has told these jurors on multiple occasions, there are documents in evidence, that Mr. Loyd has multiple life sentences…. It is…factual that if they give him a life sentence it has no meaning as to Mr. Loyd's future as an individual. I'm unaware of any case law that prohibits me from making that argument now that they have made the decision to bring it out." (T 7492) Defense counsel responded that the objected-to argument amounted to reliance on a non-statutory aggravating factor. (T 7494-95) Addressing the prosecutor, the judge stated "I would prefer you not have said it, but I don't believe it rises to the level of a mistrial." (T 7498) Defense counsel asked the court to tell the jury "any attempt [by] the State of Florida to downplay the significance of a life sentence should be disregarded." (T 7500) The judge, who had

already noted that in her view any curative instruction would "make the whole problem worse," responded "I'm not giving that instruction." (T 7500)

PENALTY PHASE: JURY INSTRUCTIONS

The State argued before trial that the standard penalty phase jury instructions and verdict form should be adapted to comply with State v. Poole, 297 So. 3rd 487 (Fla. 2020). (R 1628-34) Specifically, the State sought an order eliminating any need for the jury to unanimously agree that the proven aggravating factors are sufficient to warrant death, or to unanimously agree that the aggravation outweighs the mitigation. (R 1631-33) The defense responded that Section 921.141 of the Statutes controls, and precludes the proposed change. (R 1710-12, 3769-71) The defense further argued that the federal constitutional rule that capital proceedings must provide for "heightened reliability" militates against the proposed change. (R 1713-16, 3771)

At a charge conference, the court noted that under Poole and Section 921.141, there is no need for a jury to rule *beyond a reasonable doubt* either that the aggravation is sufficient to warrant execution, or that the aggravation qualitatively outweighs the mitigation. (T 5635) The State objected to any language being read that would require *either* unanimity *or* a beyond-a-reasonable-doubt finding by the jury as to either the sufficiency

question or the "outweighs" question. (T 5638, 5643) The court twice noted that during deliberations, twelve jurors might agree that an aggravator had been proved beyond a reasonable doubt, but only ten might agree that the aggravation was sufficient to warrant death. (T 5644-45, 5648) The court ultimately instructed the jury without making the State's requested changes to the standard instructions. (T 7421-22, 7428-29; R 4485, 4488)

During closing argument, defense counsel argued "sufficiency of the aggravating factors…is an individual decision. And it only takes one to then end this deliberation and come back with life…[if] all the jury believe [the aggravating factors] are sufficient, then you move on to the next section." (T 7550-51) The State objected to "misstatement of the law." (T 7551) The court sustained the objection, advising the jury to follow its instructions. (T 7551)

By a pretrial motion, the defense sought an express penalty phase jury instruction stating that each juror may consider mercy in determining the appropriate sentence. (R 2575-77) The motion acknowledged that the standard instructions state that "even if you find that sufficient aggravators outweigh the mitigators, the law neither compels nor requires you to determine that the defendant should be sentenced to death." *See* Fla. Std.

Jury Instr. 7.11 (Crim.). The requested additional language would have added "[y]ou may always consider mercy in making this determination." (R 2576) The State opposed the motion (R 2578-80, 3327, 6455-58), and the court read the standard language without the requested addition. (T 7429)

Over an objection made at the penalty phase charge conference, the court instructed the jury, pursuant to the standard instructions, that the defense bears the burden of proving mitigation by the greater weight of the evidence. (T 7422) The defense had sought, instead, instructions which would omit any indication that the defense carries any burden of proof as to mitigation. (T 7344-45)

PENALTY PHASE: DELIBERATIONS AND VERDICT

The jurors deliberated for three and a half hours on December 7, and for an hour and a half on December 8. (T 7559, 7565, 7567, 7575) During that time they sent out the question "[s]ince Markeith's arrest, has there been any treatment (psychiatric meds) of any sort been administered to him? Since was diagnosed of various mental illnesses – was anything done to aid in that?" (T 7560-61; Sealed Record at 724) With the agreement of both parties, the court responded that they must rely on the evidence. (T 7560) The jury also sought, and received, a readback of the cross-examination testimony of the defendant's daughter. (T 7567-73) That

cross-examination included her testimony that her father had once alarmed her by conveying paranoid thoughts; asked by the prosecutor, she answered that she did not seek medical help for him at that time. (T 7572; see T 7087-88)

The verdict form indicates the jury found that all five aggravating factors presented to them were proved beyond a reasonable doubt. (R 4860-61) The jurors also checked "yes" as to

- "we the jury find that the aggravating factors are sufficient to warrant a possible sentence of death,"
- "one or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence,"
- "we the jury find that the aggravating factors… outweigh the mitigating circumstances," and
- "we the jury unanimously find that the Defendant…should be sentenced to death." (R 4861-62)

POST-PENALTY PHASE LITIGATION

The parties reconvened before the court on January 7, 2022. (R 7287-7314) At that hearing they again addressed the "life would be no punishment at all" argument made in penalty phase. (R 7288-7301) The

State again asserted “it can’t be said that that comment was misleading or inaccurate or factually wrong in any way.” (R 7291) The defense responded “[t]here are a lot of things that are true about these cases that cannot be argued before a jury,” and added “Mr. Loyd is entitled to individualized sentencing on each case, which the State eliminated.” (R 7297)

A Spencer hearing was held on January 14 and February 7. (R 6938-7170) During that hearing the State called more witnesses to give victim-impact statements. (R 7060-76)

At the Spencer hearing, the defense also called neuropsychologist Dr. Joseph Sesta, who had evaluated Mr. Loyd for the defense but who was not called as a witness in first phase or penalty phase. (R 6992-7023) Like Dr. Negin, he concluded that brain injuries and abnormalities had played no role in the shooting. (R 6996-97) Per his testimony, however, that view does not preclude the presence of major mental illness; his diagnosis is delusional disorder with paranoid and grandiose delusions. (R 6997-98) Dr. Sesta explained that delusional disorder is a psychotic disorder, and that “psychosis” is an overarching term which also takes in schizophrenia and schizoaffective disorder. (R 6998) He rejected a schizophrenia diagnosis because those patients – as distinct from those who suffer from delusional disorder - usually cannot interact with others

normally. (R 6998-99) He distinguished Mr. Loyd from other black men who share his beliefs about American policing by pointing to his MMPI-2 score on the "paranoid scale," which was elevated "to clinical levels." (R 7002-03)

Between the Spencer hearings, on February 6, the defense moved the court to appoint an expert or experts to evaluate the defendant's competence to proceed. (R 4748-51) The motion was based on concerns expressed by another psychologist retained by the defense during January, Dr. Xavier Amador. (R 4749-50) On February 7, when court reconvened for the second portion of the Spencer hearing, the judge agreed to take Dr. Amador's testimony at that time regarding both competency and mitigation. (R 7085) Also on February 7, the court appointed Drs. Jeffrey Danziger and Katherine Oses to evaluate Mr. Loyd's competency. (R 7087-88, 7175)

Dr. Amador testified on February 7 that he met with Mr. Loyd twice on Zoom, on January 21 and February 3, and concluded that he lacked the ability to consult with counsel with an appropriate degree of rational understanding, lacked the ability to disclose pertinent facts to counsel, and lacked the ability to manifest appropriate courtroom behavior. (R 7107-10) He acknowledged that per his reading of the trial transcript, clearly Mr. Loyd has moments of clarity, in that his testimony was "responsive in a structured manner." (R 7117-18) However, Dr. Amador testified that during

their 2022 interactions he was completely unable to re-direct Mr. Loyd's attention from the deficiencies he saw in the court system's handling of the Sade Dixon matter. (R 7121-22) Amador acknowledged that he only works with defense counsel, but noted that in "the overwhelming majority" of cases he has found their clients to be competent. (R 7126, 7165)

A competency hearing was held February 21. (R 7172-7282) At that hearing, the court noted that the Spencer hearing had concluded, and that there was no further opportunity under the Criminal Procedure Rules for either party to introduce testimony, or for the defendant to speak on his own behalf. (R 7175-76) The defense argued that under the Rules the court could not proceed until a competency finding was made. (R 7176, 7263-64) The judge questioned one of the doctors she had appointed, Dr. Jeffrey Danziger; he responded that the defendant would understand a death or life sentence if either were to be announced, and would understand his appeal rights. (R 7218-19) When she asked Danziger "what is it he would not be competent to do at…sentencing?" he responded "my opinion would be he would factually understand what you were doing, but rationally, the idea that you are lawfully sentencing him in your role as an impartial judge…that, through the prism of his delusional mind, he would not grasp." (R 7219) The court eventually ruled that "[t]he Defendant must be

competent in order to proceed with sentencing," citing Rule 3.214, Fla. R. Crim. P. (R 4779)

At the competency hearing the defense called as its witness Dr. Danziger, who is a psychiatrist with 34 years' experience in forensic practice, and who has evaluated between 18,000 and 20,000 inmates for competency, sanity, or mitigation. (R 7178) He noted that he tested for malingering in this case, since he had assumed "this is all a last-minute scheme he's pulling to derail the process. But somewhat to my surprise, the malingering test came out clean." (R 7180, 7187) Danziger diagnosed a psychotic disorder "not quite entirely fitting the criteria for schizophrenia." (R 7180, 7206-08) He explained that delusional disorders are part of a spectrum of psychotic disorders that includes schizophrenia, and testified that he "wouldn't quibble too much" in this case over the defense experts' differences as to which of those psychotic disorders is present. (R 7206-07)

Dr. Danziger disagreed with Dr. Amador's conclusion that Mr. Loyd is incapable of manifesting appropriate courtroom behavior; he concluded that "[m]y opinion is he can behave himself in court if he wants to." (R 7223) However, Danziger concluded that as of February, 2022, Mr. Loyd had a factual understanding of the proceedings against him, but lacked a *rational* understanding of the proceedings. (R 7186) While the defendant

understood in 2022 what the various actors in the system were assigned to accomplish, “he expressed a belief that…the defense team are aware of his innocence, [and] that [this view has something] to do with blood not being tested or bodies being moved. [8] That [the defense team] are all aware of this and [are] deliberately working against him as part of a plot to have him killed… He believes [the proceedings are] essentially a sham.” (R 7186-88)

As part of his inquiry into whether Mr. Loyd could consult with counsel with a reasonable degree of rational understanding, Dr. Danziger asked one of the lawyers on the defense team, Teodoro Marrero, “can you work with your client?” (R 7188) Per Danziger Marrero responded “no, we cannot, because he continually perseverates on this issue of…you-all are working against me, tell me about the body being moved, tell me about the blood that wasn’t tested.” Dr. Danziger expressed his understanding that this “is not a rational defense. So in that sense, his ability to consult with

[8] Mr. Loyd addressed the court on several occasions, over the course of the Clayton case, about his beliefs that just after the Dixon shooting, the Dixon family moved the bodies of Sade and her brother Ronald; that blood testing would reveal their interference; that the fact of their interference would tend to show his innocence in the Dixon matter; that a press release issued by police just after the Dixon shooting was inaccurate and was deliberately intended to inflame the public; and that proof of these facts would make a crucial difference to the Clayton jury. (R 6501, 6530, 6535, 6554, 6475, 6997, 7052-59, 7329, 7336)

counsel, directly because of mental illness, is in my opinion unacceptably impaired." (R 7189)

The State called the third expert appointed by the court, psychologist Dr. Katherine Oses. (R 7227-63) She reported that that Mr. Loyd, during their conversation on February 10, did consistently return to his views that the legal system was biased against him, that he "didn't trust anyone," and that he "did focus somewhat on the blood evidence and the body being moved." However, in her view, he was cooperative and "oriented to date, person, place, time," and she was able "for the most part" to get him to stay on her choice of topics. (R 7233-38, 7242) Dr. Oses perceived no psychosis, concluding instead that the defendant's preoccupations are typical of antisocial personality disorder. (R 7239-40) She agreed with Dr. Danziger that no malingering was present. (R 7242)

Dr. Oses concluded that the defendant's appreciation of the charges and appreciation of the range of possible penalties are both "acceptable." (R 7243) In contrast, she characterized as "likely acceptable" his understanding of the adversarial nature of the system, his ability to disclose pertinent facts to counsel, his ability to testify relevantly, and his ability to manifest appropriate courtroom behavior. (R 7244-48) As to that last criterion, she reported that Mr. Loyd "told me that…he did not plan to

present with appropriate courtroom behavior." (R 7242) Her overall conclusion was that the defendant was competent to proceed. (R 7248)

The defense argued that characterizing a person's abilities as "likely acceptable" "is another way of saying…'I don't know.' " (R 7269) The State, in its argument, noted that Mr. Loyd has not previously been found incompetent. (R 7273) The defense rejoined that "[a]s the Court is well aware, competency waxes and wanes." (R 7278)[9] Defense counsel further noted that at that moment, during the competency hearing, the defendant was urging her to proffer a police report which examined the trajectory of the bullets that were fired at Sade Dixon's house. (R 7280)

The court on February 24 filed an order finding the defendant competent to proceed. (R 4779-89) In the order, the court noted that the defendant had been ruled competent before the Dixon trial when the defense first brought such concerns to the court's attention, had sensibly realized before trial that he was too limited by his inmate status to successfully represent himself, and had testified at trial in a relevant fashion. (R 4784, 4786, 4787) The court concluded that Mr. Loyd "has a

[9] Dr. Danziger so testified, as to both competency and the symptoms of psychosis, at the competency hearing. (R 7198) Drs. Sesta and Amador testified similarly at the Spencer hearing. (R 7011-12, 7168) Dr. Maher testified in the penalty phase that the intensity of such symptoms ebbs and flows, "sometimes very dramatically." (T 6932)

reasonably rational understanding of the proceedings against him." (R 4785) The court in its order did not acknowledge that four doctors had emphasized in this case that psychotic symptoms are not static, but ebb and flow.

In its order the court also concluded that "throughout this trial the Defendant demonstrated an ability to control himself when he wished to." (R 4785) The record shows that at a motion hearing in 2019, the defendant was removed from the courtroom after telling the judge "watch your m*****-f****** tone. F*** you, ho." (R 7408-09) During the penalty phase, in the jury's presence, the defendant interjected audibly during various witnesses' testimony and during the State's closing. (T 6696-97, 7165-66, 7191-92, 7439, 7485-86) He was again removed from the courtroom after the penalty phase verdict was returned (T 7585) and during the Spencer hearing. (T 7090-99)

Also in the competency order, the court acknowledged the concerns Drs. Danziger and Amador expressed about the defendant's overwhelming persistence in objecting to how the Dixon crime scene was handled. (R 4781-82) The court characterized that preoccupation as an indication that "he simply refuses to accept his guilt and espouses a defense theory that has been rejected by two separate juries." (R 4788)

SENTENCING

The parties and court reconvened on March 3, when the court pronounced a sentence of death on Count I with consecutive maximum prison terms on each of Counts II to V. (R 7384-85) That pronouncement was accompanied by issuance of a formal sentencing order on all five counts (R 4793-98) and a written order setting out the trial court's findings underlying the death sentence. (R 4806-31) In its sentencing order, the court gave slight weight to the aggravating factor that the capital felony was committed while the defendant was on felony probation. (R 4811) The court gave the "prior violent felony" aggravator great weight. (R 4812) The court also gave the remaining aggravators – that the victim of the capital offense was a police officer, that the capital offense was committed to avoid arrest, and that the capital offense was intended to hinder a lawful government function – great weight, after treating them as one aggravator due to the overlap in their subject matter. (R 4813)

Also in the sentencing order, the judge noted that in her view the first-phase testimony of the State's experts as to sanity had been more credible than Dr. Toomer's first-phase testimony for the defense. (R 4817) As to penalty-phase testimony, the judge concluded that the proof was "consistent with the diagnosis of anti-social personality disorder." (R 4821)

While assigning that circumstance moderate weight as a mitigator, the court wrote that "[t]here is no credible evidence that this mental health factor profoundly contributed to the defendant's motives or behavior when he murdered Debra Clayton." (R 4821) The judge also found that no brain injury or abnormality had been proven, in that she found the testimony of Drs. Negrin and Sesta on the subject to be more credible than that of Dr. Colino. (R 4822)

As to the statutory mitigating circumstances that deal with mental health-related issues, the court ruled that neither was proved by the greater weight of the evidence. (R 4814-19) Generally, the court found the defense experts' testimony was both "inconsistent" and "contradictory," concluding that "[t]he multitude of…opinions was not especially helpful." (R 4815, 4818) In particular, the court singled out the varying diagnoses the defense experts had reached. (R 4815) The court did not acknowledge testimony by Drs. Sesta, Danziger, Maher, and Amador which explained that apparent inconsistencies in the defense experts' diagnoses were insignificant.

As to non-statutory mitigation not relevant to mental health, the court found that childhood trauma, trauma in the defendant's adult life, and trauma due to racism were all proven, and respectively assigned those circumstances moderate weight, some weight, and minimal weight. (R

4822-26) The court also found that excessive force was used at the time of the defendant's arrest, and gave that circumstance minimal weight. (R 4826-27)

The sentencing order also briefly addressed the comparative proportionality of a death sentence here, concluding that past cases involving similar facts establish that the death sentence is proportional. (R 4827) Timely notice of appeal from the orders of judgment and sentence was filed March 19. (R 4949-50)

SUMMARY OF ARGUMENTS

Point one. Over objection, the court granted three of the State's challenges for cause because the potential jurors knew of information that had been excluded from the first phase of trial. Two of those potential jurors assured the court they could put that knowledge aside; the court did not permit the defense to ask the third if he could do the same. The record shows the three jurors were otherwise able to follow the court's instructions. Dismissing them amounted to manifest error.

Per the governing caselaw, such an error is not subject to harmless-error analysis. This is so because a reviewing court cannot meaningfully consider how a differently composed jury might have decided a case.

The perceived problem with the jurors' service would not have arisen until the penalty phase. Again per the governing caselaw, reversal of only the sentence is for that reason the appropriate remedy.

Point two. The defense unsuccessfully sought, in writing, an amendment to the first-phase jury instruction on insanity. The requested language would have clarified the burden of proof relevant to that defense; the proposed change correctly stated the law and would have affirmatively alleviated potential confusion.

Point three. Whether the proof satisfied the necessary element of premeditation, as to the charges on Counts I and II, was vigorously disputed in argument to the jury. The State, in its first-phase closing, substantially misstated the law that defines premeditation. The misstatement amounted to fundamental error on this record, where during deliberations the jury sought and received a readback of testimony from the eyewitnesses to both shootings. The error should be deemed structural.

Point four. During closing argument in the penalty phase, objections were overruled to two State arguments that patently misstated this Court's caselaw. A third objection was overruled to an argument that relied on a non-statutory aggravating factor. Where a ruling denying an objection to closing is deemed erroneous, the reviewing court places the burden on the beneficiary of the error to show beyond a reasonable doubt that there is no reasonable possibility the ruling contributed to the conviction or death sentence. The State cannot make that showing on this record.

Point five. The defense asked the court to remove from the penalty-phase jury instructions any language that places on the defense the burden of proving mitigating circumstances. Appellant acknowledges that this Court has held that the defense bears such a burden. Appellant's position is that the caselaw adverse to him does not clearly reflect the intent of the

Legislature, has doubtful antecedents, and, in this case, ran afoul of federal caselaw applying the federal Eighth Amendment. The error should be deemed structural.

Point six. Appellant's objection to the use of music to enhance victim-impact evidence was overruled. Appellant suggests that current case-law, read together, suggest a bright-line rule precluding musical accompaniment to any exhibit offered to show the uniqueness of a victim. Appellant requests this Court create such a bright-line rule directing the trial courts to exclude music from victim-impact evidence, except in cases where a victim's musical gifts were part of that individual's unique contribution to the community.

Point seven. Even when a criminal defendant has previously been found to be competent, the trial court must remain receptive to revisiting the issue if circumstances change. Here the court treated the evaluating doctors' testimony as conflicting, and defaulted to her own experience with the defendant to find him competent to proceed. The fact that the doctors had disparate ability to communicate with Appellant reflects only the fact, testified to by four doctors below, that symptoms such as those Appellant contends with ebb and flow. The decision to disregard altogether the

serious concerns two of the three doctors had amounted to an abuse of discretion.

Point eight. Appellant's motion challenging the jury panel presented a colorable, prima-facie claim of equal protection. Since the State's response did not contest the underlying allegations, and since the motion was denied without comment, Appellant seeks remand for a hearing on this issue and, if successful at said hearing, a new trial.

Point nine. Appellant seeks to exhaust for federal review the claim that the error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be ascertained from the record.

Point ten. Appellant seeks to exhaust for federal review the claim that the United States Supreme Court should recede from its own cases, to the extent they preclude recourse to the Sixth Amendment where a capital offense is charged and the jury is death-qualified before the first phase of trial.

Point eleven. Appellant seeks to exhaust the claim for federal review that the death penalty now violates the Eighth Amendment in light of evolving standards of decency.

Point twelve. Appellant seeks to exhaust the claim for federal review that the United States' Supreme Court decision in Atkins should be extended to prohibit the execution of the severely mentally ill.

Point thirteen. Appellant seeks to exhaust the claim for federal review that Florida's capital sentencing scheme is inadequate to protect against the arbitrary and capricious application of the death penalty.

ARGUMENT

POINT ONE

THE TRIAL COURT DISMISSED FOR CAUSE, OVER DEFENSE OBJECTIONS, VENIRE MEMBERS WHO WERE COMPETENT TO SERVE. SUCH AN ERROR IS NOT SUBJECT TO HARMLESS-ERROR REVIEW.

Standard of review. A trial court's determination of juror competency will not be overturned absent manifest error. Ault v. State, 866 So. 2d 674, 684 (Fla. 2003).

Argument. Here, as in Ault, the record supports a finding of manifest error in the court's exclusion, for cause, of competent venire members. In this case jurors 809, 717, and 21 all revealed during individual voir dire that they knew the defendant had lost an eye after being beaten by law enforcement officers at the time of his arrest. (T 1096, 1105, 1540, 1558, 2975) Each of those jurors, on the State's motion and over a defense objection, was excused for cause because evidence of that incident had been excluded by the court as to the first phase and limited as to the penalty phase.[10] (T 1112-15, 1558-60, 1577, 1647, 2982-84)

[10] As noted, the court later expanded that admissibility ruling.

The State, in defending the cause challenges made below, relied on Bolin v. State, 736 So. 2d 1160 (Fla. 1999) and Reilly v. State, 557 So. 2d 1365 (Fla. 1990). In Reilly, a murder case where the defendant's confession had been suppressed, the trial court declined to exclude for cause a venire member who knew about the confession. This Court reversed Reilly's conviction because what the juror knew was "far more damaging …than anything which was actually introduced into evidence." 557 So. 2d at 1367. This Court further concluded it was unrealistic to believe a juror could entirely disregard such a piece of knowledge. Id.

In Bolin, the court trying the case denied individual voir dire, despite news reports which revealed there had been not only a confession but a prior conviction in the case, and despite a ruling excluding from trial all evidence of either the confession or the previous verdict. 736 So. 2d at 1165. Five jurors who admitted they had read about the case served, although counsel had not been permitted, in the group setting, to probe the extent of their knowledge. Id. at 1163-64. This Court reversed the ensuing conviction, based in part on Reilly.

In this case, Juror 809 established that he could presume the defendant innocent, that he could vote for either a death or life sentence, and that he could return a verdict of not guilty by reason of insanity. (T

1088-93, 1101, 1104) Voir dire of Juror #717 established that he could presume the defendant innocent; that he had no religious, personal, or moral objection to the death penalty; that he could think of no category of case that should always result in a death sentence; that he could vote for either death or life; and that he could set aside, in the guilt phase, any knowledge of the Dixon shooting. (T 1542-46) Juror 21 responded that he could presume the defendant innocent, that he believes the death penalty should never be automatic regardless of whether the victim is a law enforcement officer, that he had no doubt that he could vote for either verdict, and that he could set aside knowledge of the Dixon matter during the first phase of trial. (T 2976-81)

Defense counsel further established that jurors 809 and 717 could, during deliberations, set aside their knowledge of how the defendant came to be injured. (T 1106-07, 1558-59) Counsel unsuccessfully asked the court to inquire of juror 21 whether he could also set aside that knowledge. (T 2984-85) Defense counsel preserved, at the time the jury was selected, the question whether the State's cause challenges had been granted in error. (T 3814-15)

In Ault, *supra*, this Court noted that the test for determining a juror's competency to serve is whether he can lay aside any bias or prejudice, and

render a verdict solely on the evidence presented and the court's instructions on the law. 806 So. 2d 674, 683. A venire member must be excused for cause where there is a reasonable doubt that he is impartial. Id. In Ault, a potential juror was excluded for cause because she opposed the death penalty. Id. at 684-87. This Court held that voir dire had failed to establish that her personal views would substantially impair her ability to follow the court's instructions on the law. This Court accordingly reversed Ault's death sentence, applying Gray v. Mississippi, 481 U.S. 648 (1987), where the same disposition was reached on facts indistinguishable from those in Ault.

Here, as in Ault and in Gray, jurors were lost to the defense although there was no question as to their ability to follow the court's instructions. The error in Ault and Gray was based on the faulty perception that the jurors in question could not set aside their personal opinions on substantive law; the error here is based on the faulty perception that the jurors could not set aside a presumed visceral reaction to a circumstance which was ruled to be admissible in the penalty phase, albeit for a limited purpose. Bolin and Reilly are distinguishable here: the juries in those cases were tainted by knowledge of facts that were patently more prejudicial to the defense than anything the jury would ultimately hear. The excluded jurors

in this case, in contrast, knew something which the jury would ultimately learn, even pursuant to the court's pretrial order. What the excluded jurors knew here, further, was in no way likely to eviscerate the impact of the State's case, in light of the videotaped evidence of the charged shooting. Dismissing the three jurors thus amounted to manifest error.

According to both the United States Supreme Court and this Court, the error identified in Gray and Ault is not subject to harmless-error analysis. This is so as a practical matter, because a reviewing court cannot meaningfully consider how a differently composed jury might have decided a case. Gray, 481 U.S. at 660-66; Ault, 866 So. 2d at 686. *See generally* Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010).

Here as in Gray and Ault, the jurors' presumed disability would not have arisen until the penalty phase. Reversal of the sentence of death is for that reason the appropriate remedy.

POINT TWO

THE DEFENSE SOUGHT TO MODIFY THE STANDARD JURY INSTRUCTION ON INSANITY. THE TRIAL COURT ERRED IN DENYING THE PROPOSED CHANGE, WHICH WOULD HAVE CLARIFIED THE DEFENSE'S BURDEN OF PROOF.

Standard of review. The question whether a standard jury instruction is confusing or misleading comprises a pure question of law and is thus subject to *de novo* review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

Argument. The defense at trial unsuccessfully moved to modify the standard criminal jury instruction on insanity, no. 3.6(a). The standard paragraph addressed by the motion correctly states that "[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence." *See* Section 775.027(2), Florida Statutes. Instruction 3.6(a) goes on to state that "[c]lear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and *of such weight that it produces a firm belief, without hesitation, about the matter in issue*." The defense sought to delete the italicized clause, and to replace it with "of such weight that it is sufficient to persuade you the Defendant's claim is *highly probable*." (Emphasis added.) The motion also sought clarifying language

to follow, i.e., "[clear and convincing proof] is a higher standard of proof than a preponderance of the evidence, but less exacting than proof beyond a reasonable doubt. A preponderance of the evidence is enough evidence to persuade you that the Defendant's claim is more likely true than not true." (Emphasis added.) The request was denied, and the jury was read the standard instruction on the burden of proving insanity.

In a criminal case, in order to be entitled to a special instruction, the defendant must show (1) that the proposed instruction was supported by the evidence, (2) that the standard instructions do not adequately cover the affected subject matter, and (3) that the proposed instruction is a correct statement of the law, and is in itself neither misleading or confusing. Stephens v. State, 787 So. 2d 747, 756 (Fla. 2001). All three conditions are met in this case.

As to (1), an instruction on the burden of proof is always relevant to what the jury must consider in order to convict. *See* Yohn v. State, 476 So. 2d 123 (Fla. 1985), where this Court held that the standard instruction on the then-existing insanity defense did not completely and accurately state the law governing the defense, in that it did not establish where the burden of proof lay.

As to criterion (2), the standard language in instruction no. 3.6(a) does not *adequately* cover the affected subject matter from a layman's perspective. The standard instruction that explains how to weigh an insanity defense is not clearly different from the standard instruction that explains how to apply the "beyond a reasonable doubt" standard. All criminal juries are instructed that their doubts as to the State's case are reasonable, if their view that the defendant has been proved guilty "*is not stable but…wavers and vacillates*." Fla. Std. Jury Instr. (Crim.) 3.7. Per instruction no. 3.6(a), a defendant has not met his burden of showing insanity by clear and convincing evidence unless that evidence "*produces a firm belief, without hesitation*." Without more, the difference between the two analyses is less than clear.

As to criterion (3), the language proposed by the defense is a correct statement of law which is not in itself confusing. This Court, in cases regarding violations of the Code of Judicial Conduct, regularly explains that the "clear and convincing" quantum of proof "is an intermediate standard, more than 'a preponderance of the evidence,' but less than "beyond and to the exclusion of a reasonable doubt." In re Hawkins, 151 So. 3rd 1200, 1212 (Fla. 2014); In re Davey, 645 So. 2d 398, 404 (Fla. 1994); In re LaMotte,

341 So. 2d 513, 516 (Fla. 1977). The language sought here is indistinguishable; it is clearly correct, and positively alleviates confusion.

As Appellant argued below, in those civil theft cases where more than one burden of proof applies, a standard instruction provides the jury with in intuitively understandable comparison similar to that requested here. (R 3783) Civil instruction no. 411.3 includes this optional sentence: "'[c]lear and convincing evidence' differs from the 'greater weight of the evidence' in that it is more compelling and persuasive." The Notes for Use provided with that instruction advise the courts to "[u]se the [optional] sentence if there are other claims in the case that invoke the greater weight of the evidence standard." *See* Fla. Std. Jury Instr. (Civ.) 411.3. A similar statement could only have assisted the laymen entrusted with deciding this capital case. As this Court has said, the yardstick by which jury instructions are measured is clarity, since jurors must understand fully the law that they are expected to apply fairly. Perriman v. State, 731 So. 2d 1243, 1246 (Fla. 1999).

Here as in Murray v. State, 937 So. 2d 277, 281-82 (Fla. 4th DCA 2006), the error should be deemed structural, *i.e.,* not subject to harmless-error analysis. A juror who believed that the defense's burden of proof was as great as the State's general "beyond a reasonable doubt" burden may have been discouraged for that reason from pursuing an insanity-related

issue. *See generally* Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993) (misdescription of the burden of proof vitiates the jury's findings); *see also* Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010) (harmless-error analysis inappropriate where the reviewing court cannot meaningfully consider how an error affected the jury).

In the event this Court deems harmless-error analysis appropriate, where a jury instruction enhances the risk of an unwarranted conviction, constitutional law prohibits giving that instruction in a capital case. *See* Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980), *citing* United States Constitution Amend. 8. Here, after the jurors heard the case for and against insanity, just as they were sent back to deliberate in the guilt phase, one of them asked the court whether a copy of the DSM-5 was in evidence. (T 5512) One or more jurors in this case thus may well have given serious consideration to the insanity defense. The record therefore reflects an unacceptable risk of an unwarranted conviction. *See* Beck, *supra*.

The questioned instruction, by its terms, applied to all counts: it directed the jury to find Appellant not guilty by reason of insanity *if* it found that Appellant committed *one or more of the alleged crimes* but also found that the defense had met its burden of proof. (T 5392) Appellant's

convictions on all five offenses should be reversed, and the case remanded for a new trial.

POINT THREE

THE STATE ARGUED THAT PREMEDITATION IS PROVED UNDER FLORIDA LAW IF THE DEFENDANT HARBORED THE REQUISITE INTENTION "DURING THE ACTUAL ACT." THAT MISSTATEMENT OF LAW AMOUNTED TO FUNDAMENTAL ERROR ON THIS RECORD.

Standard of review. The Florida courts find fundamental error

- where a jury is precluded by improper argument from making a reasoned assessment based on the evidence, AND ensuing prejudice to the defendant is such as to deny due process, OR
- where doing so is necessary to protect the interests of justice itself.

Ritchie v. State, 2022 WL 2071090 *12-13 (Fla. 2022).

In its first-phase closing, the State argued as follows:

…What exactly does "premeditated design" mean? …What it means is a conscious intent to kill. And that conscious intent has to be present in the person's mind *during the act*. So the example I would give you is – all being Floridians familiar with mosquitoes. You are sitting on your front porch, a mosquito lands on your arm. You look down and you see it and you have a decision to make. Do you brush it off? Do you smack it? There is a conscious choice in your mind to do one or the other, and it may take a matter of seconds to make that decision; but if you smack it down, that is an intent to kill that was formed in your mind *at the time and during the actual act*. And that is all that is necessary to prove premeditation in the State of Florida.

(T 5408-09) (Emphasis added.) There was no objection to that argument. Appellant's position is that the argument amounted to fundamental error on this record.

In closing, the defense emphasized to the jury its view that premeditation was not shown as to either Count I or Count II. (T 5429-30, 5455-56) The argument has support in the record: as to Count I, a detective conceded that the surveillance video in evidence shows a six-second-long exchange of gunfire. Also as to Count I, counsel for the State conceded that the proof would not establish, beyond a reasonable doubt, who had fired first. On Count II, the proof showed that a single shot was fired and entered Captain Carter's hubcap. Hours into first-phase deliberations, the jury sought and received a readback of testimony from the eyewitnesses to both shootings. (T 5537-46, 5562-5602) On this record, the prosecutor's misstatement of the law amounted to fundamental error as to both Counts I and II.

The jury was instructed, pursuant to the standard instruction on first-degree murder, as follows:

> Killing with premeditation is killing *after* consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of *time that must pass between the formation of a premeditated intent to kill and the killing*. The

> period of time must be *long enough to allow reflection* by the defendant. The premeditated intent to kill must be formed *before* the killing.

(T 5360-61; R 4020-21) (Emphasis added.) *See* Std. Jury Instr. (Crim.) 7.2. The State's assertion was that intent to kill is premeditated under Florida law if it is shown to exist "during the act." While the second sentence set out above does read that the decision to kill "must be present in the mind at the time of the killing," the first sentence states that a premeditated killing is one committed *after* consciously deciding to do so; the third sentence assumes that some period of time must pass between the decision and the act; the fourth requires that period of time to be "long enough to allow reflection by the defendant;" and the fifth sentence, although phrased in reverse order, restates the first. Even if it were ever proper to analyze a single sentence out of context, it would clearly be improper here, where the other four sentences in the same paragraph *convey a completely different meaning* from that announced by the State. In any event, as Justice Scalia and Professor Bryan Garner pointed out in Reading Law: The Interpretation of Legal Texts,[11] "[p]erhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the…interpreter to consider the entire text…. Context is a primary determinant of meaning." Id.

[11] (West, 2012).

at 167. *Accord* Conage v. United States, 2022 WL 3651398 *2 (Fla. 2022) (urging consideration of "statutory context.")

As noted, Florida's appellate courts may correct an error on fundamental-error grounds, despite a party's failure to follow procedural rules regarding preservation, in order "to protect the interests of justice itself." Ritchie, *supra,* 2022 WL 2071090 at 12; *accord* Smith v. State, 320 So. 3rd 20, 27 (Fla. 2021). For that principle, Smith cites Reed v. State, 837 So. 2d 366 (Fla. 2002). In Reed, the trial court read a standard instruction which had been effectively superseded by this Court's caselaw, and which incorrectly defined a statutory term. As this Court wrote in Reed, the incorrect definition had the effect of reducing the State's burden of proof on a disputed element of a charged offense. 837 So. 2d at 369. While this case involves the argument of counsel rather than an instruction read by the court, the State's "mosquito" analogy, like the faulty instruction in Reed, may have had the effect of reducing the State's burden of proof. For all it lacks as legal analysis, the analogy is memorable, and may well have featured in deliberations. "Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury." Drake v. Kemp, 762 F. 2d 1449, 1459 (11th Cir. 1985). Reversal is warranted on Counts I and II, pursuant to Reed.

POINT FOUR

THE COURT OVERRULED OBJECTIONS TO IMPROPER ARGUMENT IN CLOSING ARGUMENT IN THE PENALTY PHASE. THE STATE MUST SHOW THERE IS NO REASONABLE POSSIBILITY THAT THE RULINGS CONTRIBUTED TO THE VERDICT.

Standard of review. Where a trial court overrules objections to closing argument, the reviewing court considers whether the rulings represented an abuse of the court's discretion. Cardona v. State, 185 So. 3rd 514, 520 (Fla. 2016). If the rulings are deemed erroneous, the reviewing court applies the harmless error standard, placing the burden on the beneficiary of the errors to show beyond a reasonable doubt that there is no reasonable possibility that they contributed to the conviction or death sentence. Id.

Argument. Near the beginning of penalty phase closing, the State told the jurors "you have an obligation to…try your best to reach a unanimous verdict." An objection to "misstatement of the law" followed, and was overruled. In defense counsel's subsequent closing, he argued that the prosecutor "was trying to shift the law into his favor, about going back there and… acting as one…. That's all incorrect. If you read the jury instructions, I'm right, he's wrong." A State objection was sustained at that juncture.

The defense objection to the initial misstatement of law should have been sustained. The position that the jurors in a capital sentencing proceeding "have an obligation to…try [their] best to reach [unanimity]" is nowhere echoed in Section 921.141(2) of the Statutes, or in Florida's standard jury instructions for use in capital cases. Counsel may possibly have had in mind Allen v. United States, 164 U.S. 492, 501 (1896), where the nineteenth-century Court noted "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors." However, a jury charge based on Allen may not be given in the penalty phase of a capital case; this Court holds that to do so amounts to reversible error. Patten v. State, 467 So. 2d 975, 979-80 (Fla. 1985); Rose v. State, 425 So. 2d 521, 525 (Fla. 1985), *disapproved on other grounds in* Williams v. State, 488 So. 2d 62, 64 (Fla. 1986). In any event, the courts have moderated Allen, concluding that "a trial court should not couch an instruction to a jury or otherwise act in any way that would appear to coerce any juror to…abandon a conscientious belief in order to achieve a unanimous position." Thomas v. State, 748 So. 2d 970, 976 (Fla. 1999). Even if an Allen charge were appropriate in the penalty phase, that fact would not authorize the State to improvise a prophylactic instruction declaring a non-existent "obligation" to achieve unanimity.

Here the court's rulings placed its imprimatur on the "obligation" referenced by the State. *See* Cardona v. State, *supra*, 185 So. 3rd at 516. The objected-to argument was misleading to the jurors, minimizing the role they properly play as individuals in Florida's capital sentencing process. The Eighth Amendment precludes comments that mislead the jury *as a whole* as to its role in the process in a way that leads them *as a group* to feel less responsible than they should for the sentencing decision. Reynolds v. State, 251 So. 3rd 811, 822 (Fla. 2018), *citing* Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Where, as here, the prosecution misleads individual jurors in a way that allows them to feel less responsible *as individuals* than they should for the sentencing decision, a similar diminution of reliability in the decision necessarily results.

Also early in penalty-phase closing, the State argued that the jury had no need to address the statutory mitigating circumstance that "the defendant's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired."[12] Its position was that the jury had already decided the question when it rejected the insanity defense. The argument was, again, completely

[12] *See* Section 921.141(7)(f), Fla. Stat.

incorrect: this Court expressly holds that a finding of sanity does not eliminate consideration of the statutory mitigating factors that involve the defendant's mental condition. Campbell v. State, 571 So. 2d 415 (Fla. 1990); Mines v. State, 390 So. 2d 332, 337 (Fla. 1980). The incorrect argument was made in the jury's presence although, at the charge conference, the State had acknowledged that the proof supported an instruction on the statutory mitigating factor in question. The court overruled the defense objection to the misstatement of law, again giving its stamp of approval to a legally insupportable position.

Juries in capital cases may not be precluded from considering, and giving effect to, relevant mitigating circumstances. Skipper v. South Carolina, 476 U.S. 1, 4 (1986). A misstatement by the prosecution which is designed to undermine the jury's ability to consider relevant mitigation may violate Eighth Amendment requirements. DePew v. Anderson, 311 F. 3rd 742, 749-50 (6th Cir. 2002). Both of the misstatements of law discussed here were launched early in the State's presentation, indicating that they "were not provoked by irritations or proddings by the defense counsel." *See* Brooks v. State, 762 So. 2d 879, 905 (Fla. 2000). Nor were they made "during an impassioned appeal;" instead "the record… suggests that the objectionable arguments were tendered calmly and in a fashion calculated

to forestall a mercy recommendation." Id. *Cf*. also Almeida v. State, 748 So.2d 922, 927 (Fla. 1999), where this Court deemed a misstatement of law "innocent" in that "the prosecutor was struggling with a subtle rule of law that is difficult to articulate."

Near the end of penalty phase closing in this case, the defense made a further objection which was sustained in part and overruled in part. Counsel preserved the point by following up with a motion for mistrial and motion for curative instruction, both of which were denied. That third objection was engendered by the following argument:

> the fact that Markeith Loyd is already serving two life sentences indicates that a life sentence in this case is no punishment at all.... Is another sentence of life appropriate in this case? The reality is, it would be another piece of paper in Mr. Loyd's file.

Defense counsel argued that the State, by so arguing, had in effect improperly relied on a non-statutory aggravating factor; the State responded that its argument was factually correct. The court relied on Spivey v. Head, 207 F. 3rd 1263 (11th Cir. 2000) to deny relief, noting "I would prefer you not to have said it, but I don't believe it rises to the level of a mistrial." This Court should decline to apply Spivey here. Judge Rosemary Barkett's dissent in that case is well-reasoned; her view was that the argument made to Spivey's jury, which was similar to the argument

addressed on this point, presented the jury with a "false choice between imposing death and imposing no punishment." 207 F. 3rd at 1287.

In Brooks v. State, 762 So. 2d 879 (Fla. 2000), an objection was overruled when the State announced in closing that it carefully selects the cases where it seeks the death penalty. On appeal, this Court found that overruling the objection amounted to an abuse of discretion, in that while the State's remark was "undoubtedly correct…it is also irrelevant and tends to cloak the State's case with legitimacy…much like an improper 'vouching' argument." 762 So. 2d at 902. Here, similarly, the "no punishment at all" rumination - while based in the undeniable fact that life sentences cannot as a practical matter actually be served consecutively - is both irrelevant and toxic, in that the State in capital cases may not rely on non-statutory aggravation. *E.g.*, Poole v. State, 997 S. 2d 382, 393 (Fla. 2008).

Since each objection discussed here was overruled, the State must show beyond a reasonable doubt that there is no reasonable possibility those rulings contributed to the jury's death verdict. As to the phantom duty to strive for unanimity in the penalty phase, the court compounded its initial error in overruling the objection when it sustained the State's objection to defense counsel's later attempt to right the ship. One or more jurors, as a

result, may have curtailed active participation in deliberations based on a perceived "obligation" to go along with a clear majority.

The federal courts look not only to whether misstatements of law are deliberate, but also to whether they go to the heart of the proffered mitigation. DePew v. Anderson, *supra*, 311 F. 3rd at 749-50 (6th Cir. 2002). Here, the incorrect statement that the jury need not consider the mental health-related statutory mitigators went to the heart of the defense: no fewer than eight mental health-related expert witnesses testified for the parties over the course of both phases of trial.

Finally, the "another piece of paper" argument made in the penalty phase was quotable, like the mosquito-swatting analogy floated by the State in the first phase. Both likely made their way into the jury room; both were patently designed to induce a verdict for a reason other than the evidence and the law. *See generally* Rodriguez v. State, 210 So. 3rd 750, 754 (Fla. 5th DCA 2017). Reversal of the sentence is the correct outcome on this record, since the State cannot show beyond a reasonable doubt that there is no reasonable possibility that the rulings addressed on this point contributed to the penalty phase verdict.

POINT FIVE

THE DEFENSE SOUGHT TO MODIFY THE STANDARD JURY INSTRUCTION WHICH PLACES THE BURDEN ON THE DEFENSE TO PROVE THAT MITIGATING CIRCUMSTANCES EXIST. THE REQUEST SHOULD HAVE BEEN GRANTED, AS THE LEGISLATURE HAS ALLOCATED NO SUCH BURDEN.

Standard of review. Whether a standard jury instruction is accurate comprises a pure question of law subject to *de novo* review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

Argument. The defense in this case asked the court to remove from the penalty-phase jury instructions any language that places on the defense the burden of proving mitigating circumstances. Appellant acknowledges that this Court has held that the defense bears such a burden. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), *receded from on other grounds in* Trease v. State, 768 So. 2d 1050 (Fla. 2000). Appellant's position is that Campbell does not clearly reflect the intent of the Legislature, has doubtful antecedents, and in this case runs afoul of caselaw applying the federal Eighth Amendment.

Section 921.141 of the Florida Statutes is, and always has been, silent as to a burden of proof relevant to mitigation. *Cf*. Section 921.141(2),

Fla. Stat. (2022) with Ch. 95-159, §1, Laws of Florida, Ch. 79-353, §1, Laws of Florida, and Ch. 72-72, §1, Laws of Florida. As this Court has clarified, Florida's capital sentencing process begins with a finding that the defendant is eligible for the death penalty, *i.e.*, a unanimous finding that a statutory aggravating factor has been proved beyond a reasonable doubt. State v. Poole, 297 So. 3rd 487, 501 (Fla. 2020), *citing* Tuilaepa v. California, 512 U.S. 967 (1994). If that "eligibility phase" results in a finding favorable to the State, the case enters the "selection phase," where the jury is tasked with determining the appropriate penalty. Id. Only if the selection phase ends with a unanimous death verdict does the process continue. §921.141(2)(c), Fla. Stat. (2022). The Supreme Court has expressed doubt

> whether it is even possible to apply a standard of proof to the…selection phase of a capital-sentencing proceeding. It is possible to do so for the…eligibility phase, because that is a purely factual determination. The facts justifying death…either did or did not exist – and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call).

Kansas v. Carr, 577 U.S. 108, 119 (2016) (punctuation omitted). This Court has echoed that doubt. *See* Poole at 503, quoting Carr for the further thought that "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy."

Florida's Legislature characterizes the jury's duties during the selection phase as "a weighing." §921.141(2)(b), Fla. Stat. That focus on weighing, rather than findings, suggests that the Legislature agrees with the view set out in Kansas v. Carr, and has at all times intentionally *not* prescribed a burden of proof for the selection phase.

In Florida's Standard Jury Instructions, no express allocation of a burden of proof on mitigation was present until 2009. *See* In re Standard Jury Instructions in Criminal Cases, 22 So. 3rd 17, 21 (Fla. 2009). When it approved new language which allocated the burden to the defense, this Court relied on cases which rely on Campbell v. State, *supra*. *See* id., citing *e.g.* Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006). Similar language, to the same effect, was later approved by this Court. *See* In re Standard Criminal Jury Instructions in Capital Cases, 214 So. 3rd 1236, 1262 (Fla. 2017) and In re Standard Criminal Jury Instructions in Capital Cases, 244 So. 3rd 172, 189 (Fla. 2018). The current instructions provide that

> it is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence.

Fla. Std. Jury Instr. (Crim.) 7.11.

In Campbell v. State, this Court for the first time specified that mitigating circumstances must "ha[ve] been reasonably established by the greater weight of the evidence." 571 So. 2d 415, 419 (Fla. 1990). For that principle this Court cited Brown v. Wainwright, 392 So. 2d 1317, 1331 (Fla. 1981). Campbell at n.5. What this Court said in Brown on the subject is that as the reviewing court in capital cases, "[o]ur only concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances." 392 So. 2d at 1331. Brown, of course, predates Apprendi v. New Jersey, 530 U.S. 466 (2000), which has led to the understanding that the federal Sixth Amendment by and large governs aggravating factors, while the federal Eighth Amendment controls the treatment of mitigation. *See* Poole, *supra*, 297 So. 3rd at 500.

Mitigating circumstances can arise from the defendant's history, but also from the circumstances of the offense. *E.g.,* Bright v. State, 299 So. 3rd 985, 996 (Fla. 2020); Fla. Std. Jury Instr. (Crim.) 7.11. Historical information is naturally within the knowledge of the defense, but the circumstances of the offense are proved up largely by the State. This practical consideration, as well as the perception that weighing of mitigation is in general a bad fit

with burdens and standards of proof, may have motivated the Florida Legislature to deliberately forego the opportunity to allocate to the defense any burden regarding mitigation.

Constitutional constraints apply here as well. Juries in capital cases may not be precluded from considering, and giving effect to, relevant mitigating circumstances. Skipper v. South Carolina, 476 U.S. 1, 4 (1986). As noted, Florida's current burden of proof regarding mitigation begins with "it is the defendant's burden to prove that one or more mitigating circumstances exist." Particularly in an emotional case, jurors may well be disinclined to find *any* proof brought by the defense mitigating; a juror so disinclined may conclude from the quoted admonition that the defense has *ipso facto* failed to meet its burden and that a vote for death necessarily follows. In any case, if mitigation relied on in closing was introduced by the State as part of the circumstances of the charged offenses, the same result may ensue. Where a jury instruction enhances the risk of an outcome adverse to the defendant in a capital case, the Eighth Amendment prohibits giving that instruction. Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980).

Appellant's view, for the foregoing reasons, is that it is error to read the instruction at issue over an objection. The error should be deemed

structural, *i.e.,* not subject to harmless-error analysis. *See generally* Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993) (misdescription of the burden of proof vitiates the jury's findings). *See also* Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010) (harmless-error analysis inappropriate where the reviewing court cannot meaningfully consider how an error affected the jury). If this Court deems harmless-error analysis appropriate, the State's argument in its penalty-phase closing is pertinent: "The mitigating circumstances they are alleging [are] just like the State's allegations, they have to be proven...the idea that Markeith Loyd has a mental illness has not been proven whatsoever." (T 7450, 7453) *See* Johnson v. State, 44 So. 3rd 51, 70-72 (Fla. 2010) (State emphasized erroneously admitted matter; this Court was unable to conclude error was harmless beyond a reasonable doubt); Robertson v. State, 829 So. 2d 901, 913-14 (Fla. 2002) (same). Reversal of the death sentence appealed from is therefore warranted.

POINT SIX

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO VICTIM IMPACT EVIDENCE.

Standard of review. Rulings on admissibility of victim-impact evidence in the penalty phase of a capital trial are reviewed for abuse of discretion. Deparvine v. State, 995 So. 2d 351, 378 (Fla. 2008).

Argument. Defense counsel in this case objected solely to the musical soundtrack included in a two-minute montage of photographs displayed for the jury during the penalty phase. Appellant acknowledges that the montage was not maudlin, and was not exploited by the State in argument. Appellant's position is that this Court should create a bright-line rule directing the trial courts to exclude music from victim-impact evidence, except in cases where a victim's musical gifts were part of that individual's unique contribution to the community.

Several courts have addressed memorial montage videos displayed as part of victim-impact showings. In State v. Graham, 513 P. 3rd 1046 (Alaska 2022) and State v. Hess, 23 A. 3rd 373 (N.J. 2011), both cases that did not involve a jury, a memorial montage set to music was played at sentencing; the supreme courts of both states criticized the use of such evidence as likely to appeal solely to emotion. Hess at 393-94; Graham at

1069. The California Supreme Court, in a death-penalty case, affirmed the sentence appealed from, noting that a video played for the jury had *not* been accompanied by "stirring music," which leads to a situation where "the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience from other types of evidence." People v. Prince, 156 P. 3rd 1015, 1091-93 (Cal. 2007).

A Texas intermediate court has reversed a 30-year jury sentence where music, including the theme from "Titanic," "swell[ed] to a crescendo" as an accompaniment to a memorial-style montage of photos of the victim in life. In Salazar v. State, 90 S.W. 3rd 330 (Tex. Crim. App. 2002), the court wrote that the punishment phase of a criminal trial is not a memorial for the victim, and that courts must carefully consider the potential of memorial exhibits "to impress the jury in some irrational, but nevertheless indelible, way." 90 S.W. 3rd at 333-34. The court remanded the case for the trial court to make a harmless-error determination about the montage.

This Court should hold that the trial court abused its discretion by overruling the defense objection to the audio component of the memorial video played for the jury. As noted, such presentations appeal to emotion rather than reasoned discourse. While the State did not emphasize its victim

impact exhibits, a theme of the showing in aggravation was law enforcement officers' great worth to the community.

The cited cases frequently note that bright-line rules are difficult to craft in the victim-impact arena. Hess at 394; Price at 1092; Salazar at 336. Appellant submits that these cases, read together, suggest a bright-line rule precluding musical accompaniment to any exhibit offered to show the uniqueness of a victim, unless that victim's musical gifts are part of the loss to the community. Such a rule would protect the right to due process of law, which is violated when victim impact presentations become an "undue focus" of a penalty phase. Wheeler v. State, 4 So. 3rd 599, 604 (Fla. 2009). It would protect the justice system's interest in verdicts which are based on the evidence and the law, rather than emotion. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977) ("[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.") For these reasons, this Court should apply the requested bright-line rule pursuant to Article I, Section 9 of the Florida Constitution and pursuant to the federal right to due process of law. U.S. Const., Amend. 14.

POINT SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE DEFENDANT COMPETENT TO BE SENTENCED.

Standard of review. The constitutional test of competency is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings." McCray v. State, 71 So. 3rd 848, 862 (Fla. 2011). Where expert testimony on competency is in conflict, it is the trial court's responsibility to consider all relevant evidence and resolve all factual disputes. Id. Its resolution of the conflict(s) will not be disturbed as long as that resolution is supported by competent, substantial evidence. Id.

Argument. As noted above, the question of competency was raised February 6, 2021, when the Spencer hearing was in recess. When the Spencer hearing reconvened on February 7, the court chose to hear defense expert Dr. Xavier Amador's testimony both as to competency and as to mitigation. Dr. Amador testified that he spoke with the defendant by Zoom on January 21 and February 3, and concluded that the defendant lacked the ability to consult with counsel with an appropriate degree of rational understanding, lacked the ability to disclose pertinent facts to

counsel, and lacked the ability to manifest appropriate courtroom behavior. He acknowledged that patently Mr. Loyd has moments of clarity, in that his trial testimony was “responsive” and “structured.” However, during their 2022 interactions Dr. Amador was completely unable to re-direct Mr. Loyd’s attention from the deficiencies he saw in the court system’s handling of the Sade Dixon matter. The court appointed Drs. Jeffrey Danziger and Katherine Oses to evaluate the defendant, and set a competency hearing for February 22.

On February 22, the court noted that since the Spencer hearing was complete, the defendant no longer had an active role to play, and all that remained was for the parties to hear sentence pronounced. In response to the court’s questions, Dr. Danziger responded that Mr. Loyd “would factually understand what you were doing, but rationally, the idea that you are lawfully sentencing him in your role as an impartial judge… that, through the prism of his delusional mind, he would not grasp.” Defense counsel argued that Rule 3.210(a), Florida Rules of Criminal Procedure, required a hearing. Per that rule, a person who is mentally incompetent at any material stage of a criminal proceeding shall not be proceeded against; the Rule defines “material stage” to include “sentencing.” The court correctly concluded that the competency hearing had to go forward.

Dr. Danziger, who spoke with Appellant sometime between February 7 and February 21, concluded – like Dr. Amador -- that at that time he lacked a *rational* understanding of the proceedings against him, in that he believed the defense team were aware of his innocence, and were deliberately working against him as part of a plot to have him killed. Dr. Danziger's opinion was that Mr. Loyd's ability to consult with counsel, directly because of mental illness, was unacceptably impaired.

Dr. Oses, who spoke with Appellant on February 10, reported that he could be redirected from his fixations at some times but not others. The judge deemed the experts' testimony to conflict as to whether Appellant was in 2022 able to focus on pertinent matters, and defaulted to her own experience with him throughout the Dixon and Clayton trials. (R 4782-83) The court noted that Appellant was ruled competent before the Dixon trial, and noted that between that 2019 evaluation and 2022 he had on many occasions conducted himself well in the courtroom. (R 4783-86)

Even when a criminal defendant has previously been found to be competent, the trial court must remain receptive to revisiting the issue if circumstances change. Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995). The prior determination does not control, when new evidence suggests that the defendant is at the current time incompetent. Nowitzke v. State, 572

So. 2d 134, 1349 (Fla. 1990). The red flags raised without equivocation by Drs. Amador and Danziger were dismissed because they were not replicated by the court's own experience with the defendant, which the court found was confirmed by the experience Dr. Oses had with him.

When expert testimony conflicts as to competency to proceed, the court's resolution of the factual disputes must be supported by competent, substantial evidence. McCray v. State, *supra*, 71 So.3rd 848, 862 (Fla. 2011). In McCray, none of the appointed experts could rule out malingering, and the court's own observations tended to support the view of the State's expert that malingering was the sole cause of the defendant's courtroom outbursts. Id. at 863. On that record, this Court had no difficulty affirming the trial court's finding that McCray was competent to proceed.

On this record, four experts testified without opposition that psychotic symptoms wax and wane, sometimes "dramatically." In light of that undisputed testimony, it was unreasonable for the court to conclude that Dr. Amador's and Dr. Danziger's testimony conflicted factually with Dr. Oses's testimony. The latter established that Appellant was having a relatively good day when Dr. Oses spoke to him, but the former – again, unequivocally – established that Appellant's symptoms were in flux and that he could not sustain, for long, a rational understanding of his situation.

Since there was no factual conflict, the record does not reflect a reasonable resolution of conflicting expert opinion which is supported by competent, substantial evidence. The decision to disregard altogether the testimony that Drs. Amador and Danziger gave regarding competency amounted to an abuse of discretion. This Court should vacate the sentence imposed below, and remand for a determination whether at the time of that remand Appellant can rationally understand the proceedings against him.

POINT EIGHT

FELONS WERE EXCLUDED FROM THE JURY POOL, VIOLATING THE VENIREMENS' EQUAL PROTECTION RIGHTS AS WELL AS APPELLANT'S RIGHTS.

Preservation. This argument was made below in Appellant's pretrial motion challenging the jury panel, and denied.[13]

Standard of Review. "Constitutional challenges to statutes are pure questions of law, subject to de novo review."[14]

Argument. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[15] This Amendment was enacted as part of a post-Civil War effort by the federal government to ensure the fair

[13] (R 2314-2332, 2854-2960).

[14] Jackson v. State, 191 So. 2d 423, 426 (Fla. 2016).

[15] U.S. Const. Amend. XIV.

treatment of Blacks in the southern states.[16] Florida's constitution contains a similar provision.[17]

The venires for petit juries are subject to an equal protection requirement with respect to the method of their selection[18], and "a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race."[19] Indeed, "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."[20] Even "a facially-neutral law violates the Equal Protection Clause if adopted with the intent to discriminate against a racial group."[21]

[16] Strauder v. West Virginia, 100 U.S. 303, 310 (1879) *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975) (Fourteenth Amendment's "aim was against discrimination because of race or color.").

[17] Art. I, § 2, Fla. Const.

[18] Batson v. Kentucky, 476 U.S. 79, 85–86 (1986).

[19] Powers v. Ohio, 499 U.S. 400, 415 (1991).

[20] Batson v. Kentucky, 476 U.S. 79, 85 (1986) *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991).

[21] Johnson v. Governor of the State of Florida, 405 F.3d 1214, 1222 (11th Cir. 2005).

The analysis of a claim that a facially race-neutral law violates the Fourteenth Amendment's equal protection guarantee proceeds in three stages. First, the plaintiff must prove by a preponderance of the evidence that the challenged law has a racially disparate impact.[22]

Second, the plaintiff must then show by a preponderance of the evidence that the law's enactment was either motivated by a racially discriminatory purpose, or that race discrimination played a substantial part in the decision to enact the law.[23] The plaintiff is not required to show that "the challenged action rested solely on racially discriminatory purposes," but must bring "proof that a discriminatory purpose has been a motivating factor in the decision" to pass the legislation.[24] To this end, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."[25]

[22] Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 240-42 (1976).

[23] Arlington Heights, 429 U.S. at 265.

[24] Id., at 265-66.

[25] Arlington Heights, 429 U.S. at 267.

Third, "[o]nce racial discrimination is shown to have been a "substantial" or "motivating" factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.[26]

In Hunter v. Underwood, 471 U.S. 222 (1985), the Supreme Court addressed a similar issue to that presented here; specifically, whether a provision in Alabama's constitution that disenfranchised persons convicted of crimes "involving moral turpitude" violated equal protection. There, the Supreme Court held that "[w]ithout deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under Arlington Heights."

Here, Appellant's motion challenged the jury panel on two grounds, including the equal protection challenge discussed above. As required by Arlington Heights and Hunter, the motion alleged (1) that the provision at issue – Section 40.013 – has a racially disparate impact, and (2) that racial discrimination was a substantial and/or motivating factor in its enactment:

[26] See Mt. Healthy City School Dist. Bd. of Educ. V. Doyle, 429 U.S. 274, 287 (1977), 97 S.Ct. 568, 576 (1977).

> Historically, Florida's statutory disqualification of jurors on the basis of criminal convictions has worked to keep Blacks off of juries entirely: in response to a 1910 survey, Florida counties where Blacks made up over 50% of the population reported that Blacks were uniformly excluded from juries. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 Texas L. Rev. 1401, 1407 (1983) (citing G. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 253-72 (1910)). In 1946, a journalist described the situation in Florida: "The Negroes who have served on juries since reconstruction probably could be counted on the fingers of one hand." Stanmore Cawthon, *Lakeland Lawyer Charges Negroes Barred As Jurors*, ST. PETERSBURG TIMES 7 (Dec. 19, 1946). This law continues to keep Blacks off juries at a disturbingly high rate. It is estimated that 21.35% of Blacks in Florida are disqualified from jury service because of a conviction, compared to 10.43% of the state's adult population as a whole.2 Uggen et al., at 15-16.

(R 2321).

> Florida's juror disqualification law was enacted as part of an effort to keep Blacks oppressed in the wake of emancipation. *See* Sarah C. Grady, *Civil Death is Different: An Examination of a Post*-Graham *Challenge to Felon Disenfranchisement Under the Eighth Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 441, 447 (2013) (explaining that after the Civil War, "southern states used criminal disenfranchisement provisions to prohibit black men from access to the ballot"); Part C (ii) (c), *supra*; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 41-68, 236-44 (2008) (explaining racial threat theories; finding that percent of non-white prison population is a statistically significant predictor of a state's enactment of a felon disenfranchisement law). Florida's disqualification of jurors on the basis of criminal history continues to disproportionately exclude Blacks. *See* THE

> SENTENCING PROJECT, ESTIMATES OF AFRICAN AMERICAN DISENFRANCHISEMENT, *supra.*

(R 2331).

The State's only response to Appellant's motion did not contest either of these allegations, nor did it attempt to demonstrate that the law would have been enacted without this factor.[27] Instead, the response focused entirely on the motion's *other* argument – not advanced here – that the exclusion of felons from the venire violated the "fair cross-section" requirement of the Sixth Amendment. Despite this, the lower court orally denied Appellant's motion without further comment.

Because Appellant's motion alleged a colorable, prima-facie claim that the provision at issue violates equal protection, because the State's response did not address the argument nor contest the facts underlying these allegations, the court erred in denying the claim, and the matter should be remanded for further hearing.

[27] (R 2388-2391).

POINT NINE

THE DEFENSE REQUEST FOR AN EXPRESS JURY INSTRUCTION ON MERCY SHOULD HAVE BEEN GRANTED.

Standard of review. Whether a standard jury instruction is accurate comprises a pure question of law subject to *de novo* review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

Argument. Appellant acknowledges that the argument raised on this point is precluded by Woodbury v. State, 320 So. 3rd 631 (Fla. 2021). Appellant seeks to exhaust the claim made here for federal review.

In Woodbury, as here, the defense at trial unsuccessfully sought to modify Florida's standard criminal jury instruction for use in the penalty phase, no. 7.11. There, as here, the defense sought an instruction that would have expressly told the jurors that mercy could guide their decision-making; the request was denied, and the jury was read standard instruction no. 7.11. The gravamen of Woodbury is that standard language in 7.11 adequately conveys the idea that jurors may be guided by mercy; that standard language reads "even if you find that the sufficient aggravators outweigh the mitigators, the law neither compels nor requires you to determine that the defendant should be sentenced to death." 320 So. 3rd at 656. The Mississippi Supreme Court, considering indistinguishable

language, has held that it "seems simply to instruct the jury on its ability to impose a sentence of life in prison, rather than the death penalty." Flowers v. State, 158 So. 3rd 1009, 1066 (Miss. 2014), *cert. granted, judgment vacated on other grounds*, 136 S. Ct. 2157 (2016). Appellant submits that the Mississippi court correctly intuits the layperson's likely reaction to the language in question.

If a jury instruction enhances the risk of an outcome adverse to the defendant, the right to heightened reliability in capital proceedings prohibits giving that instruction in a death-penalty case. Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980), *citing* U.S. Const., Amend. 8. That risk is enhanced here, because mercy is central to the death-penalty selection process, as viewed by the United States Supreme Court. That Court has observed that "what our case law is designed to achieve" in the selection process is a conscious jury decision to accord or withhold mercy. Kansas v. Carr, 577 U.S. 108, 119 (2016). This Court agrees. *See* State v. Poole, 297 So. 3rd 487, 503 (Fla. 2020) (citing Carr); see also State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (defending a client's interests in a penalty phase consists of "seeking the mercy of society.")

The error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be ascertained

from the record. *See generally* Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010) and United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006).

POINT TEN

THE JURY WAS DEATH-QUALIFIED OVER OBJECTION.

Standard of review. This point raises a question of law; accordingly *de novo* review is appropriate. *E.g.*, Smiley v. State, 966 So. 2d 330, 333 (Fla. 2007).

Argument. The Appellant acknowledges that the argument raised on this point is precluded under this Court's caselaw. *E.g.*, San Martin v. State, 717 So. 2d 462, 467 (Fla. 1998). Appellant seeks to exhaust for federal review the claim that the United States Supreme Court should recede from its own cases, to the extent they preclude recourse to the Sixth Amendment where a capital offense is charged and the jury is death-qualified before the first phase of trial.

The Sixth Amendment to the federal constitution protects the right to trial by an impartial jury. U.S. Const., Amend. 6. As elaborated by the courts, that guarantee entails both a right to disinterested jurors and a right to a jury drawn from a fair cross-section of society. Taylor v. Louisiana, 419 U.S. 522, 529-31 (1975). "Fair cross section" jurisprudence allows challenges only where a group recognized as "distinctive" is under-represented in jury venires due to systematic government action. Berghuis

v. Smith, 559 U.S. 314, 327 (2010). In Lockhart v. McCree, 476 U.S. 162 (1986), in this context, the Court rejected the idea that a sector of society bound together only by like-mindedness could form the requisite "distinctive" group.

Were it not for his inability to show a constitutionally-protected distinctive group is involved, Appellant could easily argue he is entitled to relief under the fair-cross-section cases. The other element he would need to show is under-representation of the group in question by systematic government action. The record of jury selection, in this case, shows that element on its face. *See generally* Berghuis v. Smith, 559 U.S. at 328 (process of jury selection can itself establish those factors).

While the "fair cross section" cases were evolving, the Supreme Court decided Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985). Witherspoon involved the wholesale exclusion of *all* venire members who harbored *any* reservation about the death penalty; the Court reversed the death sentence imposed in that case. In Witt, the Court clarified Witherspoon, holding that jurors who would be substantially impaired in following the court's instructions by their beliefs against capital punishment could not serve where a unitary jury is in use. The process of excluding those venire members became known as death-

qualification, and the affected would-be jurors became known as "Witherspoon-excludables." *See* Morgan v. Illinois, 504 U.S. 719, 733 (1992).

Justice Breyer, dissenting in Glossip v. Gross, 576 U.S. 863 (2015), has acknowledged that research has shown for decades that death qualification skews juries toward guilt. 576 U.S. at 913 (Breyer, J., dissenting, *citing* Susan D. Rozelle, The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation, 38 Ariz. S. L. J. 769 (2006).) There is no shortage of scholarship attesting to that causal relationship. Studies show that death-qualified juries are as much as 44% more likely to find guilt, and are more hostile to the insanity defense, more mistrustful of defense lawyers, and less concerned about the risk of erroneous convictions. Note, Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process, 2005 B.Y.U. L. Rev. 519, 530-32. Other studies show that death-qualified jurors are more inclined to believe a prosecutor's version of events. Aliza Plener Cover, The Eighth Amendment's Lost Jurors: Death Qualification and the Evolving Standard of Decency, 92 Ind. L. J. 113, 121 (2016). From a statistical standpoint, the data set of death-qualified juries represents a biased sample. Id at 115-16.

Further, the practice of death-qualification provides prosecutors with a firewall against changing public opinion. Brandon Garrett *et al.*, Capital Jurors in an Era of Death Penalty Decline, 126 Yale L. J. Forum 417 (2017). Notably, twenty-first century support for the death penalty in Black communities has been measured at a mere 36%. *See* pewresearch.org/fact-tank/2018/06/11.

Professor Susan Rozelle, the author of The Principled Executioner, *supra,* makes a persuasive case for requiring bifurcation of juries in capital cases. She distinguishes between "excludables" and "nullifiers": the latter would never find a defendant charged with a capital crime guilty, given the knowledge that their judgment might eventually result in an execution, while the former could fully participate in a guilt-or-innocence phase, although not a penalty phase. 38 Ariz. S. L. J. at 776. Florida has both an anti-nullifier statute and a general unitary capital jury statute. Sections 913.13, 921.141(1), Florida Statutes (2021). However, where an interest recognized by statute comes into conflict with a constitutional right, the latter prevails. *E.g.,* Gray v. Mississippi, 481 U.S. 648, 663 (1987). Professor Rozelle's conclusion is that nullifiers may reasonably be excluded at the outset of capital trials, but that the current practice of removing Witherspoon-excludables at the guilt-or-innocence stage cannot

be allowed to continue. The Principled Executioner at 793, 796-97. For the foregoing reasons, the Supreme Court should revisit its view on death-qualification.

POINT ELEVEN

THE DEATH PENALTY IS UNCONSCIONABLE.

Standard of review. "Constitutional challenges to statutes are pure questions of law, subject to de novo review." Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016).

Argument.

A. Capital punishment is no longer compatible with the evolving standards of decency.

"Often when deciding whether a punishment practice is, constitutionally speaking, 'unusual,' this Court has looked to the number of States engaging in that practice.[28] In this respect, the number of active death penalty States has fallen dramatically."[29] "In 1972, when the Court decided Furman, the death penalty was lawful in 41 States. Nine States had abolished it."[30] Since then, the number of active death penalty states has fallen to 24. At present, 23 states do not have an active death penalty. If Governor-imposed moratoriums are included – currently active in California,

[28] Atkins v. Virginia, 536 U.S. 304, 313–316, 122 S.Ct. 2242 (2015); Roper v. Simmons, 543 U.S. 551, 564-66, 125 S. Ct. 1183 (2005).

[29] Glossip v. Gross, 576 U.S. 863, 940 (2015) (J. Breyer, dissenting).

[30] Id. (citations omitted).

Oregon, and Pennsylvania – this number rises to 26. As of last year, the majority of states now prohibit the death penalty.

Further, it " 'is not so much the number of these States that is significant, but the consistency of the direction of change.' "[31] Here, the consistency and direction of change away from the death penalty is unambiguous. Writing in 2015, Justice Breyer concluded that "capital punishment has indeed become unusual," noting that "[s]even States have abolished the death penalty in the last decade"[32]

Since that time, 5 more states have joined the chorus. In 2016, Delaware's Supreme Court declared their death penalty scheme unconstitutional, as did Washington's in 2018. New Hampshire's legislature abolished their death penalty in 2019, Colorado repealed its death penalty statute for future offenses in 2020, and Virginia repealed its death penalty statute in its entirety in 2021.

[31] Roper, 543 U.S., at 566, 125 S.Ct. 1183 (quoting Atkins, supra, at 315, 122 S.Ct. 2242) (finding significant that five States had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court's decision in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)).

[32] Glossip, at 942 (J. Breyer, dissenting) (citing Death Penalty Information Center, States With and Without the Death Penalty).

It is therefore evident – from the declining number of death sentences imposed each year, the growing number of jurisdictions that have abolished capital punishment, and the palpable reluctance to carry out executions in the states that still permit the death penalty – that the "objective indicia of society's standards," as expressed through legislation and state practice, is no longer compatible with "evolving standards of decency" and therefore violates the Eighth Amendment.[33]

B. Additional constitutional infirmities

Further, "[t]oday's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose."[34]

i. Unreliability. As of 2002, "there was evidence of approximately 60 exonerations in capital cases."[35] By 2015, "the number of exonerations in

[33] Graham v. Florida, 560 U.S. 48, 61, 58 (2010).

[34] Glossip, 576 U.S. at 909 (J. Breyer, dissenting).

[35] Id., at 911 (J. Breyer, dissenting) (citing Atkins, 536 U.S., at 320, n. 25, 122 S.Ct. 2242)).

capital cases ha[d] risen to 115."[36] As of 2022, that number stands at 190.[37] Florida leads the nation in this regard, and has exonerated *30 people* sentenced to death.[38] These statistics demonstrate not only that there is a risk that the death penalty will be imposed arbitrarily, but that such arbitrary imposition actually does occur all too frequently.

ii. Arbitrary application. Otherwise irrelevant factors, such as geography, play far too dominant a role in determining who is sentenced to death. See Glossip, at 918 (J. Breyer, dissenting). This is not simply because some States permit the death penalty while others do not," but rather because even "within a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried."[39]

[36] Id. (J. Breyer, dissenting).

[37] Death Penalty Information Center (DPIC), Innocence Database (September 2, 2022), https://deathpenaltyinfo.org/policy-issues/innocence-database?sort=exonerationYear/desc&sort=id/asc.

[38] Death Penalty Information Center (DPIC), Innocence Database (September 2, 2022), https://deathpenaltyinfo.org/policy-issues/innocence-database?state=Florida&sort=exonerationYear/desc.

[39] Id., at 918-19 (J. Breyer, dissenting) (citing Smith, The Geography of the Death Penalty and its Ramifications, 92 B. U. L. Rev. 227, 231–232 (2012); Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. Empirical Legal Studies 637, 673 (2014)("[T]he single most important influence from 1973–2007 explaining whether a death-

"Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide [. . .] And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for all death sentences imposed nationwide."[40]

Yet "whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—do significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as "egregiousness"—do not determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily."[41]

iii. Lengthy delays. Lastly, lengthy delays undermine the penological justification for the death penalty, and constitutes cruel and unusual punishment in its own right. A lengthy delay is especially cruel because it

eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]").

[40] Id., at 919 (J. Breyer, dissenting) (citing DPIC, The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All 9 (Oct. 2013)).

[41] Id., at 920 (J. Breyer, dissenting).

"subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement."[42]

In 1890, the Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist *for the period of four weeks*, as to the precise time when his execution shall take place."[43] The "long wait between the imposition of sentence and the actual infliction of death" is "inevitable" and often "exacts a frightful toll."[44]

"In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured, not in weeks, but in *decades*."[45] Perhaps worse still, most prisoners must suffer this

[42] Id., at 928-29 (J. Breyer, dissenting) (internal citations omitted).

[43] In re Medley, 134 U.S. 160, 172 (1890).

[44] Furman v. Georgia, 408 U.S. 238, at 288, 92 S. Ct. 2726 (1972) (Brennan, J., concurring).

[45] Glossip, at 927 (J. Breyer, dissenting) (emphasis added).

"frightful toll" in solitary confinement, as nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day.[46]

In sum, Appellant respectfully submits that the death penalty – now active in only a minority of states – constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, as it no longer comports with "evolving standards of decency," exacts a decades-long, torturous and "frightful toll" on defendants, is unreliable in its imposition, and is arbitrary in its application.

[46] American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report).

POINT TWELVE

ATKINS v. VIRGINIA SHOULD BE EXTENDED TO PROHIBIT THE EXECUTION OF THE SEVERELY MENTALLY ILL.

Standard of Review. "Constitutional challenges to statutes are pure questions of law, subject to de novo review." Jackson v. State, 191 So. 2d 423, 426 (Fla. 2016).

Argument. In Atkins v. Virginia, 536 U.S. 304 (2002), the United States Supreme Court held that the execution of an individual who is intellectually disabled is prohibited by the Eighth Amendment, and applicable to the States through the Fourteenth. The Court found that the penological purposes served by the death penalty - specifically, "retribution and deterrence of capital crimes by prospective offenders," as identified some 30 years prior in Gregg v. Georgia, 428 U.S. 153 (1976) - were not measurably furthered by the execution of these individuals.[47]

In Gregg, "the Court firmly embraced the holdings and dicta" from prior cases[48] "to the effect that the Eighth Amendment bars not only those

[47] Id., 317-321.

[48] Including Furman v. Georgia, 408 U.S. 238 (1972); and Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).

punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed."[49] "Under Gregg, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground."[50]

Accordingly, regarding the former: Unless the death penalty, when applied to those in the defendant's position, "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."[51] The question, therefore, is whether the execution of the severely mentally ill "measurably contributes" to the goals of either retribution or deterrence.

"The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and

[49] Coker v. Georgia, 433 U.S. 584, 591-92 (1977).
[50] Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

[51] Enmund v. Florida, 458 U.S. 782, 798, 102 S.Ct. 3368 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[52]

"With respect to retribution – the interest in seeing that the offender gets his 'just deserts' – the severity of the appropriate punishment necessarily depends on the culpability of the offender."[53] "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, [the intellectually disabled] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[54] "Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."[55]

These same rationales apply to the severely mentally ill. See, e.g., Lyn Entzeroth, The Challenge and Dilemma of Charting a Course to

[52] Atkins v. Virginia, 536 U.S. 304, 320 (2015).

[53] Id., at 319.

[54] Id., at 306.

[55] Id., at 318.

Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty, 44 Akron L. Rev. 529, 559 (2011) (noting that "the parallels between the severely mentally ill and the individuals protected by Atkins and Roper are remarkable"). In light of Atkins and Roper, the American Psychiatric Association, the American Psychological Association, and the American Bar Association have all recommended defendants with severe mental illness be excluded from capital punishment.[56]

As in the instant case, severe mental illness often affects a person's ability to engage in logical thought and his capacity to understand and process information.[57] And, just as with the intellectually disabled in Atkins, the imposition of the death penalty on the severely mentally ill makes "no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."[58] Accordingly, sentencing a defendant who is severely mentally ill to death violates the Eighth Amendment's prohibition of cruel and unusual punishment.

[56] Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, 30 Mental & Physical Disability L. Rep. 668 (2006).

[57] Id.

[58] Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

POINT THIRTEEN

FLORIDA'S CAPITAL SENTENCING SCHEME RISKS THE ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY AND, THEREFORE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Standard of review. "Constitutional challenges to statutes are pure questions of law, subject to de novo review."[59]

Argument. Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of arbitrary and capricious action.[60] Since reinstating the death penalty in Gregg v. Georgia, the U.S. Supreme Court has barred "sentencing procedures that create [] a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner."[61]

[59] Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016).

[60] Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

[61] 428 U.S.153, 188 (1976) (plurality opinion); see also Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (recognizing the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case").

In Gregg, "[t]he approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, *and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate*. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty."[62]

The same two factors were cited in Proffit v. Florida, 428 U.S. 242 (1976), where the Supreme Court rejected an 'arbitrary and capricious' challenge to Florida's post-Furman statute.[63] In upholding the statute, the Court after noting that "the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed,"[64] the court added:

> Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. *The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases*.

[62] Zant v. Stephens, 462 U.S. 862, 876 (1983) (emphasis added).

[63] See id., at 254.

[64] Id., at 258.

Id., at 258 (citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (emphasis added)).

In Pulley v. Harris, 465 U.S. 37 (1984), the Supreme Court held that the Eighth Amendment does not require "comparative proportionality review by an appellate court [. . .] in every case in which the death penalty is imposed."[65] The Court explained that while "[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, [] "each distinct system must be examined on an individual basis."[66] Relying on Pulley, this Court recently announced that it would no longer perform comparative proportionality review in death cases.[67]

Florida's scheme now fails to sufficiently reduce the risk of arbitrary infliction of death sentences. The Pulley Court acknowledged that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."[68] Appellant respectfully submits that Florida's system has become such a system, as multiple vital safeguards for

[65] Pulley, at 50.

[66] Pulley, at 45 (quoting Gregg, 428 U.S., at 195).

[67] Lawrence v. State, 308 So. 3d 544 (Fla. 2020).

[68] Pulley, at 879-80.

the system have either been eliminated or eroded since it was last examined in Proffitt v. Florida, 428 U.S. 242 95 (1976).

First, as noted above, this court has eliminated the safeguard of comparative proportionality review. As Justice Labarga opined in his dissent in Lawrence, "the fact that this Court has reversed death sentences due to a lack of proportionality underscores the need for proportionality review," and its elimination marks "the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence."[69]

Second, this Court has also recently eliminated the safeguard of the "reasonable hypothesis of innocence" motion for judgment of acquittal. See Bush v. State, 295 So. 3d 179, 216 (Fla. 2020) (J. Labarga, dissenting) ("today, this Court eliminates another reasonable safeguard in our death penalty jurisprudence and in Florida's criminal law across the board.").

Third, Florida's capital scheme has fallen victim to the "aggravator creep"[70] problem.[71] A capital sentencing scheme, either through legislatively

[69] Lawrence, 308 So. 3d at 552 (J. Labarga, dissenting).

[70] The undersigned is indebted to O.H. Eaton, Circuit Judge emeritus, for the expression.

[71] In Hidalgo v. Arizona, 138 S. Ct. 1054 (2018), four Justices commented on the Court's denial of certiorari. The state court had held that Arizona's

enumerated aggravating factors or through legislatively mandated guilt-phase findings, must genuinely narrow the class of persons eligible for the death penalty.[72] Each aggravating factor, taken singly, must also narrow the eligible class.[73] Florida's scheme, however, fails to do so.

The California capital scheme approved in Pulley contained eight aggravating factors[74], as did this State's then-existing scheme approved in Proffitt v. Florida, 428 U.S. at 251. Since then, however, the number of aggravating factors in Florida has doubled.[75] Several of the categories are not tightly drawn and, as of 2021, virtually all conceivable murders fit at least one of the sixteen categories of eligibility.

capital scheme is sufficiently narrowly drawn even if it assumed that 98% of Arizona's first-degree murder cases are automatically eligible for death-penalty proceedings. The four Justices recognized "a possible constitutional problem" which "warrants careful attention and evaluation." 138 S. Ct. at 1057. In Florida, the reported cases and the relevant statutes on their face establish that an "aggravator creep" problem exists.

[72] Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

[73] Zant, at 877.

[74] Pulley, at 46.

[75] Chapters 2010-120 '1, 2005-28 '7, 96-290 '5, 95-159 '1, 91-270 '1, 88-381 '10, 87-368 '1, Laws of Florida.

For instance, Florida's scheme treats as an aggravator the fact that a defendant was found guilty of felony-murder, rather than premeditated murder. As Tennessee and North Carolina have held, doing so of necessity fails to narrow the death-eligible class.[76] Notably, the conduct underlying common predicate felonies has broadened over the years[77], and the statute has been expanded to cover significantly more participants.[78]

Another of Florida's aggravators, that the defendant has been convicted of a prior violent felony, in practice has also failed to narrow the eligible class. This court has construed "prior" broadly, to include violent crimes on other victims committed in connection with the murder.[79]

The cold, calculating and premeditated ("CCP") aggravator has also evolved. In its early years that factor was applied in cases involving contract

[76] State v. Middlebrooks, 840 S.W. 2d 317, 346-47 (Tenn. 1992); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (N.C. 1979).

[77] See Sparre v. State, 164 So. 3d 1183, 1200-01 (Fla. 2015) (burglary can occur after invitation is effectively rescinded); Rockmore v. State, 140 So. 3d 979, 982 (Fla. 2014) (robbery includes force used after taking).

[78] See State v. Dene, 533 So. 2d 265, 266-69 (Fla. 1988).

[79] See, e.g., Stephens v. State, 787 So. 2d 747, 761 (Fla. 2001).

killings and execution-style killings.[80] In recent years, however, a CCP finding has been upheld so long as the murder was not committed impulsively or on the spur of the moment, and was not committed in a state of rage or loss of control[81], "even where there is evidence that the final decision to kill was not made until shortly before the murder itself."[82]

In sum, Florida's capital scheme, as administered in 2021, fails to adequately reduce the risk of arbitrary infliction of death sentences[83], as it has eliminated the safeguards of comparative proportionality review and the "reasonable hypothesis of innocence" judgment of acquittal, and fails to narrow the class of first-degree murderers eligible for death.

[80] See Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986) and Garron v. State, 528 So. 2d 353, 360-61 (Fla. 1988).

[81] Campbell v. State, 159 So. 3rd 814, 830-31 (Fla. 2015).

[82] Gosciminski v. State, 132 So.2d 678, 712 (Fla. 2013).

[83] Notably, the decision to pursue the death penalty in the instant case varied from prosecutor to prosecutor.

CONCLUSION

The Appellant requests this Court to reverse the conviction and sentence appealed from, and remand for a new trial on all counts, as to the issues raised on Points 2, and 10.

The Appellant requests this Court to reverse the conviction and sentence appealed from, and remand for a new trial on Counts I and II, as to the issues raised on Point 3.

Appellant requests this Court to reverse the sentence appealed from, and remand for a new penalty-phase hearing, as to the issues raised on Points 1, 4, 5, 6, and 9.

As to the issue raised on Point 7, Appellant asks this Court to vacate his sentence and remand for a new competency evaluation and hearing.

As to the issue raised on Point 8, Appellant asks this Court to remand for an evidentiary hearing.

As to the issues raised on Points 11-13, Appellant asks this Court to vacate his death sentence and remand with directions to impose a sentence of life in prison.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, at www.myflcourtaccess.com; the Office of the Attorney General, Assistant Attorney General Doris Meacham, at capapp@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Mr. Markeith Loyd, #380384, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 6th day of September, 2022.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing initial brief complies with the Florida Rules of Appellate Procedure in that it is set in Arial 14, and in that it does not exceed the word count set out in the Rules.

/s/ Nancy Ryan
Nancy Ryan
Assistant Public Defender

APPENDIX E

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC22-378
DEATH PENALTY CASE

MARKEITH DEMANGZLO LOYD,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ANSWER BRIEF /CROSS INITIAL BRIEF

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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PRELIMINARY STATEMENT

This is the direct appeal of a conviction for first-degree murder and a sentence of death. Appellant, Markeith Loyd, the defendant in this case will be referred to as the "Appellant" or "Loyd". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." The record below will be referred to as “R” and then the page number, i.e., “(R 1).” The trial transcript will be referred to as “TT” and then the page number, i.e., “(TT 1).” Appellant’s brief shall be referred to as “IB” followed by the page number.

STATEMENT OF THE CASE AND FACTS

On February 15, 2017, Appellant was indicted by the grand jury of Orange County, Florida, for the January 9, 2017, murder of Officer Debra Clayton. The Indictment charged Appellant with First Degree Murder with a Firearm of a Law Enforcement Officer (Capital) (Count One); Attempted First Degree Murder with a Firearm of a Law Enforcement Officer (Count Two)[1]; Aggravated Assault with a Deadly

[1] Count II charged the attempted premeditated murder of a second law enforcement officer, Joe Carter. (R 174)

Weapon (Count Three); Carjacking with a Firearm (Count Four) [2] and Possession of a Firearm by a Convicted Felon (Count Five). (R 173-76)

In its Notice of Intent to Seek Death Penalty, filed on April 3, 2017, the State announced that it intended to prove the following eight[3] aggravating factors as set forth in Florida Statute 921.141(6)(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 of threat of violence to a person; (c) the defendant knowingly created a great risk of death to many persons; (e) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (g) the

[2] Counts III and IV were both committed against Antwyne Thomas. (R 174-75)

[3] The jury instructions specified that three aggravators, the victim was a law enforcement officer engaged in a legal duty; that the murder was committed to disrupt or hinder the lawful exercise of a governmental function; and that the murder was committed for the purpose of avoiding arrest, were to be treated as a single aggravator. (R 4860-6, 4493)

capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or 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 her official duties.[4] (R 319-320)

Prior to the conviction in the instant case, Appellant was convicted of the December 13, 2016 capital murder of his pregnant girlfriend, Sade Dixon, and attempted murder of three of her family members; Stephanie Dixon-Daniels, Dominique Daniels, and Ronald Stewart. The State sought the death penalty as to Sade Dixon; after a penalty phase, the jury returned a verdict of life imprisonment without parole. Appellant was sentenced to five consecutive life sentences in 2019. (R 4807-08)

[4] The court found that the "great risk of death" and "especially heinous" aggravators were not proven beyond a reasonable doubt, and before the jury was instructed in the penalty phase the State let the court know it would not be seeking the "cold, calculated" aggravator. (TT 5945)

PRETRIAL LITIGATION

On January 14, 2021, the State of Florida filed a Motion in *Limine* seeking to preclude Loyd from eliciting any evidence of law enforcement's use of force against Loyd in both the guilt phase and penalty phase of the trial. (R 3166-78) On April 26, 2021, the court ruled that the use of force was not relevant for the guilt phase of the instant case. (R 3691-92)

On September 3, 2021, a hearing was held regarding the admissibility of the use of the force against Loyd at the time of his arrest at the penalty phase. On October 6, 2021, the court issued an order holding that the use of force would be admissible in the penalty phase only in a very narrow scenario. The court held that such evidence would be relevant only on the narrow issue to explain the presence of brain damage if the defense expert witness opined that the injury to Loyd's eye was relevant to his diagnosis of brain damage. If that relevancy was established through the defense expert, the fact that Loyd sustained a head injury which resulted in the loss of his eye would be admissible; however, the court specially excluded any mention of how the injury occurred, who inflicted it, or any details surrounding the injury. (R 3692)

Jury selection commenced on October 8, 2021 and was completed on October 25, 2021. (TT 4-3815) The court granted individual voir dire regarding knowledge of pretrial publicity, attitudes toward the death penalty, and attitudes toward the insanity defense. (R 7360) The State moved for cause on three venire members due to their exposure to inadmissible and prejudicial information, specifically, Loyd's injuries. The court granted the State's cause challenges over defense objection. (TT 1095-96, 1105-07, 1112-15, 1540-41, 1557-61, 1577-78, 1647-48, 2975, 2981-85)

On Friday November 5, 2021, the Court, during a charge conference to discuss penalty phase jury instructions, reversed itself, over the State's objection, and held that evidence of law enforcement's use of force against Loyd at the time of arrest would now be admissible during the penalty phase of the trial. The State requested a continuance of the penalty phase as they were unprepared to deal with the issue on November 6, 2021, when penalty phase was to begin. The Court granted the continuance and set the use of force matter for a full hearing on November 9, 2021, which was followed by a written Order that same day.

The Order specified that the "Defense may present testimonial evidence as to how the injury to Defendant's eye occurred and who caused it and the Defense may present testimonial evidence as to the delay in providing medical attention to the defendant". The court also cautioned "that unless the Defense can present actual evidence of such, nothing in this Order allows the Defense to argue that any agency involved with this case gave orders to attack Defendant or that law enforcement was in a conspiracy to kill the Defendant. Additionally, the Defense will not use the terms "extra-judicial punishment" when addressing the jury regarding Defendant's injury. Extra-judicial punishment is not mitigation and is only intended to inflame the jury's passions. Defendant has already testified that he believed that law enforcement wanted to kill him, and he may testify to that." (R 4169-4174)

Also prior to trial, the State filed a motion moving the trial court to modify the Florida Standard Penalty Phase Jury Instructions and Verdict Form to mirror the state of the law as announced by this Court in its January 23, 2020 decision in *State v. Poole*, 297 So.3d 487 (Fla. 2020). (R 1628-1654) The State argued that the Preliminary

and Final Instructions[5] needed to be updated to conform with the Court's decision in *Poole* and the current, clear language of Florida Statute section 921.141. Specifically, the State sought an order eliminating any need for the jury to unanimously agree that the proven aggravating factors are sufficient to warrant death, or to unanimously agree that the aggravation outweighs the mitigation. (R 1631-33) The defense filed a written response. (R 1710-1717)

The trial court initially granted the State's motion finding "that the *Poole* decision does, in fact, say that the last two factors do not have to be found by a jury beyond a reasonable doubt. I also find that the case law in Florida is clear, including from the Supreme Court, and I don't remember the name of the case, but the trial court is to make sure that the jury instructions, regardless of what the standard jury instructions say, conform to the evidence in the case and conform to the existing law at the time the instructions are read". (TT 274, 292, 5635, 5639, 5647) The court ultimately instructed the jury

[5] State's "Exhibit A," "Exhibit B," and "Exhibit C" were provided to the court with the conforming language. (R 1366-1654)

with the standard jury instructions. (TT 7421-22,7428-29; R4485;4488)

GUILT PHASE

The jury trial began on October 25, 2021, before Circuit Judge Leticia Marques, with the State's first witness, Detective Brian Savelli. His testimony provided the jury with the relevant circumstances leading up to the fatal confrontation on January 9, 2017, in which Lieutenant Debra Clayton attempted to take Appellant into custody.

Detective Savelli testified that he was with the Orange County Sherriff's Office (OSCO) for over 10 years and currently worked the homicide unit as of January 2016. (TT 3866) He was employed and on duty as a member of the homicide unit the night of December 13th of 2016 when he received a phone call around 9:00 p.m. that night asking him to respond to a scene at 6130 Long Peak Drive regarding a homicide. The alleged victim of the homicide was Ms. Sade Dixon. Late that night, or early on the morning of the 14th, he asked a judge to sign a warrant for the arrest of a suspect in that homicide by the name of Markeith Loyd. (TT 3867-68) Savelli testified how other members of law enforcement were made aware of the arrest warrant

for Loyd. He explained to the jury that the information is entered into NCIC/FCIC, so anytime a deputy runs an individual, they will be able to see that they have a warrant. Also, in-house, they will broadcast the warrants. They will also send out an email to the entire sheriff's office, something called a bulletin, and that will broadcast the arrest warrant. (TT 3870-3872).

The State next introduced Ms. Takeshia Bryant. (TT 3875) Bryant testified that she knew Loyd through his marriage to her cousin Lacarsha Robinson. She testified that prior to the incident she had never met Loyd in person or spoken to him face-to-face at any point but knew what he looked like, particularly by a scar on his lip. She further testified that she became aware in late 2016, early 2017 that Loyd was wanted by law enforcement for the murder of his pregnant girlfriend. (TT 3876 -78)

Bryant testified that at 7:00 a.m. on the morning of January 9th, 2017, she went to the Walmart on the intersection of Princeton Street to buy a jacket. (TT 3878-79) After finding the jacket, Bryant went to register 2, which was close to the exit, to check out. She then went to customer service to ask where the clerk was because the light was on, but no one was there to check her out. (TT 3880-3883). When

Bryant went back to the register, she saw that a line had formed. The person at the front of the line was a black male, wearing a black shirt with security writing on it in white, and a skullcap. He also had a distinctive scar. She also described what she thought was a lot of clothes or like a bullet proof vest. When Bryant spoke to him to let him know she wasn't skipping the line, she recognized the male as Loyd. (TT 3888-90)

Bryant testified that when she realized it was Loyd, the first thing that went through her mind was that she needed to get to the police officer she had just seen leaving the store. She testified that she knew the female was a police officer because she was in full uniform. She had also seen the patrol car parked in front of the store. (TT 3891). Bryant calmly walked out the doors and then ran to the officer who was outside her patrol car putting groceries inside. She told the officer that Loyd was in the store and that he was wanted for murdering his pregnant girlfriend. She then heard Lieutenant Clayton call on her radio to find out if the information that she was telling her was true. Bryant then gave the officer a description of the suspect. (TT 3895-3898).

As Bryant proceed to walk to her car, she heard Officer Clayton say, “Get on the ground” and then saw Loyd push his basket and run behind a pillar. (TT 3899). When Loyd came back from behind the pillar, she saw Loyd had a gun in his hand and then she heard shots fired. Bryant got on the ground. (TT 3900-3901). When the shots stopped, Bryant stood up and saw Loyd standing over Officer Clayton. She then heard another shot and got back down on the ground. When she got back up, Loyd was gone, and Officer Clayton was laying on the ground. (TT 3902-3904).

Julia Johnson and Monica Pridgeon, both employees of Walmart who were working that day, testified as to what they witnessed that day. According to Johnson, she had just clocked out and was waiting to be picked up. (TT 3938-3939). She was familiar with Lieutenant Clayton as the officer was known to shop at the Walmart every day after her shift was over and recalled seeing her that day. (TT 3942). She remembered seeing Loyd that day as well. (TT 3944) According to her testimony, after hearing Lieutenant Clayton give orders to Loyd to Stop, freeze, or get on the ground, she witnessed Loyd take off. (TT 3945). She then heard one gunshot and

then five seconds later, heard seven shots, but was not able to see who fired the first shot. (TT 3947).

Pridgeon was also familiar with Lieutenant Clayton. She testified to seeing a female walk up to Lieutenant Clayton with a little boy. The female was talking to the officer about something, and she kept seeing them point at the door towards the grocery. She testified that it looked like Lieutenant Clayton was calling for backup and was saying something on her walkie-talkie as she walked towards the door. (TT 3960) She saw the female and child walk back to their car and heard Lieutenant Clayton say something to Loyd who was pushing a cart out of the Walmart. (TT 3961-62) At that point she saw Loyd push the cart and run around a pillar. (TT 3965-66) Pridgeon testified that when Lieutenant Clayton first said something to Loyd, she had her hand on her gun, and it was still holstered. Loyd had a gun in his hand. (TT 3966-67) Based on her vantage point, Loyd fired the first shot. After Loyd fired the first shot, Lieutenant Clayton then fired shots back. (TT 3967-68) Pridgeon then saw Lieutenant Clayton fall. (TT 3969)

Pridgeon testified that after Clayton fell, Loyd kept shooting and continued shooting her while she was on the ground. After that is

when Loyd went to his car, an old school Oldsmobile, Hunter green body and fled. (TT 3970-72). At some point Pridgeon was able to get to Lieutenant Clayton who was trying to get to her walkie-talkie. When asked if she saw any injuries, Pridgeon testified that she was able to see the hole in Lieutenant Clayton's neck. (TT 3972-73)[6]

Dr. Joshua Stephany, Chief Medical Examiner for Districts Nine and Twenty-Five, performed Clayton's autopsy. (TT 4218, 4225) Dr. Stephany testified that the cause of death was gunshot wounds and manner of death Homicide. (TT 4243) According to his testimony, there was a total of four gunshot wounds. There was one in the neck, which also went to the back. There was one in the leg, one in the abdomen, and another superficial one to the abdomen. He was not able to determine the order in which the gunshots were inflicted. (TT 4225)

[6] The events at the Walmart, inside and outside, including the fatal shooting, were captured on video. The State presented the testimony of Mr. Stephens, the asset protection manager at the Princeton St. Walmart. He was familiar with the surveillance camera system at that Walmart store and testified that the cameras were functional that morning. He gave law enforcement access to the surveillance camera system. (TT 3925-3936). The video(s) were introduced into evidence and played for the jury. (TT 3884-86, 3926-35, 4020-32)

Dr. Stephany described for the jury the damage that the projectile caused to the abdomen/buttock area as it entered the top right buttock area and traveled through her body. The projectile penetrated the soft tissue and musculature of the right buttock, fractured the right iliac bone or the hip bone, and then penetrated and lacerated the small bowel in Clayton's abdomen, and partially exited the right abdomen. (TT 4231) Dr. Stephany testified that the gunshot wound of the inner right thigh, like the gunshot wounds to the abdomen, was very superficial. It went just deep to the skin so the injuries it would have caused would have been lacerations and hemorrhage of the subcutaneous soft tissue. (TT 4235-38) There were also injuries to Clayton's face consistent with her falling and striking her face on the pavement and injuries to her elbow and her knees consistent with her falling and hitting those portions of her body on pavement. (TT 4240, 4242)

Dr. Stephany described to the jury the damage the projectile caused as it entered the right side of her neck and traveled through her body. The projectile entered Clayton's neck and crossed what is called the cricoid cartilage, which is the inferior neck, otherwise known as the Adams apple. The projectile lacerated or fractured that,

then went across into her left chest, fracturing three ribs and contusing the upper left lung resulting in 700 millimeters of blood in the left chest cavity. The projectile then entered the back, lacerating the soft tissue and musculature of the back and caused a partial exit wound to the left back. (TT 4227-28) The projectile was able to be recovered from this wound. (TT 4229)[7]

According to Dr. Stephany, Lieutenant Clayton could have survived any of those gunshot wounds except for the wound to her neck. (TT 4246)

Patricia Monahan was the dispatcher, for the Orlando Police Department (OPD). (TT 3988) She testified to receiving a communication over the radio made by Lieutenant Debra Clayton on January 9th of 2017, at about 7:15 or so in the morning. (TT 3992, 3995). The radio dispatch was played for the jury:

5020. 5020.

[7] FDLE analyst Richard Ruth testified that the projectiles represented as coming from the medical examiner, one for Debra Clayton, one for Sade Dixon, were fired by Loyd's .40 caliber firearm. (TT 4479-80, 4332-45)

Hey, hun, give me a clear channel at Walmart. Give me a couple units for a signal 17[8], if possible, signal 5[9] suspect.

(Inaudible.)

(Inaudible) 33 traffic on emergency north[10] for Bravo 20 out at the Walmart, 3101 West Princeton Street, reference attempted contact, possible signal 5 suspect. 10-33[11] on emergency north.
(Inaudible) we're here.

(Inaudible) officer.

(Inaudible.)

Serg, where are you exactly?

I guess we're looking for Markeith. He's walking out the door right now. I guess he was involved in a shooting with a pregnant female. I'm at the first entrance.

Do you have eyes on him or a vehicle?

(Inaudible.)

Bravo 20, you 10-4?[12] (Inaudible) Bravo 20, are you 10-4?

[8] Signal 17 is attempt to contact. (TT 3996)

[9] Signal 5 is code for murder suspect. (TT 3999)

[10] Channels are broken up to north, west, east. Every channel has another channel, which is their emergency channel, that they go to so that – emergency north is for a north call where they want emergency traffic for it. (TT 3995)

[11] 10-33 stands for emergency traffic. (TT 3996)

[12] 10-4 means, yes, they're okay. (TT 3996)

(Inaudible) 43, might have been shots.

Signal 43 [13] for a Bravo 20, possible shots fired into a Walmart, 3101 West Princeton Street. Possible shots fired, signal 43 on emergency north.

(Inaudible.)

Code out (inaudible) a purple -- officer down. Officer down. Officer shot. Hurry up. He's(inaudible) Silver Star, silver car (inaudible) going westbound.

Silver Star and Princeton, vehicle description?

Purple vehicle.

(Inaudible) right now.

(Inaudible) male with a gray top, black jeans, leaving the parking lot going west onto Silver Star.

(Inaudible) onto Princeton.

Going out of Walmart, he went west towards (inaudible).

(Inaudible.)

Okay. Scene is secure. I'm starting CPR.

(Inaudible) chase off.

[13] Signal 43 is the worst possible signal. That's rush because the officer needs assistance now. Rushing officers to the scene, not just OPD officers, but other agencies' officers. (TT 3996, 4000)

10-39[14] (inaudible).

(Inaudible.)

(Audio stopped.)

(TT 3997-98)

Captain Joseph Carter, of the Orange County Sheriff's Office, testified that he had just left the house and was coming to work. He heard something come over the radio that morning that got his attention. It was called a signal 43, call for help, that was put out at the Walmart at Princeton and John Young Parkway. He proceeded to activate his lights and siren. (TT 4079-80) As he was traveling southbound, someone patched in and said a suspect vehicle was now westbound, on Silver Star. (TT 4081) Carter eventually encountered the suspect vehicle and followed the vehicle, with lights flashing, into the Royal Oaks Apartment complex. The car pulled in and made a quick turn and a stop into one of the alcoves or park-outs where the parking spots are for the apartments. (TT 4084-87) Carter pulled in behind, leaving distance and turned his vehicle at an angle and

[14] 10-39 means that a message has been delivered. (TT 3996)

turned the wheels to give himself cover before stepping out to address the suspect. (TT 4089)

Carter testified that he had the door open, probably had a foot either on the ground or just about on the ground. He could see the suspect standing by his car door, standing up, looking at him, and about the time he started to put some weight and stand up, he heard two shots. Carter got back into the car backed up a little bit farther and turned the car at a greater angle, more perpendicular to the back of his vehicle. At that point, the suspect took off running. (TT 4090; 4094-95) Law enforcement officers arrived on the scene to assist Carter and they discovered a bullet hole in his hubcap as well as shell casings, which were later matched to Loyd's gun. (TT 4096-9, 4474-7, 4332-45)

Antwyne Thomas was a resident at Royal Oaks. Thomas testified that he was driving back home the morning of January 9, 2017 after getting coffee. He arrived back at about 7:10, 7:15am. (TT 4102-04) After parking his car, a VW Passat, he walked back to his apartment. (TT 4105-06) While walking back to his apartment, he heard someone say "hey", to which he ignored. (TT 4110) As Thomas got to the landing between two staircases a black male wearing a

black shirt with Security on the back of it ran up on him. The man pointed a gun to his face and told him to give him the keys to his car. (TT 4111-14) Scared, he threw the keys up in the air and ran to his apartment. (TT 4115) At the conclusion of his testimony, Thomas identified Loyd as the black male who put the gun to his face on January 9, 2017. (TT 4121)

According to the testimony of Stacy Munro, a crime scene investigator supervisor with the OPD, the stolen VW Passat was driven through one of the wooden slate fences, through a couple of backyards into a residential neighborhood.[15] (TT 4137-39) The vehicle was recovered in the Brookside Apartments complex. (TT 4148) Bloodhounds tracked from the vehicle to a particular building in the apartment complex. Perimeter units were set up around that building. Paul Foster, with OPD was one of the perimeter units. (TT 4152)

Paul Foster testified that he responded to Brookside apartments in response to locating Loyd. At the time of the incident, he was a K-

[15] Surveillance footage recovered from a Sonoma Village apartment, documenting the vehicle's travel and path of destruction was played for the jury. (TT 4143)

9 handler. (TT 4183) As he was walking along the back side of the apartment in that complex, he located some clothing balled up on the back of the patio. It was a pair of pants and right next to the camouflage pants was a T-shirt which said security in white letters across the front of it. (TT 4185-86) The clothing was photographed and collected pursuant to a search warrant by Gary Crosby, a crime scene investigator with OPD. (TT 4171-77) The trail went cold and according to the testimony of Detective Cadiz, the next date that law enforcement was able to locate Markeith Loyd was January 17th, at around 6:00 p.m. due to the implementation of wiretaps. (TT 4151-53)

Chuck Ashworth, with the OCSO, testified as to the events surrounding Loyd's arrest. At the time of Loyd's capture and arrest, he was assigned to the United States Marshals Task Force, Fugitive Task Force. (TT 4188-90) He testified that he responded to Lescot Lane the night of January 17th, 2017 with regard to the apprehension of the fugitive, Markeith Loyd. (TT 4191) According to his testimony, the original plan was just to hold the house and make sure nobody could get in or out. However, somebody from his team

had mentioned on the radio that they thought they saw somebody come out the back and then run back in the house.

At that point he remembers the front door of the house opening. The first thing he saw was some clothing come out of the door and the door close again. (TT 4195-97) The door opened again, and he briefly could see somebody appear to be inside the house and then an object came out of the house again and the door shut. He thought it was a firearm. Then shortly after, the door opened again, and another object came out. Possibly another firearm. The door opened a fourth time, and someone was coming out showing their hands. It was Loyd. Then everything happened very fast, a lot of people showed up. He could hear commands being given to the person who was crawling out. (TT 4198-99) At some point he stepped away to retrieve a ballistic shield out of his car. He came back and took position to cover the front door. He made his way into the home and observed two firearms which had been thrown. No one else was in the home. (TT 4200-01)

Cleveland Jenkins, Deputy United States Marshal Middle Florida, was also on duty the night of January 17th, 2017. He was assigned to the south side of the residence to perform a perimeter

security. (TT 4209-10) He had contact with Loyd after he was taken near some patrol vehicles and observed that Loyd was wearing a bullet proof vest. (TT 4211-12)

Ed Vanderberg, crime scene investigator with OPD, testified that he responded to 1157 Lescot Lane in Orange County, Florida to document and collect evidence. (TT 4332) While there he collected a bulletproof vest, blue camo bag, a cell phone battery, and US currency evidence, which were located on the roadway in front of the residence. (TT 4335) Found inside of the bag were 36 .40 Smith & Wesson rounds of ammunition. (TT 4336-37) Also collected were two pistols. He collected a Smith & Wesson model S&W .40 VE semiautomatic pistol, .40 caliber. (TT 4342) There was one chambered into the chamber itself and there were 14 rounds in the magazine. (TT 4344) The chambered round was a Win 40-cal automatic S&W. Inside the magazine were loaded 14 rounds, and those were six Win .40 S&W, three Perfecta .40 S&W, and five R&D .40 S&W rounds. The other was a Glock model 17 .9-millimeter semiautomatic pistol. (TT 4345) Also collected from inside the house in one of the bedrooms was an extended magazine which contained 30 .9-millimeter rounds of ammunition. There were 17 Perfecta .9-

millimeter rounds, six Win .9-millimeter rounds, one Blazer .9-millimeter round, three Hornady .9-millimeter rounds, and one GM .9-millimeter round. (TT 4348-50) The guns were introduced into evidence. (T4332; 4339-46) FDLE Analyst Richard Ruth testified that one of the guns thrown from the house was the .40 caliber handgun used by Loyd to kill Sade Dixon, her unborn child and Sgt. Clayton. (T4470-80; 4329-31) The other gun was used at the Royal Oaks complex in his attempts to kill Captain Carter. (T4332-4, 4474-75)

The parties stipulated that on January 9th, 2017, Appellant was a convicted felon who had not had his civil rights and firearm authorization restored. The State then rested. (T4492) The defense moved for judgment of acquittal, which was denied. (T 4496-97)

The defense then presented their case and offered evidence in support of the alternative arguments of Self-Defense and Insanity, with Loyd taking the stand in his defense. Loyd testified that he grew up without a father in Carver Shores, one of the rough neighborhoods in the city. At a young age he started watching movies that were consistent with racism. (TT 4797-99) Growing up in the streets he was taught to run if he saw the police. He was taken to a mental health facility/drug facility by his mother at sixteen to be evaluated

and stayed for two weeks. (TT 4811-12) After the second time that he was robbed, he began carrying two firearms. (TT 4817) He joined Facebook in July 2014 and began to post about the police due to the police killings going on around the country. (TT 4818- 19) The State introduced into evidence fourteen posts Loyd made on Facebook between 2014 and 2016. (R3787-3804; TT 4444)

Loyd told his side of the story regarding Dixon and that after the incident he went to a trap house to think and to hide. (TT 4833-39, 4842) As for the reason he was wearing a vest, Loyd told the jury he was hanging out with a bum who told him he needed a vest. (TT 4850) Loyd recounted going out to get food and seeing a guy wearing a vest and believing that God sent him the vest. (TT 4857)

He explained to the jury that he went to Walmart the day of the incident to use the restroom and get some food. While going to checkout he saw Clayton. He held back and went to another line, then saw her leave. As he was pushing his cart out, he had his head down. When he looked up, he saw a gun in his face. He told the jury that he thought he was about to get shot and that he knew it was the police and he knew that it was Clayton. (TT 4861-62)

He didn't know why, but he ducked behind the cart, then pushed the cart away and ran left towards the woods. He heard a shot and immediately pulled his gun, turned around and returned fire. (TT 4862-63, 4866-68, 4956, 4958) He described a gun battle and that when she stopped shooting, he stopped shooting. (TT 4868, 4871-72, 4960) His story was that his intent was to try to shoot the vest. (TT 4867-68, 4871, 4960)

Loyd testified that after leaving the Walmart, he saw an unmarked vehicle turn back around, so he knew they were coming for him. According to Loyd's version of events, he got out of the car and fired one warning shot so the officer wouldn't try to come after him. He then turned around and started running, when he saw a car just come from out of nowhere and he knew that God sent him the car. (TT 4873-74)

When asked about the insanity defense during cross-examination, Loyd responded that it was the defense his lawyer and psych came up with. (TT 4945)

Dr. Jethro Toomer, a clinical and forensic psychology, also testified for the defense. He evaluated Loyd in 2019 to see whether Loyd met the criteria for insanity. (TT 4984-85) It was his belief that

Loyd suffered from delusions and that he had an ongoing belief that the police were trying to kill him. (TT 5009) He also diagnosed post-traumatic stress disorder, bipolar disorder, and schizophrenia, explaining that the symptoms of those disorders overlap to a significant extent. (TT 5019, 5141-44) He concluded that although the defendant knew what he was doing at the time he shot Lt. Clayton, and knew the consequences of what he was doing, he did not know it was wrong. (TT 5020-21)

On cross, the state brought out that the delusion Dr. Toomer stated Loyd was under at the time of this murder was in fact true. That at the time of this murder, it was a fact that the police were out to get him for the murder of Sade Dixon. (TT 5046) Dr. Toomer conceded that there were instances where Loyd had interactions with law enforcement that were not negative or violent and that the overtly negative interactions that Loyd had with law enforcement throughout his life occurred when he was violating the law.(TT 5050-51) He also agreed that one of the criteria for PTSD in the DSM-5 is that you identify a specific trauma and that he could not identify a specific trauma that was the source of Loyd's PTSD. (TT 5054) Dr. Toomer also agreed that he relied, in part, on Dr. Sesta's diagnosis of

paranoid schizophrenia for Loyd, but was then confronted by the State that Dr. Sesta didn't diagnose Loyd with paranoid schizophrenia. (TT 5060)

The State called Dr. Michael Gamache in rebuttal. He testified that after interviewing Loyd in 2021, reviewing depositions, Loyd's trial testimony, and all discovery, he did not agree with Dr. Toomer's diagnosis of insanity. (TT 5180-82)

Dr. Gamache explained that the first prong of insanity is that it must be established that the defendant suffers from a mental infirmity, disease or defect, and that Loyd failed to meet that prong as Dr. Toomer did not specifically examine the diagnostic criteria for any of the mental illnesses that he opined Loyd suffered from. (TT 5185; 5189) Additionally, Dr. Gamache found Loyd's functioning in the community in the time frame from 2014 when he returned to the community from prison up until December 2016 and January 2017, to be exceptionally good, not disabled. And he had not been diagnosed or treated for a mental illness during that time frame. (TT 5192-96)

Dr. Werner, board certified in general psychiatry and in forensic psychiatry also testified for the State. After reviewing depositions,

police records, statements from different witnesses, Facebook pages, medical records from Department of Corrections and an interview with Loyd, Dr. Werner also disagreed with Dr. Toomer's conclusion as to insanity. (T 5289-95) Dr. Werner diagnosed Loyd with antisocial personality disorder and cannabis-use disorder and that the first prong of the insanity defense specifically excludes antisocial personality disorder. As to the second prong, Loyd was very clear that he understood what he was doing and the consequences of his actions. (TT 5294-95)

On November 3, 2021, the jury returned guilty verdicts on all five counts. (TT 5621-24; R 4078-86)

PENALTY PHASE

On November 29, 2021[16], the trial's penalty phase began as to Count 1 of the Indictment. (TT 5742) In its penalty phase the State called Todd Herb, previously employed as an officer with the Orlando Police Department. He testified to being on patrol on January 3rd of

[16] On November 5, 2021, after a hearing on defense counsel's Motion for Reconsideration of Use of Force, the court ruled that the defense was permitted to talk about the loss of Loyd's eye, who did it, and allowed the helicopter video in. The penalty phase was continued to give the State time to prepare. (TT 5692-96)

1998 at around 2 p.m. in the afternoon. (TT 5799-5800) He saw a vehicle with no tag going at a high rate of speed and proceeded to conduct a traffic stop. (TT 5802) After getting out of the vehicle, the driver, whom he identified as Loyd, just started walking. After being ordered to stop, Loyd responded that he wasn't driving, and then just kept walking away. (TT 5804) At that point since Loyd was refusing to stop or to provide any identification, Herb decided to place him under arrest for resisting without violence. (TT 5805-07) When he grabbed his right wrist, Loyd immediately swung with his left fist and punched him on the side of his face and then he took off running. (TT 5808) Loyd was convicted of battery on a law enforcement officer and resisting a law enforcement officer with violence as a result of that incident.

Stephanie Dixon-Daniels, Dixon's mother, testified to the night of Sade's murder. She testified that Loyd was shooting at her front door when she opened it and that she was listed as one of the victims of attempted first degree murder. (TT 5868-73)

Monica Pridgeon testified that after the shooting of Lieutenant Clayton, after she fell to the ground and was shot, she went to her side. She testified that Clayton's hand was motioning to her walkie-

talkie like, she was trying to get to it, but couldn't. She stated Clayton just kept looking at her like she was trying to say something, but nothing would come out. She told the jury she could see the hole in Clayton's neck. (TT 5900-01)

Dr. Joshua Stephany testified that based on the video, his testimony would be that the first three shots, the body shots, happened first. He still had no opinion as to the sequence, but the shot to her neck was the final shot. Setting aside the gunshot wound to her neck, that final wound, the three prior wounds would not have caused Lieutenant Clayton to lose consciousness immediately or very quickly after they were inflicted. Stephany testified that he located approximately 700 milliliters of blood in the left pleural cavity and that the presence of that much blood in her left chest cavity told him that her heart was still pumping. It would also lead him to believe that it would hinder the ability of the left lung to expand and breathe in oxygen. (TT 5964-66)

Additionally, the State called four victim-impact witnesses Regina Hill (TT 5918); Tammy Hughes (TT 5925); Dorothy Patterson (TT 5930); and Francine Thomas (TT 5985). A slideshow of photos of the victim in life, set to music was also played for the jury. (TT 5834)

In its penalty phase the defense presented character evidence through Loyd's friends and family members. (TT 6151-6222, 6301-20, 6367-6401, 6433-46, 6668-90, 6743-64, 6841-6900, 7070-7112) Per the courts prior ruling, evidence of Loyd's injuries and how he received them was presented. (T 6068-6142; 6290-95; 6714-21)

The defense also presented mental health experts. Dr. Geoffrey Colino, a forensic neurologist, diagnosed the defendant with organic psychosis NOS. (TT 6451) The defense displayed images of the defendant's brain while Dr. Colino pointed to areas where he perceived scarring and other abnormalities. (T 6482-6510) Dr. Colino believed that Loyd suffers from extreme neurological dysfunction which affected his ability to conform his behavior as the law required. He could not, however, say that Loyd did not know right from wrong. (TT 6512-13)

On cross, Dr. Colino conceded he was not a psychologist, a psychiatrist, a radiologist, a neuroradiologist, or board-certified in neurology. He also admitted he was not currently on staff at any hospital and had not seen patients clinically since around 2011. (TT 6514) Dr. Colino testified that he received a report from defense expert Dr. Joseph Sesta, a board-certified neuropsychologist, but

that he disagreed with the conclusions that Dr. Sesta reached. (TT 6516; 6548)

Dr. James Campbell, a licensed clinical psychologist, testified that he was asked by the defense to evaluate Loyd, specifically with relation to PTSD and complex trauma, that he had been through prior to his incarceration. (TT 6580) Dr. Campbell relied on the Orange County Sheriff's investigative report, written by a Detective Savelli; Orange County Public School records; an Orange County police report from 11/17/2016; a homicide report from 1/20/1996; a joint homicide investigative team supplemental report from January 9th, 2017; an investigative supplemental report from 10/20/93; arrest and docket information from 8/16/2016 for Loyd's son; the transcript of testimony of a Tonya Loyd from 2019; a neuropsychological report written by Dr. Joseph Sesta from 11/2/2018; and surveillance video from the parking lot of this incident. (TT 6583-84) He also saw Loyd twice, on the 30th of September 2019, for four hours, and then September 22, 2021, for three and a half hours. (TT 6584) He testified that Loyd met the criteria for PTSD and complex trauma. (TT 6595-6621)

On cross-examination, Dr. Campbell agreed that a lot of the information he gets is subjective and cannot be corroborated and he was relying on Loyd's multiple criteria. (TT 6638)

Dr. Marvin Dunn, a retired professor from the psychology department at Florida International University, specializing in community psychology, also testified. (TT 6768-69; 6779-80) He gave his opinion that he considered Loyd to be culturally paranoid. (T 6803)

On cross-examination, he admitted that he was not legally permitted to examine Loyd for psychological diagnoses, that the last time he was licensed was in 1972, and that he never practiced clinical work or forensic work. (TT 6812-13)

In rebuttal, the State called neuro-radiologist Dr. Geoffrey Negin, a diagnostic radiologist and neuroradiologist. (TT 7226) He testified that he specialized in traumatic brain injury. (TT 7231) He was provided with several different brain imaging scans done on Loyd and various reports and depositions generated or conducted on some of the defense experts in this case. (TT 7233) He testified that one can diagnose a brain tumor from a CAT scan and MRI and that would be a diagnosis. He could say there's a tumor there, but not how the brain

is functioning by looking at an MRI or a CAT scan. Meaning, if he sees scarring in the brain or sees a piece of the brain missing from a previous injury, he will have no idea how that person is behaving and functioning. Someone must examine the patient and see if anything correlates with the findings they see. A person could have a portion of their brain missing or some injury, but still function normally. (TT 7239-40)

He reviewed Loyd's CT scan conducted on July 8th of 2016. (TT 7241) He did not see any indication of brain injury after reviewing that CT scan. (TT 7243-44) As for scarring, Dr. Negin stated that the presence of scarring does not say anything about how Loyd's brain functions. Dr. Negin testified that there is no correlation whatsoever and that the number of scars is not indicative of anything as many people have them. He further testified that most people over 45 or 50, have as many, if not more, scars and that they don't have any predictive value whatsoever. (TT 7251)

On December 8, 2021, the jury returned with a unanimous recommendation for death, finding that all five aggravating factors presented to them were proved beyond a reasonable doubt. (TT 7576; R 4860-62)

The trial court held a *Spencer*[17] hearing on January 14, 2022, with additional testimony taken on February 7, 2022.[18] (R 6939-7171) On February 7, when court reconvened for the second portion of the *Spencer* hearing, the judge agreed to take Dr. Amador's testimony regarding both competency and mitigation and appointed Drs. Jeffrey Danziger and Katherine Oses to evaluate Loyd's competency. (R 7085,7087-88, 7175)

Dr. Amador testified that he was asked by defense counsel to conduct an evaluation specifically regarding competency to proceed. (R 7107) Because of time constraints, the only thing he did not do was a structured interview like the MacArthur Competency evaluation, which specifically talks about the role of the judge, the role of the State, and the role of the prosecutor. However, he was able to evaluate the criteria for mental competence to proceed under Chapter 916.12 Florida law. Of the six criteria generally that Florida courts use to determine competency, Loyd was not competent regarding the first criterion, because of his inability to consult with

[17] *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996).

[18] The Court granted Defendant's Motion to Re-Open *Spencer* Hearing on January 27, 2022.

his attorneys with a reasonable degree of rational understanding. Loyd also did not meet the second criterion, as he could not assist with a reasonable degree of rational understanding and could not disclose pertinent facts and manifest appropriate courtroom behavior. He specifically diagnosed Loyd with schizophrenia. (R 7109-10)

During cross-examination Dr. Amador conceded that he had only interviewed Loyd for two hours and 12 minutes and had not reviewed Loyd's Facebook Postings, the police reports associated with either case, any depositions or trial testimony of the witnesses involved in either of those cases, or any trial testimony or depositions of the witnesses who interacted with Loyd before, during, and after the crimes. (R 7127-28) Dr. Amador agreed that it's very common for convicted defendants to feel the court system and the judge and the lawyers were unfair and for convicted defendants to be angry at their lawyers for not arguing things or putting witnesses on the stand the defendant felt would have been beneficial. (R 7132-33) He stated that it was not relevant if a defendant was able to maintain complete courtroom behavior in front of the jury who's watching him and deciding his fate, but then decides to act out the moment the jury

leaves the room. He also conceded he had no knowledge regarding the details of either crime or what occurred at trial. (R 7134-36)

A competency hearing was held February 21, 2022. (R 7172-7282) On direct examination, defense expert Dr. Jeffrey Danziger testified that his diagnosis was that of other schizophrenia spectrum or psychotic disorder, implying he is suffering from a psychotic illness with many features of schizophrenia, although not quite entirely fitting the criteria for schizophrenia. He opined that he had no doubt Loyd had a factual understanding that the defense team is supposed to represent him, that the state attorney is supposed to prosecute him, and a jury and judge is supposed to decide his fate. But while he had a factual understanding of the roles of the officers of the court, he lacked a rational understanding because he believed the defense was actually working against him. (R 7186-87) He agreed with Dr. Amador's conclusion to the extent that Dr. Amador found he suffers from a psychotic illness but disagreed that he meets criteria for schizophrenia. (R 7206) Dr Danziger also stated that many of the views that Loyd held on race and the criminal justice system in this country were widely held, which doesn't make you incompetent. That it might make you a difficult client to defend, but it doesn't

necessarily make you incompetent. The key issue was the mental illness. (R 7213)

During cross-examination, Dr. Danziger conceded that other than what defense counsel told him, he had no idea regarding how Loyd has participated in the trial. (R 7215) And was also unaware that for a time Loyd was permitted to represent himself, but then changed his mind given the constraints on his ability to do so. Although he did not believe Loyd could testify relevantly on his own behalf, he was not aware that Loyd exercised his right to testify in both trials. (R R7217-18) The judge then questioned the doctor:

> THE COURT: Would he understand I'm the judge?
>
> THE WITNESS: Factually, yes, he would.
>
> THE COURT: Would he understand if I sentenced him to life?
>
> THE WITNESS: He factually would, yes.
>
> THE COURT: Would he understand if I sentenced him to death?
>
> THE WITNESS: Yes.
>
> THE COURT: Would he understand if I explained his appeal rights to him for either of those sentences?
>
> THE WITNESS: He likely would, yes.

> THE COURT: Okay. So what is it he would not be competent to do at that sentencing?
>
> THE WITNESS: I see. He would be of the opinion that, while you have the -- you are the judge with the authority to sentence him to death, that essentially you, Your Honor, are part of a plot, that you are aware of exculpatory evidence and, nevertheless, sentencing him and you're essentially in cahoots with the State and his attorneys, who are sandbagging him. So, again, my opinion would be he would factually understand what you were doing, but rationally, the idea that you are lawfully sentencing him in your role as an impartial judge to either life or the death penalty, that through the prism of his delusional mind he would not grasp.

(R 7218-19)

Dr. Oses, a forensic psychologist, testified for the State. Dr. Oses believed that Loyd did not suffer from any delusional disorder or psychosis because she attributed his thoughts on the legal system to be similar to individuals in certain cultures and with certain diagnoses, i.e., antisocial personality disorder, individuals that have been to prison before and usually will have some sort of view of or concerns on the biased nature of the legal process. Regarding the first criteria, the appreciation of the charges and allegations, Oses opined that he was acceptable. He understood that he was now looking at the sentencing phase and that was in conjunction with him understanding that his attorneys were present and the

seriousness of the case. As to prong two, the appreciation of the range and nature of penalties to be imposed, Dr. Oses stated that was acceptable also, not only from his conversation regarding his previous placement in the federal system, but as well as his understanding of the current situation. Loyd understood that he was potentially facing the death penalty. As to prong number three, the understanding of the adversarial nature of the legal process, it was noted as likely acceptable as it was difficult to get Loyd to move beyond his frustration with the legal process. (R 7243-44) That distrust towards the system and even his lawyers was consistent with antisocial personality disorder. (R 7245) The fourth statutory prong, the capacity to disclose to his attorney's facts pertinent to the proceedings at issue, and fifth prong, the ability to manifest appropriate courtroom behavior, and the last criteria, the capacity to testify relevantly, were all likely acceptable based on a review of court records. (R 7246-47)

On February 24 the court filed a detailed order finding Loyd competent to proceed. (R 4779-89)

On March 3, 2022, after receiving sentencing memoranda from the State and defense, the trial court sentenced Appellant to death on Count I with consecutive prison sentences on the other counts. (R 4793-98) The court found three aggravators: (1) the defendant was previously convicted of a felony and on felony probation at the time the First Degree Murder was committed (SLIGHT WEIGHT); (2) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (GREAT WEIGHT); and (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws, the victim of the capital felony was a law enforcement officer engaged in the performance of her official duties (GREAT WEIGHT).[19] The court

[19] These aggravating factors were merged and considered together. *See Wheeler v State*, 4 So. 3d 599 (Fla. 2009); *Kearse v State*, 662 So. 2d 677 (Fla. 1995); *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994).

found one statutory mitigator (NO WEIGHT) [20] and five non-statutory mitigators which it gave moderate to minimal weight.[21] (R 4811-26)

This appeal followed.

[20] The age of the defendant at the time of the crime. (R 4819-20)

[21] The defendant's psychological and psychiatric mitigators (moderate weight); the defendant's childhood trauma (moderate weight); the defendant's trauma as an adult (some weight); the trauma of racism (minimal weight); and the circumstances related to defendant's offer to surrender and his arrest (minimal weight). (R 4820-26)

SUMMARY OF ARGUMENTS

Point one. In this case it is clear from the record that jurors 809, 717, and 21 all revealed during individual voir dire that they knew the defendant had lost an eye after being beaten by law enforcement officers at the time of his arrest and that evidence of that incident had been excluded by the court as to the first phase and limited as to the penalty phase. The trial court's decision to allow the three cause challenges was not clearly erroneous.

Point two. The trial court did not err when it denied Appellant's request for a special jury instruction on insanity. Appellant failed to show that his proposed special instruction was supported by the evidence; not adequately covered by the other instructions; and a correct statement of the law and not misleading or confusing.

Point three. Viewing the comment not in isolation, but in the context of the entire closing argument, the jury was adequately and fairly instructed on the elements of premeditation. Contextually, the statements made by the state regarding premeditation were proper argument. The prosecutor's comments were by and large identical to the standard jury instruction on premeditation which were

accurately displayed on the screen for the jury to follow during the argument.

Point four. Viewing the comments not in isolation, but in the context of the entire closing argument, the statements made by the state were proper argument.

Point five. Appellant has failed to establish fundamental error affected the penalty phase jury instructions.

Point six. The current standard governing the admissibility of victim-impact evidence already restricts any evidence that would unduly prejudice the jury and lead to an unfair trial. The trial court did not abuse its discretion in allowing the State to play music during the victim impact statement.

Point seven. The court did not abuse its discretion in finding Appellant competent to proceed.

Point eight. Felons were properly excluded from the jury pool; Appellant lacks standing to argue violation of the veniremen's equal protection rights.

Point nine. The standard penalty phase jury instructions, which included an instruction that the jury may consider "the

existence of any other factors in [the defendant's] character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty," sufficiently obviated the need for a specific instruction regarding mercy or sympathy.

Point ten. The Constitution does not prohibit the states from 'death qualifying' juries in capital cases.

Point eleven. Appellant asserts that Florida's death penalty statute, section 941.121, violates the Eighth Amendment's prohibition on cruel and unusual punishment. But the United States Supreme Court has repeatedly held otherwise. This Court is bound, both as a matter of federal and state law, by the United States Supreme Court's precedent to reject this Eighth Amendment challenge to capital punishment.

Point twelve. Appellant asserts that the Eighth Amendment's protection against cruel and unusual punishment precludes his death sentence due to his mental health diagnoses. Mental illness may be a statutory or non-statutory mitigating circumstance, but neither this Court nor the United States Supreme Court has recognized it as a per se bar to execution.

Point thirteen. Appellant's constitutional challenges to Florida's capital sentencing process have been repeatedly rejected. Florida's capital punishment scheme is constitutional.

Point fourteen. The trial court should have granted the State's motion updating the Preliminary and Final Instructions to conform with the Court's decision in *Poole* and the current, clear language of Florida Statute section 921.141.

ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY GRANTED THE STATE'S CAUSE CHALLENGES. ERROR, IF ANY, WAS HARMLESS.

Standard of review. The validity of a cause challenge is a mixed question of law and fact, on which a trial court's ruling will be overturned only for 'manifest error,'" which "is tantamount to an abuse of discretion." *Johnson v. State*, 969 So. 2d 938, 946 (Fla. 2007).

Loyd first claims that he is entitled to a new sentencing hearing because the trial court erroneously granted three cause challenges against prospective jurors 809, 717 and 21. Loyd further argues that such an error is not subject to harmless-error analysis and reversal of only the sentence is the appropriate remedy. The trial court did not err in granting the State's cause challenges because exposure to inadmissible and prejudicial information through pretrial publicity is a classic example of a valid ground for a cause challenge. *Hamdeh v. State*, 762 So. 2d 1030, 1032 (Fla. Dist. Ct. App. 2000). Even if the court did err, Loyd is not entitled to reversal because he cannot show that his right to a fair and impartial jury was injured, nor that he

suffered any prejudice by the court's ruling. As such, this claim should be denied.

On January 14, 2021, the State filed a Motion *In Limine* regarding Evidence of Law Enforcement Use of Force. (R 3166-78) On October 6, 2021, the court issued an order holding that the use force would be admissible in the penalty phase only in very narrow scenario. The court held that such evidence would be relevant only on the narrow issue to explain the presence of brain damage if the defense expert witness opined that the injury to Loyd's eye was relevant to his diagnosis of brain damage. If that relevancy was established through the defense expert, the fact that Loyd sustained a head injury which resulted in the loss of his eye would be admissible; however, the court specially excluded any mention of how the injury occurred, who inflicted it, or any details surrounding the injury. The court further ruled that the defense MAY NOT directly or indirectly establish, or attempt to establish, the cause of the injury. (R 3692)

Jury selection commenced on October 8, 2021. (TT 4) The court had previously granted individual voir dire regarding knowledge of

pretrial publicity[22], attitudes toward the death penalty, and attitudes toward the insanity defense. (R 7360) During the examination of Juror 809 by Mr. Williams, the following exchange took place:

> **Q** Mr. 809, I'll call you, you told us a few minutes ago -- you told me that you saw the injuries that Mr. Loyd suffered after his arrest?
> **A** Yes.
> **Q** What do you think about the fact that he was injured during his arrest?
> **A** What do I think about it?
> **Q** Yes, sir.
> **A** I mean...
> **Q** And there's no wrong answer.
> **A** Yeah.
> **Q** Because I understand the sensitive nature of this topic.
> **A** Yeah, it's -- I mean, just being honest --
> **Q** Yes.
> **A** -- what I seen, I was, you know, like -- because I seen the helicopter footage.
> **Q** Yes, sir.
> **A** I just remember seeing him, like, laid out, you know, and the first thing I seen was the cop, you know, kind of, like, kick him.
> **Q** Yes, sir.
> **A** I thought it was messed up, like, honestly, but at the same time, it was like, Well, you know, you killed a cop, so it's kind of like -- I'm not saying that it's the right thing to do, but it's like, you know -- I think it was wrong.

[22] This Court has held that exposure to prejudicial information "might not require disqualification of prospective jurors if this information were going to be introduced into evidence", and that trial courts have a duty to ascertain whether prospective jurors possess information which is not admissible in the trial in which they will serve as jurors. *Reilly v. State,* 557 So. 2d 1365, 1367 (Fla. 1990).

> **Q** You think what the police are alleged to have done was wrong?
> **A** Yeah.

(TT 1105-06)

The State moved for cause on the juror's knowledge of pretrial publicity and, specifically, Loyd's injuries:

> MR. WILLIAMS: I understand the juror said he could set it aside, but I think – State's belief is that his knowledge of information that is not going to be admissible -- in fact, my recollection of your last order noted that it was inflammatory, and this juror said he saw Mr. Loyd's face post-injury, is that he needs to be excused for cause.[23]
>
> THE COURT: Reply?
>
> MR. LENAMON: Yes, Judge. Based on their belief system, I can excuse the entire jury because you instructed the jury not to consider in the first part of the case the murder and the attempted murders of the people on the Dixon case, and they agreed to do so. How this is any different than that is beyond me. This person said he could set it aside, just like he can set aside the pretrial publicity, and this is no different than that, Judge.
>
> THE COURT: Number one, this is completely different. The fact of Ms. Dixon and the unborn child, the conviction in

[23] In arguing the cause challenges, the State cited to *Bolin v. State*, 736 So. 2d 1160 (Fla. 1999) (trial court abused its discretion in refusing to grant Bolin's request for individual and sequestered voir dire where five jurors had been exposed to inadmissible information) and *Reilly v. State,* 557 So. 2d 1365, 1367 (Fla. 1990) (error to fail to excuse a juror for cause, who knew from a media report that the defendant had confessed to the crime charged, where the confession was later suppressed and was not to be offered into evidence).

the trial was introduced to the jury by stipulation of the parties.[24] The injuries of Mr. Loyd have been excluded by the Court by court order except in a very narrow, very limited circumstance. It's not the same thing at all. There is a long line of cases about this that I'm familiar with of possessing knowledge of facts that have been specifically excluded by the Court, and almost all of them, it constitutes reversible error to deny the cause challenge, so I'm granting the State's cause challenge.

(TT 1112-15)

As to the examination of Juror 717 by Mr. Williams:

Q You said that you saw some media coverage about Mr. Loyd's eye?
A Yes.
Q Did you -- was it a verbal description or did you see a photograph?
A I saw it on the news.
Q A photograph?
A No, it was -- it was video on the news.

[24] A stipulated statement of relevant facts was read to each panel prior to questioning, to wit:

On the morning of January 9th, 2017, Defendant Markeith Loyd is alleged to have entered the Walmart store at 3101 West Princeton Street. Mr. Loyd had an active warrant for his arrest. Orlando Police Lieutenant Debra Clayton attempted to take Mr. Loyd into custody on the information she received regarding Mr. Loyd's involvement in the Dixon homicide when it is alleged Mr. Loyd shot and killed Lieutenant Clayton following an exchange of gunfire before fleeing the Walmart and eventually being apprehended about a week later. Mr. Loyd's trial for the killing of Sade Dixon and her unborn child began on September 27th, 2019, and concluded on October 23rd, 2019. Mr. Loyd was convicted and sentenced to life without the possibility of parole.

(E.g., TT 305-06)

Q Video. Was it Mr. Loyd with police around him coming out?
A Yes.
Q Did you hear or see anything about how that happened?
A Yes, I do remember. I was -- there was a fight or something -- something to that, that he got into an altercation, or there was --
Q Do you know a fight with whom?
A Of the police.
Q The police?
A I don't know if it was police, Orange County, I don't know. It was -- it was law enforcement.
Q Okay. So, is it your understanding from the information that you have that law enforcement inflicted the injuries on Mr. Loyd?
A I don't know. I just saw it on there. Again, that's something, just because you see something, you can't judge that's what occurred. I don't know.

(TT 1557-58)

The State moved for cause relying on the court's prior ruling and the defense agreed. (TT 1559-60). As to the examination of Juror 21 by Mr. Williams:

Q Did you hear anything about when he was caught?
A Oh, I think he was -- he got beat up.
Q Okay. Anything else you remember about that?
A No, ma'am.
Q Did you hear anything about who beat him up?
A The police officers that caught him.

(TT 2975)

The State moved for cause based on the juror's intimate knowledge of evidence that was ruled inadmissible by the court. The

defense objected and moved the court to reconsider its previous order excluding evidence of Loyd's injuries. The Court again addressed the relevancy of Loyd's injuries stating "This is a case where one week later, officers who are not being called to testify -- I think the record is clear in all this, but I'm just going to make it again. One week later, officers who are not being called to testify and are not part of this case, beat Mr. Loyd and he lost his eye. None of that is relevant to the issues of whether or not Mr. Loyd is guilty, and at this point it has not been tied to any mitigation". (TT 2984). The court granted the motion for cause finding that the juror was in possession of information that had been ruled inadmissible. (TT 2981-84).

This Court has held that "trial courts must ascertain whether prospective jurors possess information which is not admissible in the trial in which they will serve as jurors, and which is so prejudicial to the defendant that the jurors' knowledge of the information creates doubt as to whether the jurors can decide the case based solely upon the evidence that will be admitted at trial." *Kessler v. State,* 752 So. 2d 545, 551 (Fla. 1999), *citing Bolin v. State,* 736 So. 2d 1160, 1165-6 (Fla. 1999). This Court has found publicity concerning inadmissible information to be so prejudicial that even a prospective

juror without a preformed opinion should not be allowed to serve on a jury after exposure to the publicity. *Bolin v. State*, 736 So. 2d 1160, at 1164-65. (Fla. 1999); *citing Reilly v. State*, 557 So. 2d 1365, 1367 (Fla. 1990) (although juror subsequently gave the right answers with respect to whether or not he could be impartial, it was unrealistic to expect him to entirely disregard his knowledge of a confession no matter how hard he tried). *See Overton v. State*, 757 So. 2d 537, 539 (Fla. 3d DCA 2000) (where several jurors had knowledge of "otherwise inadmissible and highly prejudicial information," specifically that the defendant was sentenced to death in another case, "reasonable doubt existed as to their ability to serve as fair and impartial jurors, notwithstanding their assertions to the contrary").

In this case it is clear from the record that jurors 809, 717, and 21 all revealed during individual voir dire that they knew the defendant had lost an eye after being beaten by law enforcement officers at the time of his arrest and that evidence of that incident had been excluded by the court as to the first phase and limited as to the penalty phase. Competent, substantial evidence supports the trial court's findings. The trial court did not err in granting the State's three cause challenges.

Loyd's rationalization that the excluded jurors knew something which the jury would ultimately learn, holds no merit. (IB at 55). The reality is that at the time of voire dire, the use of force by the police was not coming in during the penalty phase ***unless*** the defense was able to tie the injury to any brain damage. So, there was no guarantee that the evidence was coming in, contrary to Loyd's assertion. More importantly, the fact that the judge allowed the evidence to come in does not change the fact that it was inadmissible during the guilt phase.

Loyd further argues that it was enough that the jurors excused for cause averred that they possessed an open mind and could render a fair verdict based solely on the evidence presented at trial, citing to *Ault v. State*, 866 So. 2d 674 (Fla. 2003) and *Gray v. Mississippi*, 481 U.S. 648 (1987). However, those cases are distinguishable as they relate to prospective jurors' views on capital punishment.

The United States Supreme Court held that the "exclusion of a juror for cause, in a capital prosecution, who was not irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings, was reversible constitutional error which could not be

subjected to harmless-error review. *Gray v. Mississippi,* 481 U.S. 648 (1987). In *Ault*, this Court ordered a new penalty phase after concluding that the trial court erroneously dismissed a potential juror for cause based on the juror's "opposition to the death penalty." *Ault*, 866 So. 2d at 683. This court concluded that it was reversible error for the trial court to have dismissed a prospective juror for cause where the juror's responses to questioning indicated "that she could put her personal feelings aside and be fair in the penalty phase and that she could be fair in the guilt and penalty phases even though she opposed the death penalty." *Id.* At 685-86. Where a single juror who is not in fact *Witherspoon*[25]-excludable is excused from service, the error is deemed structural because the impartiality of the jury, no less than the impartiality of the presiding judge, goes to the very integrity of the legal system. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

The circumstances in Loyd's case do not involve jurors who expressed conscientious scruple or religious objection to the death penalty as was the case of the prospective jurors excluded in *Ault* and

[25] *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) (prospective jurors may not be excused for cause simply because they voice general objections to the death penalty).

Gray. The relevant inquiry in Appellant's case was not whether the jurors who were excused could set aside any preconceived notions or opinions, or whether their ability to follow the court's instructions was impaired. Rather, the question was whether their ability to serve was compromised because they possessed specific knowledge of evidence the court had deemed to be inadmissible. It is clear from the record that the each of those jurors did. The trial court did not abuse its discretion in granting the State's cause challenges, as there is evidence to support the trial court's decision.

Should this Court find that the trial court erred in granting the cause challenges, any error is harmless under these facts. The harmless error rule is "concerned with the due process right to a fair trial" and "preserves the accused's constitutional right to a fair trial by requiring the state to show beyond a reasonable doubt that the specific [errors] did not contribute to the verdict." *State v. DiGuilio,* 491 So. 2d 1129, 1135–36 (Fla. 1986). The test for harmless error focuses on the effect of the error on the trier of fact. *Id.* at 1139. "The question is whether there is a reasonable possibility that the error affected the verdict." *Id.* The burden is on the State to prove beyond a reasonable doubt that the error did not contribute to the outcome.

Id. For purposes of the harmless error analysis in this case, the issue is whether the granting of the State's three cause challenges contributed to the sentence.

Appellant's right to a fair and impartial penalty phase jury was not impinged because there was no reasonable doubt as to the impartiality of any of the jurors that sat in Appellant's case. Application of the test requires an examination of the entire record by the appellate court. *Id.* at 1135. Nothing in the record suggests that the outcome of Loyd's sentencing might have been different but for the trial court's granting of the three cause challenges. The record demonstrates that Appellant was tried before a qualified jury composed of individuals not challengeable for cause, and Appellant has pointed to no objectionable juror that was accepted because of juror's 809, 717, and 21's removal from the jury. During jury selection, the defense had used only five of their ten preemptory challenges before the twelve jurors were selected. (TT 3800-01) In fact, prior to the jury being sworn, defense counsel acknowledged they still had preemptory challenges left, but did not want to exercise them. (TT 3814) Likewise, the State had only used six of their ten preemptory challenges before the twelve jurors were selected. (TT

3799-3800) Had the cause challenges not been granted, the State was free to use their preemptory challenges to remove the jurors if needed. Ultimately, the trial court's granting of the State's cause challenges had no impact on the outcome of his case. *Deviney v. State*, 322 So.3d 563, 588 (Fla. 2021). There is no reasonable possibility that the error contributed to the verdict in the penalty phase.[26] *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).

As such, this claim should be denied.

POINT TWO

THE TRIAL COURT PROPERLY DENIED APPELLANT'S PROPOSED MODIFICATION TO THE STANDARD JURY INSTRUCTION ON INSANITY.

Standard of review. Appellant argues structural error in the trial court's denial of its motion to modify the standard jury instructions on insanity. The trial court has wide discretion in instructing the jury, and the decision to give or refuse to give a special jury instruction is reviewed under the abuse of discretion standard. *See Hudson v. State*, 992 So. 2d 96, 112 (Fla. 2008).

The standard criminal jury instruction on insanity reads, in part:

[26] As Loyd acknowledges, no error can be found at the guilt phase. (IB at 55)

> Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a *firm belief, without hesitation, about the matter in issue*.

Section 775.027(2), Florida Statutes.

Loyd filed a motion to modify the standard insanity jury instruction to include the following modified and additional language:

> Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight *that it is sufficient to persuade you that the Defendant's claim is highly probable. It is a higher standard of proof than a preponderance of the evidence, but less exacting than proof beyond a reasonable doubt.*
>
> *A "preponderance of the evidence" is enough evidence to persuade you that the Defendant's claim is more likely true than not true.*

(R 3782)

The trial court denied the request as to both proposed instructions, ultimately concluding the insanity instruction already provided the definition of clear and convincing evidence. (TT 3585)

Standard jury instructions for criminal trials are presumed correct and are generally preferred over special instructions. *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001). To be entitled to a special jury instruction, the party making the request must prove that: "(1) the special instruction was supported by the evidence; (2)

the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing." *Bogle v. State*, 213 So.3d 833, 853 (Fla. 2017) (*quoting Stephens v. State*, 787 So. 2d 747, 756 (Fla. 2001)). Appellant has not only failed to meet the prerequisites for establishing error; he has failed to meet each of them. The trial committed no error in rejecting Appellant's proposed instructions.

Loyd shows no evidence to support the request for a special instruction other than the blanket assertion that an instruction on the burden of proof is always relevant, citing *Yohn v. State*, 476 So. 2d 123 (Fla. 1985). (IB at 57) However, in *Yohn*, the standard instruction on the then-existing insanity defense did not establish where the burden of proof lay. No such discrepancy exists here. Nor is this a case where current case law is in direct contravention with the standard jury instruction. *Rodriguez v. State*, 172 So.3d 540, 545 (Fla. Dist. Ct. App. 2015) (trial court abused its discretion by using hallucinations instruction not applicable for offenses that occurred after June 19, 2000). Rather, Appellant seeks to redefine the clear and convincing standard from "firm belief" to "highly probable", which is a clear misstatement of law.

The definition of clear and convincing evidence used in the standard insanity instruction has been used in Florida for decades, and the language used mirrors the language used to define the clear and convincing evidence standard in case law, which requires "a firm belief, without hesitation," in the minds of the jurors. *See In re Petition for Jud. Waiver of Parental Notice & Consent or Consent Only to Termination of Pregnancy*, 333 So.3d 265, 272–73 (Fla. Dist. Ct. App. 2022) (On a minor's petition for judicial waiver of parental consent to abortion, Section 390.01114(6)(c) the evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established); *T.B. v. Dep't of Child. & Fams.,* 299 So.3d 1073, 1076 (Fla. 4th DCA 2020) (Standard of review of the final judgment terminating parental rights; the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy); *Derossett v. State*, 311 So.3d 880, 890 (Fla. 5th DCA 2019) (Stand your Ground Motion defining clear and convincing standard as evidence to be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established); *Dana v.*

Eilers, 279 So.3d 825, 828–29 (Fla. Dist. Ct. App. 2019) (A party seeking to establish a prescriptive easement; the evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy).

Furthermore, the standard jury instruction on insanity has been upheld against the contention that it raises a murder defendant's burden of proof to establish insanity from clear and convincing evidence to beyond a reasonable doubt. *Pewo v. State*, 177 So.3d 32 (Fla. 2d DCA 2015). ("[F]ailure to give special instructions does not constitute error where the instructions given adequately address the applicable legal standards." (*quoting Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001)).

Nor was the clarifying language necessary to properly instruct the jury on the burden of proof. *Trepal v. State,* 621 So. 2d 1361, 1366 (Fla. 1993) ("a circumstantial evidence instruction is unnecessary if the jury is properly instructed on reasonable doubt and the burden of proof"; upheld trial court's denial of special instruction); *Hansborough v. State,* 509 So. 2d 1081 (Fla. 1987) ("... the standard instructions adequately apprised the jury as to the law

..."; upheld trial court rejection of "four special jury instructions on sanity").

The trial court did not err in denying these special instructions. Even if the court did err, any err was harmless. An error is harmful if the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict. *State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986)). In this context, "[r]eversible error occurs when an instruction is not only an erroneous or incomplete statement of the law but is also confusing or misleading. The test is not whether a particular jury was actually misled, but instead the inquiry is whether the jury might reasonably have been misled. *Rodriguez v. State*, 172 So. 3d 540, 545–46 (Fla. Dist. Ct. App. 2015). In determining whether the erroneous instruction was harmful, the appellate court is required to consider the instruction in light of the State's argument, the other jury instructions, and the evidence in the case.

The court, as well as defense, instructed the jury that clear and convincing was a lower standard than the State having to prove Appellant guilty beyond a reasonable doubt during jury selection. (E.g., TT 3337, 3344-45) And the State did not argue to the jury that

the defense had a burden to prove that Loyd was insane at the time of the crime beyond a reasonable doubt. In fact, the state used the language which Appellant included in its modified instruction:

> Now, in a moment, I will sit down, and the defense will have an opportunity to speak to you, and I suspect that they will discuss self-defense and insanity. And as we discussed during jury selection, and as you've already been instructed here today, it is their burden to *prove by clear and convincing evidence* that Mr. Loyd was insane at the time of this offense.
>
> So, I would ask you as the argument is made to you that you listen carefully to defense counsel's argument but ask, is there evidence that is clear and convincing that Mr. Loyd was insane? *Is it -- to use the language of the instruction -- precise, explicit, and lacking in confusion*?[27] Is that what you heard from Dr. Toomer?

(TT 5425-26)

The opinions of the mental health specialists who testified on Loyd's behalf all had inconsistent, and often contradictory opinions, while the State's experts believed Appellant did not suffer from any major mental illness prior to the killing of Sgt. Clayton. After considering all the evidence, the jurors rightfully rejected the insanity defense. The facts in this case clearly establish that Loyd committed a cold-blooded murder of a law enforcement officer. Loyd shot

[27] Appellant did not object to this wording in their argument. (IB 56)

Lieutenant Clayton because he wanted to get away, not because he was insane.

Accordingly, Appellant's claim for relief on this issue should also denied.

POINT THREE

THE PROSECUTOR'S COMMENT IN THE PENALTY PHASE CLOSING ARGUMENT WAS NOT IMPROPER.

This Court reviews trial court rulings regarding the propriety of comments made during closing argument for an abuse of discretion. *See Salazar v. State*, 991 So. 2d 364, 377 (Fla. 2008). When no objection to a comment challenged on appeal was made below, or no motion for mistrial was made following a sustained objection, this Court reviews the issue for fundamental error. *Evans v. State*, 177 So.3d 1219, 1234 (Fla. 2015). As no objection was made, Appellant's position is that the State's closing argument as to premeditation amounted to fundamental error as to both Counts I[28] and II.

[28] The improper argument Loyd refers to was made only as to Count II. As to the argument made in reference to premeditation to Count I, the prosecutor relied on three reasons Loyd had a premediated intent to kill: motivation to kill premised on his Facebook posts; arming himself before entering the Walmart; the circumstances surrounding her death; and the anger and hatred Loyd had for law enforcement officers. (TT 5415; 5420-5424)

Such a review includes two factors: (1) whether the improper statement was repeated; and (2) whether the jury was provided with an accurate statement of law after the improper comment was made. *Kaczmar v. State*, 228 So.3d 1, 12 (Fla. 2017). The fundamental error doctrine is to be applied "only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Martinez v. State,* 981 So. 2d 449, 455 (Fla. 2008).

Appellant asserts that the State improperly argued during its first phase closing argument that intent to kill is premeditated under Florida law if it is shown to exist "during the act." Appellant only selectively cites one part of the State's closing in making this claim. To determine whether a prosecutor has engaged in improper argument, it is necessary to evaluate the actions of the prosecutor in context rather than focus on the challenged statement in isolation. *See State v. Jones*, 867 So. 2d 398, 400 (Fla. 2004). The following argument was made by the prosecutor during guilt phase closing arguments on premeditation as to Joseph Carter:

> So that brings us to the second element. Markeith Loyd acted with a premeditated design to kill Joseph Carter. Now, what evidence do we have of that and what exactly does premeditated design mean?
>
> You've all been read to this morning, I'm not going to read to you again, but ***you can see it on the screen***. What it means is a conscious intent to kill. And that conscious intent has to be present in the person's mind during the act.
>
> So, the example I would give you is all being Floridians familiar with mosquitoes. You are sitting on your front porch, a mosquito lands on your arm. You look down and you see it and you have a decision to make. Do you brush it off? Do you smack it? There is a conscious choice in your mind to do one or the other, and it may take a matter of seconds to make that decision; but if you smack it down, that is an intent to kill that was formed in your mind at the time and during the actual act. And that is all that is necessary to prove premeditation in the state of Florida.

(TT 5408-09)

To determine whether an instruction error "vitiated the 'validity of the trial,' courts conduct a totality of the circumstances analysis." *Garzon v. State,* 980 So. 2d 1038, 1043 (Fla. 2008). Contextually, the statements made by the state regarding premeditation were proper argument. Premeditation is "understood as requiring proof that the defendant was aware of the consequences of the actions that caused death, and that the defendant had the

opportunity for reflection prior to committing the fatal act." *Sparre v. State*, 164 So.3d 1183, 1200 (Fla. 2015). Premeditation does not require lengthy deliberation on the part of the actor; the intent to commit potentially fatal acts "may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act." *Brown v. State*, 126 So.3d 211, 221 (Fla. 2013) (quoting *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001)).

The prosecutor's comments were by and large identical to the standard jury instruction on premeditation which were accurately displayed on the screen for the jury to follow during the argument. [29]

[29]The jury instruction read to the jury and *on the screen* as the prosecutor was making his closing argument was as follows:

> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of a premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

(TT 5360-61; R 420-21).

The prosecutor then applied the instruction to the facts of the case, clearing up confusion, if any:

> *And there is no doubt that Markeith Loyd had a premeditated design to kill Captain Carter. How do we know that? We know that because of the way Captain Carter described what he saw when he pulled up behind who we now know has Markeith Loyd. What did Captain Carter say the man in the dark clothing was doing when he pulled his car to a stop? He was already standing looking right at him.*
>
> *Remember, the firearm wasn't up at that point, but he was standing waiting for Captain Carter.*
>
> *If Markeith Loyd's intention was to flee, if his intention was to scare Captain Carter, he could have jumped out of the Mercury and taken off running, but he didn't. He stood and he waited for Captain Carter, yet another law enforcement officer, to start to get out of his car, and that's when Markeith Loyd fired at Captain Carter.*
>
> *We also know, unfortunately, that Markeith Loyd intended to kill Captain Carter because he had just killed another law enforcement officer minutes before for trying to do the same thing that Captain Carter was doing, which was to take his freedom away from him.*

(TT 5408-10) (Emphasis added.)

Viewing the comment not in isolation, but in the context of the entire closing argument, the jury was adequately and fairly instructed on the elements of premeditation.

However, if this Court finds that it was improper, it was harmless and did not amount to fundamental error. Unlike *Reed v. State*, 837 So. 2d 366 (Fla. 2002), this was not an incorrect jury instruction, but closing argument. On this record, it cannot be said that the jury lacked competent, substantial evidence to support its conclusion as to premeditation.

Appellant is not entitled to relief on this claim.

POINT FOUR

THE PROSECUTOR'S COMMENTS DURING PENALTY PHASE CLOSING ARGUMENTS WERE NOT IMPROPER.

Appellant argues that the State made several improper comments during its closing argument that warrant reversal. Where a trial court overrules objections to closing argument, the reviewing court considers whether the rulings represented an abuse of the court's discretion. Control of prosecutorial argument lies within the trial court's sound discretion and will not be disturbed absent an abuse of discretion. *Lowe v. State*, 259 So.3d 23, 47 (Fla. 2018). This claim is without merit because the prosecutor's comments were not improper, and even if they were improper, any error is harmless.

Appellant first characterizes the comments "you have an obligation to…try your best to reach a unanimous verdict" as a misstatement of the law, minimizing the role the jury plays as individuals in Florida's capital sentencing process. (IB 68) To begin with, the Appellant misquotes the prosecutor, as he never used the word "obligation", but rather that "they try their best" in reference to a unanimous verdict. What the prosecutor obligated the jury to do, was "to give meaningful consideration to everything". (TT 7439)

Furthermore, the cases Appellant cites to all involve a trial courts erroneous jury instruction to the jury. *Thomas v. State*, 748 So. 2d 970, 976–77 (Fla. 1999) (cumulative nature of the trial judge's actions and comments under the extreme prevailing circumstances created a substantial risk of coercion, or at the very least, constituted undue pressure upon the lone holdout juror to change his or her vote due to the trial judge's repeated failure and refusal to give the balanced *Allen* charge from the Standard Jury Instructions; the judge's repeated informal instructions urging the jury to render a decision; the prevailing conditions surrounding the deliberations evidenced predominantly by the jury's deliberations into the early morning hours of the following day; and the jury's announcement in

open court of their split vote indicating a lone holdout); *Patten v. State*, 467 So. 2d 975, 979–80 (Fla. 1985) (the trial judge should have advised the jury that it was not necessary to have a majority reach a sentencing recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment). It is undisputed here that the jury was never instructed by the court that they had to reach a unanimous decision, nor can the comment made by the prosecutor compare to the patent coercion displayed in the above cases.

Secondly, Appellant once again only selectively cites one part of the State's closing in making this claim. To determine whether a prosecutor has engaged in improper argument, it is necessary to evaluate the actions of the prosecutor in context rather than focus on the challenged statement in isolation. *See State v. Jones*, 867 So. 2d 398, 400 (Fla. 2004). The following argument was made by the prosecutor during penalty phase closing arguments *as to the steps needed to reach a lawful verdict in the case*:

> **MR. WILLIAMS:** Now, you-all sat and listened to the multiple steps that you-all have to take in order to reach a lawful verdict in this case. And I'm gonna take a moment here to submit to you that the process itself is important and that you not deviate from that process. Now, we will

come back to this again, but you have a duty to deliberate in this case, and there's been discussion during jury selection and at multiple times during the trial about what it means to deliberate.

And while it is true, as you have been told several times, that *your decision as to whether or not a sentence of death is appropriate is an individualized decision*, that is nothing new to you. *That is something you have already done, because what the instructions and the law tell you is that each of you reach an individualized decision, and only if you're unanimous that death is the appropriate punishment can it be imposed.*

(T 7436-37)

MR. WILLIAMS: I would suggest to you that as the instructions point out, you have an obligation to give meaningful consideration to everything. And not only that, **but that you try your best to** reach a unanimous verdict. And I say that knowing --

MR. LENAMON: Objection. Misstatement of the law.

THE COURT: Overruled.

MR. WILLIAMS: I say that knowing that you-all may unanimously decide that Mr. Loyd deserves life in prison without parole.

MR. WILLIAMS: *This is an important decision and all I am suggesting is that you-all collaborate together understanding you will make an individualized decision to reach a decision that is commiserate with the task in front of you.*

(T 7439-40)

The prosecutor's comment did not diminish the jurors' roles and was not improper. This comment was made in the context of the State's full explanation to them regarding the jury instructions. Contextually, the comments made by the state repeatedly emphasized the juror's individual role in the sentencing process and explained that only if they are unanimous that death is the appropriate punishment, can it then be imposed. No obligation to return a unanimous verdict was ever conferred onto them by the state.

Even if this Court finds that the comment was improper, any error is harmless under these facts. It was a single, isolated comment given in an otherwise proper closing argument that, on the whole asked the jury to return a death recommendation based on the evidence. Loyd's jury was properly instructed by the trial court, including that a unanimous verdict was not required.[30] *Ritchie v. State*, 344 So.3d 369, 386 (Fla. 2022), *reh'g denied*, No. SC20-1422, 2022 WL 3593821 (Fla. Aug. 23, 2022). What's more, Defense

[30] And then the last question, if you answer yes to that one, the last one is the verdict as to the death penalty. That must be unanimous. And it will ask you yes or no on that. If it is not unanimous, it's a life sentence. So the answer would be no. All right? (TT 7555)

counsel was able to remedy any possible ambiguities the jurors may have had as to their individualized role:

> **MR. LENAMON:** So, you can actually, without question, find that the aggravating factors outweigh the mitigating factors, and when it gets to question -- the last question on this, about we, the jury, unanimously find that the defendant, Markeith Loyd, should be sentenced to death, if one juror, even if they believe the aggravators outweigh the mitigators, they don't have to vote for death. And so, for the things that we have talked about over the last two hours, you never have to vote for death. For a death sentence to occur, it has to be all 12 jurors unanimously believing that the death penalty is the appropriate sentence.
>
> If you go through all the weights and you get to that point and you don't feel the death penalty is appropriate, it's not a death sentence. It's got to be unanimous. All 12. One juror is a life verdict. End of story.
>
> And so when you go back there and make a decision, if your decision is life, you just say life.

(TT 7552-53)

Appellant next accuses the prosecutor of arguing to the jury there was no need to address the statutory mitigating circumstance that "the defendant's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired." (IB 68) While, Appellant cites to *Campbell v. State*, 571 So. 2d 415 (Fla. 1990); and *Mines v. State*, 390 So. 2d 332,

337 (Fla. 1980) to further their argument, both *Mines* and *Campbell* stand for the proposition that once a trial court determines that a defendant is not insane, it must still consider the statutory mental mitigating factors. The trial court below did not reject the statutory mental mitigators after finding Loyd to be sane; it rejected them after a reasoned analysis comparing the findings of the mental health experts who evaluated him. *Middleton v. State*, 220 So.3d 1152, 1178 (Fla. 2017).

Perceptibly, these cases, involve an utter disregard of any mental mitigators. In the instant case, on the other hand, there was no such refusal to consider mental mitigation. *Francis v. State*, 808 So. 2d 110, 141 (Fla. 2001) As for the comment made by the prosecutor, Appellant once again misrepresents the prosecutor's argument. The prosecutor never made such a statement or suggestion, nor was the jury precluded from considering mitigation.

The factors to be considered when analyzing a claim of prosecutorial misconduct are the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the

strength of the competent proof to establish the guilt of the accused. *Angel v. Overberg,* 682 F.2d 605, 608 (6th Cir.1982) (en banc). Prior to the complained of comment, the prosecutor highlighted the testimony from Dr. Colino. The actual comment made by the prosecutor was:

> **MR. WILLIAMS**: So the next mitigating circumstance I want to talk about is the allegation that Mr. Loyd's capacity to appreciate the criminality of his conduct or conform to requirements of law was substantially impaired. And my recollection is that the only testimony of this came from Dr. Colino, and it came at the end of his testimony. And he was asked the specific question with the specific language and he clarified that in his view Mr. Loyd understood or appreciated the criminality of his conduct. And here again, you-all have already made this determination by rejecting his insanity defense. You determined that he knew the difference between right or wrong or that it was unlawful.

(TT 7463-64)

The prosecutor then argued that *in addition* to the testimony from Dr. Colino, the jury could also consider the fact that they rejected the insanity defense. While a finding of sanity does not preclude consideration of the statutory mitigating factors concerning a defendant's mental condition, no rule of law states that those findings must be ignored in weighing the mitigating factors. *Globe v. State*, 877 So. 2d 663, 676 (Fla. 2004) The prosecutor then went on

to argue why there was no evidence that Loyd couldn't conform his conduct to requirements of law:

> **MR. WILLIAMS:** So what you're left with is Dr. Colino in his testimony that Mr. Loyd couldn't conform his conduct. Well, Dr. Colino didn't explain why he believes that. Didn't say a word about it.
>
> What evidence is there that Mr. Loyd was unable to conform his conduct to the requirements of law? In fact, as Dr. Maher had to acknowledge, the records from the Orange County Jail where Mr. Loyd was staying after he murdered Lieutenant Clayton indicated that he was able to. In fact, they changed his confinement level based upon his willingness to do so to do that very thing, to follow the laws and rules and regulations.
>
> There's no evidence that he couldn't conform his conduct to requirements of law. And that leaves aside that Dr. Negen completely blew up Dr. Colino's testimony by saying that yes, he, in his expert opinion, evaluated the scans, that the scarring was normal, that all of the scans were normal.

(TT 7464)

This comment was not improper because the prosecutor was attempting to rebut mitigating evidence argued by the defense. In this case, the comments directly before and after the one indicated by Appellant dispels the message Appellant perceives was being conveyed. The prosecutor in this case urged the members of the jury to use their recollection of the evidence introduced at trial and to the

witness testimony they heard to decide whether the mitigator had been proven.

Even if this Court finds that the comment was improper, any error is harmless under these facts. There is no reasonable probability that they contributed to the death sentence. The facts themselves support the jury's rejection of this mitigator as well as their verdict in favor of death. As stated in the sentencing order:

> At his trial, the defendant testified that he knew that he was wanted for the murder of Sade Dixon. The defendant was hiding in the woods near the Princeton Walmart prior to the murder of Debra Clayton. Before killing Debra Clayton, the defendant obtained a bulletproof jacket, clearly anticipating a confrontation with law enforcement. To avoid being arrested for the murder of Sade Dixon, the defendant murdered Debra Clayton and fled from Walmart. When confronted by law enforcement again, the defendant attempted to kill Captain Carter of the Orange County Sheriff's Office. Ultimately the defendant was found by law enforcement hiding in a house. The actions of the defendant both before and after the murder of Debra Clayton speak of a person making decisions to avoid the consequences of his crimes. The evidence established that the defendant appreciated the criminality of his conduct. The testimony of the experts to the contrary was not credible.

(R 4819)

Lastly, Appellant argues that the State, by so arguing the following, had in effect improperly relied on a non-statutory aggravating factor:

> the fact that Markeith Loyd is already serving two life sentences indicates that a life sentence in this case is no punishment at all.... Is another sentence of life appropriate in this case? The reality is it would be another piece of paper in Mr. Loyd's file.

(IB 70).

The trial court relied on *Spivey v. Head*, 207 F. 3rd 1263 (11th Cir. 2000) to deny relief. In *Spivey*, explaining why a life sentence verdict would be just "a slap on the wrist," the prosecutor in his closing during the sentencing phase stated:

> State's Exhibit Number 22 ... is an Indictment, a verdict of guilty, and a sentence to life imprisonment for the defendant in Bibb County, Georgia. You know when he committed that murder in Bibb County, Georgia? Two hours before he committed the one, or three hours before he committed the one in Muscogee County. So your verdict of life imprisonment will not add one day of punishment to this man.... If he is sentenced to life imprisonment on the first murder and you give him life on the second, is that appropriate punishment?

The court held that assuming *arguendo*[31] that the prosecutor did misstate the law and his argument was therefore improper, there was not a reasonable probability that the misstatement changed the outcome of the case. At the sentencing stage, the jury faced the central question of whether to sentence Spivey to death or to life imprisonment. *Spivey v. Head*, 207 F.3d 1263, 1277–78 (11th Cir. 2000) The court explained that, even assuming the statements were improper and misstated the law, the comments unlikely affected, even minimally, the jury's verdict; therefore, the sentence was not fundamentally unfair.

Similarly, the State's comments in closing argument neither misrepresented the law or the facts in any way and were not improper. In the present case, the comments at issue represented a very brief portion of the State's entire closing and much like the "slap on the wrist" hyperbole in *Spivey*, there is not a reasonable probability that the figurative language used here changed the outcome of the case. Moreover, the State clarified that it was

[31] It is important to note that the 11th Circuit in *Spivey*, never determined that the prosecutor's comments were improper or misstated the law.

intentionally argued as to the weight of the prior violent felony aggravators. (TT 7493, 7495; see TT 7484)

Prior to closing argument, the jurors were aware that Loyd was convicted of murder, that he was serving a life sentence, and that he would never get out of prison. The defense in this case made a strategic decision to tell the jurors from the very beginning from the statement of facts that were first read to the jurors, that the defendant had already been convicted of a murder after a trial, gave the jurors the dates of that trial, and was serving a life sentence such that he would never get out of prison. This information was brought to the attention of every single juror that was substantially questioned during individual voir dire in hopes of getting a more life-oriented jury. By telling the jury that Loyd was already serving a life sentence and was never getting out of prison, they could then question the jurors about that specific aggravator and the fact that he was never getting out in order to find those jurors who think that that was so weighty, such that it would become an automatic life sentence based on that aggravator.

This Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any

prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989). As this Court has explained, "[t]estimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." *Id.* Such testimony would also be relevant in determining what weight to give to the prior violent felony aggravator. *Cruz v. State*, 320 So.3d 695, 721 (Fla. 2021); citing *Seibert v. State*, 64 So.3d 67, 79 (Fla. 2010). The prosecutor did not rely on a nonstatutory aggravating factor but used strong language only to describe the weight ascribed to a statutory aggravating factor. *Oyola v. State*, 158 So.3d 504, 511 (Fla. 2015).

Should this Court find that the trial court erred, any error is harmless under these facts. It is unlikely that a different sentence would have been imposed but for the comment. The jury was instructed to follow the law as instructed by the court and further instructed on which aggravating factors they could consider,

provided those aggravators were established by the evidence.[32] The law presumes that juries follow the instructions given them by the court. *Crain v. State*, 894 So. 2d 59, 70 (Fla. 2004).

In the context of the entire closing argument and considering the evidence presented in the penalty phase, namely, the strength of the evidence against Loyd and the gravity of the aggravators, it cannot be said that the objected-to comments deprived Loyd of a fair penalty phase or were "so inflammatory" that a sentence of death could not have been obtained without it. *Lowe v. State*, 259 So.3d 23, 48 (Fla. 2018).

Accordingly, this claim should be denied.

POINT FIVE

THE TRIAL COURT PROPERLY DENIED APPELLANT'S PROPOSED MODIFICATION TO THE PENALTY PHASE JURY INSTRUCTIONS.

Standard of review. Appellant argues that the court should have removed from the penalty-phase jury instructions any language that places on the defense the burden of proving mitigating circumstances. The trial court has wide discretion in instructing the

[32] Defense counsel conceded the aggravators were proven. (TT 7552)

jury, and the decision to give or refuse to give a special jury instruction is reviewed under the abuse of discretion standard. *See Hudson v. State*, 992 So. 2d 96, 112 (Fla. 2008).

Appellant's claims that Florida's capital sentencing statute and jury instructions are unconstitutional because they shift the burden of proof as to the weighing of aggravation and mitigation have consistently been rejected by this Court. *See Bush v. State*, 295 So.3d 179, 210 (Fla. 2020) (standard penalty phase jury instructions do not 'impermissibly shift the burden to the defense to prove that death is not the appropriate sentence.' (quoting *Rogers v. State*, 957 So. 2d 538, 555 (Fla. 2007); *Lebron v. State,* 982 So. 2d 649, 666 (Fla. 2008) (penalty-phase instructions do not improperly shift burden of proof to the defendant); *Barnhill v. State,* 971 So. 2d 106, 117 (Fla. 2007) (Florida's death penalty statute and jury instructions do not unconstitutionally shift the burden of proof); *Reynolds v. State,* 934 So. 2d 1128, 1151 (Fla. 2006) (rejecting claim that capital sentencing statute and instruction unconstitutionally place a higher burden on the defendant to establish that life is the appropriate penalty than is placed on the State to establish that death is appropriate).

Appellant's claim for relief on this issue should also denied.

POINT SIX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE VICTIM IMPACT EVIDENCE

Standard of review: Appellant suggests that this Court create a bright-line rule directing the trial courts to exclude music from victim-impact evidence, except in cases where a victim's musical gifts were part of that individual's unique contribution to the community. IB 81. A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. *Kalisz v. State*, 124 So.3d 185, 211 (Fla. 2013).

Sentencing judges have broad discretion to admit a victim impact statement, which limits to identifying the victims and the crime's impact on them and their family but imposes no restriction on the manner of presentation. Traditionally, during the sentencing phase of a capital trial, a member of the victim's family would go before the court and read aloud into the record a written statement of victim-impact evidence "to inform the judge or jury of the financial, physical, and psychological impact of the crime on the victim and the victim's family."[33] But with technological advances in the courtroom,

[33] BLACK'S LAW DICTIONARY (9th ed. 2009)

victim impact is no longer limited to just the words of the family members. The presentation has evolved to include photographs, videos, and now background music.

The possibility that evidence may in some cases be unduly inflammatory does not justify a prophylactic rule that this evidence may never be admitted. *Payne v. Tennessee*, 501 U.S. 808, 831 (1991). The current standard governing the admissibility of victim-impact evidence already restricts any evidence that would unduly prejudice the jury and lead to an unfair trial.[34]

With regard to the admissibility of music during victim impact statements, different jurisdictions have drawn the line of admissibility differently. A common thread, however, is the necessity that the trial court review any video evidence before it is presented at the sentencing hearing so that the court can exclude irrelevant, cumulative, or overly prejudicial material. The sentencing judge has the duty to ensure that the defendant's due process rights are not violated by the court's consideration of evidence "so unduly prejudicial that it renders the trial fundamentally unfair." *State v.*

[34] *Payne v. Tennessee*, 501 U.S. 808 (1991).

Graham, 513 P.3d 1046, 1069 (Alaska 2022). Thus, when determining whether to permit the use of music in victim-impact evidence, courts must determine whether the music is so emotionally evocative it reaches a prejudicial level of emotion that would render the trial unfair.

The first widely cited case applying *Payne's* guidelines to the admission of music during VIS was *Salazar*, decided in 2002. There, the Texas Court of Criminal Appeals rejected a picture montage set to music. The defendant, a sixteen-year-old special-education student, was convicted of murder and sentenced to death. During sentencing, the state showed a video tribute of the victim consisting of 140 photographs set to the music of "Storms in Africa" and "River" by Enya and Celine Dion's "My Heart Will Go On." shop's life. *Salazar v. State*, 90 S.W.3d 330, 333 (Tex. Crim. App. 2002). The court held that admitting the video was reversible error. Describing the video as "lengthy, highly emotional, and barely probative of the victim's life at the time of his death," with background music that "greatly amplifie[d] the prejudicial effect of the original error," the Texas appellate court held that the probative value of the video was "substantially outweighed" by its risk of unfair prejudice. *Id.* at 337–

39. Furthermore, it was an abuse of discretion to admit the videos over objection without reviewing them beforehand to ensure that their contents comported with the constitutional limits and the twin purposes of victim impact evidence laid out in *Payne*. The case was remanded back for the sentencing judge review the video tribute evidence for relevance, prejudice, and cumulativeness.

A district court in Massachusetts refused to allow a similar video tribute in *Sampson*, excluding a memorial video of the victim that featured "evocative" and "poignant" music that "would have inflamed the passion and sympathy of the jury". *United States v. Sampson*, F. Supp 2d 166, 191-93 (D. Mass. 2004). There the government sought to introduce a memorial video of the college victim during the sentencing. The video was made in preparation of a memorial service, lasted twenty-seven minutes, included over 200 photographs, in roughly chronological order, from the time he was born until the time just before his death and was set to background music of The Beatles and James Taylor. *Id.* at 191.

A professionally produced seventeen-minute video entitled "A Tribute to Officer James Hess" was played at sentencing in *State v. Hess*, 207 N.J. 123, 158–59, 23 A.3d 373, 393–94 (2011). The video

displayed approximately sixty still photographs and four home-video clips of the victim in various activities and phases of his life. The video included photographs of the victim's childhood and his tombstone and a television segment covering his funeral. Three poems scrolled over the photographs and video clips. The video was scored to popular, holiday, country, religious, and military music. *Id.* The court held that the music and the photographs of the victim's childhood and of his tombstone, and the television segment about his funeral should have been redacted from the video because they contained *little to no probative value, but instead have the great capacity to unduly arouse or inflame emotions. Id.* (emphasis added).

In comparison, the video shown to the jury in Loyd's case lasted 1 minute and 32 seconds, set to music containing no lyrics. *See State v. Leon*, 142 Idaho 705, 710, (Ct. App. 2006) (the musical accompaniment was not found to be unduly inflammatory or manifestly unjust, noting that the entire DVD presentation was only four-and-one-half minutes in length, and therefore offered only a "quick glimpse of the life petitioner chose to extinguish."). Although it is conceivable that a video or photographic presentation could be so prejudicial or inflammatory in its design or content that its

consideration by the sentencing court would result in "manifest injustice," that is not the case here. Moreover, even if there was an error, such error was harmless. The addition of music to the photographic montage did not inflame the passions of the jury any more than the facts of the crime. *See Payne*, 501 U.S. at 832.

Appellant has not established, and cannot establish, an abuse of discretion in the trial court's admission of music during the State's presentation of victim impact evidence.

POINT SEVEN

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE DEFENDANT COMPETENT TO BE SENTENCED.

Standard of review. Next, Loyd claims the court abused its discretion in finding Loyd competent to proceed. A trial court's decision regarding a determination of competency is subject to review for abuse of discretion, and the -trial court's resolution of factual disputes will be upheld if supported by competent, substantial evidence. *Larkin v. State*, 147 So.3d 452, 464 (Fla. 2014). The test for determining a defendant's mental competence is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he

has a rational as well as factual understanding of the proceedings against him." *Id.*

When expert testimony regarding a defendant's competency is in conflict, this Court has traditionally afforded great deference to the trial court's resolution of that factual dispute. "It is the duty of the trial court to determine what weight should be given to conflicting testimony." *Mason v. State,* 597 So. 2d 776, 779 (Fla. 1992). Appellant claims since there were no conflicts in the evidence, the record does not reflect a reasonable resolution of conflicting expert opinion which is supported by competent, substantial evidence. (IB 86) The record is clear that the opinions of the mental health specialists who testified on Loyd's behalf all had inconsistent, and often contradictory opinions. Even if this Court found that there were no conflicts, the reports of experts are 'merely advisory to the [trial court], which itself retains the responsibility of the decision. *Hunter v. State,* 660 So. 2d 244, 247 (Fla. 1995)(quoting *Muhammad v. State,* 494 So. 2d 969, 973 (Fla. 1986)).

Loyd further alleges that the testimony that Drs. Amador and Danziger gave regarding competency was disregarded by the trial judge amounting to an abuse of discretion. (IB 86) Contrary to Loyd's

allegations, in finding Loyd competent to proceed, the trial judge considered all the testimony and evidence presented. In an eleven-page order filed on February 27, 2022, the trial court found that based on the court's observations, experience, and Dr. Oses' opinion, Loyd was competent to proceed to trial. *McCray v. State*, 71 So.3d 848, 861–62 (Fla. 2011) (R 4779-89):

> **1. Whether the Defendant has a Factual Understanding of the proceedings.**
>
> Dr. Amador's testimony focused exclusively on the Defendant's ability to discuss his case rationally with his lawyers and his ability to conform his conduct in the courtroom. Dr. Amador presented no additional evidence as to any other factor, indicating he focused on those 2 factors alone. Nothing prevented him from evaluating the other factors.
>
> Drs. Danziger and Oses both opined that the Defendant has a factual understanding of the proceedings against him, the charges against him, the range and nature of the penalties, including the fact he might be sentenced to death. The Defendant understands the prosecutors are against him. The Defendant understands that his lawyers are supposed to be working for him, although he informed the doctors that he feels they are acting against his interests. Both doctors believe the Defendant can manifest appropriate courtroom behavior if he chooses.
>
> The testimony of these two doctors who evaluated those factors as required by Fla. R. Crim.P. 3.211 establish that the defendant has a factual understanding of the proceedings in this case.

2. Whether the Defendant has a Rational Understanding of the Proceedings:

Drs. Danziger and Amador opined that the Defendant does not have a rational understanding of the case and cannot communicate effectively with his lawyers. Both doctors are of the opinion that the voices the Defendant says he hears are a sign of psychosis and that he is mentally ill. Dr. Amador believes the Defendant is Schizophrenic and psychotic. Dr. Danziger believes he suffers from Other Schizophrenia Spectrum and Psychotic Disorders, and antisocial personality disorder. Both doctors believe his mental illness prevents him from rationally discussing his case with his lawyers.

During interviews with Drs. Amador and Danziger, the Defendant discussed his beliefs about the historical treatment of blacks and his assertion that the judge and the prosecutors were slave masters seeking to kill him. Additionally, the two experts report that the Defendant has fixated on factual issues related to his convictions for the murder of Ms. Sade Dixon, her unborn child, and the attempted murder of Ms. Dixon's brother Ron Stewart in Orange County case 2016-CF- 15738. The doctors report that the Defendant continues to insist that the bodies of Ms. Dixon and Ron Stewart were moved and that testing the blood found at the scene will prove this and prove his innocence. He claims that the judge, the lawyers, and the police are all conspiring t assure his conviction. In his interviews with the doctors, the Defendant would constantly and repeatedly speak about this issue. Dr. Danziger testified that the Defendant's counsel had informed him that they could not communicate with the Defendant effectively due to this behavior. Because of the Defendant's continuing aggressive pursuit of the prior case, the doctors opine that Defendant does not have a rational understanding of the present case and cannot communicate effectively with his counsel. Both doctors have opined that the Defendant is incompetent to proceed for the preceding reasons.

Dr. Oses, having heard the same information as Drs. Amador and Danziger throughout her interview with the Defendant, diagnosed him with antisocial personality disorder. Unlike Drs. Danziger and Amador, Dr. Oses testified that when the Defendant would begin speaking about these matters in response to questions, she would redirect him to the question, which he would then answer. She testified that happened "most of the time," leaving the Court the impression there were some times he refused to be redirected. Dr. Oses also noted that the Defendant informed her he was planning on acting out in Court. She noted that this statement confirmed the volitional nature of his outbursts. Dr. Oses opined that the Defendant is competent to proceed.

The expert opinions about the Defendant's competency are to be considered, but the decision as to the Defendant's competency is solely the Court's responsibility. *See Peede v State,* 955 So. 2d 480, 488-489 (Fla. 2007) (citations omitted). The experts testimony is conflicting, and the Court must now turn to its experience and observations of the Defendant in numerous court proceedings. *Id.*

The Court has had the opportunity to observe and interact with the Defendant since 2019. These observations have included numerous motion hearings and his two capital trials, which included penalty phases and involved daily contact with the Defendant for weeks on end. In the present case, where Defendant is facing sentencing after a December 8, 2021 recommendation of death by the jury, this Court has had the opportunity to observe and interact with the Defendant on numerous occasions. The Court has also reviewed the numerous pro se motions filed by the Defendant.

The Court's observations have been consistent throughout all the above but will discuss the trial in the present case as it is closest in time to the assertion of incompetence by the defendant.

During this trial, the Defendant actively participated in his defense throughout the trial. He would object to

lawyers ending their examination of a witness and confer with them as to further questions. At times the lawyers did not ask the questions. On other occasions, they read the Defendant's written question or just asked the question. At no time did the Defendant appear to have trouble following testimony, nor did the lawyers indicate an issue with his competence to this Court. He constantly communicated with his attorneys at counsel table.

The Defendant spent several hours on the stand testifying at length during the trial. He answered questions that were asked of him about this case without difficulty. He reviewed a video of the shooting frame by frame with his attorney. He explained in detail his version of what happened and why he shot Lt. Clayton. He maintained his innocence. He claimed Lieutenant Clayton was trying to murder him and was first to fire her weapon and that "he stopped shooting when she stopped shooting. During his testimony, he remained alert, focused, and attentive.

Of particular note is that during testimony the Defendant stopped several times to inquire directly of the Court about matters that the Court had ruled inadmissible. His inquiry would recognize the previous ruling, and he would ask if he could speak about the issue. When the Court ruled that he could not, he would move on. It was clear that he had been instructed on what he could discuss on the stand; he understood those instructions, the Court's rulings, and what those rulings meant in terms of testifying. This Court notes there was absolutely nothing about his testimony that would cause anyone, let alone the Court, to think he did not have a rational understanding of the proceedings and an ability to communicate with his lawyers about them.

During the trial(s) (and motion hearings) the Defendant would repeatedly exhibit a pattern of commentary loud enough to be heard. This was particularly true during the State's case-in-chief. When the Court would admonish him, the Defendant would lapse into silence.

During the State's closing arguments the Defendant became increasingly loud and disruptive.

After admonishing him several times, the Court ordered him removed. The Defendant argued for a brief period and then indicated he would behave and asked the Court, "Can I stay?" Given permission to remain in the courtroom, he behaved for the remainder of the closing argument.

This Court notes that throughout his trial the Defendant demonstrated an ability to control himself when he wished to. Dr. Amador's findings of incompetence based on Defendant's actions or words during the trial are not supported by the record nor by the Court's observations.

The Court further notes that none of the doctors observed the trial or read the entire transcript.

In addition to the expert testimony as to competency, at least five or more doctors examined the Defendant during the trial and penalty phase, including defense experts. None indicated any concerns with his competence. Also, during the last five years of the Defendant's incarceration pending trial, no evidence has been presented of the Defendant being treated for or having any need of psychiatric care at the county jail. He was examined immediately after the jury's death recommendation and no issues were noted.

Based on the testimony of Dr. Oses who evaluated the competency factors as required by Fla. R. Crim.P. 3.211 and the Court's observations of the Defendant this Court finds that the Defendant has a reasonably rational understanding of the proceedings against him.

As a special note, during the hearing on February 21, 2022, defense counsel gave vague hints, but offered no evidence, about their concerns about the Defendant's competence during the preceding trial. Although what the lawyers say is not evidence, the Court feels compelled to make certain observations, so that the record is clear.

The Defendant's counsels are neither timid nor diffident in defending their client. During the trial and in

the preceding case, the defense team has been active with both objections and motions.

> [FN1] In fact, in one memorable moment in the present case, the defense moved for a mistrial (later withdrawn) on the basis of what a group of people watching on the Internet thought had happened in the courtroom and had posted on the internet.

An example of this attentiveness regarding the Defendant's mental health is the action of lead counsel, Terrance Lenamon, who filed a Motion to Determine Competence in August of 2019 prior to the Defendant's first trial (2016-CF-15738-A-0). Mr. Lenamon expressed concerns about Defendant's paranoia and ramblings.

> [FN2] After examination, the Defendant was found competent to proceed. August 13, 2019.

Based on the record before the Court at this time and the Court's observations, the Court does not find the implication that the defense team failed to notice or bring to the Court's attention that the defendant was incompetent during this trial credible.

A discussion of Drs. Amador and Danziger's opinions about the defendant's continuing to discuss bodies being moved and blood testing is warranted.

This Defendant has been discussing this issue for years. His lawyers have filed motions at his request regarding this issue, and he testified to it in the previous trial. That jury rejected the idea. The Defendant presents this claim to the Court at every opportunity. This Court notes that this has not prevented the Defendant from testifying to his version of events in this case nor answering questions, even when the Court has indicated to him that the blood/bodies issue is not going to be discussed at that time. As Dr. Oses noted, while the

Defendant does talk about this issue, he can be redirected, and this Court sees that as a choice.

Additionally, the Defendant, in this case, has filed numerous pro se motions. He asked to represent himself and was granted that right in August 2021. After struggling to do so because of the restrictions placed upon inmates, he stated in Court that the restrictions made it impossible to represent himself and asked to have his lawyers reappointed. These are not the actions of an incompetent defendant.

This Court finds that Dr. Oses observations and opinions are supported by the Court's extensive observations of the Defendant over three years. The Court has observed no significant change in the Defendant's behavior in that time. He has previously been examined and found competent to proceed during this time. The Court recognizes that the issue is whether he is competent to proceed at this time. Dr. Amador's opinion was based on an incomplete assessment. The Court notes that nothing prevented him from conducting a full assessment he just chose not to address many factors. The Court is left to consider Dr. Danziger's opinion.

The Court accepts that the Defendant suffers from some mental illness, however, that does not necessarily equate with incompetence to proceed to sentencing. *See Thompson v State*, 88 So. 3d 312, 319 (Fla. 4th DCA 2012) (*quoting Card v. Singletary*, 981 F.2d 481, 487-88 (11th Cir. 1992). Dr. Danziger is very well known to the Court, and his opinion has been accepted many times. However, this Court finds the opinion of Dr. Oses to be more reliable and therefore more credible than that of Dr. Danziger in this case based on the factual bases of Oses opinion coupled with this Court's interactions with and observations of the Defendant now and over the course of these cases. To accept Dr. Danziger's opinion, the Court would have to find that a

Defendant who knows:

a. what the judge, prosecutor, and defense's role are,

b. knows he is being sentenced for the murder of Debra Clayton,

c. knows the sentence can be life or death,

d. knows he can appeal that sentence, and

e. has repeatedly demonstrated the ability to talk about his version of why he shot DebraClayton.

is not competent because he simply refuses to accept his guilt and espouses a defense theory that has been rejected by two separate juries. Dr. Oses was able to redirect him from this topic, indicating he has the present ability to communicate with his lawyers. The Court understands that Dr. Danziger believes this is a product of his mental illness, making him incompetent.

However, this Court notes that nothing has occurred since the jury recommended death that is different from before the jury recommended death. Based on the Court's observations, experience, and Dr. Oses' opinion, the Court finds:

The defendant has a factual understanding of the proceedings in this case. None of the experts has testified otherwise. The Court further finds the defendant has a rational understanding of the proceedings in this case. The defendant understands the role of the Court, the prosecutors, and defense counsel. The defendant understands and appreciates the charges and allegations against the defendant and the nature of possible penalties in this case. He understands the adversary nature of the legal process. He can, if he wishes, manifest appropriate courtroom behavior and testify relevantly.

Therefore, the Court finds the Defendant, in this case, Markeith Loyd, is competent to proceed.

(R 4779-89)

Although two experts testified that they believed Loyd was not competent to stand trial, the trial court relied on one expert who

testified that defendant was competent to stand trial, and the trial court personally observed defendant's behavior in the courtroom and expressly relied on this observation as one basis for its determination. Loyd argues that because the trial court relied extensively on the expert opinion of Dr. Oses, it is clear the trial court disregarded the conflicting expert testimony offered by Drs. Amador and Dr. Danziger. However, the order reflects that the trial court considered all the testimony introduced during the hearing in making its final determination. Although the experts disagreed with the ultimate conclusion regarding Loyd's competency, the trial court resolved that disagreement in favor of finding Loyd competent based on all the evidence before her.

In *Barnes*, this Court noted that the defendant filed and argued motions, lodged objections and comported himself well in court. Barnes also appeared alert and knowledgeable and made clear that he understood the consequences of self-representation and of entering a guilty plea. *Id.* at 913. In fact, the trial judge in *Barnes* made comments similar to the trial judge here, specifically remarking on Barnes's demeanor and competence in his presentation. *Id.* Equally applicable here is the reasoning from *Card v. Singletary*, 981

F.2d 481, 487-88 (11th Cir. 1992), upon which this Court relied in *Barnes,* noting, "[n]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *Barnes,* 124 S. 3d at 913.

Accordingly, there is competent, substantial evidence to support the trial court's resolution of the conflicting testimony and that the trial court did not abuse its discretion in finding Loyd competent.

POINT EIGHT

FELONS WERE PROPERLY EXCLUDED FROM THE JURY POOL; APPELLANT LACKS STANDING TO ARGUE VIOLATION OF THE VENIREMENS' EQUAL PROTECTION RIGHTS.

Appellant next argues that felon exclusion violates the equal protection rights of felons. And while Appellant relies on *Powers*[35] to establish standing, the right being violated is that of the juror, not of the Appellant.

[35] *Powers v. Ohio*, 499 U.S. 400 (1991), was a United States Supreme Court case that re-examined the *Batson* Challenge. Established by *Batson v. Kentucky*, 476 U.S. 79 (1986), the *Batson* Challenge prohibits jury selectors from using peremptory challenges on the basis of race, ethnicity, gender, and sex. *Powers* expanded the

Nevertheless, the argument that felon exclusion violates the equal protection rights of felons has consistently failed. Not everyone has the *right to serve* as a juror. What one does have, as recognized by the United States Supreme Court and our own supreme court, is the constitutional *right not to be excluded* from jury service *on the basis of racial, gender, or ethnic discrimination. Batson v. Kentucky,* 476 U.S. 79 (1986); *State v. Alen,* 616 So. 2d 452 (Fla. 1993). It is clear, however, that there can be no violation of equal protection where there is no protected class, and merely showing the existence of a distinct group, is not sufficient. *Bryant v. State*, 386 So. 2d 237, 240 (Fla. 1980).

No court has ever held that, as a matter of federal constitutional law, jury service is a fundamental right entitled to strict or even heightened scrutiny. Moreover, felons are not entitled to strict scrutiny as a suspect class. Any such case would rely heavily on *Hunter v. Underwood*, 471 U.S. 222 (1985) in which the Supreme Court struck down a felon disenfranchisement provision on grounds

jurisdictions of this principle, allowing all parties within a case, defendants especially, to question preemptory challenges during a jury selection, regardless of race.

that it was a thinly veiled Jim Crow law. However, the fatal flaw with the provision in *Hunter* was that disenfranchising crimes were chosen (and enforced) so that black people would be affected vastly more than white people. Most states have changed their felon exclusion laws since 1900, and Florida excludes all felons rather than some.

Accordingly, this claim should be denied.

POINT NINE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING APPELLANT'S PROPOSED JURY INSTRUCTIONS ON MERCY.

Standard of review: Appellant argues structural error in the trial court's denial of its express mercy instruction. The trial court has wide discretion in instructing the jury, and the decision to give or refuse to give a special jury instruction is reviewed under the abuse of discretion standard. *See Hudson v. State*, 992 So. 2d 96, 112 (Fla. 2008).

In addition to the standard jury instructions being offered by the court, Loyd proposed a special instruction with two alternative options:

The Defendant requests the following instruction:

> Even when death is a possible sentence, each juror must decide based on his or her own moral assessment, whether life imprisonment without the possibility of parole, or death, should be imposed. Regardless of your findings, the law never requires nor compels any juror to return a sentence of death. You may always consider mercy in making this determination of the appropriate sentence. Every juror has the right to vote for a sentence of life imprisonment without the possibility of parole.
>
> In the alternative, the Defense requests the following:
>
> Regardless of your findings, the law never compels nor requires any juror to return a sentence of death. You may always consider mercy in making this determination. Mercy itself is sufficient to justify a sentence of life without the possibility of parole.
>
> In the alternative, the Defense requests the following:
>
> Regardless of your findings, the law never compels nor requires any juror to return a sentence of death. You may always consider mercy in making this determination.

(R 2576). The request was denied.

Appellant asserts that precluding consideration of mercy, in the absence of a mercy instruction amounted to structural error. The instructions proposed by Loyd were not required to ensure the consideration of mitigating factors. The "failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards." *Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006) (*quoting Stephens v. State*, 787 So.

2d 747, 755 (Fla. 2001)); *Flowers v. State*, 158 So.3d 1009, 1066 (Miss. 2014), *cert. granted, judgment vacated on other grounds*, 136 S. Ct. 2157 (2016) (although the court stated that the life without parole option was stated more clearly in D–39 than in the omnibus instruction, it cannot be said that the jury was not given the instruction. The trial court did not err in refusing instruction D–39).

As here, the standard penalty phase jury instructions sufficiently obviated the need for a specific instruction regarding mercy or sympathy. The standard jury instructions specifically instructed the jurors regarding the concepts contained in Loyds's proposed jury instruction regarding mercy. *See* Fla. Std. Jury Instr. 7.11 (Crim.) ("Regardless of the results of each juror's individual weighing process—even if you find that sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death."). Additionally, Appellant was able to argue mercy in closing argument, to wit:

> **MR. LENAMON:** Mercy is not about just emotion. Mercy comes from the heart……. Each of you have your own definition of mercy. I can't tell you what one juror's definition from the other. It's an individual process. And with mercy alone, you can find life in this case.

(TT 7503)

This Court has rejected similar claims regarding jury instructions on the role of sympathy. *Bush v. State*, 295 So.3d 179, 210 (Fla. 2020); *Downs v. Moore*, 801 So. 2d 906, 913 (Fla. 2001); *Moore v. State*, 820 So. 2d 199, 210 (Fla. 2002); *Zack v. State*, 753 So. 2d 9, 23–24 (Fla. 2000); *Hunter v. State*, 660 So. 2d 244, 253 (Fla. 1995).

Appellant's claim for relief on this issue should also denied.

POINT TEN

THE CONSTITUTION DOES NOT PROHIBIT THE STATES FROM 'DEATH QUALIFYING' JURIES IN CAPITAL CASES.

Standard of review: Appellant argues that the Supreme Court should revisit its views on death-qualification. Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

The United States Supreme Court has explicitly rejected the argument that death qualification deprives a defendant of a jury comprised of a fair cross section of the community. *Lockhart v.*

McCree, 476 U.S. 162, 176–77 (1986). This Court has similarly recognized that there is no constitutional infirmity in the "death qualification" of a jury in a capital case. *See San Martin v. State,* 705 So. 2d 1337, 1343 (Fla.1997) "Indeed, any group 'defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement.'" *San Martin v. State*, 705 So.2d 1337, 1343 (Fla. 1997), *citing Lockhart*, 476 U.S. at 176-77.

The United States Supreme Court also noted in *Lockhart* that not all prospective jurors who oppose the death penalty are subject to removal for cause in capital cases; "only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case." *San Martin*, 705 So. 2d at 1343, *citing Lockhart*, 476 U.S. at 176. The standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) 31 (*quoting Adams v. Texas*, 448 U.S. 38, 45 (1980)).

This claim is meritless and foreclosed by binding precedent.

POINT ELEVEN

CAPITAL PUNISHMENT DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT OF THE FEDERAL CONSTITUTION.

Standard of review: Appellant's next challenges the validity of the death penalty as a sentencing option. This Court reviews constitutional challenges to statutes de novo. *Braddy v. State*, 219 So.3d 803, 819 (Fla. 2017). Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

The only authority cited by the appellant to support his argument is Justice Breyer's dissenting opinion in *Glossip v. Gross*, 576 U.S. 863 , 908-947 (2015). The actual holding of *Glossip* upheld the practice of judicial execution and fully refutes the appellant's claim. *See also Baze v. Rees*, 553 U.S. 35, 47 (2008); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Correll v. State*, 184 So.3d 478 (Fla. 2015); *Mann v. State*, 112 So.3d 1158, 1162 (2013).

The High Court has repeatedly held capital punishment constitutional.[36] Historically, the Eighth Amendment was understood to bar only those punishments that added " 'terror, pain, or disgrace' " to an otherwise permissible capital sentence.[37] Appellants attempt to redefine "cruel" to mean "unreliable," "arbitrary," or causing "excessive delays," and "unusual" to include a "decline in use," offers up a white paper devoid of any meaningful legal argument. [38]

While Appellant draws a connection between unreliability and the number of exonerations to date, the reality is that it is the

[36] *Baze v. Rees*, 553 U.S. 35, 47 (2008) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional" and observing it "necessarily follows that there must be a means of carrying it out.") (emphasis added but citation omitted); *McCleskey v. Kemp*, 481 U.S. 279, 299-319 (1987) (rejecting an Eighth Amendment as-applied challenge to the death penalty based on a study and observing the "Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment" and that "the Constitution does not place totally unrealistic conditions" on the use of capital punishment); *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding the punishment of death for the crime of murder did not violate the Eighth Amendment).

[37] *Glossip v. Gross*, 576 U.S. 863, 894–95 (2015) (J. Scalia, concurring) (citing *Baze v. Rees,* 553 U.S. 35, 96 (2008)).

[38] *Id.* (J. Scalia, concurring).

convictions, not punishments, that are unreliable.[39] Nor are Appellant's claims regarding the arbitrary application of the death penalty compelling. The argument that death sentences do not necessarily correspond to the "egregiousness" of the crimes, but instead appear to be correlated to "arbitrary" factors, such as the locality in which the crime was committed, fails to respect the values implicit in the Constitution's allocation of decision-making in this context. [40] We rely on juries to make judgments about the people and crimes before them. The fact that these judgments may vary across cases is an inevitable consequence of the jury trial. But when a punishment is authorized by law—if you kill you are subject to death—the fact that some defendants receive mercy from their jury no more renders the underlying punishment "cruel" than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned.[41] As for the argument that delay undermines the penological rationales for the death penalty by

[39] *Id.* (J. Scalia, concurring).

[40] *Id.,* at 901 (J. Thomas, concurring).

[41] *Id.,* at 896 (J. Scalia, concurring).

subjecting inmates to long periods on death row, life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty. [42]

Appellant also claims capital punishment violates the Eighth Amendment because it is contrary to the "evolving standards of decency. The evolving standards of decency standard certainly does not require that States in the majority adopt the view of States in the minority. Moreover, basing the evolving standards of decency on mere trends undermines the States' independent sovereignty, which is at its highest when the issue concerns a state's police powers and the criminal law. *United States v. Morrison*, 529 U.S. 598, 618 (2000) (noting police power was denied to the National Government and reposed in the States by the Founders); *United States v. Lopez*, 514 U.S. 549, 561, n.3 (1995) ("Under our federal system, the States possess primary authority for defining and enforcing the criminal

[42] *Id.*, at 896 (J. Scalia concurring).

law" citing cases). Florida should not be required to do what other states have done based merely on trends in those other states.

As this claim is defeated as a matter of law, this Court must deny relief.

POINT TWELVE

APPELLANT'S MENTAL ILLNESS DOES NOT CATEGORICALLY BAR EXECUTION OR VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Standard of review: Appellant asserts that his death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment due to his mental health. This Court reviews constitutional challenges to statutes de novo. *Braddy v. State*, 219 So.3d 803, 819 (Fla. 2017). Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

Appellant's alternative argument, that the death penalty is unconstitutional as applied to him due to his mental and intellectual deficits, cites no supporting authority whatsoever. The Eighth Amendment broadly protects two classes from execution: people who are intellectually disabled and minors. *Atkins v. Virginia*, 536 U.S.

304 (2002) (intellectual disabilities); *Roper v. Simmons*, 543 U.S. 551 (2005) (minors). This Court has repeatedly declined to extend *Atkins*, to defendants that are mentally ill but do not suffer intellectual disability. It cannot be disputed that *Atkins* and *Hall* do not apply to Loyd's case because he was/is not intellectually disabled, and his intellect was *never* in dispute or made an issue.

This Court has previously held that the Eighth Amendment's prohibition of cruel and unusual punishment does not require a categorical bar against the execution of persons who suffer from any form of mental illness or brain damage. *McKenzie v. State*, 153 So.3d 867, 884-85 (Fla. 2014) (noting "neither this Court nor the United States Supreme Court has recognized mental illness as a per se bar to execution," *citing Power v. State*, 992 So. 2d 218, 222 (Fla. 2008); *McCoy v. State*, 132 So.3d 756, 775 (Fla. 2013) (rejecting the argument that capital defendant was "so severely mentally ill" that he is in "the class of persons similar to those" under the age of eighteen and with "mental retardation, who are categorically excluded from being eligible for the death penalty"); *Muhammad v. State*, 132 So.3d 176, 207 (Fla. 2013) (holding execution of a capital defendant who suffers from schizophrenia and paranoia does not

constitute cruel and unusual punishment); *Carroll v. State*, 114 So.3d 883, 886–87 (Fla. 2013) (holding that similar claims that mental illness bars the death penalty have been rejected on the merits); *Simmons v. State*, 105 So.3d 475, 511 (Fla. 2012) (holding claim that persons with mental illness must be treated similarly to those with intellectual disability due to reduced culpability to be without merit); *Schoenwetter v. State*, 46 So.3d 535, 562-63 (Fla. 2010) (holding "mental illness does not serve as a bar to execution under *Atkins*" and mental and psychological disorders or conditions may be considered as mitigation circumstances); *Johnston v. State*, 27 So.3d 11, 26 (Fla. 2010) (finding no merit in the claim that mentally ill persons are similar to and should be treated the same as juvenile murderers who are exempt from execution); *Lawrence v. State*, 969 So. 2d 294, 300 n. 9 (Fla. 2007) (rejecting assertion that the Equal Protection Clause requires extension of *Atkins* to the mentally ill due to their reduced culpability).

Likewise, other courts have rejected the argument that the Equal Protection Clause of the United States Constitution requires that the decision in *Atkins* be extended to the mentally ill. *Lewis v. State*, 620 S.E. 2d 778, 786 (Ga. 2005) (declining to extend *Atkins* to

the mentally ill); *State v. Hancock*, 840 N.E. 2d 1032, 1059-1060 (Ohio 2006) (declining to extend *Atkins* to the mentally ill because mental illnesses come in many forms and different illnesses may affect a defendant in different ways and to different degrees, thus creating an ill-defined category of exemption from the death penalty without regard to the individualized balance between aggravation and mitigation in a specific case); *Dunlap v. Kentucky*, 435 S.W. 3d 537, 616 (Ky. 2013), as modified (Feb. 20, 2014) ("We are not prepared to hold that mentally ill persons are categorically ineligible for the death penalty."); *Commonwealth v. Baumhammers*, 960 A. 2d 59, 96 (Pa. 2008) (rejecting a substantially similar argument); *State v. Dunlap*, 313 P. 3d 1, 36 (Idaho 2013) ("It appears that every court that has considered this issue have refused to extend *Atkins* and hold that the Eighth Amendment categorically prohibits execution of the mentally ill."); *People v. Castaneda*, 254 P. 3d 249, 290 (Ca. 2011) (holding that antisocial personality disorder is not analogous to mental retardation or juvenile status for purposes of imposition of the death penalty); *Mays v. State*, 318 S.W. 3d 368, 379 (Tex. Crim. App. 2010) (noting absence of authority to support claim that mental illness renders one exempt from execution under the Eighth Amendment);

State v. Johnson, 207 S.W. 3d 24, 51 (Mo. 2006) (noting that "federal and state courts have refused to extend Atkins to mental illness situations"); *Malone v. State*, 293 P. 3d 198, 216 (Okla. Crim. App. 2013) ("Appellant cites no cases from any American jurisdiction that hold that the *Atkins* rule or rationale applies to the mentally ill . . . . We expressly reject that the *Atkins* rule or rationale applies to the mentally ill."). Loyd's assertion that the evolving standards of decency prohibit the execution of the mentally ill is refuted by the decisions of numerous courts that have considered and rejected similar claims.

Additionally, mental illnesses, in their various forms, are not treated the same as intellectual disability because they are, in fact, different. *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (holding equal protection "does not require things which are different in fact or opinion to be treated in law as though they were the same"). There is no basis in law or fact for the proposition that the death penalty's justifications of deterrence and retribution are not applicable to those with mental illnesses. Mental illness can be considered by the judge in sentencing as a mitigating factor, "thus providing the individualized determination that the Eighth Amendment requires in capital cases." *Hancock* 840 N.E. 2d at 1059-1060.

This claim is meritless and foreclosed by binding precedent.

POINT THIRTEEN

FLORIDA'S CAPITAL SENTENCING SCHEME DOES NOT VIOLATE THE UNITED STATES OR FLORIDA STATE CONSTITUTIONS.

Standard of review: The appellant's final challenge disputes the validity Florida's capital sentencing scheme. This Court reviews constitutional challenges to statutes de novo. *Braddy v. State*, 219 So.3d 803, 819 (Fla. 2017). Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

Appellant asserts that Florida's capital sentencing scheme does not limit the class of persons eligible for the death penalty and violates the Eighth Amendment due to 1) elimination of proportionality review;[43] 2) elimination of the special standard for reviewing circumstantial evidence;[44] and 3) an overprovision of aggravating factors. (IB 115). Loyd's arguments are ones that this Court has consistently rejected or recently declined to reconsider.

[43] *Lawrence v. State*, 308 So.3d 544 (Fla. 2020).

[44] *Bush v. State*, 295 So.3d 179 (Fla. 2020).

Bush v. State, 295 So.3d 179, 214 (Fla. 2020); *Colley v. State*, 310 So.3d 2 (Fla. 2020); *Davidson v. State*, 323 So.3d 1241 (Fla. 2021); *Bell v. State*, 336 So.3d 211 (Fla. 2022); *Joseph v. State*, 336 So.3d 218 (Fla. 2022); *State v. Garcia*, 338 So.3d 847, 848 (Fla. 2022);*Rodriguez v. State*, 335 So.3d 168, 172 (Fla. Dist. Ct. App. 2021); *Bradwell v. State*, 300 So.3d 325, 327-28 (Fla. 1st DCA 2020), *review denied*, SC20- 1337, 2021 WL 276149 (Fla. Jan. 27, 2021). Because Loyd offers no new or persuasive argument or specific claim of error in his sentencing, this facial challenge to Florida's capital sentencing scheme is meritless and should be rejected.

The constitutional protections Florida capital defendants are afforded ensure "a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *See State v. Poole*, 297 So.3d 487, 495-96 (Fla. 2020). The existence of a statutory aggravating factor is but the first step in the sentencing process to narrow that class of persons eligible for the death penalty. It begins "with an evidentiary hearing before a jury and/or judge to hear evidence relevant to the nature of the crime and the character of the defendant, including

statutory aggravating and mitigating circumstances." *Poole*, 297 So.3d at 495. Whether the sentencing fact finder is a jury or judge, at least one aggravating factor must be proven beyond a reasonable doubt. *Id.* at 491; *McKinney v. Arizona*, 140 S.Ct. 702, 707 (2020). Only then is the sentencer able to proceed to the sufficiency and weighing stage. § 921.141(2)(b), Fla. Stat. (2019). In the event of unanimous jury aggravation findings and death sentence recommendation, the trial court may still nonetheless impose a life sentence. § 921.141(3), Fla. Stat. (2019).

The *Colley* Court succinctly rejected the claim that Florida's "legislative enactments have expanded the number of aggravating factors to the point where every first-degree murder conviction is eligible for a death sentence, in violation of the Supreme Court's mandate" in *Furman*. *Colley v. State*, 310 So.3d 2, 15-16 (Fla. 2020), *citing Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006). The argument that Florida's capital sentencing scheme was unconstitutional and failed to limit the class of persons eligible for the death penalty was also made in *Cruz v. State*, 320 So.3d 695, 730 (Fla. 2021). This Court rejected Cruz's claim, relying in part on *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) (the argument that Florida's capital sentencing

scheme "fails to limit the class of persons eligible for the death penalty" is meritless). [45]

Loyd ignores the undisputed fact that he became constitutionally eligible for the death penalty when the trial court found three aggravating factors were proven beyond a reasonable doubt. *See, e.g., Craft v. State*, 312 So.3d 45, 56 (Fla. 2020) and *Knight v. State*, 225 So. 3d 661, 683 (Fla. 2017). Only after this process was Loyd placed within a narrow class of persons *eligible* for the death penalty. The *number* of aggravating factors enumerated in Florida Statutes had no impact on the individualized eligibility findings.

Because this issue is well-settled at law, no relief is warranted. The issue should be rejected, and Appellant's sentence affirmed.

The record establishes sufficient evidence of Appellant's guilt, and this Court should affirm.

POINT FOURTEEN

THE TRIAL COURT ERRED IN DENYING THE STATE'S PROPOSED STANDARD JURY INSTRUCTIONS 7.10

[45] *Cruz* was reversed and remanded "for the limited purpose of resentencing by the trial court and a new sentencing order" where the defendant was improperly sentenced to death based on facts not admitted during the penalty phase. *Id.* at 723-24.

AND 7.11 AND VERDICT FORM 3.12(E) WHICH ARE IN CONFLICT WITH THIS COURT'S DECISION IN POOLE AND FLORIDA STATUTE 921.141.

Standard of review. The question of whether a standard jury instruction is confusing, or misleading comprises a pure question of law and is thus subject to *de novo* review. *State v. Floyd*, 186 So.3d 1013, 1019 (Fla. 2016).

Argument. In the wake of its opinion in *Hurst v. State,* 202 So.3d 40 (Fla. 2016), this Court adopted Florida Standard Jury Instructions 7.10 and 7.11—"Preliminary Instructions in Penalty Proceedings—Capital Cases" ("*Preliminary Instructions"*) and "Final Instructions in Penalty Proceedings—Capital Cases," (*"Final Instructions"*) respectively—in its opinion in *In re Std. Crim. Jury Instrs. in Capital Cases*, 244 So.3d 172, 174 (Mem.) (Fla. 2018). This Court explicitly adopted the current version of the *Preliminary Instructions* and the *Final Instructions* by citing to its opinion in *Hurst*. This Court's opinion also made the following observation: "The changes to the standard criminal jury instructions were also warranted in light of chapter 2017-1, Laws of Florida, amending section 921.141, Florida Statutes (2016), which requires a jury to

unanimously determine that a defendant should be sentenced to death." *Id.* at 173.[46] 921.141 reads in pertinent part, as follows:

> **(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:

[46] This Court also stated that "in authorizing the publication and use of these instructions, we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of these instructions". *Id* at 174.

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 a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine 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.

Fla. Stat. § 921.141(2) (2019). Significantly, the statute only requires the jury unanimously find aggravating factors and unanimously recommend a sentence of death. The other components of the statute (found in (b)2, set out above) are a part of the weighing process, but unanimity is not required.

On January 23, 2020, this Court released its decision in *State v. Poole,* 297 So.3d 487 (Fla. 2020) and reached the following, clear conclusion: "Having thoroughly considered the State's and Poole's arguments in light of the applicable law, we recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a

reasonable doubt." *Id.* at 508. The core principle in *Poole* is its explanation of the difference between "eligibility" for a death sentence and "selection" for such a sentence. As this Court has clarified, Florida's capital sentencing process begins with a finding that the defendant is eligible for the death penalty, *i.e.*, a unanimous finding that a statutory aggravating factor has been proved beyond a reasonable doubt. *State v. Poole*, 297 So.3rd 487, 501 (Fla. 2020), *citing Tuilaepa v. California*, 512 U.S. 967 (1994). If that "eligibility phase" results in a finding favorable to the State, the case enters the "selection phase," where the jury is tasked with determining the appropriate penalty. *Id.* That selection finding is not a "fact." The ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy. The *Poole* Court made it clear that the jury is *not* required to unanimously agree that the aggravating factor or factors are sufficient to impose a sentence of death.[47] Thus, the decision upon which significant

[47] This is the § 921.141(2)(b)(2)(b) factor in the current statute. The *Poole* decision refers to the statute in effect at the time of that case. For purposes of this case, § 921.141(2)(b)(2)(b) is the pertinent provision.

portions of the current *Preliminary* and *Final Instructions* were based is no longer good law.

Prior to trial, the State filed a motion moving the trial court to modify Florida Standard Penalty Phase Jury Instructions 7.10 and 7.11, as well as Verdict Form 3.12(E) to mirror the state of the law as announced by this Court in its January 23, 2020 decision in *State v. Poole*, 297 So.3d 487 (Fla. 2020). (R 1628-1654) The State argued that the Preliminary and Final Instructions[48] needed to be updated to conform with the Court's decision in *Poole* and the current, clear language of Florida Statute section 921.141. Specifically, the State sought an order eliminating any need for the jury to unanimously agree that the proven aggravating factors are sufficient to warrant death, or to unanimously agree that the aggravation outweighs the mitigation. (R 1631-33)

[48] State's "Exhibit A," "Exhibit B," and "Exhibit C" were provided to the court with the conforming language. (R 1366-1654)

The State sought to delete the italicized portion[49] of the *Preliminary Instructions* to conform with the holding in *Poole* as follows:

> You are instructed that this evidence [, along with the evidence that you heard during the guilt phase of this trial,] is presented in order for you to determine, as you will be instructed, (1) whether each aggravating factor is proven beyond a reasonable doubt; *(2) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty; (3) whether mitigating circumstances are proven by the greater weight of the evidence; (4) whether the aggravating factors outweigh the mitigating circumstances; and (5)* (2) whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

The State also argued that under *Poole*, the following portion of the *Preliminary Instructions* was incorrect[50], and should not be given:

> Before moving on to the mitigating circumstances, you must determine that the aggravating factor[s] [is] [are] sufficient to impose a sentence of death. If you do not unanimously agree that the aggravating factor[s] [is] [are] sufficient to impose death, do not move on to consider the mitigating circumstances.

[49] This is the paragraph of the section of the *Preliminary Instructions* under the heading "Give this instruction in all cases."

[50] This is the final paragraph of the section of the *Preliminary Instructions* under the heading "Aggravating Factors."

Likewise, the *Final Instructions* contained the following, inaccurate, language[51] which is indicated by italics:

> Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, *if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor[s] found to exist outweigh the established mitigating circumstances must be unanimous, and* your decision to impose a sentence of death must be unanimous.

The State further sought to modify the verdict form to reflect that a unanimous finding is only required to (1) find the existence of an aggravating factor, and (2) recommend a sentence of death. (R 1633) The defense filed a written response. (R 1710-1717)

The trial court initially granted the State's motion finding "that the *Poole* decision does, in fact, say that the last two factors do not have to be found by a jury beyond a reasonable doubt. I also find that the case law in Florida is clear, including from the Supreme Court, and I don't remember the name of the case, but the trial court is to

[51] This is the third paragraph following the listing of mitigating circumstances.

make sure that the jury instructions, regardless of what the standard jury instructions say, conform to the evidence in the case and conform to the existing law at the time the instructions are read". (TT 274, 292, 5635, 5639, 5647) However, the court ultimately instructed the jury with the standard jury instructions. (TT 7421-22,7428-29; R4485;4488)

It is undisputed that the trial judge has "the responsibility of correctly charging the jury." *State v. Floyd*, 186 So.3d 1013, 1022 (Fla. 2016). "That responsibility includes giving instructions that are not 'confusing, contradictory, or misleading.' "*Routenberg v. State*, 301 So.3d 325, 328 (Fla. 2d DCA 2020) (*quoting Dooley v. State*, 268 So.3d 880, 885 (Fla. 2d DCA 2019)). The State argues that the language identified in both the *Preliminary Instructions* and the *Final Instructions* as well as the Verdict Form, is contrary to the explicit holding in *Poole*, is not a correct statement of the law, and should not have been given. In short, the burden is on the trial court to provide clear, correct, and complete instructions to the jury on what the law is and how it is to be applied. *Nichols v. State*, 312 So.3d 530, 533 (Fla. 2d DCA 2021).

The trial court should have granted the State's motion updating the Preliminary and Final Instructions to conform with the Court's decision in *Poole* and the current, clear language of Florida Statute section 921.141.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court to affirm the trial court's Judgments of Conviction and Sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLE'S ANSWER BRIEF/CROSS-INITIAL BRIEF has been furnished via e-portal to: **Nancy Ryan**, Assistant Public Defender, Email: ryan.nancy@pd7.org, coppello.renee@pd7.org, appellate.efile@pd7.org; **Robert Jackson Pearce, III**, Assistant Public Defender Email: pearce.robert@pd7.org, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118 on this 15th day of November, 2022.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Bookman Old Style, and word count is 27,909 in compliance with Fla. R. App. P. 9.210 and 9.045.

s/DORIS MEACHAM
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APPENDIX F

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARKEITH LOYD,

Appellant/Cross-Appellee,

vs. Supreme Court Case No. SC22-378

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF/CROSS-APPELLEE'S ANSWER BRIEF

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[1] Title of brief amended to reflect correction: 'Cross-Appellee's Answer Brief'

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SUMMARY OF ARGUMENTS

Point one. Per the United States Supreme Court, Appellant need not show prejudice from the exclusion of the three jurors in question. After the court ruled it would strike any venire member who admitted knowing that Appellant was severely beaten on being arrested, the State obtained extra challenges by prodding selected venire members into acknowledging that well-known fact. When a state's jury selection system is undermined, however subtly, the Supreme Court does not require a showing of prejudice to challenge the offending procedure.

Point two. Appellant maintains his position that the trial court erred by denying his request for the jury to hear what relationship exists among the preponderance, clear and convincing, and beyond a reasonable doubt standards of proof. The trial court further erred by denying his request for the jury to hear that clear and convincing evidence is proof that makes the existence of a fact highly probable.

Point three. This Court recently reaffirmed a commitment to redress fundamental error when necessary to protect the interests of justice. This Court should hold that the prosecutor's misleading comments on what suffices to prove premeditation amounted to fundamental error, and should reverse the convictions on Counts I and II based on that holding.

Point four. The State argues that no error took place when the prosecutor exhorted the jurors to agree amongst themselves, and suggested they need not consider mental health-related mitigation. The courts hold that jurors must base their decisions on the facts elicited during trial and the law *instructed on by the trial court.* Extraneous instructions on the law by counsel for the State have no place in that system. The defense's objections to those comments should have been sustained. The State has failed to show beyond a reasonable doubt that the objected-to comments, and the court's responsive rulings, did not contribute to the penalty phase verdict.

Point five. Appellant seeks, on this point, an opinion receding from Campbell v. State, 571 So. 2d 571 (Fla. 1990), to the extent Campbell holds that the defense bears any burden at all to prove mitigation in a capital case. The State has responded to a distinct argument that the defense bar historically made in Florida capital cases. Appellant maintains his position that his challenge to Campbell has merit, and that this Court should act on it and order a resentencing hearing on that ground.

Point six. As to this point, Appellant will rely on his initial brief.

Point seven. The parties disagree whether the trial judge properly considered all of the expert testimony adduced on the question whether Appellant was competent to be sentenced. Appellant urges this Court to

hold that the trial court abused its discretion by failing to do so.

Point eight. As to this point, Appellant will rely on his initial brief.

Point nine. The State argues that the standard jury instructions, although they omit any express mention of mercy, adequately address the subject. As was argued in the initial brief, the Appellant disagrees, and asks this Court to recede from Woodbury v. State, 320 So. 3rd 631 (Fla. 2021), to reverse his sentence, and to remand for a new penalty phase.

The State further argues that any error on this point was cured by defense counsel's mercy-based argument to the jury. The caselaw holds that allowing counsel to argue a pertinent point to the jury in closing is not an adequate substitute for an instruction from the court.

Points ten through thirteen. As to these points, Appellant will rely on his initial brief.

Cross-Appellant's Answer Brief. The State objects to rulings made during the penalty-phase charge conference, but seeks no remedy other than general affirmance. If this Court does not order a new penalty phase, per the governing caselaw the State is entitled to no relief.

On the merits of the cross-appeal, the State asserts that the court ultimately instructed the jury in accordance with outdated standard instructions, disregarding changes the State had sought pursuant to State v. Poole, 297 So. 3rd 487 (Fla. 2020). The record shows that the court did,

in fact, make the requested changes. The State is thus entitled to no relief, regardless of the outcome of the direct appeal.

ARGUMENT

POINT ONE

IN REPLY: THE TRIAL COURT DISMISSED FOR CAUSE, OVER DEFENSE OBJECTIONS, VENIRE MEMBERS WHO WERE COMPETENT TO SERVE. SUCH AN ERROR IS NOT SUBJECT TO HARMLESS-ERROR REVIEW.

The State relies, in supplemental authority, on Jones v. Dretke, 375 F. 3rd 352 (5th Cir. 2004). In Jones, a death-penalty case, the State challenged a juror for cause because her instinct was to disfavor the testimony of an accomplice. 375 F. 3rd at 354. She was later rehabilitated, but was removed for cause – erroneously, under Texas law. Id. at 355. Both the Texas and federal courts reasoned that since the jury that served in Jones's case was impartial, there was no remedy for the erroneous cause removal. Id. at 355-57. No mention was made whether the venire member in question was qualified to serve pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968).

The State argues that in this case, there is no legal remedy for the exclusion of jurors no. 809, 717, and 21. This is so, in their view, because there has been no showing that the jury that served was biased, and because the three excluded jurors were not struck based on their views on capital punishment, thus leaving this case outside the structural-error rule

set out in Gray v. Mississippi, 481 U.S. 648 (1987). (Answer brief at 55-59) Appellant acknowledges that the Supreme Court has "decline[d] to extend the rule of Gray beyond its context: the erroneous "Witherspoon exclusion" of a qualified juror in a capital case." Ross v. Oklahoma, 487 U.S. 81, 87 (1988). Ross involved the erroneous *inclusion* of a juror who should have been excluded under Witherspoon, which caused the defense to use a peremptory strike. Ross sought relief based on losing the peremptory strike; the Court held that it would not intervene because there is no constitutional aspect to peremptory challenges, in the absence of invidious discrimination. The quotation from Ross set out above is not fatal to Appellant's claim, however, in light of a principle announced by the Court in Thiel v. Southern Pacific Co., 327 U.S. 217 (1946).

In Thiel, a personal injury suit brought against a railway under the federal courts' diversity jurisdiction, the clerk of the court deliberately excluded day laborers from the jury pool because the judge had a practice of excluding such workers for economic hardship. The Court reversed the ensuing judgment for the railway pursuant to its supervisory powers, holding that the plaintiff's motion to strike the venire should have been granted. Per the Court it was "unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion…. The evil lies in the admitted wholesale exclusion of a large class of wage earners in

disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial." Id. at 225.

Thiel reflects the Supreme Court's view that a showing of prejudice is not necessary to challenge a practice which effectively undermines the jury system, no matter how subtly. Here, as shown to some extent in the answer brief at 50-53, the prosecutor prodded excluded jurors 809 and 717 to disclose just what they knew about the injuries imposed during Appellant's arrest. Earlier questioning of Juror 809 appears in the trial transcript as follows:

> STATE: You talked about the different places that you received information about the case.
>
> 809: Right.
>
> STATE: But I didn't hear you say exactly what information you had.
>
> 809: Uh-huh.
>
> …STATE: What did you hear about the second case…the one we're here about now?
>
> 809: Yeah. That one, basically, everything that's on the news. Like he's at Walmart.
>
> STATE: Okay. He was at Walmart. What else?
>
> 809: Pretty much the officer approached him or something, and he shot her.
>
> STATE: All right. Anything else about that situation that you're aware of?

809: Huh-uh. Well besides him going on the run.

STATE: Okay. He went on the run. Did you hear, or did you see, any media coverage of when he was arrested?

809: Yeah, yeah.

STATE: Okay. What do you know about his arrest?

809: I seen when he was getting arrested, I seen the footage of it. It was like a helicopter.

STATE: Okay. The helicopter footage, yes, sir.

809: Yeah. I seen him like just laid out on the ground, police came, arrested him. Looked like he was hit.

STATE: Okay. It looked like law enforcement struck him?

809: Yeah.

STATE: Okay. Do you know anything about what happened as a result of his arrest? His injuries or anything like that?

809: Like, what injuries happened to him?

STATE: Yes, sir.

809: Eye.

STATE: Okay. What do you know about his eye?

809: I guess from when he got hit, maybe, from the police officers.

STATE: Okay. That's what you heard?

809: That's – I mean, I seen that on the footage, the kicking from the officer.

STATE: All right. And did you see footage of Mr. Loyd with the injury to his eye after his arrest?

809: Yes.

STATE: Okay. So you actually saw the injuries?

809: Like, I mean, he had something on his eye.

STATE: The big bandage over his eye?

809: Yeah, I seen that.

(T 1093-96) As to juror 717, the prosecutor again was following up, asking about that venire member's earlier statement to the court that he knew something about the case. (T 1540) The questioning of venire member 21 – conducted by the court - is set out in full in the answer brief at 53. (T 2975) The State successfully challenged No. 21 for cause based on the quoted colloquy. (T 2981-85)

Excluded venire members 809 and 717 had each weathered a Witherspoon-based colloquy without incident before the State sought further information about just what they had seen on the news. (T 1097-1101, 1542-45) It was also established that Juror 21 satisfied the Witherspoon test. (T 2977-80) In contrast, of the jurors that served, numbers 215, 927, and 759 told the court they had heard about the case on the news, but during the State's follow-up questioning not one of the three was asked just what they remembered. (T 603-04, 607-20, 1161-62, 1166-73, 1412-14, 1417-25; see SR 540) That Appellant Loyd lost an eye during his arrest was an open secret: as the defense noted in its motion for new penalty phase, Appellant "was seated in court throughout the entirety of voir dire, very noticeably missing his left eye." (R 4605) The record thus

quite clearly suggests that the State, when it disfavored a venire member who had already been Witherspoon-approved, prodded until a cause challenge could be raised regarding knowledge of the arrest scenario, but when it wished to retain a juror, refrained from asking identical questions. This practice exploited the court's determination, expressed early on in voir dire, that any venire member who acknowledged the defendant's well-known treatment at the hands of the police would be removed. (See T 1112-15) The practice added to the State's total number of challenges, thus tending to undermine the jury system set out in Florida's statutes and rules. For that reason, the defense need not show prejudice from the exclusion of the three jurors in question. Thiel, *supra*. Reversal of Appellant's sentence should follow.

POINT TWO

IN REPLY: THE DEFENSE SOUGHT TO MODIFY THE STANDARD JURY INSTRUCTION ON INSANITY. THE TRIAL COURT ERRED IN DENYING THE PROPOSED CHANGE, WHICH WOULD HAVE CLARIFIED THE DEFENSE'S BURDEN OF PROOF.

The State argues that when a standard jury instruction is given over a motion to substitute non-standard language, the courts review the ruling for abuse of discretion. (Answer Brief at 60) Appellant has argued for a *de novo* review standard on this point, citing State v. Floyd, 186 So. 3rd 1013 (Fla. 2016). In its cross-appeal in this case, objecting to the trial court's alleged refusal to alter a standard penalty phase instruction, the State relies on State v. Floyd to seek *de novo* review. (State's Brief at 124) The anomaly is nowhere explained. Appellant maintains his view that *de novo* review is appropriate on this point. *See* Schminky v. State, 305 So. 3rd 640, 644 (Fla. 3rd DCA 2020) (accuracy of a jury instruction is a question of law); Robinson v. State, 290 So. 3rd 1007, 1011 (Fla. 2d DCA 2020) (en banc) (legal adequacy of an instruction is a question of law); Rodriguez v. State, 174 So. 3rd 502, 505 (Fla. 4th DCA 2016) (propriety of giving standard instruction calls for *de novo* review).

On the merits, the State disputes Appellant's assertion that instructions on the parties' burdens of proof are always relevant to what the

jury must consider in order to convict. It distinguishes Yohn v. State, 476 So. 2d 123 (Fla. 1985), noting that in Yohn the standard instruction disapproved by this Court did not establish where the burden lay. (Answer Brief at 62) Here the drawback in the standard instruction is that it does not adequately help a layman understand what the law means by "clear and convincing." This Court holds that an instruction which fails to correctly and completely state the law relating to a criminal defense denies the "trial by due course of law" guaranteed by Section 12 of Florida's Declaration of Rights. Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (Fla. 1945).

As the State correctly notes, the defense asked the court to define "clear and convincing evidence" as evidence "sufficient to persuade you the Defendant's claim is highly probable." The State characterizes the requested language as "a clear misstatement of law." (Answer brief at 62) In fact, the First and Second DCA's use the term "highly probable" in explaining the clear and convincing standard. Edwards v. State, 2022 WL 17087690 *6 (Fla. 1st DCA 2022), citing Cummings v. State, 310 So. 3rd 155, 158-59 (Fla. 2d DCA 2021). The State's view is that the language used in the standard insanity instruction to define "clear and convincing," *i.e.*, "of such weight that it produces a firm belief, without hesitation, about the matter in issue," is the *only* correct language to use in explaining the intermediate standard. It notes, in support, that the "firm belief" formulation

dates back “decades.” (Answer Brief at 63) The language in question was added to the insanity instruction in 2006. *See* In re Standard Jury Instructions in Criminal Cases (no. 2005-5), 939 So. 2d 1052 (Fla. 2006).

In arguing that any error on this point is harmless, the State asserts that the trial court “instructed the jury that clear and convincing was a lower standard than…beyond a reasonable doubt during jury selection.” In support, it cites the trial transcript at 3337 and 3344-45. (Answer Brief at 65) At those pages, during individual voir dire, the court mentioned to potential jurors 912 and 534 that “clear and convincing” is a lower burden than “beyond a reasonable doubt.” (See T 3333, 3342) Neither of those venire members was chosen to serve. (SR 540)

Appellant further maintains his position that the trial court should have granted his request for the jury to hear what relationship exists among the preponderance, clear and convincing, and beyond a reasonable doubt standards. The First and Second DCA’s, like this Court in the JQC cases cited in the initial brief, have found an explanation of that relationship useful when educating the public about how it reaches decisions. *See* Edwards v. State, *supra*, 2022 WL 17087690 *6 (Fla. 1st DCA 2022) and In re Petition for Judicial Waiver of Parental Notice, 333 So. 3rd 265, 272 (Fla. 2d DCA 2022). A jury’s understanding of the law it must apply in a capital case is no less critical a matter.

Finally, the State urges this Court to conclude that the jury "rightfully rejected the insanity defense," alleging there was inconsistent testimony by mental-health experts called by the defense. (Answer Brief at 66) In the first phase of trial the defense called only one expert, Dr. Toomer. (T 4983-5070) In any event, the State's argument on this point would inappropriately substitute this Court's judgment for that of the jury in a case where an uninformative instruction on the burden of proof had the effect of vitiating the jury's findings. *See* Murray v. State, 937 So. 2d 277, 281-82 (Fla. 4th DCA 2006). Reversal should follow.

POINT THREE

IN REPLY: THE STATE ARGUED THAT PREMEDITATION IS PROVED UNDER FLORIDA LAW IF THE DEFENDANT HARBORED THE REQUISITE INTENTION "DURING THE ACTUAL ACT." THAT MISSTATEMENT OF LAW AMOUNTED TO FUNDAMENTAL ERROR ON THIS RECORD.

The State cites Kaczmar v. State, 228 So. 3rd 1, 12 (Fla. 2017) for a rule that review of closing argument for fundamental error "includes two factors," *i.e.*, whether an improper statement was repeated, and whether the jury was provided with an accurate statement of law afterward. (Answer brief at 67-68) Kaczmar cites Poole v. State, 151 So. 3rd 402, 415 (Fla. 2014) for that rule. It is clear from Poole that those two factors are not intended to be the *only* factors considered. 151 So. 3rd at 415. Read fairly, Poole and Kaczmar do not overrule long-standing decisions reversing judgments based on comments which were not repeated, but were of the type that invokes comparison to a skunk in the jury box. *E.g.,* F.J.W. Enterprises, Inc. v. Johnson, 746 So. 2d 1145, 1147 (Fla. 5th DCA 1999). Nor do Poole and Kaczmar overrule decisions where a particular set of instructions, on a particular record, was held inadequate to erase the taint of improper argument. *See generally* Paul v. State, 980 So. 2d 1282 (Fla. 4th DCA 2008). As noted in the initial brief, this Court has recently

reaffirmed a commitment to acknowledge and redress fundamental error when necessary to protect the interests of justice. Ritchie v. State, 344 So. 3rd 369, 386 (Fla. 2022).

The State suggests that if a reversal results on this point it should only apply to Count II, since the objectionable discussion did not clearly refer to Count I. (Answer brief at 67 n. 28) While the prosecutor's musing on premeditation was conveyed during his discussion of the proof underlying Count II, his comments were not limited to that subject matter. Reversal as to both Counts I and II should follow.

POINT FOUR

IN REPLY: THE COURT OVERRULED OBJECTIONS TO IMPROPER ARGUMENT IN CLOSING ARGUMENT IN THE PENALTY PHASE. THE STATE MUST SHOW THERE IS NO REASONABLE POSSIBILITY THAT THE RULINGS CONTRIBUTED TO THE VERDICT.

The State cites Lowe v. State, 259 So. 3rd 23, 47 (Fla. 2018) for a rule that improper comments, to warrant reversal, must have been so inflammatory that a sentence of death could not have been obtained without them. (Answer Brief at 86) Each of the penalty-phase comments now questioned was the subject of an objection which was overruled. (T 7439-40, 7464, 7485, 7491-7500) Since the objections should have been sustained, the correct standard of review is whether the State can show beyond a reasonable doubt that there is no reasonable possibility any of the comments contributed to the death sentence. *E.g.,* Cardona v. State, 185 So. 3rd 514, 520 (Fla. 2016).

As the State correctly notes, what the prosecutor said about unanimity was this: “I would suggest to you that as the instructions point out, you have an obligation to give meaningful consideration to everything. And not only that, but that you try your best to reach a unanimous verdict.” The State’s view is that in those sentences, “you have an obligation” patently relates *only* to the goal of considering all the proof. (Answer Brief

at 73-76) Of course, the jury had no transcript of closing argument to parse. The jurors, or one or more of them, may indeed have taken in just "try your best to reach a unanimous verdict" rather than "you have an obligation to try your best to reach a unanimous verdict." The former is just as objectionable as the latter, in light of the fact that *no such aspirational goal is remotely appropriate in penalty phase deliberations*,

The State argues that any error in exhorting the jurors to agree amongst themselves was harmless, because defense counsel and the jury instructions both told the jury that the law does not require unanimity as to the ultimate sentencing decision. The fact that unanimity on that question *is not required by law* in no way precludes the possibility that unanimity on that question *is preferred by the prosecuting authority.* As noted in the initial brief, argument by the government's advocate has "a heightened impact on the jury." Drake v. Kemp, 762 F. 2d 1449, 1459 (11th Cir. 1985). As this Court has further noted, "a bedrock principle of our criminal justice system is that every effort must be made in any trial…to ensure that the jurors base their decision…solely on the facts elicited during trial and the law *instructed by the trial court.*" Cardona v. State, *supra*, 185 So. 3rd 514, 519 (Fla. 2016) (emphasis added). Extraneous advice on the law from counsel for the State appears nowhere in that calculus.

As to the comment "you have already made th[e] determination [what weight to give to mental health-related mitigation] by rejecting [the] insanity defense," the State argues that what the jury probably heard was "you may take your guilt-phase verdict into account as you weigh the evidence" rather than "you don't need to consider this aspect of the mitigation." Appellant perceives a significant risk that one or more jurors arrived at the latter interpretation. A reliable penalty-phase verdict exists when the reviewing court can be confident that the decision-maker gave independent weight to the mitigation. Beck v. Alabama, 447 U.S. 625, 638 n.13 (1980). The comments challenged on this point tend firmly to undermine such confidence.

Relying on the judge's sentencing order, the State asserts that the comment "you have already made this determination" should be considered harmless, if error at all. It points to the trial judge's view that the more credible testimony indicates that Appellant could easily conform his conduct to the requirements of law. (Answer Brief at 81) As on Point Two, the State is suggesting that this Court may rely on the judgment of another entity – here, the trial judge – as to a decision which the Legislature entrusts to the jury.

In his initial brief, Appellant characterized a third comment by the prosecutor - to the effect that another life sentence would amount to no punishment at all – as reliance on a non-statutory aggravating factor. (Initial brief at 71) This Court in Globe v. State, 877 So. 2d 663 (Fla. 2004) held that a similar conclusion in a sentencing order did not, in fact, amount to reliance on a non-statutory aggravator.[2] In Globe, a case involving a prison murder, this Court held that the judge had instead validly summed up the strength of a statutory aggravator present in that case, *i.e.*, that the murder was committed while under a sentence of imprisonment. 877 So. 2d at 676. The trial court, and this Court, noted that Globe's life sentences – which were in effect at the time he killed his cellmate - had the effect of eliminating deterrence from further violent crime, which made that aggravator weigh heavily in favor of a death sentence. No analogous reasoning has connected the objected-to argument to a statutory aggravating factor in this case. The trial judge should have read the curative instruction proposed by the defense, to the effect that any effort to denigrate the choice of a life sentence should be disregarded. The defense's objections to the other comments discussed on this point should have been sustained. The State has failed to show beyond a reasonable

[2] The undersigned has belatedly discovered Globe, and had no intention of misleading this Court in the initial brief.

doubt that the prosecutor's comments, and the court's responsive rulings, did not contribute to the penalty phase verdict. Reversal of the sentence should follow.

POINT FIVE

IN REPLY: THE DEFENSE SOUGHT TO MODIFY THE STANDARD JURY INSTRUCTION WHICH PLACES THE BURDEN ON THE DEFENSE TO PROVE THAT MITIGATING CIRCUMSTANCES EXIST. THE REQUEST SHOULD HAVE BEEN GRANTED, AS THE LEGISLATURE HAS ALLOCATED NO SUCH BURDEN.

As on Point Two above, the State argues for an abuse-of-discretion standard of review, although in its cross-appeal it seeks *de novo* review of a ruling which allegedly denied a departure from the standard jury instructions. (Answer brief at 86-87, 124, 60) *De novo* review is appropriate. State v. Floyd, *supra*, 186 So. 3rd 1013, 1019 (Fla. 2016); Schminky v. State, *supra*, 305 So. 3rd 640, 644 (Fla. 3rd DCA 2020); Robinson v. State, *supra*, 290 So. 3rd 1007, 1011 (Fla. 2d DCA 2020) (en banc); Rodriguez v. State, *supra*, 174 So. 3rd 502, 505 (Fla. 4th DCA 2016).

Appellant seeks, on this point, an opinion receding from Campbell v. State, 571 So. 2d 571 (Fla. 1990), to the extent Campbell holds that the defense bears any burden at all to show mitigation in a capital case. Appellant's point is that this aspect of Campbell does not reflect any view ever expressed by the Florida Legislature, and that the single case cited in the Campbell opinion on the point does not support the disputed principle. *See* Initial Brief at 73-76. As this Court teaches, the proper question is

whether there is a valid reason is *why not* to recede from Campbell. *E.g.*, Lawrence v. State, 308 So. 3rd 544, 551 (Fla. 2020), *citing* State v. Poole, 297 So. 3rd 487, 507 (Fla. 2020).

The State has responded to a distinct argument that the defense bar historically made in Florida capital cases. That argument challenged the constitutionality of language in Section 921.141 of the Statutes which arguably required a showing that the mitigation outweighed the aggravation, rather than vice versa. The Legislature, in 2016, corrected that often-challenged provision. *Cf*. Section 921.141(2)(b)(2)b, Florida Statutes (2016) with Section 921.141(2)(b), Florida Statutes (2015); *see* Chapter 2016-13, §3, Laws of Florida.

Appellant maintains his position that his challenge to Campbell has merit, and that this Court should act on it and order a resentencing hearing on that ground.

POINT SIX

IN REPLY: THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO VICTIM-IMPACT EVIDENCE.

The Appellant will rely on his initial brief as to this point.

POINT SEVEN

IN REPLY: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE DEFENDANT COMPETENT TO BE SENTENCED.

The Appellant's position is that the expert testimony the defense introduced below, read fairly, is not internally consistent. The State makes much of the fact that the defense experts' ultimate diagnoses differed; however, those witnesses' testimony regarding the symptoms they perceived was consistent, as was their testimony that such symptoms wax and wane. They further agreed that the taxonomy used by mental-health professionals often varies.

It is also Appellant's position that the testimony given by Dr. Oses, that the defendant was sufficiently able to communicate with her on the day she saw him, is in fact consistent with testimony from multiple defense experts to the effect that symptoms such as those Appellant endures vary widely from day to day.

The State maintains that the trial judge properly considered all of the experts' contributions. On this record, Appellant disagrees. The judge rejected Dr. Amador's testimony because he did not consider all the factors laid out in Florida's rule governing competency evaluations. Dr. Amador, who appeared by Zoom from Utah, was never appointed to conduct such

an evaluation; he was hired by the defense team to testify at the Spencer hearing, then reported to them his concerns about Appellant's mental state at the time of their interaction in 2022. The judge also dismissed any opinion that did not reflect her experience with the defendant in court between 2018 and 2021, although three months elapsed between the end of the penalty phase and Dr. Amador's testimony.

In its competency order, the court dismissed the defendant's continual return to the topic of the handling of the crime scene in the Dixon case, which he perceived as significant to the jury's consideration of the Clayton case. The court's view was that "he simply refuses to accept his guilt." (Answer brief at 102) This view is at odds with the defense experts' explanation that "perseveration," or returning continually to a fixed idea, is a symptom of mental-health difficulties. (T 4987, 6944)

Appellant urges this Court to hold that the trial court abused its discretion when it found him competent to be sentenced.

POINT EIGHT

IN REPLY: FELONS WERE EXCLUDED FROM THE JURY POOL, VIOLATING THE VENIREMENS' EQUAL PROTECTION RIGHTS AS WELL AS APPELLANT'S RIGHTS.

The Appellant will rely on his initial brief as to this issue.

POINT NINE

IN REPLY: THE DEFENSE REQUEST FOR AN EXPRESS JURY INSTRUCTION ON MERCY SHOULD HAVE BEEN GRANTED.

As on Points Two and Five above, the State argues for an abuse-of-discretion standard of review, although in its cross-appeal it seeks *de novo* review where the court allegedly denied a departure from the standard jury instructions. (Answer brief at 106, 60, 86-87, 124) *De novo* review is appropriate. State v. Floyd, *supra*, 186 So. 3rd 1013, 1019 (Fla. 2016); Schminky v. State, *supra*, 305 So. 3rd 640, 644 (Fla. 3rd DCA 2020); Robinson v. State, *supra*, 290 So. 3rd 1007, 1011 (Fla. 2d DCA 2020) (en banc); Rodriguez v. State, *supra,* 174 So. 3rd 502, 505 (Fla. 4th DCA 2016).

On this point, the State takes the position that the standard jury instructions, although they omit any express mention of mercy, adequately address the subject. In the cross-appeal portion of its brief, the State concedes that "[t]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy," citing State v. Poole, 297 So. 3rd 487 (Fla. 2020). If mercy is indeed "the whole megillah" in a penalty phase, an express mention of that fact could only assist the laypeople who are tasked with deciding the defendant's fate. *See*

generally Pickel v. State, 32 So. 3rd 638 (Fla. 4th DCA 2010) (DNA evidence amounts to "the whole megillah" in a sexual battery trial).

The State further argues that any error in the jury instructions was cured by defense counsel's mercy-based argument to the jury. The Third DCA has rejected a similar argument: "[w]e are not persuaded that permitting defense counsel to argue [a pertinent point] to the jury in closing was an adequate substitute for an instruction from the court…. The comparative value of arguments by counsel and instructions by the court, through the eyes of the jury, cannot be underestimated given the fact that 'particularly in a criminal trial, the judge's last word is apt to the be the decisive word.'" Cliff Berry, Inc. v. State, 116 So. 3rd 394, 411-12 (Fla. 3rd DCA 2012), *citing* Boyde v. California, 494 U.S. 370, 384 (1990) and Bollenbach v. United States, 326 U.S. 607, 612 (1946).

Appellant asks this Court to recede from Woodbury v. State, 320 So. 3rd 631 (Fla. 2021), to reverse his sentence, and to remand for a new penalty phase.

POINT TEN

IN REPLY: THE JURY WAS DEATH-QUALIFIED OVER OBJECTION.

POINT ELEVEN

IN REPLY: THE DEATH PENALTY IS UNCONSCIONABLE.

POINT TWELVE

IN REPLY: ATKINS v. VIRGINIA SHOULD BE EXTENDED TO PROHIBIT THE EXECUTION OF THE SEVERELY MENTALLY ILL.

POINT THIRTEEN

IN REPLY: FLORIDA'S CAPITAL SENTENCING SCHEME RISKS THE ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY AND, THEREFORE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Appellant will rely on his initial brief as to Points Ten through Thirteen.

CONCLUSION

The Appellant requests this Court to reverse the conviction and sentence appealed from, and remand for a new trial on all counts, as to the issues raised on Points 2, and 10.

The Appellant requests this Court to reverse the conviction and sentence appealed from, and remand for a new trial on Counts I and II, as to the issues raised on Point 3.

Appellant requests this Court to reverse the sentence appealed from, and remand for a new penalty-phase hearing, as to the issues raised on Points 1, 4, 5, 6, and 9.

As to the issue raised on Point 7, Appellant asks this Court to vacate his sentence and remand for a new competency evaluation and hearing.

As to the issue raised on Point 8, Appellant asks this Court to remand for an evidentiary hearing.

As to the issues raised on Points 11-13, Appellant asks this Court to vacate his death sentence and remand with directions to impose a sentence of life in prison.

CROSS-APPELLEE'S ANSWER BRIEF

THE STATE SEEKS NO RELIEF, AND IS ENTITLED TO NONE, BASED ON THE JURY INSTRUCTIONS READ DURING THE PENALTY PHASE.

The State, in its Cross-Appeal (which it has styled as "Point Fourteen" of its brief), objects to rulings made during the penalty-phase charge conference, but seeks no remedy other than general affirmance. If this Court does not order a new penalty phase in this matter, the State is entitled to no relief. *See* Pitone v. Pitone, 585 So. 2d 449, 451 (Fla. 4th DCA 1991) (cross-appellant sought no remedy other than general affirmance; per the court "we see no need to go any further…in light of our decisions [denying the appellant relief.]"). *See also* Gamble v. State, 659 So. 2d 242, 244 (Fla. 1995) (state's cross-appeal moot in light of affirmance of death sentence). The State, in effect, seeks an advisory opinion to which it is not entitled. *See* Walker v. State, 459 So. 2d 333, 335 (Fla. 3rd DCA 1984).

The matter disputed at the charge conferences below was whether the court would read standard instructions which required the jury to *unanimously* decide both (a) whether the case in aggravation was sufficient, in isolation, to warrant a death penalty, and (b) whether the aggravation outweighed the mitigation. (T 5740-46, 7343, 7393) The parties and court also discussed whether to adapt the penalty-phase verdict form so as to make it parallel to the instructions on those topics. (T

7404-06) The State asserts that the court ultimately instructed the jury in accordance with the standard instructions. (State's Brief at 131) This is not quite accurate.

As to the **preliminary** penalty-phase instructions, the standard instruction called for the following language:

> Before moving on to the mitigating circumstances, you must determine that the aggravating factors are sufficient to impose a sentence of death. If you do not **unanimously** agree that the aggravating factors are sufficient to impose death. Do not move on to consider the mitigating circumstances.

Fla. Std. Jury Instr. (Crim.) 7.10. The court read that language with one change, *i.e.*, "unanimously" was removed. (R 4453; T 5744) Neither the standard preliminary instruction, nor the preliminary instruction given below, addresses whether the "outweighing" determination must be found unanimously. Fla. Std. Jury Instr. (Crim.) 7.10. (R 4453; T 5744-45) The jury received a copy of the preliminary penalty-phase instructions. (T 5740)

As to the **final** penalty-phase instructions, the standard instruction called for the following language:

> The next step in the process [after finding which aggravating factors and mitigating circumstances were proved] **is for each of you to determine whether the aggravating factors…outweigh the mitigating circumstances….** Once each juror has weighed the proven factors, he or she must determine the appropriate punishment…. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be **unanimous**, your finding that the aggravating factors are sufficient to impose death must be

> **unanimous**, your finding that the aggravating factors…outweigh the…mitigating circumstances must be **unanimous**, and your decision to impose a sentence of death must be **unanimous**.

Fla. Std. Jury Instr. (Crim.) 7.11. The court substituted, for that last standard sentence, the following:

> To repeat what I have said, if your verdict is that the defendant should be sentenced to death, you must have **unanimously** found that at least one aggravating factor was proven beyond a reasonable doubt and you must find that the aggravating factors are sufficient to impose death and outweigh the mitigating circumstances.

(R 4489; T 7429-30)

As to the **verdict form,** the standard form authorized by this Court contains the following language:

> B. Sufficiency of the Aggravating Factors
>
> …we the jury **unanimously** find the aggravating factors are sufficient to warrant a possible sentence of death.
>
> YES ___
>
> NO ___
>
> D. Eligibility for the Death Penalty
>
> …We the jury **unanimously** find that the aggravating factors… outweigh the mitigating circumstances….
>
> YES ____
>
> NO ____

In re Standard Criminal Jury instructions in Capital Cases, 244 So. 3rd 172, 178-79 (Fla. 2018). The verdict form used below omitted the term "unanimously" in both interrogatories B and D. (R 4494)

Judge Marques made the changes she did after making the following comments during the charge conference:

> [T]he fact of the matter is, the Poole decision changes what we were doing. I can't get around that. I wish I could, because it would be so much easier for me to say "we're just going to use the existing instructions."

(T 5647)

> [T]he trial judges are charged with telling the jury what the current law is regardless of whether the jury instructions have caught up or not…trust me, I would prefer not to be in this position. I would prefer to say "just us[e] the existing instructions," but I don't believe that I can simply ignore the Florida Supreme Court telling us this is the law in the State of Florida, and it does not require unanimity on sufficiency.

(T 5648) Since the record shows the State was not in face prejudiced by the jury instructions or the verdict form used in the penalty phase, regardless of the outcome of the direct appeal, this Court should decline to address the cross-appeal.

CONCLUSION

The Cross-Appellee asks this Court not to address the point raised in the cross-appeal.

Respectfully submitted,

MATTHEW J. METZ
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, at www.myflcourtaccess.com, and has been served on the Office of the Attorney General, Assistant Attorney General Doris Meacham, at capapp@myfloridalegal.com;. I further certify that a true and correct copy of this brief has been delivered by mail to Mr. Markeith Loyd, #380384, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 24th day of January, 2023.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing initial brief complies with the Florida Rules of Appellate Procedure in that it is set in Arial 14, and in that, at 7442 words, it does not exceed the word count set out in the Rules.

Isl Nancy Ryan
Nancy Ryan
Assistant Public Defender

APPENDIX G

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC22-378
DEATH PENALTY CASE

MARKEITH DEMANGZLO LOYD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPY BRIEF OF CROSS-APPELLANT/APPELLEE

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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THE TRIAL COURT ERRED IN DENYING THE STATE'S PROPOSED STANDARD JURY INSTRUCTIONS 7.10 AND 7.11 AND VERDICT FORM 3.12(E) WHICH ARE IN CONFLICT WITH THIS COURT'S DECISION IN *POOLE* AND FLORIDA STATUTE 921.141.

Loyd claims that the State, in its Cross-Appeal, seeks no remedy other than general affirmance. This is erroneously predicated on the argument that the term "unanimously" in the preliminary penalty-phase instructions, the final penalty-phase instructions, and the verdict form in both interrogatories B and D was omitted.

This Court held in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) that, in addition to unanimously finding the existence of at least one aggravator as required by *Hurst v. Florida*, 577 U.S. 92 (2016), a jury must also "unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So.3d at 58. This Court receded from *Hurst v. State* and clarified that *Hurst v. Florida* only requires that "a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." This Court clarified that any aggravator is

sufficient to impose death; therefore, no additional sufficiency determination is required. *State v. Poole,* 297 So.3d 487, 508 (Fla. 2020). With that in mind, the State objected to the use of that language in the penalty phase instructions and verdict form.

As to the preliminary penalty-phase instructions, the standard instruction called for the following language:

> You are instructed that this evidence is presented in order for you to determine, as you will be instructed, (1) whether each aggravating factor is proven beyond a reasonable doubt; (2) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty; (3) whether mitigating circumstances are proven by the greater weight of the evidence; (4) whether the aggravating factors outweigh the mitigating circumstances; and (5) whether the defendant should be sentenced to life imprisonment without the possibility of parole or death. At the conclusion of the evidence and after argument of counsel, you will be instructed on the law that will guide your deliberations.

Fla. Std. Jury Instr. (Crim.) 7.10.

It's clear that the jury has to unanimously find each aggravating factor and to unanimously recommend death under the statute. However, the other findings are not required nor do they have to be unanimous. The State's proposed jury instructions deleted (2) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty; (3)

whether mitigating circumstances are proven by the greater weight of the evidence; and (4) whether the aggravating factors outweigh the mitigating circumstances. While the trial court removed "unanimously", the "sufficiency" and "weighing" language was kept in.

As to the preliminary penalty-phase instructions, the standard instruction also called for the following language:

> Before moving on to the mitigating circumstances, you must determine that the aggravating factors are sufficient to impose a sentence of death. If you do not unanimously agree that the aggravating factors are sufficient to impose death, do not move on to consider the mitigating circumstances.

Fla. Std. Jury Instr. (Crim.) 7.10.

Hence, the State objected to the entire paragraph and stated that the language was already included in the first paragraph in the numbered portion describing the process. (R 6767). The trial court originally agreed and removed this paragraph because of *Poole* and noted it was taken out of the proposed new instruction. (R 6766; 6770; 6773). Nevertheless, in trying to make as few changes as possible, the trial court ultimately left the paragraph in, simply

removing the word "unanimously" contrary to the State's proposed instructions and the language in *Poole*.

Likewise, the final penalty-phase instructions, contained the following, inaccurate language which is indicated by italics:

> Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, *if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor[s] found to exist outweigh the established mitigating circumstances must be unanimous,* and your decision to impose a sentence of death must be unanimous.

Fla. Std. Jury Instr. (Crim.) 7.11. The court once again only omitted the term "unanimously" but kept the incorrect language regarding sufficiency. (R 4489; T 7429-30).

As to the verdict form, the standard form authorized by this Court contains the following language:

> **3.12(e) JURY VERDICT FORM—DEATH PENALTY**
>
> We the jury find as follows as to (Defendant) in this case:
>
> **A. Aggravating Factors as to Count ___:**

We the jury unanimously find that the State has established beyond a reasonable doubt the existence of (aggravating factor).

YES _____

NO _____

Repeat this step for each statutory aggravating factor submitted to the jury.

If you answer YES to at least one of the aggravating factors listed, please proceed to Section B. If you answered NO to every aggravating factor listed, do not proceed to Section B; (Defendant) **is not eligible for the death sentence and will be sentenced to life in prison without the possibility of parole.**

B. Sufficiency of the Aggravating Factors as to Count ___:

Reviewing the aggravating factors that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find the aggravating factors are sufficient to warrant a possible sentence of death.

YES _____

NO _____

If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed to Section C; (Defendant) **will be sentenced to life in prison without the possibility of parole.**

C. Mitigating Circumstances:

One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence.

YES _____

NO _____

Please proceed to Section D, regardless of your findings in Section C.

D. Eligibility for the Death Penalty for Count ___.

We the jury unanimously find that the aggravating factors that were proven beyond a reasonable doubt (Section A) outweigh the mitigating circumstances established (Section C above) as to Count ___.

YES _____

NO _____

If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; (Defendant) **will be sentenced to life in prison without the possibility of parole.**

E. Jury Verdict as to Death Penalty

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt (Section A), that the aggravating [factor] [factors] [is] [are] sufficient to warrant a sentence of death (Section B), and the aggravating [factor] [factors] outweigh the mitigating circumstances (Section D), we the jury unanimously find that (Defendant) should be sentenced to death.

YES _____

NO _____

Although the verdict form used below omitted the term “unanimously” in both interrogatories B and D, the State had asked to strike B, C and D and leave A and E, to be consistent with *Poole* and the statute. (R 5706).

The motions filed by the State asked that the verdict form and the penalty phase jury instructions omit the language that *Poole* said was unnecessary. However, while the trial court, removed the word "unanimously" as requested by the State, it still used much of the standard language in contradiction to the State’s proposed instructions which eliminated the sufficiency and weighing requirements from *Hurst v. State*. The State argues that the language identified in both the *Preliminary Instructions* and the *Final Instructions* as well as the Verdict Form, is contrary to the explicit holding in *Poole*, is not a correct statement of the law, and should not have been given.

The trial judge's error is harmless only if the death penalty is affirmed by this Honorable Court.

CONCLUSION

The State respectfully requests this Honorable Court find that the trial court should have granted the State's motion updating the Preliminary and Final Instructions to conform with the Court's decision in *Poole*.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPY BRIEF OF CROSS-APPELLANT/APPELLEE has been furnished via e-portal to: **Nancy Ryan**, Assistant Public Defender, Email: ryan.nancy@pd7.org, coppello.renee@pd7.org,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Bookman Old Style, and word count is 1,709 in compliance with Fla. R. App. P. 9.210 and 9.045.

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