No. ______

IN THE

Supreme Court of the United States

BOBBY JOE LONG,

Petitioner,

v.

MARK S. INCH, SECRETARY
FLORIDA DEPARTMENT OF CORRECTIONS

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI – DENIAL OF STATE PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, MAY 23, 2019, AT 6:00 P.M.

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether an individual who suffers from severe mental illness is exempt from execution under the Eighth Amendment and the evolving standards of decency?

2. Whether the Fifth Amendment Double Jeopardy Clause prohibits the imposition of the death penalty on a prisoner who has already served the statutorily prescribed alternative of a life sentence for the same first-degree murder conviction?

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PARTIES TO THE PROCEEDINGS

Petitioner, Bobby Joe Long, a death-sentenced Florida prisoner scheduled for execution on May 23, 2019, was the petitioner in the Florida Supreme Court.

Respondent, the State of Florida, was the respondent in the Florida Supreme Court.

DECISION BELOW

The decision of the Florida Supreme Court is not yet reported but is available at 2019 WL 2066964, and is reprinted in the Appendix (App.) at 1.

JURISDICTION

The judgment of the Florida Supreme Court was entered on May 10, 2019. App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Critical to the first question presented is the fact that Bobby Joe Long has a history of significant head injuries. His first such injury occurred when he was about four or five years old and he fell off a swing. Petitioner was knocked unconscious for several minutes and awakened to find a stick stuck in his left eyelid. He still bears a scar there.

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[1] Petitioner requests expedited consideration of this petition in order to ensure it is circulated with the accompanying stay application.

At around the same age, Petitioner was hit by the side of a door and busted his head open. Soon after that, he fell off his bike. A few years later, Petitioner fell down the stairs. He was knocked unconscious for fifteen or twenty minutes, and his mother had to call a rescue squad.

When Petitioner was seven, he was hit by a car in the head, tearing off parts of his face and busting his jaw. He also had extensive damage to his mouth and smashed some of his teeth into his gums. Petitioner was in the hospital for a week. He had a broken jaw and could not eat solid food for weeks.

A year later, Petitioner fell down another set of stairs, this time at his grandmother's apartment building. There was a long flight of stairs in the building, and Petitioner fell all the way to the bottom. He was knocked out for several minutes. When Petitioner was eleven or twelve, he was riding a horse at a cousin's house when the horse threw him off. Petitioner hit the front of his head again and was unconscious for several minutes. He vomited once he became conscious.

Petitioner's most consequential head injury occurred when he was nineteen. Petitioner was driving his motorcycle in Miami when he was hit by a car. Petitioner was thrown over the motorcycle head first. As a result of the accident, he fractured part of his skull. At the time of this accident, Petitioner was enlisted in the United States Army. Due to his injuries, he was discharged and received a service-connected disability rating from the Veteran's Administration.

Testimony from numerous expert witnesses at Petitioner's penalty phase proceedings established the extensive brain damage suffered by him as a result of

severe head trauma. Dr. Dorothy Lewis, a psychologist, detected a noticeable indentation in Petitioner's skull from the motorcycle accident. R1/765. Petitioner also had an injury to his nervous system. *Id*. Dr. Lewis explained that the limbic system is the part of the brain that affects feelings, rage, sex, appetite, and other basic instincts. R1/774. The frontal or temporal lobe concerns judgment, control, and "the ability to modulate this limbic system and keep it under control." R1/776.

Dr. Lewis testified that with any injury to the brain involving tremendous impact, a person develops microhemorrhages all over the brain. R1/776. Given the number of accidents Petitioner had, there were multiple sources of damage. *Id*. This included damage to Petitioner's temporal lobe, which showed up in abnormal waves on his EEG. R1/776-77.

Dr. Lewis was able to analyze the results of Petitioner's neuropsychological testing. He showed evidence of cerebral brain lesions on the Halstead-Reitan. R1/800. His Wisconsin Card Sorting Test indicated frontal lobe damage. R1/802. Dr. Lewis explained, "[W]hat is interesting is, this damage, injury, dysfunction, is the part of the brain that puts a curb on our instincts, that stops us from killing each other, stops us from raping each other, that makes us sit back and not act instinctively." R1/802-03.

Dr. Robert Berland, a forensic psychologist, defined psychosis as "a class of mental disorder" that "stem[s] from a chemical imbalance and an improper functioning of brain tissue, most often caused by an injury to the brain or by an inherited disorder, or by both." R2/607-08. Dr. Berland found Petitioner to have

psychosis. R2/619. Specifically, Dr. Berland concluded that Petitioner had manic-depressive psychosis and organic psychosis caused by damage to his brain tissue. R2/620. This damage likely resulted from the head injury during Petitioner's motorcycle accident. *Id.*

Dr. Berland was also particularly concerned about Petitioner's long-term amphetamine use, explaining that "[p]eople who use amphetamines at least three or four times a week, consistently, at best, daily, over at least a six-month period, usually sustain what appears to be relatively permanent brain damage." R1/926. It can also cause or enhance paranoid symptoms. R1/926-27. Petitioner had been using amphetamines daily for over nine months.

Dr. Berland further testified that Petitioner suffers from "paranoid disturbance." Dr. Berland described this as "somebody who is not just apprehensive about people taking advantage of him or being at the short end of the stick, but actually entertains some fairly rigid ideas about potential harm from things around him, that the rest of us wouldn't see any harm in, and no amount of talking can talk them out of it." R2/633. This paranoia had a "biological basis." *Id.* Petitioner's scoring on a Wechsler intelligence test showed that he scored in the average to superior range of intelligence, but there was such a gap in his scores on subtests measuring each side of his brain that this indicated impairment from brain damage. R2/636-37. Dr. Berland testified that while there was damage to both sides, the right side of Petitioner's brain was especially impaired. R2/637.

Dr. Berland found that Petitioner had depressive episodes and periods of anger related to his paranoia. R2/654. Dr. Berland's clinical interviews of Petitioner corroborated his belief that Petitioner suffered from hallucinations. *Id.*

Dr. Berland also diagnosed Petitioner with bipolar disorder, or what was previously called manic depressive psychosis. R1/963. Singularly or in combination, Petitioner's psychosis, brain damage, and bipolar disorder would "significantly reduce [his] ability to control deviant impulses that he had," making him "considerably less capable of controlling them and either not acting on them or finding some acceptable social way to act on them." R1/966. Dr. Berland stated, "[Long"] was not in good contact with reality. . . . [H]e was very much less able to control any deviant impulses he had. And he was paranoid, psychotically paranoid, during the period in which the offenses occurred." R1/968. Dr. Berland testified that regardless of Petitioner's understanding of right versus wrong at the time, his conditions "significan[tly] impact[ed] his behavior." *Id.*

Dr. John Money, a professor of medical psychology and pediatrics, diagnosed Petitioner with temporal lobe epilepsy, which occurs in the temples. R2/542. Dr. Money described it as a form of epilepsy where one does not have convulsions or become unconscious, but instead enters into an altered state of consciousness. *Id.* Dr. Money explained that this altered state can continue for as much as two or three hours. R2/543.

Dr. Money also diagnosed Petitioner with bipolar or manic-depressive disorder. He described that as having "a wave-like experience of being extremely high and

acting manically and then down to melancholy and despair and up again." R2/544. Bipolar disorder occurs quite frequently in those with paraphilia. R2/545. Another overlapping symptom exhibited by Petitioner is paranoia. *Id.*

Additionally, Dr. Money diagnosed Petitioner with dual personality phenomena. R2/558. Dr. Money explained:

> The very nature of a dual personality or of, indeed, a paraphilic attack is that it is like a temporal lobe epileptic attack. You can't decide when this starts it or stops it. It's not subject to a voluntary decision.
>
> Ordinary people can understand perhaps that it's like a dream. You can't decide to have a dream or not to have one; it just happens.

R2/559. According to Dr. Money, because of Petitioner's "altered state," he lacked "the capacity to behave like a normal, rational human being" and control his behavior. R2/561.

I. Prior Proceedings

Petitioner pled guilty to first-degree murder and related crimes in 1985. Petitioner was sentenced to death on two occasions, the first sentence being vacated on direct appeal.[2] The evidence and history of the earlier proceedings are described in the prior opinions of the Florida Supreme Court. *See Long v. State*, 259 So. 2d 286 (Fla. 1988); *Long v. State*, 610 So. 2d 1268 (Fla. 1992); *Long v. State*, 118 So. 3d 798 (Fla. 2013); *Long v. State*, 183 So. 3d 342 (Fla. 2016); *Long v. State*, 235 So. 3d 293 (Fla. 2018).

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[2] It is undisputed that Petitioner's death sentence was imposed pursuant to an unconstitutional sentencing statute. *See Hurst v. Florida*, 136 S. Ct. 616 (2016).

II. Current Proceedings

On April 23, 2019, Florida Governor Ron DeSantis signed a death warrant scheduling Petitioner's execution for May 23, 2019, at 6:00 p.m.

On April 29, 2019, Petitioner filed a motion for post-conviction relief in the state trial court. An evidentiary hearing was held on an issue pertaining to Florida's lethal injection procedure. On May 6, 2019, the trial court issued an order denying relief. Petitioner's appeal was denied on May 17, 2019.

On May 9, 2019, Petitioner filed a state habeas corpus petition in the Florida Supreme Court. The petition raised nine issues, which included, among other claims, the assertion that contemporary standards of decency have evolved to the point that severely mentally ill individuals must be exempt from the death penalty because they lack the requisite moral culpability to warrant such a punishment.

Petitioner further asserted that his execution would violate the Fifth Amendment's Double Jeopardy Clause, as he had already served the alternative punishment for the crime of first-degree murder—life imprisonment with eligibility for parole after twenty-five years.

On May 10, 2019, the Florida Supreme Court denied the petition. *Long v. Inch,* No. SC19-752, 2019 WL 2066964 (Fla. May 10, 2019). The entirety of the Florida Supreme Court's analysis is as follows:

> Robert Joe Long a/k/a Bobby Joe Long is a prisoner under sentence of death and active death warrant for the 1984 murder of Michelle Simms. *See Long v. State*, 610 So. 2d 1268 (Fla. 1992); *Long v. State*, 529 So. 2d 286 (Fla. 1998). Two weeks before his scheduled execution, Long filed the instant habeas petition, which we hereby deny because all of Long's claims are procedurally barred. *See Branch v. State*,

> 236 So. 3d 981, 988 (Fla. 2018) ("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been, should have been, or were raised on direct appeal." (quoting *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992))); *Blake v. State*, 180 So. 3d 89, 125 (Fla. 2014) ("Habeas corpus may not be used as a vehicle for presenting issues which should have been raised at trial and on appeal or in postconviction proceedings."); *Knight v. St*ate, 923 So. 2d 387, 395 (Fla. 2005) ("[C]laims [that] were raised in [a] postconviction motion . . . cannot be relitigated in a habeas petition."); *see also Wright v. State*, 857 So. 2d 861, 875 (Fla. 2003) ("[C]laims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion.").

Id. The Florida Supreme Court stated that it would not entertain rehearing. *Id*.

REASONS FOR GRANTING THE WRIT

I. This Court Should Exercise Jurisdiction

"The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction." *Caldwell v. Mississippi*, 472 U.S. 320 (1988). The question is whether the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

In *Lee v. Kemna*, 534 U.S. 362 (2002), this Court reiterated that "'the adequacy of state procedural bars to the assertion of federal questions,' we have recognized, is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" 534 U.S. at 375 (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)). And in *Douglas*, 380 U.S. 415 at 420-23, this Court explained that adequacy includes a determination of whether a state court's factual determination as to a procedural bar was erroneous.

The Florida Supreme Court's blanket application of a procedural bar to each of Petitioner's nine claims in his state habeas petition was plainly inadequate to foreclose this Court's review of the federal questions presented. *See Douglas,* 380 U.S. at 423. Under the independent and adequate state law doctrine, the state procedural rule was not adequate, as it was not "firmly established and regularly followed." *See Walker v. Martin*, 562 U.S. 307, 316 (2011); *see also Card v. Dugger*, 911 F.2d 1494, 1517 (11th Cir. 1990) (citations omitted) ("[A] state court's procedural rule must be faithfully and regularly applied . . . and must not be manifestly unfair in its treatment of a petitioner's federal constitutional claim.").

For instance, Petitioner's claim concerning his severe mental illness as a bar to execution relies upon legal developments and standards that emerged subsequent to his direct appeal and post-conviction proceedings. Numerous other capital defendants in Florida have similarly raised state habeas petitions based on developing case law that emerged after their direct appeal or initial post-conviction proceedings; however, many of those defendants did not have a procedural bar applied by the Florida Supreme Court. *See, e.g., Kearse v. State*, 969 So. 2d 976, 992 (Fla. 2007) (state habeas petition based on the United States Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Ring v. Arizona*, 122 S.Ct. 2428 (2002)); *Lowe v. State*, 2 So. 3d 21, 42, 46 (Fla. 2008) (state habeas petition based on *Roper v. Simmons*, 543 U.S. 551 (2005)); *Chandler v. Crosby*, 916 So. 2d 728, 736 (Fla. 2005) (state habeas petition based on *Crawford v. Washington*, 541 U.S. 36 (2004)); *Breedlove v. Crosby*, 916 So. 2d 726

(Fla. 2005) (same); *Hertz v. Jones*, 218 So. 3d 428 (Fla. 2017) (state habeas petition based on *Hurst v. Florida*, 136 S.Ct. 616 (2016)); *Card v. Jones*, 219 So. 3d 47 (Fla. 2017) (same); *Bailey v. Jones*, 225 So. 3d 776 (Fla. 2017) (same).

Additionally, unlike in Petitioner's case, numerous capital defendants in Florida have been given merits determinations by the Florida Supreme Court on claims concerning recent developments in the law even where such challenges occurred while the defendants were under a pending death warrant. *See, e.g., Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999) (the Florida Supreme Court considered Provenzano's state habeas petition, filed under an active death warrant, which concerned the evolving standards of decency as to the constitutionality of Florida's electric chair); *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) (the Florida Supreme Court considered Lightbourne's all writs petition, filed under an active death warrant, which considered the evolving standards of decency as to the constitutionality of Florida's lethal injection procedure); *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013) (the Florida Supreme Court considered whether Muhammad's postconviction claim, filed under an active death warrant, which considered whether the evolving standards of decency require a one-drug protocol in the lethal injection procedure); *Marek v State*, 8 So. 3d 1123 (Fla. 2009) (the Florida Supreme Court considered Marek's postconviction claim, filed under an active death warrant, which concerned the length of time spent on death row awaiting execution); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) (the Florida Supreme Court considered Bottoson's state habeas petition, filed under an active death warrant, which concerned this

Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)); *King v. Moore*, 831 So. 2d 143 (Fla. 2002) (same).

Moreover, the Florida Supreme Court's summary dismissal of Petitioner's Fifth Amendment double jeopardy issue rested on a state law ground that was inadequate to support the judgment. By its very nature, Petitioner's claim could not be ripe for consideration until he had served twenty-five years in prison and his execution had been scheduled. It is the attempt to carry out Petitioner's execution that constitutes the second punishment for the same crime, thereby triggering the Fifth Amendment violation. In similar circumstances, the Florida Supreme Court has recognized that such issues are not cognizable until a death warrant has been signed. *See Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001) (stating that it is premature for a death-sentenced individual to present a claim of incompetency or insanity with regard to his execution if a death warrant has not been signed); *Barnhill v. State*, 971 So. 2d 106 (Fla. 2007) (same); *Anderson v. State*, 18 So. 3d 301 (Fla. 2009) (same); *Israel v. State*, 985 So. 2d 510 (Fla. 2008) (same); *Rigterink v. State*, 66 So. 3d 866, 897-98 (Fla. 2011) (Claim that lethal injection constitutes cruel or unusual punishment is not ripe for review as Governor had not yet signed a death warrant).

Because the state procedural rule applied by the Florida Supreme Court to denying Petitioner relief is not a "regularly followed" rule, this Court has jurisdiction to grant a writ of certiorari here.

II. This Court Should Consider Whether the Execution of Persons with Severe Mental Illness is Consistent with the Evolving Standards of Decency and in Violation of the Eighth Amendment Protection against Cruel and Unusual Punishment

Mr. Long is an honorably discharged veteran of the United States Army who has a service-connected disability rating from the Veteran's Administration due to a severe traumatic brain injury. Since the death penalty's reinstatement in 1976, this Court has recognized that the right to an individualized sentencing is not sufficient to fully protect certain classes of people from unconstitutional execution. This recognition began with *Ford v. Wainwright*, 477 U.S. 399 (1986), when this Court found that the retributive and deterrent aims of the death penalty were not served by execution of defendants who were insane. Next, in *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that individuals with intellectual disability are categorically exempt from the death penalty. Three years later, in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court prohibited the execution of individuals who were juveniles at the time of the offense—again, for the reason that a condition (youth) rendered them less morally culpable. The same lessened moral culpability cited by *Atkins* and *Roper* in finding the intellectually disabled and juveniles ineligible for execution applies with equal force to individuals with severe mental illness.

The decisions in *Roper v. Simmons*, *Atkins v. Virginia*, and *Ford v. Wainwright* ultimately turned on the issue of cognitive function—whether by nature of a defendant's condition, it would be unconstitutional to execute him because his moral culpability is lowered and the penological justifications for capital punishment would not be served by his execution. Severe mental illness, like intellectual disability, is a

persistent and frequently debilitating medical condition that impairs an individual's ability to make rational decisions, control impulses, evaluate information, and function properly in society. Because severely mentally ill defendants have a lessened moral culpability, because their impairments "jeopardize the reliability and fairness of capital proceedings," *Atkins*, 536 U.S. at 307-08, and because their diminished capacity negates the retributive and deterrent goals of capital punishment, they should be held categorically ineligible to receive the death penalty.

In determining whether a particular punishment is unconstitutional, a court should look to "objective factors to the maximum possible extent." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991). This Court has found a number of factors persuasive. One factor is whether state legislation indicates that a national consensus has emerged against the imposition of a particular punishment. *See e.g., Roper*, 543 U.S. at 551 (finding a national consensus against imposing the death penalty upon juvenile defendants when twelve states had rejected the death penalty entirely and eighteen states had, either by express enactment or judicial interpretation, excluded juveniles from capital punishment).

In addition to looking for objective indicia of consensus, a court must also exercise its own independent judgment in determining whether a punishment is a disproportionate response. *See Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion)). This requires judicial scrutiny of prevailing scientific and social science literature with an eye towards evidence that the group in question may be physiologically incapable of full culpability. *See Roper*, 543 U.S. at

569-71. And, in determining whether execution would result in the unnecessary infliction of pain or suffering, a reviewing court must ask whether execution of members of the group is likely to further the retributive or deterrent purposes of capital punishment. *See id.* at 571-72.

In evaluating whether a national consensus exists in the Eighth Amendment context, this Court has relied on legislative action as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). The Court also looks to "measures of consensus other than legislation," *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008), such as "actual sentencing practices [, which] are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Also, in looking at whether a national consensus exists, the Court examines the opinions of relevant professional organizations and international consensus. *See Atkins*, 536 U.S. at 316 n.21.

In looking to legislative consensus, this Court includes abolitionist states in its analysis. Nineteen states, as well as the District of Columbia, prohibit the death penalty outright for all crimes committed after the repeal, and five states currently have governor-imposed moratoriums on executions. *See States With and Without the Death Penalty*, Death Penalty Information Center, http://www. deathpenaltyinfo.org/ states-and-without-death-penalty. The direction of change is consistently moving toward abolition. For consensus purposes, each of these jurisdictions functions as prohibiting the death penalty for seriously mentally ill offenders.

Even among active death penalty states, there has been a consistent bipartisan trend toward introducing legislation to exempt persons with serious mental illness from being eligible for the death penalty.[3] And, three-quarters of jurisdictions with

[3] *See, e.g.*, https://apps.azleg.gov/BillStatus/BillOverview /71768?SessionId=121 (accessed on May 8, 2019) (2019 **Arizona** bill (SB 1192) that would create an exemption for a capital defendant who has severe mental illness from the death penalty);http: //www.arkleg.state.ar.us/assembly/2019/2019R/Pages/BillInformation. aspx?measureno=HB1494 (accessed on May 8, 2019) (2019 **Arkansas** bill (HB 1494) concerning the imposition of the death penalty on a defendant with a serious mental illness);https://apps.legislature.ky.gov/record/19rs/SB17.html (accessed on May 8, 2019) (2018 **Kentucky** bill (SB 17) that would create an exemption for defendants with serious mental illness from execution); https://www.senate.mo.gov/ 19info /BTS_ Web/Bill.aspx? Session Type= R&BillID=5152977 (accessed on May 8, 2019) and https://house.mo. gov/Bill.aspx?bill=HB353&year=2019&code=R (accessed on May 8, 2019) (2018 Missouri bill (HB 353) and complimentary 2019 **Missouri** bill (SB 462) that would create an exemption for defendants with serious mental illness from the death penalty); https://www.ncleg. gov/BillLookUp/2019/sb668 (accessed on May 8, 2019) (2019 **North Carolina** bill (SB 668) that would prohibit the imposition of the death penalty on defendants with severe mental disability at the time of the crime.); https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-136 (accessed on May 8, 2918) and https://www.legislature.ohio.gov /legislation/ legislation-status?id=GA133-SB-54 (accessed on May 8, 2019) (2019 **Ohio** complimentary bills (HB 136 and SB 54) that would prohibit the imposition of the death penalty upon defendants with serious mental illness); https://sdlegislature.gov/ Legislative_ Session/Bills/Bill. aspx? Bill=71&Session=2019 (accessed on May 8, 2019) (2019 **South Dakota** bill (SB 71) that would prohibit the imposition of capital punishment on a person with severe mental illness); http://wapp. capitol.tn.gov/apps/ BillInfo/Default.aspx?BillNumber=SB0031 (accessed on May 8, 2019) and http://wapp.capitol.tn.gov/apps /BillInfo /default.aspx? BillNumber =HB1455& GA=111 (accessed on May 8, 2019) (2019 **Tennessee** complimentary bills (SB 0031, HB 1455 and SB 1124) that would abolish the death penalty for defendants with severe mental illness); https://capitol.texas.gov /Bill Lookup/History.aspx?Leg Sess=86R&Bill=HB1936 (accessed May 8, 2019) (2019 **Texas** bill (HB 1936) that would create an exemption for defendants with severe mental illness from the death penalty); http://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+SB1137 (accessed May 8, 2019) (2019 **Virginia** bill (SB 1137) that would create an exemption for defendants with serious mental illness from the death penalty); see also Laura A. Bischoff, Murderers with mental illnesses may be spared execution in Ohio, Dayton Daily News, February 18, 2017 (detailing similar legislation in Ohio); Brigid Curtis Ayer, Lawmakers To Consider Death Penalty Ban For Those with Serious Mental Illness,

the death penalty—including Florida—explicitly ask juries to consider mental or emotional disturbance/capacity as a mitigating factor.[4] The fact that so many death penalty states recognize mental illness as a mitigating factor is a clear legislative signal that defendants with serious mental illness should not receive the death penalty.

Additionally, nearly every major mental health association in the United States has issued policy statements recommending the banning of the death penalty

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Indiana Catholic Newspapers, January 19, 2017 (Indiana); Bryan Clark, Bill would restrict death penalty for mentally ill, Post Register, October 1, 2016 (Idaho).

[4] *See* Ala. Code § 13A-5-51 (mental or emotional disturbance and capacity); Ariz. Rev. Stat. Ann. § 13-751(G) (capacity); Ark. Code Ann. § 5-4-605 ("mental disease or defect" and capacity); Cal. Penal Code § 190.3 ("mental disease or defect" and capacity); Colo. Rev. Stat. Ann. § 18-1.3-1201(4) (capacity and "emotional state"); Fla. Stat. Ann. § 921.141(6) (mental or emotional disturbance and capacity); Ind. Code § 35-50-2-9(c) ("mental disease or defect" and capacity); Ky. Rev. Stat. Ann. § 532.025(2)(b) ("mental illness" and capacity); La. Code Crim. Proc. Ann. art. 905.5 ("mental disease or defect" and capacity); Miss. Code Ann. § 99-19-101(6) (mental or emotional disturbance and capacity); Mo. Rev. Stat. § 565.032(3) (mental or emotional disturbance and capacity); Mont. Code Ann. § 46-18-304(1) (mental or emotional disturbance and capacity); Nev. Rev. Stat. § 200.035 (mental or emotional disturbance); N.H. Rev. Stat. Ann. § 630:5(VI) (mental or emotional disturbance and capacity); N.C. Gen. Stat. Ann. § 15A-2000(f) (mental or emotional disturbance and capacity); Ohio Rev. Code Ann. § 2929.04(B) ("mental disease or defect" and capacity); Or. Rev. Stat. Ann. § 163.150(1) ("mental and emotional pressure"); 42 Pa. Cons. Stat. Ann. § 9711(e) (capacity); S.C. Code Ann. § 16-3-20(C)(b) (mental or emotional disturbance and capacity); Tenn. Code Ann. § 39-13-204(j) ("mental disease or defect" and capacity); Utah Code Ann. § 76-3-207(4) ("mental condition" and capacity); Va. Code Ann. § 19.2-264.4(B) (mental or emotional disturbance and capacity); Wash. Rev. Code § 10.95.070 ("mental disease or defect" and capacity); Wyo. Stat. Ann. § 6-2-102 (mental or emotional disturbance and capacity); 18 U.S.C. § 3592(a) (mental or emotional disturbance and capacity).

for defendants with serious mental illness.[5] The American Bar Association also publically opposes executing or sentencing to death defendants with serious mental illness. *Am. Bar Ass'n, ABA Recommendation 122A* (adopted Aug. 7-8, 2006). Further, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon defendants with severe mental illness. The United Nations Commission on Human Rights has called for countries with capital punishment to abolish it for people who suffer "from any form of mental disorder." *U.N. Comm'n on Human Rights Res. 2004/67*, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); *U.N. Comm'n on Human Rights Res. 1996/91*, U.N. Doc. E/CN.4/RES/1996/91 (Apr. 28, 1999). A recent report by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions emphasized concern "with the number of death sentences imposed and executions carried out" in the United States "in particular, in matters involving individuals who are alleged to suffer from mental illness." *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

The Eighth Amendment analysis also requires a court to exercise its own independent judgment in determining whether the death penalty is a disproportionate response to the moral culpability of the defendant. *See e.g., Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597). To impose our society's gravest

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[5] *See, e.g.*, Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011), *available at* http://www. mentalhealthamerica.net/positions/death-penalty; National Alliance on Mental Illness, *Death Penalty, available at* https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty.

punishment, the defendant must meet the highest level of moral culpability—the "punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982). Without such congruence, the punishment of death becomes "grossly disproportionate." *Id*. at 788 (quoting *Coker*, 433 U.S. at 592). Only the "most deserving" may be put to death. *Atkins*, 536 U.S. at 320.

In *Atkins*, this Court determined that the deficiencies of the intellectually disabled "diminish[ed] their personal culpability." 536 U.S. at 318. Much like intellectual disability, serious mental illness is a persistent and frequently debilitating medical condition that impairs an individual's ability to make rational decisions, control impulse, and evaluate information. Because defendants with serious mental illness lack the requisite degree of moral culpability and thus the acceptable goals of capital punishment are negated, they should be held categorically ineligible for the death penalty. *See id*. at 318.

Although severely mentally ill individuals who are not found incompetent to stand trial or "not guilty by reason of insanity" know the difference between right and wrong, they nevertheless have diminished capacities compared to those of sound mind. Hallucinations, delusions, disorganized thoughts, and disrupted perceptions of the environment lead to a loss of contact with reality and unreliable memories. As a result, they have an impaired ability to analyze or understand their experiences rationally and as such, have an impaired ability to make rational judgments. These characteristics lead to the same deficiencies cited by *Atkins* in finding the

intellectually disabled less personally culpable—the severely mentally ill are similarly impaired in their ability to "understand and process information" (because the information they receive is distorted by delusion), "to communicate" (because of their disorganized thinking, nonlinear expression, and unreliable memory), "to abstract from mistakes and learn from experience" (because of their impaired judgment and understanding), "to engage in logical reasoning" (because of their misperceptions and disorganized thinking), and "to understand the reactions of others" (because of their misperceptions of reality and idiosyncratic assumptions).

Finally, the diminished culpability of severely mentally ill defendants negates any legitimate penal objective of imposing the death penalty upon such individuals. The Supreme Court has held that the death penalty violates the Eighth Amendment and "'is nothing more than the purposeless and needless imposition of pain and suffering'" when it "'makes no measurable contribution to acceptable goals of punishment.'" *Penry*, 492 U.S. at 335 (quoting *Coker*, 433 U.S. at 592). There are two acceptable goals of imposing capital punishment: "'retribution and deterrence of capital crimes.'" *Id.* at 335-36 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). In *Atkins*, this Court held that imposing the death penalty on the intellectually disabled advances neither of these goals. *Atkins*, 536 U.S. at 319-20. Likewise, neither retribution nor deterrence is served by executing the severely mentally ill.

Similarly, because the cognitive deficiencies and distorted perception of severely mentally ill offenders prevent them from making reasoned judgments about the consequences of their actions, it is unlikely such individuals can be meaningfully

deterred from committing capital crimes by the prospect of a death sentence. "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." *Atkins*, at 320. However, this type of cause-and-effect determination depends on one's capacity to engage in reasoned judgment. As the *Atkins* Court observed, "it is the same cognitive and behavioral impairments that make [the intellectually disabled] less morally culpable . . . 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." *Id*. at 320.

Petitioner has a significant history of severe mental illness. *See supra* at 1-6. Indeed, both statutory mental health mitigating factors were found by the trial court. R2/865-68. Given his severe mental illness and in light of the evolving standards of decency, Petitioner's severe mental illness places him within the class of defendants who should be categorically excluded from being eligible for the death penalty because they lack the requisite moral culpability to warrant such a punishment.

III. This Court Should Review whether the Execution of Petitioner's Death Sentence after Full Completion of a Statutorily Defined Life Sentence, the Alternative Punishment for First Degree Murder Allowed by Florida Statute, Violates the Fifth Amendment's Prohibition against Double Jeopardy and Punishment Beyond that Authorized by the Legislature

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy

of life or limb."[6] This clause creates three distinct constitutional protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The last protection—against multiple punishments—is most relevant here. At the time of Petitioner's crime and sentencing, the Florida legislature authorized two alternative punishments for the crime of first-degree murder: (1) death; and (2) life with eligibility for parole after twenty-five years. Fla. Stat. § 775.082 (1983). The allowance for an opportunity at parole at twenty-five years demonstrates the legislative acceptance that, if granted parole, a defendant convicted of first-degree would serve twenty-five years. Alternatively, that person could be sentenced to death, at a time when the average time spent on death row was six to eight years. Thus, the time served before a prisoner's execution was about a quarter of the time a life-sentenced defendant might serve in prison. While Petitioner was initially sentenced to death, he has since served thirty-three years in prison—almost a decade longer than the twenty-five year alternative life sentence authorized by the Florida legislature at the time of his crime. Because he has substantially completed the legislatively authorized alternative life sentence, Petitioner's execution would violate the Fifth Amendment's Double Jeopardy Clause.

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6 This Court found the Fifth Amendment applicable to the States in *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

A. The Fifth Amendment's Double Jeopardy Clause Prohibits Multiple Punishments for One Offense where not Authorized by Statute

This Court first recognized the third prong of the Double Jeopardy Clause well over one hundred years ago, in the case of *Ex Parte Lange*, 85 U.S. 163 (1873). There, the petitioner was convicted of unlawfully misappropriating mailbags belonging to the Post Office. *Id.* at 164. The relevant statute provided that the punishment for this offense was "imprisonment for not more than one year *or* a fine of not less than ten dollars nor more than two hundred dollars." *Id.* (emphasis in original). However, the judge sentenced Lange to one year imprisonment and fined him two hundred dollars. *Id*. Lange was imprisoned and the next day paid the fine to the court clerk. *Id*. Five days after sentencing, the judge, having realized his error, ordered the sentence vacated and set aside and resentenced Lange to one year imprisonment. *Id.* at 180 (Clifford, J., dissenting).

When Lange appealed, this Court was asked to decide whether, having already paid a fine and served five days of his one year sentence, Lange could have his sentence vacated and another punishment imposed for the same verdict. *Id.* at 175. The Court held that such resentencing would be "to punish him twice for the same offence." *Id.* It noted that the sentencing court "imposed both punishments, when it could rightfully impose but one." *Id*. Because the defendant "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176. The trial court judge could not impose the new sentence because "[t]he record of the court's proceedings, at the moment the

second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence . . . ." *Id*. Therefore, the court's "power to punish for that offence was at an end." *Id*.

This Court followed a similar rationale in *In re Bradley*, 318 U.S. 50 (1943). As in *Lange*, the petitioner was sentenced to six months' imprisonment and a five hundred dollar fine for an offense punishable by imprisonment *or* a fine. *Id*. at 51. Three days after Bradley was taken into custody, his attorney paid the fine to the court clerk. *Id*. Later that same day, the court realized that it had sentenced Bradley erroneously, instructed the clerk to return the fine, and "delivered to the clerk an order amending [the sentence] by omitting any fine and retaining only the six months imprisonment." *Id*. at 51-52. Bradley's attorney refused to receive the money, and instead, appealed the sentence to the Supreme Court. *Id*. at 52.

On appeal, this Court, citing *Lange*, held that the errors committed by the sentencing court required Bradley to be freed from further imprisonment. *Id*. In his dissent, Justice Stone attempted to differentiate *Lange* by pointing out that in that case, the court did not offer to remit the fine, which would have been impossible since the money had already been handed over to the United States Treasury. *Id*. at 53 (Stone, J., dissenting). Justice Stone argued that Bradley would not suffer double punishment if he were made to serve a term of six months imprisonment, since the actual punishment in a fine is depriving the offender of his money, and that here, that punishment was absent since the clerk remitted the fine on the very day that

the petitioner paid it. *Id.* However, the majority rejected this reading of *Lange*, instead focusing on Bradley's completion of an available alternative punishment. *Id.* at 52. The Court stated that at the moment Bradley paid the fine, he "had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed as to be a full satisfaction of one of the alterative penalties of the law, the power of the court was at an end." *Id.*

More recently, this Court clarified the *Lange/Bradley* analysis to focus more on the sentencing statute's intent. In *United States v. DiFrancesco*, 449 U.S. 117 (1980), this Court considered a provision of Organized Crime Control Act of 1970 that authorized an enhancement to a defendant's sentence following his trial should he qualify as a "dangerous special offender". *DiFrancesco*, 449 U.S. at 118. DiFrancesco was convicted on various racketeering charges and sentenced by the trial judge to nine years imprisonment. *Id.* at 122. The next month, DiFrancesco was sentenced as a "dangerous special offender" on the same racketeering charges he was convicted of at trial and sentenced to two ten-year terms "to be served concurrently with each other and with the sentences imposed in March . . . thus result[ing] in additional punishment of only about a year." *Id.* at 122-23. This Court considered "whether the increase of a sentence on review . . . constitutes multiple punishment in violation of the Double Jeopardy Clause." *Id.* at 138. This Court, in holding such an enhancement constitutionally permissible, explained that "a defendant may not receive a greater sentence than the legislature has authorized." *Id.* at 139. In *Lange*, error occurred

because the sentencing statute did not allow for the imposition of both imprisonment and a fine. *Id.*

This Court further expanded on its inquiry into legislative intent in *Jones v. Thomas*, 491 U.S. 376 (1989). There, a Missouri court convicted a defendant of attempted robbery and first-degree felony murder, for a killing that occurred during the commission of the armed robbery. *Jones*, 491 U.S. at 378. He received fifteen years for armed robbery and life imprisonment for felony murder; Thomas was to serve his fifteen-year sentence first. *Id.* While Thomas was imprisoned, the Missouri Supreme Court held in another case that the legislature never intended to allow separate punishments for felony murder and the underlying felony. *Id.* After the completion of Thomas' fifteen-year sentence, "the state trial court vacated [his] attempted robbery conviction and 15-year sentence, holding ... that [he] could not be required to serve both sentences." *Id. at 379.* This Court, after affirming the finding of a double jeopardy violation, considered the question of whether Thomas was entitled to immediate release since he had completed one of his two erroneous sentences. *Id.* at 381. This Court again emphasized the purpose behind the third prong of the Double Jeopardy Clause: "to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Id.*

Citing *DiFrancesco*, this Court in *Jones* affirmed that the proposition behind *Lange* is "that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature. . . ." *Id.* at 383. Following this rationale, the *Jones* Court

noted two "important differences between this case and *Bradley*." *Id.* at 384. First, *Lange* and *Bradley* "both involved alternative punishments that were prescribed by the legislature for a single criminal act." *Id.* Second, "[t]he alternative sentences in *Bradley* . . . were of a different type, fine and imprisonment. While it would not have been possible to 'credit' a fine against time in prison, crediting time served under one sentence against the term of another has long been an accepted practice." *Id.* Elaborating on the second point, the Court noted that "[i]n a true alternative sentences case such as *Bradley*, . . . the legislature viewed each punishment as appropriate for some cases." *Id.*

What this Court's cases make clear is that whether the Double Jeopardy Clause precludes multiple punishments for one offense is a question of legislative intent. This Court has repeatedly recognized as much. *See, e.g.*, *Jones*, 491 U.S. at 381 (the courts may not "exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments"); *Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) ("Legislatures, not courts, prescribe the scope of punishments."); *id.* (a court cannot "prescrib[e] greater punishment than the legislature intended"); *Albernaz v. United States*, 450 U.S. 333, 344 (1981) ("the question of what punishments are constitutionally permissible is not different from the question of

what punishments the Legislative Branch intended to be imposed."); *Whalen v. United States*, 445 U.S. 684, 688 (1980) (the unconstitutionality of multiple punishments for the same offense "cannot be resolved without determining what punishments the Legislative Branch has authorized"); *Jeffers v. United States*, 432 U.S. 137, 155 (1977) (the "critical inquiry" is the legislature's intent); *Brown v. Ohio*, 432 U.S. 161, 165 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense").

Because this analysis focuses on the court's ability to impose punishment prescribed by the legislature, any overreach in sentencing becomes a jurisdictional issue. For example, in *In re Bonner*, 151 U.S. 242, 254-55 (1894), this Court found that a trial court did not have the authority to sentence a defendant to serve a one-year sentence at a penitentiary, which was reserved for those with sentences over one year. This Court explained that the sentencing statute in that case served as a "direct denial of any authority on the part of the court to direct that imprisonment be executed in a penitentiary in any cases other than those specified." *Id.* This Court further described the trial court's role:

> [T]he court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits, in any essential requirement, in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law, or doubtful construction of its terms.

Id. at 256; *see also In re Mills*, 135 U.S. 263, 270 (1890) (where a court sentences outside of the statute, it is "not a case of mere error, but one in which the court below transcended its powers").

So, this is not just a question of double jeopardy but one of separation of powers. *See Whalen*, 445 U.S. at 689 (where a "court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individualized liberty"). For this reason, the "object" of "judges of all courts" should be, "where the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess." *Bonner*, 151 U.S. at 260.

Finally, this prohibition against sentences not prescribed by the legislature is by nature a technical rule requiring strict adherence. As the late Justice Scalia once explained:

> The Double Jeopardy Clause is and has always has been . . . the embodiment of technical, prophylactic rules that require the Government to turn square corners. . . . With technical rules, above all others, it is imperative that we adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all. Three strikes is out. The State broke the rules here, and must abide by the result.

Jones, 491 U.S. at 396 (Scalia, J., dissenting). This Court has not hesitated to afford strict adherence to this technical rule before. *See, e.g.*, *Evans v. Michigan*, 568 U.S. 313, 320 (2013) (finding an acquittal for double jeopardy purposes where the trial

court granted a directed verdict of acquittal based on an element of the crime the Government did not actually have to prove).

Sentences may only be imposed, then, within the bounds of the sentencing statute. Anything beyond that is constitutionally impermissible.

B. Florida's Criminal Code Mandates the Alternative Sentences of Life and Death for First-Degree Murder, So That Petitioner's Completion of a Life Sentence and Execution Would Exceed Statutory Authority and Contradict Legislative Intent

As this Court's jurisprudence makes clear, the relevant question here is what the Florida legislature intended as just punishment for first-degree murder.

In both 1984—the year of the commission of Petitioner's capital offense—and 1989—the year of his resentencing—the Florida Criminal Code provided:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Fla. Stat. § 775.082(1).

This language leaves no doubt that the legislature intended some persons convicted of first-degree murder to receive the sentence of life imprisonment, and others to receive the death penalty—it did not intend any persons to receive both punishments. It is also indisputable that the legislature at the time believed twenty-five years before parole eligibility to be a sufficient sentence for a person convicted of first-degree murder. The State enacted a procedure whereby a proceeding would be held to differentiate between those who would be punished by death and those who

would instead receive life imprisonment. See Fla. Stat. § 775.082 (1). These are "true alternative sentences" under the Court's rationale in *Jones*: the legislature viewed each punishment as appropriate for some cases. *See Jones*, 491 U.S. at 384.

It was not until years after Petitioner's crime and resentencing that the Florida legislature amended its Criminal Code to offer life without the possibility of parole as an alternative sentence to the death penalty in first-degree murder cases.[7] This change in the statute created the effect that whenever the execution of a death sentence occurred, any execution necessarily happened before the prisoner would have completed a life sentence. In that instance, the length of time the prisoner serves is of no import to any double jeopardy question. However, that is not the statute under which Petitioner was sentenced and is not a reflection of the Florida legislature's intent in the 1980s. And at the time of the commission of Petitioner's crime, the average time on death row was just over six years.[8] By the time of his resentencing, it had only increased to eight years. This means that both the legislature and Petitioner reasonably should have expected that his death sentence would be carried out in a quarter of the time that a life sentence may last.

Other actions by the Florida legislature have only bolstered the indication that there is no intent to require death row prisoners to serve a full life sentence before

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[7] This amendment to life without the possibility of parole is not retroactive. *See Hudson v. State*, 708 So. 2d 256, 262 (Fla. 1998).

[8] United States Department of Justice, Bureau of Justice Statistics, Capital Punishment, 2013 – Statistical Tables, *available at* https://deathpenaltyinfo.org/files/pdf/cp13st.pdf (last revised December 19, 2014).

being subjected to a death sentence. At every opportunity since the imposition of Petitioner's death sentence, the Florida legislature has sought to speed up the time between sentencing and execution. *See, e.g.*, Fla. Stat. § 922.052, Timely Justice Act (accelerating the timing of a death warrant following clemency review and the timing of the execution following a warrant).

Currently, Petitioner has been serving his sentence in this case for almost thirty-three years. He has therefore served, as punishment for murder, more than the twenty-five years that defendants who are sentenced to life imprisonment for first-degree murders committed before 1994 are required to serve before becoming eligible for parole. *See Hudson*, 708 So. 2d at 262. Therefore, Petitioner has served life imprisonment—one of the two punishments at the State's disposal to punish those who commit the crime of first-degree murder. Now, the State is again punishing him for the exact same offense through the use of the death penalty. Under *Jones*, the death penalty is a "true alternative" to life imprisonment because they are different in kind, each legislatively intended punishments for Petitioner's conviction, and there is no way to credit Petitioner's time in prison against execution any more than the a fine can be credited against time in prison. *See Jones*, 491 U.S. at 384.

As a result, the State of Florida cannot lawfully execute Petitioner for the same first-degree murder conviction for which he has already completed the alternative sentence of life in prison. To impose both punishments authorized by the Florida legislature as alternatives to one another is to inflict a greater punishment than a legislature intended. This Court should grant certiorari review to consider whether,

because Petitioner has "fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, . . . [the] power to punish for that offence [is] at an end." *Lange*, 85 U.S. at 176.[9]

CONCLUSION

The growing consensus in the United States today is that those with severe mental illnesses, like the intellectually disabled and juveniles, do not possess the moral culpability to be classified among the worst of the worst offenders. Accordingly, this Court should grant certiorari and stay Petitioner's execution to review whether Petitioner's severe mental illnesses render him ineligible for capital punishment.

In addition, Petitioner has already served the life sentence authorized by the Florida legislature at the time of his crime. Because the legislature did not intend for those convicted of first-degree murder to serve both a life and death sentence for the same offense, this Court should grant review to consider whether Petitioner's execution is prohibited by Fifth Amendment double jeopardy protections.

This Court should stay Petitioner's execution pending resolution of these questions.

[9] To be clear, Petitioner is not seeking immediate release. Rather, this Court has found that the proper remedy in a situation like this one would be to void the excess punishment—death—and allow Petitioner to continue on with his lawful life sentence. *See, e.g.*, *Bonner*, 151 U.S. at 257 (a sentence exceeding statutory authority is void to the extent of the excess); *Jones*, 491 U.S. at 381-82 (remedy for the erroneous conviction of both felony-murder and armed robbery was to resentence the defendant to just the life sentence on the felony-murder conviction).

Respectfully submitted,

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No. ______

IN THE

Supreme Court of the United States

BOBBY JOE LONG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, MAY 23, 2019, AT 6:00 P.M.

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Exhibit 1 — Florida Supreme Court Opinion Below (May 10, 2019) 1

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Supreme Court of Florida

FRIDAY, MAY 10, 2019

CASE NO.: SC19-752
Lower Tribunal No(s).:
291984CF013346000AHC

ROBERT JOE LONG vs. MARK S. INCH, ETC.

Petitioner(s) Respondent(s)

Robert Joe Long a/k/a Bobby Joe Long is a prisoner under sentence of death and active death warrant for the 1984 murder of Michelle Simms. *See Long v. State*, 610 So. 2d 1268 (Fla. 1992); *Long v. State*, 529 So. 2d 286 (Fla. 1988). Two weeks before his scheduled execution, Long filed the instant habeas petition, which we hereby deny because all of Long's claims are procedurally barred. *See Branch v. State*, 236 So. 3d 981, 988 (Fla. 2018) ("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been, should have been, or were raised on direct appeal." (quoting *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992))); *Blake v. State*, 180 So. 3d 89, 125 (Fla. 2014) ("Habeas corpus may not be used as a vehicle for presenting issues which should have been raised at trial and on appeal or in postconviction proceedings."); *Knight v. State*, 923 So. 2d 387, 395 (Fla. 2005) ("[C]laims [that] were raised in [a] postconviction motion . . . cannot be relitigated in a habeas petition."); *see also Wright v. State*, 857 So. 2d 861, 875 (Fla. 2003) ("[C]laims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion.").

No rehearing will be entertained by this Court.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.

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John A. Tomasino
Clerk, Supreme Court

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HON. RONALD N. FICARROTTA, CHIEF JUDGE

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IN THE SUPREME COURT OF FLORIDA

BOBBY JOE LONG,

Petitioner,

v.

MARK S. INCH,
Secretary,
Florida Department of Corrections,

Respondent.

CASE NO. SC19-726
Lower Court: 84CF-013346-A

DEATH WARRANT ISSUED
EXECUTION SCHEDULED FOR
MAY 23, 2019 AT 6:00 PM

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, which demonstrate Petitioner Bobby Joe Long was deprived of his right to a fair, reliable penalty phase proceeding. The proceedings which resulted in his death sentence violated fundamental constitutional imperatives.

INTRODUCTION[1]

This Court has explained that a procedural bar premised upon *res adjudicata* may be overcome in order to avoid manifest injustice:

> The State contends that the law of the case doctrine and collateral estoppel barred the Second District from addressing this claim below. We disagree. Under Florida law, appellate courts have "the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) (alteration in original) (recognizing this Court's authority to revisit a prior ruling if that ruling was erroneous)(quoting *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004)); *see State v. J.P.*, 907 So. 2d 1101, 1121

[1]The record on appeal from Long's original sentencing proceeding shall be referred to as "R1" followed by the appropriate page number. The record on appeal from Long's resentencing proceeding shall be referred to as "R2" followed by the appropriate page number.

> (Fla. 2004)(same); *Parker v. State*, 873 So. 2d 270, 278(Fla. 2004)(same); *see also Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001)("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" (quoting *Strazzulla v. Hendrick*, 177 So. 2d 1, 3 (Fla. 1965).

State v. Akins, 69 So. 3d 261, 268 (Fla. 2011).

In *Strazzulla v. Hendrick*, 177 So. 2d 1, 3-4 (Fla. 1965), this Court stated:

> [I]nsofar as these earlier decisions may be construed as holding that an appellate court in this state is wholly without authority to reconsider and reverse a previous ruling that is 'the law of the case', we hereby expressly recede therefrom.
>
> We think it should be made clear, however, that an appellate court should reconsider a point of law previously decided on a former appeal only as a matter of grace, and not as a matter of right; and that an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons-and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule. *Beverly Beach Properties v. Nelson*, *supra*.

This Court's recognition of its "power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice" under *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009), is in accord with the well recognized inherent equitable powers vested in American courts. A court's

inherent equitable powers were discussed in *Holland v. Florida*, 560 U.S. 631, 649-50 (2010), where the United States Supreme Court stated:

> But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." *Baggett v. Bullitt, 377 U.S. 360, 375 (1964)*. In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)*, we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944)*. The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid.*

The circumstances presented by Long in several claims in this petition demonstrate "exceptional circumstances" such that "reliance on the previous decision would result in manifest injustice." *Muehleman*, 3 So. 3d at 1165. New case law has developed since the time of Long's previous direct appeal; case law which now casts doubt on the reliability of this Court's prior rulings. In short, this Court's "original pronouncement of the law [in Long's prior appeals] was erroneous and such ruling[s] resulted in manifest injustice." *Beverly Beach Properties v. Nelson*, 68 So. 2d 604 (Fla. 1953). Long respectfully requests that this Court utilize its equitable powers to rectify the errors in his cause.

Moreover, Long’s petition calls on this Court to review the constitutionality of a death sentence steeped in fundamental error. Fundamental error occurs when the error “has affected the proceedings to such an extent it equates to a violation of the defendant’s right to due process of law.” *Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010). It is “axiomatic” that “fundamental error may be raised at any time, ‘before trial, after trial, on appeal, or by habeas corpus.’” *Tucker v. State*, 459 So. 2d 306, 307 (Fla. 1984) (quoting *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983)).

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Long respectfully requests oral argument.

JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF

This petition presents issues which directly concern the constitutionality of Long’s sentence of death. This Court has jurisdiction to entertain a petition for a writ of habeas corpus, an original proceeding governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that “[t]he writ of habeas corpus shall be grantable of right, freely and without cost.” Art. I, § 13, Fla. Const.

In its jurisdiction to issue writs of habeas corpus, this Court has an obligation to protect Long's right under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that those rights are protected. *Allen v. State*, 636 So. 2d 494, 497 (Fla. 1994) (holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at time of crime); *Shue v. State*, 366 So. 2d 387 (Fla. 1978) (holding that the Court was required under Article I, § 17 of the Florida Constitution to invalidate the death penalty for rape); *Makemson v. Martin County*, 491 So. 2d 1109 (1986)(noting that "[t]he courts have authority to do things that are essential to the performance of their judicial functions. The unconstitutionality of a statute may not be overlooked or excused"). This Court has explained: "It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court." *Rose v. Palm Beach County*, 361 So. 2d 135, 137 n.7 (1978).

This Court must protect Long's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution. Where constitutional rights - whether state or federal - of

individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. Instead, this Court is required to exercise its independent power of judicial review. *Ford v. Wainwright*, 477 U.S. 399 (1986).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. *Elledge v. State*, 346 So. 2d 998, 1002 (Fla. 1977); *Wilson v. Wainwright*, 474 So. 2d 1162, 1165 (Fla. 1985). This Court has not hesitated in exercising its inherent jurisdiction to review issues arising in the course of capital postconviction proceedings. *State v. Lewis*, 656 So. 2d 1248 (Fla. 1995). This petition presents substantial constitutional questions concerning the administration of capital punishment in this State consistent with the United States Constitution. The fundamental constitutional errors challenged herein in the context of a capital case warrant habeas relief. *See Wilson*, 474 So. 2d at 1163; *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The reasons set forth herein demonstrate that the Court's exercise of its jurisdiction, and of its authority to grant habeas relief, is warranted in this action.

RELEVANT FACTS

Long has a history of significant head injuries. His first such injury occurred when he was about four or five years old and

he fell off a swing. Long was knocked unconscious for several minutes and awakened to find a stick stuck in his left eyelid. He still bears a scar there.

At around the same age, Long was hit by the side of a door and busted his head open. Soon after that, he fell off his bike. A few years later, Long fell down the stairs. He was knocked unconscious for fifteen or twenty minutes, and his mother had to call a rescue squad.

When Long was seven, he was hit by a car in the head, tearing off parts of his face and busting his jaw. He also had extensive damage to his mouth and smashed some of his teeth into his gums. Long was in the hospital for a week. He had a broken jaw and could not eat solid food for weeks.

A year later, Long fell down another set of stairs, this time at his grandmother's apartment building. There was a long flight of stairs in the building, and Long fell all the way to the bottom. He was knocked out for several minutes.

When Long was eleven or twelve, he was riding a horse at a cousin's house when the horse threw him off. Long hit the front of his head again and was unconscious for several minutes. He vomited once he became conscious.

Long's most consequential head injury occurred when he was nineteen. Long was driving his motorcycle in Miami when he was hit

by a car. Long was thrown over the motorcycle head first. As a result of the accident, he fractured part of his skull.

Testimony from numerous expert witnesses at Long's penalty phase proceedings established the extensive brain damage suffered by Long as a result of severe head trauma. Dr. Dorothy Lewis, a psychologist, detected a noticeable indentation in Long's skull from the motorcycle accident. R1/765. Long also had an injury to his nervous system. *Id.* Dr. Lewis explained that the limbic system is the part of the brain that affects feelings, rage, sex, appetite, and other basic instincts. R1/774. The frontal or temporal lobe concerns judgment, control, and "the ability to modulate this limbic system and keep it under control." R1/776.

Dr. Lewis testified that with any injury to the brain involving tremendous impact, a person develops microhemorrhages all over the brain. R1/776. Given the number of accidents Long had, there were multiple sources of damage. *Id.* This included damage to Long's temporal lobe, which showed up in abnormal waves on Long's EEG. R1/776-77.

Dr. Lewis was able to analyze the results of Long's neuropsychological testing. Long showed evidence of cerebral brain lesions on the Halstead-Reitan. R1/800. His Wisconsin Card Sorting Test indicated frontal lobe damage. R1/802. Dr. Lewis explained, "[W]hat is interesting is, this damage, injury, dysfunction, is the

part of the brain that puts a curb on our instincts, that stops us from killing each other, stops us from raping each other, that makes us sit back and not act instinctively." R1/802-03.

Dr. Robert Berland, a forensic psychologist, defined psychosis as "a class of mental disorder" that "stem[s] from a chemical imbalance and an improper functioning of brain tissue, most often caused by an injury to the brain or by an inherited disorder, or by both." R2/607-08. Dr. Berland found Long to have psychosis. R2/619. Specifically, Dr. Berland concluded that Long had manic-depressive psychosis and organic psychosis caused by damage to Long's brain tissue. R2/620. This damage likely resulted from the head injury during Long's motorcycle accident. *Id.*

Dr. Berland was also particularly concerned about Long's long term amphetamine use, explaining that "[p]eople who use amphetamines at least three or four times a week, consistently, at best, daily, over at least a six-month period, usually sustain what appears to be relatively permanent brain damage." R1/926. It can also cause or enhance paranoid symptoms. R1/926-27.[2]

Dr. Berland further testified that Long suffers from "paranoid disturbance." Dr. Berland described this as "somebody who is not

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[2]Dr. Walter Afield, a psychiatrist, shared Dr. Berland's concern about Long's long term amphetamine use and agreed that this causes brain damage. R1/1003.

just apprehensive about people taking advantage of him or being at the short end of the stick, but actually entertains some fairly rigid ideas about potential harm from things around him, that the rest of us wouldn't see any harm in, and no amount of talking can talk them out of it." R2/633. This paranoia had a "biological basis." *Id.* Long's scoring on a Wechsler intelligence test showed that he scored in the average to superior range of intelligence, but there was such a gap in his scores on subtests measuring each side of his brain that this indicated impairment from brain damage. R2/636-37. Dr. Berland testified that while there was damage to both sides, the right side of Long's brain was especially impaired. R2/637.

Dr. Berland found that Long had depressive episodes and periods of anger related to his paranoia. R2/654. Dr. Berland's clinical interviews of Long corroborated his belief that Long suffered from hallucinations. *Id.*

Dr. Berland also diagnosed Long with bipolar disorder, or what was previously called manic depressive psychosis. R1/963. Singularly or in combination, Long's psychosis, brain damage, and bipolar disorder would "significantly reduce [Long's] ability to control deviant impulses that he had," making him "considerably less capable of controlling them and either not acting on them or finding some acceptable social way to act on them." R1/966. Dr.

Berland stated, "[Long"] was not in good contact with reality. . . . [H]e was very much less able to control any deviant impulses he had. And he was paranoid, psychotically paranoid, during the period in which the offenses occurred." R1/968. Dr. Berland testified that regardless of Long's understanding of right versus wrong at the time, his conditions "significan[tly] impact[ed] his behavior." *Id.*

Dr. John Money, a professor of medical psychology and pediatrics, diagnosed Long with temporal lobe epilepsy, which occurs in the temples. R2/542. Dr. Money described it as a form of epilepsy where one does not have convulsions or become unconscious, but instead enters into an altered state of consciousness. *Id.* Dr. Money explained that this altered state can continue for as much as two or three hours. R2/543.

Dr. Money also diagnosed Long with bipolar or manic-depressive disorder. He described that as having "a wave-like experience of being extremely high and acting manically and then down to melancholy and despair and up again." R2/544. Bipolar disorder occurs quite frequently in those with paraphilia. R2/545. Another overlapping symptom exhibited by Long is paranoia. *Id.*

Additionally, Dr. Money diagnosed Long with dual personality phenomena. R2/558. Dr. Money explained:

> The very nature of a dual personality or of, indeed, a paraphilic attack is that it is like a temporal lobe epileptic attack. You can't decide when this starts it or

stops it. It's not subject to a voluntary decision.

> Ordinary people can understand perhaps that it's like a dream. You can't decide to have a dream or not to have one; it just happens.

R2/559. According to Dr. Money, because of Long's "altered state," he lacked "the capacity to behave like a normal, rational human being" and control his behavior. R2/561.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Long asserts that his sentence of death was obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

I. THIS COURT SHOULD RECONSIDER LONG'S CLAIM ON DIRECT APPEAL CONCERNING HEARSAY TESTIMONY INTRODUCED AT THE RESENTENCING PROCEEDING.

During Long's resentencing proceeding, the trial court permitted two detectives to relay to the jury details provided by the victims of two prior rapes for which Long had been convicted.[3] Neither victim testified at the resentencing, and neither victim was determined to be unavailable. Long's counsel objected to the hearsay testimony on the grounds that it violated his Sixth

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[3]Major Chuck Troy of the Pasco County Sheriff's Office testified to statements made by Sandra Jensen. R2/354-58. Terry Rhoads, a detective with the Pinellas County Sheriff's Office, testified to statements made by Linda Nuttal. R2/386-92.

Amendment right of confrontation and his Eighth Amendment right prohibiting the arbitrary and capricious imposition of the death penalty. R2/980-87. The trial court overruled the objections, finding that Long's confession was consistent with the hearsay testimony and that the testimony was related to the police investigation because the officers took statements from the victims. R2/897-99.

Long asserted on direct appeal that his Sixth Amendment right of confrontation had been violated by the admission of the hearsay evidence. This Court disagreed, finding that hearsay is admissible in Florida at the penalty phase as long as the opposing party has an opportunity to rebut it. *Long v. State,* 610 So. 2d 1268, 1274-75 (Fla. 1992).[4]

Twelve years after this Court's decision, the United States Supreme Court issued its decision in *Crawford v. Washington*, 541 U.S. 36 (2004). There, the Supreme Court considered the contours of the rights guaranteed by the Confrontation Clause. The Court determined that the test in *Ohio v. Roberts*, 448 U.S. 56 (1980), permitting the introduction of hearsay evidence that falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness", "departs from the historical

[4]This Court determined that Long was provided with such an opportunity. *Id.* at 1275.

principles” underlying the Confrontation Clause. *Crawford*, 541 U.S. at 60. The Supreme Court explained:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law–as does *[Ohio v.] Roberts[*, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. *Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.* We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 541 U.S. at 68 (emphasis added).

The Supreme Court reached this conclusion after exploring at length “the original meaning of the Confrontation Clause.” *Id.* at 42. The Court examined the history of the Confrontation Clause and concluded, “Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless.” *Id.* at 51. Thus, the Confrontation Clause “applies to ‘witnesses’ against the accused--in other words, those who ‘bear testimony.’” *Id.*

Reviewing the history of the Confrontation Clause also led the Supreme Court to a second conclusion: “the Framers would not have allowed admission of testimonial statements of a witness who did

not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 54. This is the only exception to the Confrontation Clause, and there are no "open-ended exceptions from the confrontation requirement to be developed by the courts." *Id*. The Supreme Court concluded that the hearsay exceptions and the trustworthiness test described in *Roberts*, 448 U.S. 56, "depart[] from the historical principles identified above" because *Roberts* was both "too broad" and "too narrow." *Crawford*, 541 U.S. at 60.

The Court also held that when a State admits an out-of-court testimonial statement against a criminal defendant and the defendant has no opportunity to cross-examine the witness who made the statement in front of the trier of fact, "[t]hat alone is sufficient to make out a violation of the Sixth Amendment" because "[w]here testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. at 68-69.

In light of the United States Supreme Court's decision in *Crawford*, it is evident that Long was denied the right to confront the actual witnesses against him, those people whose statements were heard by the jury. While this Court has recognized that the Confrontation Clause applies at capital sentencing proceedings in Florida, *see Engle v. State*, 438 So. 2d 803 (Fla. 1983), this Court

in Long’s case failed to understand the intent of the Framers of the Constitution and correctly apply the Confrontation Clause. Based on the foregoing, this Court should utilize its equitable powers to reconsider and correct its prior decision in order to a avoid a manifest injustice. *See Muehleman*, 3 So. 3d at 1165.

II. THIS COURT SHOULD RECONSIDER LONG’S CLAIM ON DIRECT APPEAL THAT IT IS UNCONSTITUTIONAL TO EXECUTE THE MENTALLY ILL.

Long asserted on direct appeal that his mental illness precluded his execution pursuant to the Eighth and Fourteenth Amendments to the United States Constitution. This Court denied Long’s claim without discussion. *See Long,* 610 So. 2d at 1275 (“As stated, Long’s remaining claims are without merit and do not require discussion.”).

This Court should reconsider it previous determination in light of developments in the law, and in society, which have occurred subsequent to Long’s resentencing proceeding in 1989. Contemporary standards of decency have evolved to the point that severely mentally ill individuals must be exempt from the death penalty because they lack the requisite moral culpability to warrant such a punishment.

Since the death penalty’s reinstatement in 1976, the United States Supreme Court has recognized that the right to an individualized sentencing is not sufficient to fully protect

certain classes of people from unconstitutional execution. This recognition began with *Ford v. Wainwright*, 477 U.S. 399 (1986), when the Supreme Court found that the retributive and deterrent aims of the death penalty were not served by execution of defendants who were insane. Next, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that individuals with intellectual disability are categorically exempt from the death penalty. Central to this exemption was the Court's reasoning that the condition of intellectual disability rendered offenders lacking in the moral culpability necessary for imposition of the death penalty. Three years later, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court prohibited the execution of individuals who were juveniles at the time of the offense—again, for the reason that a condition (youth) rendered them less morally culpable. The same lessened moral culpability cited by the *Atkins* and *Roper* Courts in finding the intellectually disabled and juveniles ineligible for execution applies with equal force to individuals with severe mental illness.

The decisions in *Roper v. Simmons*, *Atkins v. Virginia*, and *Ford v. Wainwright* ultimately turned on the issue of cognitive function—whether by nature of a defendant's condition, it would be unconstitutional to execute him because his moral culpability is lowered and the penological justifications for capital punishment

would not be served by his execution. Severe mental illness, like intellectual disability, is a persistent and frequently debilitating medical condition that impairs an individual's ability to make rational decisions, control impulses, evaluate information, and function properly in society. Because severely mentally ill defendants have a lessened moral culpability, because their impairments "jeopardize the reliability and fairness of capital proceedings," *Atkins*, 536 U.S. at 307-08, and because their diminished capacity negates the retributive and deterrent goals of capital punishment, they should be held categorically ineligible to receive the death penalty.

In determining whether a particular punishment is unconstitutional, a court should look to "objective factors to the maximum possible extent." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991). The Supreme Court has found a number of factors persuasive. One factor is whether state legislation indicates that a national consensus has emerged against the imposition of a particular punishment. *See e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (finding a national consensus against imposing the death penalty upon juvenile defendants when twelve states had rejected the death penalty entirely and eighteen states had, either by express enactment or judicial interpretation, excluded juveniles from capital punishment).

In addition to looking for objective indicia of consensus, a court must also exercise its own independent judgment in determining whether a punishment is a disproportionate response. *See Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion)). This requires judicial scrutiny of prevailing scientific and social science literature with an eye towards evidence that the group in question may be physiologically incapable of full culpability. *See Roper*, 543 U.S. at 569-71. And, in determining whether execution would result in the unnecessary infliction of pain or suffering, a reviewing court must ask whether execution of members of the group is likely to further the retributive or deterrent purposes of capital punishment. *See id*. at 571-72.

In evaluating whether a national consensus exists in the Eighth Amendment context, the Supreme Court has relied on legislative action as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). The Court also looks to "measures of consensus other than legislation," *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008), such as "actual sentencing practices[, which] are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Also, in looking at whether a national consensus exists, the Court examines the opinions of relevant professional

organizations and international consensus. *See Atkins*, 536 U.S. at 316 n.21.

In looking to legislative consensus, the Supreme Court includes abolitionist states in its analysis. Nineteen states, as well as the District of Columbia, prohibit the death penalty outright for all crimes committed after the repeal, and five states currently have governor-imposed moratoriums on executions. *See States With and Without the Death Penalty*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty. The direction of change is consistently moving toward abolition. For consensus purposes, each of these jurisdictions functions as prohibiting the death penalty for seriously mentally ill offenders.

Even among active death penalty states, there has been a consistent bipartisan trend toward introducing legislation to exempt persons with serious mental illness from being eligible for the death penalty.[5] And, three-quarters of jurisdictions with the

[5]*See*, e.g.,https://apps.azleg.gov/BillStatus/BillOverview /71768? SessionId=121 (accessed on May 8, 2019) (2019 **Arizona** bill (SB 1192) that would create an exemption for a capital defendant who has severe mental illness from the death penalty); http: //www.arkleg.state.ar.us/assembly/2019/2019R/Pages/BillInformation. aspx?measureno=HB1494 (accessed on May 8, 2019) (2019 **Arkansas** bill (HB 1494) concerning the imposition of the death penalty on a defendant with a serious mental illness);https: //apps. legislature.ky.gov/record/19rs/SB17.html (accessed on May 8, 2019) (2018 **Kentucky** bill (SB 17) that would create an exemption for

death penalty—including Florida—explicitly ask juries to consider

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defendants with serious mental illness from execution); https://www.senate.mo.gov/19info/BTS_Web/Bill. aspx? Session Type= R&BillID=5152977 (accessed on May 8, 2019) and https://house.mo. gov/Bill.aspx?bill=HB353&year=2019&code=R (accessed on May 8, 2019) (2018 **Missouri** bill (HB 353) and complimentary 2019 Missouri bill (SB 462) that would create an exemption for defendants with serious mental illness from the death penalty); https://www.ncleg. gov/BillLookUp/2019/sb668 (accessed on May 8, 2019) (2019 **North Carolina** bill (SB 668) that would prohibit the imposition of the death penalty on defendants with severe mental disability at the time of the crime.); https://www. legislature.ohio.gov/ legislation /legislation-summary?id=GA133-HB-136 (accessed on May 8, 2918) and https://www.legislature.ohio.gov /legislation/legislation-status?id =GA133-SB-54 (accessed on May 8, 2019) (2019 **Ohio** complimentary bills (HB 136 and SB 54) that would prohibit the imposition of the death penalty upon defendants with serious mental illness); https://sdlegislature.gov/ Legislative_ Session/Bills/Bill. aspx? Bill=71&Session=2019 (accessed on May 8, 2019) (2019 **South Dakota** bill (SB 71) that would prohibit the imposition of capital punishment on a person with severe mental illness); http://wapp. capitol.tn.gov/apps/ BillInfo/Default.aspx? BillNumber=SB0031 (accessed on May 8, 2019) and http://wapp.capitol. tn.gov/apps /BillInfo /default.aspx? BillNumber =HB1455& GA=111 (accessed on May 8, 2019) (2019 **Tennessee** complimentary bills (SB 0031, HB 1455 and SB 1124) that would abolish the death penalty for defendants with severe mental illness); https://capitol.texas.gov /Bill Lookup/History.aspx?Leg Sess=86R&Bill=HB1936 (accessed May 8, 2019) (2019 **Texas** bill (HB 1936) that would create an exemption for defendants with severe mental illness from the death penalty); http://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+SB1137 (accessed May 8, 2019) (2019 **Virginia** bill (SB 1137) that would create an exemption for defendants with serious mental illness from the death penalty); *see also* Laura A. Bischoff, *Murderers with mental illnesses may be spared execution in Ohio*, Dayton Daily News, February 18, 2017 (detailing similar legislation in Ohio); Brigid Curtis Ayer, *Lawmakers To Consider Death Penalty Ban For Those with Serious Mental Illness*, Indiana Catholic Newspapers, January 19, 2017 (Indiana); Bryan Clark, *Bill would restrict death penalty for mentally ill*, Post Register, October 1, 2016 (Idaho).

mental or emotional disturbance/capacity as a mitigating factor.[6] The fact that so many death penalty states recognize mental illness as a mitigating factor is a clear legislative signal that defendants with serious mental illness should not receive the death penalty.

Additionally, nearly every major mental health association in the United States has issued policy statements recommending the banning of the death penalty for defendants with serious mental

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[6]*See* Ala. Code § 13A-5-51 (mental or emotional disturbance and capacity); Ariz. Rev. Stat. Ann. § 13-751(G) (capacity); Ark. Code Ann. § 5-4-605 ("mental disease or defect" and capacity); Cal. Penal Code § 190.3 ("mental disease or defect" and capacity); Colo. Rev. Stat. Ann. § 18-1.3-1201(4) (capacity and "emotional state"); Fla. Stat. Ann. § 921.141(6) (mental or emotional disturbance and capacity); Ind. Code § 35-50-2-9(c) ("mental disease or defect" and capacity); Ky. Rev. Stat. Ann. § 532.025(2)(b) ("mental illness" and capacity); La. Code Crim. Proc. Ann. art. 905.5 ("mental disease or defect" and capacity); Miss. Code Ann. § 99-19-101(6) (mental or emotional disturbance and capacity); Mo. Rev. Stat. § 565.032(3) (mental or emotional disturbance and capacity); Mont. Code Ann. § 46-18-304(1) (mental or emotional disturbance and capacity); Nev. Rev. Stat. § 200.035 (mental or emotional disturbance); N.H. Rev. Stat. Ann. § 630:5(VI) (mental or emotional disturbance and capacity); N.C. Gen. Stat. Ann. § 15A-2000(f) (mental or emotional disturbance and capacity); Ohio Rev. Code Ann. § 2929.04(B) ("mental disease or defect" and capacity); Or. Rev. Stat. Ann. § 163.150(1) ("mental and emotional pressure"); 42 Pa. Cons. Stat. Ann. § 9711(e) (capacity); S.C. Code Ann. § 16-3-20(C)(b) (mental or emotional disturbance and capacity); Tenn. Code Ann. § 39-13-204(j) ("mental disease or defect" and capacity); Utah Code Ann. § 76-3-207(4) ("mental condition" and capacity); Va. Code Ann. § 19.2-264.4(B) (mental or emotional disturbance and capacity); Wash. Rev. Code § 10.95.070 ("mental disease or defect" and capacity); Wyo. Stat. Ann. § 6-2-102 (mental or emotional disturbance and capacity); 18 U.S.C. § 3592(a) (mental or emotional disturbance and capacity).

illness.[7] The American Bar Association also publically opposes executing or sentencing to death defendants with serious mental illness. Am. Bar Ass'n, *ABA Recommendation 122A* (adopted Aug. 7-8, 2006). Further, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon defendants with severe mental illness. The United Nations Commission on Human Rights has called for countries with capital punishment to abolish it for people who suffer to "from any form of mental disorder." *U.N. Comm'n on Human Rights Res. 2004/67*, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); *U.N. Comm'n on Human Rights Res. 1996/91*, U.N. Doc. E/CN.4/RES/1996/91 (Apr. 28, 1999). A recent report by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions emphasized concern "with the number of death sentences imposed and executions carried out" in the United States "in particular, in matters involving individuals who are alleged to suffer from mental illness." *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

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[7] *See, e.g.*, Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011), *available at* http://www.mentalhealthamerica.net/positions/death-penalty; National Alliance on Mental Illness, *Death Penalty*, *available at* https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty.

The Eighth Amendment analysis also requires a court to exercise its own independent judgment in determining whether the death penalty is a disproportionate response to the moral culpability of the defendant. *See e.g., Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597). To impose our society's gravest punishment, the defendant must meet the highest level of moral culpability—the "punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982). Without such congruence, the punishment of death becomes "grossly disproportionate." *Id.* at 788 (quoting *Coker*, 433 U.S. at 592). Only the "most deserving" may be put to death. *Atkins*, 536 U.S. at 320.

In *Atkins*, this Court determined that the deficiencies of the intellectually disabled "diminish[ed] their personal culpability." 536 U.S. at 318. Much like intellectual disability, serious mental illness is a persistent and frequently debilitating medical condition that impairs an individual's ability to make rational decisions, control impulse, and evaluate information. Because defendants with serious mental illness lack the requisite degree of moral culpability and thus the acceptable goals of capital punishment are negated, they should be held categorically ineligible for the death penalty. *See id.* at 318.

Although severely mentally ill individuals who are not found

incompetent to stand trial or "not guilty by reason of insanity" know the difference between right and wrong, they nevertheless have diminished capacities compared to those of sound mind. Hallucinations, delusions, disorganized thoughts, and disrupted perceptions of the environment lead to a loss of contact with reality and unreliable memories. As a result, they have an impaired ability to analyze or understand their experiences rationally and as such, have an impaired ability to make rational judgments. These characteristics lead to the same deficiencies cited by the *Atkins* Court in finding the intellectually disabled less personally culpable—the severely mentally ill are similarly impaired in their ability to "understand and process information" (because the information they receive is distorted by delusion), "to communicate" (because of their disorganized thinking, nonlinear expression, and unreliable memory), "to abstract from mistakes and learn from experience" (because of their impaired judgment and understanding), "to engage in logical reasoning" (because of their misperceptions and disorganized thinking), and "to understand the reactions of others" (because of their misperceptions of reality and idiosyncratic assumptions).

Finally, the diminished culpability of severely mentally ill defendants negates any legitimate penal objective of imposing the death penalty upon such individuals. The Supreme Court has held

that the death penalty violates the Eighth Amendment and "'is nothing more than the purposeless and needless imposition of pain and suffering'" when it "'makes no measurable contribution to acceptable goals of punishment.'" *Penry*, 492 U.S. at 335 (quoting *Coker*, 433 U.S. at 592). There are two acceptable goals of imposing capital punishment: "'retribution and deterrence of capital crimes.'" *Id.* at 335-36 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). In *Atkins*, the Court held that imposing the death penalty on the intellectually disabled advances neither of these goals. *Atkins*, 536 U.S. at 319-20. Likewise, neither retribution nor deterrence is served by executing the severely mentally ill.

Similarly, because the cognitive deficiencies and distorted perception of severely mentally ill offenders prevent them from making reasoned judgments about the consequences of their actions, it is unlikely such individuals can be meaningfully deterred from committing capital crimes by the prospect of a death sentence. "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." *Atkins*, at 320. However, this type of cause-and-effect determination depends on one's capacity to engage in reasoned judgment. As the *Atkins* Court observed, "it is the same cognitive and behavioral impairments that make [the intellectually disabled] less morally

culpable ... 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." *Id.* at 320.

Long has a significant history of severe mental illness. *See supra* at 8-14. Indeed, both statutory mental health mitigating factors were found by the trial court. R2/865-68. Given his severe mental illness and in light of the evolving standards of decency, Long must be exempt from execution pursuant to the Eighth Amendment to the United States Constitution.

III. THIS COURT SHOULD RECONSIDER LONG'S CLAIM ON DIRECT APPEAL THAT THE JURY'S SENSE OF RESPONSIBILITY AT THE PENALTY PHASE WAS INACCURATELY DIMINISHED IN VIOLATION OF *CALDWELL v. MISSISSIPPI.*

Citing to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), Long filed a motion in limine requesting that the court preclude any mention during voir dire that the jury verdict was only advisory. R2/969-70, 1298. He then requested an instruction that the jury's advisory verdict was binding in some circumstances. R2/ 975. Long's motions were denied by the trial court, which noted that "Florida law doesn't go that far yet." R2/978.

Prior to and during voir dire, the judge and the prosecutor explained to the jury that its function would be to render an "advisory verdict." R2/12, 43-44. The judge said the final decision

as to punishment was "the responsibility of the court," but that he would give "careful consideration and great weight to the advisory verdict." He told the jurors that the fact that they would "only be rendering an advisory verdict to the Court" should not be considered a "minimization of the very important role that you will play in the sentencing process in this case." R2/12-13.

The prosecutor told the jury that, "as Judge Lazzara has pointed out to you, your decision will be a recommendation. It will be an advisory sentence." R2/44. Following defense counsel's objection, the prosecutor told the jurors that the judge was required by law to give their recommendation great weight and careful consideration before making his final decision as to whether Long should live or die. R2/46-47. The prosecutor proceeded to ask each prospective juror whether he or she could "recommend" death given the proper circumstances. R2/75-115.

On direct appeal, Long raised the issue that the State and the trial court denigrated the jury's function by telling the jury that its verdict was only advisory. This Court denied Long's claim without discussion. *See Long,* 610 So. 2d at 1275 ("As stated, Long's remaining claims are without merit and do not require discussion.").

At the time of Long's 1989 resentencing proceeding, what the jury was told may have been consistent with the procedure set forth

in Florida law at that time. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988). However, the instructions given to Long's jury were clearly inaccurate and unconstitutional. This is because it was recognized by the United States Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that diminishing an individual juror's sense of responsibility for the imposition of a death sentence creates a bias in favor of a juror voting for death. *Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as *bias in favor of death sentences* when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.") (Emphasis added).

In *Caldwell*, a unanimous jury verdict in favor of a death sentence was vacated because the jury was not correctly instructed as to its sentencing responsibility.[8] *Caldwell* held: "it is

[8]In *Caldwell*, the prosecutor responding to defense counsel's argument had stated in his closing argument to the jury: "Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Id*. at 325. Because the jury's sense of responsibility was improperly diminished by this argument, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the death sentence to be vacated. *Id*. at 341. *Caldwell* explained: "Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely

constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 328-29. Jurors must feel the weight of their sentencing responsibility; they must know that if the defendant is ultimately executed it will be because no juror exercised her power to preclude a death sentence. Part of feeling the weight of a juror's sentencing responsibility is dependent upon knowing of their individual authority to preclude a death sentence. *See Blackwell v. State*, 79 So. 731, 736 (Fla. 1918) (prejudicial error found in "the remark of the assistant state attorney as to the existence of a Supreme Court to correct any error that might be made in the trial of the cause, in effect told the jury that it was proper matter for them to consider when they retired to make up their verdict. Calling this vividly to the attention of the jury tended to lessen their estimate of the weight of their responsibility, and cause them to shift it from their consciences to the Supreme Court."). Where the jurors' sense of responsibility for a death sentence is either not explained or is in fact diminished, a jury's unanimous verdict in favor of a death sentence violates the Eighth Amendment and the resulting death sentence

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'err because the error may be corrected on appeal.'" *Id.* at 331.

cannot stand. *Caldwell*, 472 U.S. at 341.

While *Caldwell* was the law before Long's death sentence became final, it was ruled to be inapplicable to Florida capital proceedings by the Florida Supreme Court. *See Darden v. State*, 475 So. 2d 217, 221 (Fla. 1985). In *Darden*, this Court held that under Florida's sentencing scheme, the jury was not responsible for the sentence and thus *Caldwell* was not applicable to jury instructions in Florida telling the jury that its role was advisory:

> In *Caldwell*, the Court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to appellant review. We do not find such egregious misinformation in the record of this trial, and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge.

Similarly, in *Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986), this Court concluded that due to the jury's advisory role, it was appropriate for judges and prosecutors to diminish the jury's sentence of responsibility:

> It would be unreasonable to prohibit the trial court or the state from attempting to relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial. We perceive no eighth amendment requirement that a jury whose role is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a "true sentencing jury."

Given that *Darden* and *Pope* are no longer the law in light of

Hurst v. Florida, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), the comments, argument and instructions heard by Long's jury referring to the advisory nature of its' sentencing recommendation clearly and repeatedly diminished the jury's sense of responsibility in violation of *Caldwell* and the United States Constitution.

Based on the foregoing, this Court should use utilize its equitable powers to reconsider and correct its prior decision in order to a avoid a manifest injustice. *Muehleman*, 3 So. 3d at 1165.

IV. TO EXECUTE LONG FOR FIRST-DEGREE MURDER, AFTER HE HAS BEEN IMPRISONED FOR OVER TWENTY FIVE YEARS AWAITING EXECUTION, CONSTITUTES A VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO BE FREE FROM MULTIPLE PUNISHMENTS FOR THE SAME CRIME WHICH EXCEED THE LIMITS PRESCRIBED BY THE LEGISLATIVE BRANCH OF GOVERNMENT.

The Fifth Amendment to the United States Constitution provides in relevant part, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb". U.S. CONST. amend. V.[9] This clause creates three distinct constitutional protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *North*

[9]In *Benton v. Maryland*, 395 U.S. 784 (1969), the United States Supreme Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment.

Carolina v. Pearce, 395 U.S. 711, 717 (1969).

The United States Supreme Court first recognized the third prong of the Double Jeopardy Clause well over one hundred years ago, in the case of *Ex Parte Lange*, 85 U.S. 163 (1873). There, the petitioner, Lange, was convicted of unlawfully misappropriating mailbags belonging to the Post Office. *Id.* at 164. The relevant statute provided that the punishment for a person convicted of violating the law "is imprisonment for not more than one year *or* a fine of not less than ten dollars nor more than two hundred dollars." *Id.* (Emphasis in original). However, the judge sentenced Lange to one year imprisonment and fined him two hundred dollars. *Id*. Lange was imprisoned and the next day paid the fine to the court clerk. *Id*. The fine he paid passed into the United States Treasury, "beyond the legal control of the court." *Id.* at 175. Five days after sentencing, the judge who passed the original sentence, having realized his error, ordered the sentence vacated and set aside and resentenced Lange to one year imprisonment. *Id.* at 180 (Clifford J., dissenting).

When Lange appealed, the Supreme Court was asked to decide whether, having already paid a fine and served five days of his one year sentence, Lange could have his sentence vacated and another punishment imposed for the same verdict. *Id.* at 175. The Court held that such resentencing would be "to punish him *twice* for the same

offence." *Id.* (Emphasis in original). The Court noted that the sentencing court "imposed both punishments, when it could rightfully impose but one." *Id.* The Supreme Court stated that when a defendant "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." *Id.* at 176. The trial court judge could not impose the new sentence, because "[t]he record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence ...". *Id.* Therefore, the court's "power to punish for that offence was at an end." *Id.*

The rule established in *Lange* was further clarified in *In re Bradley*, 318 U.S. 50 (1943). There, the petitioner, Bradley, was convicted of contempt for intimidation of a witness. *Id.* at 51. Although the relevant law provided for a punishment of imprisonment or a fine, the court sentenced Bradley to six months' imprisonment and a five hundred dollar fine. *Id.* Three days after Bradley was taken into custody, his attorney paid the fine to the court clerk. *Id.* Later that same day, the court realized that it sentenced Bradley erroneously, instructed the clerk to return the fine, and "delivered to the clerk an order amending [the sentence] by

omitting any fine and retaining only the six months imprisonment." *Id.* at 51-52. Bradley's attorney refused to receive the money, and instead, appealed the sentence to the Supreme Court. *Id.* at 52.

The Supreme Court, citing *Lange*, held that the errors committed by the sentencing court required Bradley to be freed from further imprisonment. *Id.* In his dissent, Justice Stone attempted to differentiate *Lange* by pointing out that in that case, the court did not offer to remit the fine, which would have been impossible since the money had already been handed over to the United States Treasury. *Id.* at 53 (Stone, J., dissenting). Justice Stone argued that Bradley would not suffer double punishment if he were made to serve a term of six months imprisonment, since the actual punishment in a fine is depriving the offender of his money, and that here, that punishment was absent since the clerk remitted the fine on the very day that the petitioner paid it. *Id.* However, the majority rejected this reading of *Lange*, instead focusing on Bradley's completion of an available alternative punishment. *Id.* at 52. The Court stated that at the moment Bradley paid the fine, he "had complied with a portion of the sentence which could lawfully have been imposed. As the judgment of the court was thus executed as to be a full satisfaction of one of the alterative penalties of the law, the power of the court was at an end." *Id.*

More recently, in *United States v. DiFrancesco*, 449 U.S. 117,

118 (1980), the issue concerned a Double Jeopardy challenge to the Organized Crime Control Act of 1970, which authorizes the United States to increase a defendant's sentence following his trial should he qualify as a "dangerous special offender". In March 1978, the respondent, DiFrancesco, was convicted on various racketeering charges and sentenced by the trial judge to nine years imprisonment. *Id.* at 122. The next month, DiFrancesco was sentenced as a "dangerous special offender" on the same racketeering charges he was convicted of at trial and sentenced to two ten-year terms "to be served concurrently with each other and with the sentences imposed in March. ... thus result[ing] in additional punishment of only about a year." *Id.* at 122-23. The case reached the Supreme Court, which considered "whether the increase of a sentence on review ... constitutes multiple punishment in violation of the Double Jeopardy Clause." *Id.* at 138.

The Court determined that *Lange* did not hold that multiple punishments for the same crime are necessarily unconstitutional, but rather that "a defendant may not receive a greater sentence than the legislature has authorized." *Id.* at 139. The Court noted that there would have been no error with the sentence in *Lange* if the law allowed for imposition of both imprisonment and a fine. *Id.*

In *Jones v. Thomas*, 491 U.S. 376 (1989), a Missouri court convicted the respondent, Thomas, in 1972 of attempted robbery and

first-degree felony murder, for a killing that occurred during the commission of the armed robbery. *Id.* at 378. Thomas was given two sentences: fifteen years for armed robbery and life imprisonment for felony murder; Thomas was to serve his fifteen year sentence first. *Id.* While Thomas was imprisoned, the Missouri Supreme Court held in another case that the legislature never intended to allow separate punishments for felony murder and the underlying felony. *Id.* After Thomas had completed his sentence for attempted robbery, "the state trial court vacated [his] attempted robbery conviction and 15-year sentence, holding ... that [he] could not be required to serve both sentences." *Id. at 379.* Thomas unsuccessfully argued before the Missouri Court of Appeals that he was entitled to immediate release, since he had already completed his shorter sentence. *Id.*

Thomas then sought relief from the United States District Court for the Eastern District of Missouri, which held that Thomas "had not suffered a double jeopardy violation because he had not been subjected to greater punishment than intended by the legislature." *Id.* A three-judge panel of the Eighth Circuit reversed and remanded, holding that under *Lange* and *Bradley*, "once respondent completed one of the two sentences that could have been imposed by law, he could not be required to serve any part of the other." *Id.* at 379-80. The Eighth Circuit reheard the case en banc,

where it again relied on *Lange* and *Bradley* and ordered Thomas' unconditional release. *Id.* at 380.

The United States Supreme Court, agreeing that in his original sentencing Thomas suffered multiple punishments in violation of the Fifth Amendment, stated that "[t]he constitutional question in this case is what remedy is required to cure the admitted violation." *Id.* at 381. The Court answered this question by considering the purpose behind the third prong of the Double Jeopardy Clause, which the Court surmised as "to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Id.* The Court criticized as "overly broad" a reading of *Lange* and *Bradley* which would compel courts to release a "prisoner who has satisfied the shorter of two consecutive sentences that could not both be lawfully imposed." *Id.* at 382. Instead, the Court cited *DiFrancesco* to affirm that the proposition behind *Lange* is "that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature ... and not for the broader rule suggested by its dictum." *Id.* at 383.

The Court acknowledged that a strict application of *Bradley* lends support to Thomas, since *Bradley* held that "where 'one valid alternative provision of the original sentence has been satisfied,

the petitioner is entitled to be freed of further restraint.'" *Id.* (quoting *In re Bradley*, 318 U.S. at 52). But the Court pointed to two "important differences between this case and *Bradley*." *Id.* at 384. First, *Lange* and *Bradley* "both involved alternative punishments that were prescribed by the legislature for a single criminal act." *Id.* Second, "[t]he alternative sentences in *Bradley* ... were of a different type, fine and imprisonment. While it would not have been possible to 'credit' a fine against time in prison, crediting time served under one sentence against the term of another has long been an accepted practice." *Id.* Elaborating on the second point, the Court noted that "[i]n a true alternative sentences case such as *Bradley*, it would be difficult to say that one punishment or the other was intended by the legislature, for the legislature viewed each punishment as appropriate for some cases." *Id.*

Florida Law provides for two alternative punishments for first-degree murder: the death penalty or life imprisonment. The relevant law states that "[a] person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence ... results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole." Fla. Stat. § 775.082 (1)(a) (2017). Although this law states that "life

imprisonment" is imprisonment without the chance of parole, that clause was added to the statute through an amendment in 1994. *See Gore v. State*, 706 So. 2d 1328, 1332 n6 (Fla. 1997). Since this amendment cannot be applied retroactively, persons convicted of committing first-degree murder before the amendment was enacted would be eligible for parole after twenty-five years, were such a person to receive a sentence of life imprisonment. *See Hudson v. State*, 708 So. 2d 256, 262 (Fla. 1998).

Long has been serving his sentence in this case for almost thirty-three years. He has therefore served, as punishment for murder, more than the twenty-five years that defendants who are sentenced to life imprisonment for first-degree murders committed before 1994 are required to serve, after which time such persons become eligible for parole. *See Hudson*, 708 So. 2d at 262.

Therefore, Long has suffered life imprisonment; one of the two punishments at the State's disposal to punish those who commit the crime of murder. He has suffered this punishment for the very same criminal offense that the State may again punish him for through the use of the death penalty. That other punishment, the death penalty, is a different kind of punishment than imprisonment. This is true for the same reason that the Supreme Court held in *Jones v. Thomas* that a fine and imprisonment are different kinds of punishment: the State cannot credit time in prison against

execution any more than the State can credit a fine against time in prison. *Jones*, 491 U.S. at 384.

It is clear from the language of Florida Statute § 775.082 (1) that the legislature intended some persons convicted of first-degree murder to receive the sentence of life imprisonment, and others to receive the death penalty - it did not intend any persons to receive both punishments. The State enacted a procedure whereby a proceeding would be held to differentiate such persons, to determine who would be punished by death and who would instead receive life imprisonment. See Fla. Stat. § 775.082 (1). These are "true alternative sentences" under the Court's rationale in *Jones*: the legislature views each punishment as appropriate for some cases. *See Jones*, 491 U.S. at 384.

The State of Florida cannot lawfully execute Long for the crime of murder, because he has already served an alternative punishment for that very same crime, that first punishment is of a different kind than the second punishment the State may impose, and to impose both punishments is to inflict a greater punishment than the legislature intended.

V. LONG'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HIS APPOINTED COUNSEL AND THE COURTS REVIEWED, LITIGATED, AND DECIDED HIS CASE WITHOUT A LEGIBLE TRANSCRIPT IN SOME INSTANCES, AND WITH AN UNREBUTTED ANNOTATED COPY OF THE TRANSCRIPT IN OTHERS.

On June 21, 2018, the Capital Habeas Unit ("CHU") of the

Federal Public Defender’s Office for the Northern District of Florida was appointed in federal court as co-counsel to Long with Attorney Robert Norgard. To attain familiarity with the case, the CHU’s lawyers and investigators immediately sought a copy of the transcript from Long’s 1989 resentencing hearing. They requested a copy of Long’s file from the Capital Postconviction Public Records Repository at the State Archives of Florida, which included the resentencing hearing transcript. Upon receipt of the file, CHU staff realized that significant portions of the resentencing transcript were illegible. This included portions of voir dire and the actual resentencing hearing.

The CHU contacted the Repository to request a new copy of the transcript. Chelsea Joslin, who works at the Repository, told the CHU that the Repository’s original copy was barely more visible than the copy they had provided to the CHU, and that they had unsuccessfully tried several different settings to try to create a more legible copy.

Because Long’s clemency proceedings had already started, clemency counsel William McClellan was also seeking a copy of the transcript. He asked the Florida Commission on Offender Review (FCOR) for the copy it was using to conduct its clemency review. Exhibit 1 (Correspondence between Attorney McClellan and FCOR). FCOR responded that it was not required to give Attorney McClellan

a copy of any of its documents, including the transcript. *Id.* Attorney McClellan responded with another request for the transcript, this time making it clear that he could not get a copy from Long's current postconviction counsel, as he usually does, and could not otherwise obtain a legible copy of the transcript. *Id.* FCOR again declined to give Attorney McClellan a transcript, but it disclosed that members of Long's clemency panel had reviewed a copy of the transcript at the Repository. *Id.*

On September 10, 2018, three CHU employees went to the Repository to review the hard copy. Per Repository rules, they were required to sit spaced out around tables in full view of the Archives staff at all times, had to leave their bags in a locker room with no access to them during review, were not allowed to have their own writing utensils, and had access only to a pencil and slip of paper provided by the Repository for notetaking purposes. The CHU employees' review confirmed that the original copy was almost as faint as the one they had received, and it was still illegible. It seemed that the type of ink and paper used led to the transcript fading to the point of being unreadable. Moreover, they discovered that the Repository did not have the complete certified version. Instead, this "official" copy of Long's resentencing transcript was comprised of pages from different sources, using noticeably different types of paper and ink. Some of the pages had

handwritten annotations by an ink pen, and some lines in the transcript were highlighted. For example, one response by an expert testifying during the resentencing hearing was underlined, and a handwritten note next to it read: "clever." A prior pagination system had been crossed off of some of the pages with alternate page numbers written in. It was apparent that the transcript was not the clean, certified copy usually created by the court reporters and instead contained pages from what was likely the legal file of one of the lawyers previously on the case.

In a conversation with the CHU lawyers, a Repository employee confirmed that the Archives has a strict prohibition against writing in or making any changes to any of its documents. This is why it has the above-described policy when allowing people to review the hard copy of the files. The Repository employee was adamant that notes and changes to Long's file could not have been made once arriving at the Archives, and that this transcript is the copy it received directly from the Florida Supreme Court.

The CHU next proceeded to get a new copy transcribed by the court reporter. After several attempts to locate the tapes of the transcript—complicated by the fact that Long's case included a change of venue, so the court reporters in Hillsborough and Volusia County both told the CHU that the other county was responsible for maintaining the trial tapes—the CHU was able to place an order to

have the original audio transcribed. After placing this request, it took two and a half months before the CHU finally received a legible copy of Long’s resentencing transcript.

While this legible copy of the transcript now exists, the steps required to obtain the copy revealed: (1) this Court relied on an annotated transcript with the personal observations of somebody working on the case; (2) there was no clean copy of the transcript available, and there is nothing in the record indicating why pages from somebody’s personal file were substituted into the official record; (3) FCOR conducted Long’s clemency proceedings without a legible copy of Long’s resentencing transcript, and Attorney McClellan was forced to prepare for and represent Long through his clemency proceedings without the legible transcript; and (4) it is unclear when the pages in the Repository copy faded to illegibility, so there is a possibility that additional proceedings in Long’s appeals occurred without this Court having the complete resentencing transcript. This violates Long’s due process rights under the Fourteenth Amendment of the United States Constitution and Art. I, § 9, of the Florida Constitution, his Sixth Amendment right to the effective assistance of counsel, and his right to access the courts guaranteed by Art. I, § 21 of the Florida Constitution.

First, this Court used an annotated, unofficial copy of the

transcript without giving Long the opportunity to review the annotations and rebut any inaccuracies.

When a court receives and relies on information that is unknown to the parties and when the parties have no opportunity to question the information, "[t]he risk that some of the information . . . may be erroneous, or may be misinterpreted, by the . . . judge, is manifest." *Gardner v. Florida*, 430 U.S. 349, 359 (1977).

Because Long was unaware of the annotations in the transcript until the September 2018 review of the Repository copy, long after this Court reviewed his direct appeal and Rule 3.850 appeal, it is impossible for Long to know whether the Court relied on these unrebutted annotations in reaching any conclusions.

If a court intends to "use any information not presented in open court as a factual basis" for a ruling, "he must advise the defendant of what it is and afford the defendant an opportunity to rebut it." *Porter v. State*, 400 So. 2d 5, 7 (Fla. 1981). *See also Krawczuk v. State*, 92 So.3d 195, 201 (Fla. 2012) ("[I]t is well settled that if a trial judge uses information not stated in open court . . . he or she must give the defendant an opportunity to rebut the information."); *Barclay v. State*, 362 So.2d 657, 658 (Fla. 1978) (vacating death sentences because, although the judge stated the sentences were not based on any information unknown to the defense, it was unclear from the record whether the defense

"had a meaningful opportunity to be heard" on presentence reports); *Edelstein v. Roskin*, 356 So. 2d 38, 39 (Fla. 3d DCA 1978) (citations omitted) ("There is no doubt that in evaluating the evidence, the [judge] should confine its considerations to the facts in evidence as weighed and interpreted in the light of common knowledge. [Judges] must not act on special or independent facts which were not received in evidence.").

It is axiomatic that while "it is not necessary for a [judge] to have no knowledge other than that which he receives in the courtroom," it is necessary that he not consider the information he acquired outside of the courtroom. *Id. See also Snook v. Firestone Tire & Rubber Co.*, 485 So. 2d 496 (Fla. 5th DCA 1986) ("In reaching a verdict, [the fact-finder] must not act on special or independent facts which were not received in evidence."); *Krawczuk*, 92 So. 3d at 202 (explaining that it is "disconcerting for a judge" to consider information he has received outside of the courtroom).

If the only transcript this Court could consider was this annotated version, it was at least necessary for Long to have the opportunity to seek redaction and, where that was not possible, rebut any inaccuracies or disputes with the additional notes.

Second, if Long and his prior counsel did not know there was an issue with the transcript—which appears to be the case—the annotated transcript did not come from anyone on Long's defense

team. If counsel for the State provided the copy to this Court, it was the result of ex parte communications.

It is indisputable that due process includes the right to an impartial tribunal. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). This Court has recognized the harmful effect of ex parte communications on the appearance of impropriety, stating: "The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question." *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992). It further explained: "Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts." *Id.* This is because "[n]o matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case." *Id.*

The Florida Bar Association has also recognized the harmful effect of ex parte communications. Canon 3 A(4) of Florida's Code of Judicial Conduct provides: "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized

by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."

This Court has taken such communications seriously in other death penalty cases. In *Smith v. State*, 708 So. 2d 253 (Fla. 1998), this Court remanded the case to the circuit court for an evidentiary hearing on an ex parte claim. In *Smith*, the judge had called the state attorney to ask him to prepare an order denying relief, to make a direction in that order, and to discuss a motion to disqualify the trial court. *Id.* at 255. This Court found that it did not matter that Smith had an opportunity to object to the proposed order; the problem was the ex parte communication itself. *Id.*

Here, it is still unknown to Long why and to what extent the ex parte communication, if any, occurred. What is clear is that Long and the parties representing him had no role in submitting the annotated transcript to this Court. As in *Smith*, this Court should remand this issue to the circuit court for further evidentiary development.

In addition to how the unofficial transcript ended up at the Repository—and, presumably, before this Court—these circumstances beg the question of when throughout the history of Long's case this transcript replaced the official copy.

"It is . . . established beyond any shadow of doubt that a

criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial." *United States v. Selva*, 559 F. 2d 1303, 1305 (5th Cir. 1977) (citing *Hardy v. United States*, 375 U.S. 277 (1964)). Where a transcript is unavailable and "the omitted requested portions of the transcript are necessary to a complete review of this cause, this Court has no alternative but to remand for a new trial of the cause." *Delap v. State*, 350 So. 2d 462, 463 (Fla. 1977). While this Court requires a showing of prejudice to warrant reversal, *see Jones v. State*, 923 So. 2d 486, 489 (Fla. 2006), Long can establish prejudice. The Federal District Court for the Middle District of Florida, sitting on habeas review, has found that cases requiring reversal because of a missing transcript are those where a "substantial and significant portion" of record is missing", which includes "opening or closing arguments, voir dire, or defense arguments." *Songer v. Wainwright*, 571 F. Supp. 1384, 1401 (M.D. Fla. 1983). As seen throughout this habeas petition, there are a number of claims depending on the resentencing record. Long could not have known of their existence, much less relied on record citations in support of these claims, without the use of the resentencing transcript. It took the CHU over two months to get a copy of the transcript once they tracked it down. In a field of law where claims fail and succeed based on immovable deadlines, such delay is prejudicial.

And, as previously stated, because neither Long nor his representatives were included in the submission of the annotated transcript, it is unknown why the replacement occurred, for how long a period no legible transcript existed, and at what stage in his proceedings this happened.

One proceeding that Long can confirm was conducted without a legible transcript was his clemency proceeding. Clemency is often described as a "safeguard" in the death penalty system. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 411-412 (1993) ("Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."); *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 768 (E.D. Va. 2001) (referring to clemency as a "historic remedy employed to prevent a miscarriage of justice where the judicial process has been exhausted.").

Clemency is often the only avenue petitioners have left for out-of-time claims or new evidence that the state and federal courts can no longer hear. *See, e.g.*, *Matthews v. White*, 807 F.3d 756, 763 (6th Cir. 2015) ("But clemency is different than litigation, even if similar issues are raised . . . [the Governor] may decide that clemency is warranted even if [the applicant] could not meet a particular legal standard for mitigation in court."); *Sanborn v. Parker*, No. 99-678-C, 2011 WL 6152849, at *1 (W.D. Ky.

Dec. 12, 2011) (noting that because "a bid for clemency is not reliant upon or restricted to matters argued before the courts, and is not restricted to cases where the guilt of the petitioner is in doubt," and evidence of a petitioner's "neuropsychological state, including whether or not he has some sort of brain damage or abnormality, is indeed relevant to his clemency petition, even though [he] was twice judged competent to stand trial.").

In Long's case specifically, much of his clemency presentation relied on his history of brain damage and traumatic brain injuries. *See supra* at 8-14. Four experts testified about these issues during Long's resentencing hearing, and his clemency presentation depended on establishing the scientific neuroimaging advances and deeper understanding the medical community has about the effects of brain trauma since the time the jury first heard this information in 1985. Thus, Long was prejudiced when he was forced to undergo such an important proceeding without anyone involved having a legible, unannotated copy of the resentencing transcript.

For all of these reasons and given the number of questions that still need to be resolved surrounding this unofficial, unannotated copy of Long's transcript that sits at the Repository, this Court should remand Long's case to the circuit court for a hearing on this issue.

VI. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE TRIAL COURT ERRONEOUSLY STRUCK JURORS FOR CAUSE UNDER *WITHERSPOON V. ILLINOIS*, IN VIOLATION OF LONG'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

It is well-established that a direct appeal "is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 398 (1985). In bringing an ineffective assistance of appellate counsel claim, the same *Strickland* standard applies. *See Eagle v. Linahan*, 279 F.3d 926, 938 (11th Cir. 2001) (citing *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987)); *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991).

To determine whether a petitioner was prejudiced by his attorney's failure to raise a particular issue, the Court "must decide whether the arguments the [petitioner] alleges his counsel failed to raise were significant enough to have affected the outcome of his appeal." *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (citing *Miller v. Dugger*, 858 F.2d 1536, 1538 (11th Cir. 1988)). "If [a court] conclude[s] that the omitted claim would have had a reasonable probability of success, then counsel's performance was necessarily prejudicial because it affected the outcome of the appeal." *Eagle*, 279 F.3d at 943 (citing *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)).

Here, appellate counsel erred in not raising a claim that the

trial court erred in excluding jurors for cause and denying the defense cause challenge of a juror based on their feelings about the death penalty under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Because this claim would have had a reasonable likelihood of success, appellate counsel was ineffective for failing to raise a *Witherspoon* claim.

In *Witherspoon*, the United States Supreme Court held "that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." 391 U.S. at 521. The Court continued: "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 521-22.

To allow such strikes during the death-qualification process violates a capital defendant's Sixth Amendment right to an impartial jury and Fourteenth Amendment due process rights. *Id.* at 522. The *Witherspoon* Court found such a process constitutionally infirm for two reasons. First, it would affect the views of a cross-section of the community. Even in 1968, the year the Supreme Court decided *Witherspoon*, the Court acknowledged: "Culled of all who harbor doubts about the wisdom of capital punishment—of all who

would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority." *Id.* at 520. Secondly, "when [the State] swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." *Id.* at 520-21.

Before granting a cause challenge because a potential juror opposes capital punishment, the court must determine whether that juror could set aside his views to follow the law. "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it." *Id.* at 519. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the United States Supreme Court announced the standard for when a potential juror may appropriately be stricken for cause: "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424 (internal citation omitted).

In making this determination, the Court has warned that

truncated, superficial questioning is inadequate for determining a potential juror's true capacity for following the law. In *Morgan v. Illinois*, 504 U.S. 719 (1992), the related case where the Supreme Court found that capital defendants are entitled to a cause challenge where a juror will automatically vote for death, the Court observed: "Illinois suggests that general fairness and 'follow the law' questions, of the like employed by the trial court here, are enough to detect those in the venire who automatically would vote for the death penalty." 504 U.S. at 734. The Court found this general questioning insufficient, explaining: "*Witherspoon* and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Id.* at 734-35.

Here, the trial court erred in granting the State's cause challenge for veniremen Harold Lucas and Tom Scofield despite their indications that they could vote for death in some circumstances. Moreover, the court failed to protect Long's due process rights and permitted the State to strike jurors for cause for stating opposition to the death penalty after superficial questioning that did not properly educate the jurors about the law's requirements.

During voir dire, Lucas stated early on that he is opposed to

capital punishment. When the State asked Lucas whether it was a fair statement to say that given Lucas' view toward capital punishment, he would have a problem giving the State a fair trial. R2/103. Lucas clarified that he would have a problem giving the death penalty. *Id.* The following exchange occurred:

> Q: All right. Is it a fair statement that under no circumstances, Mr. Lucas, could you vote to recommend the death penalty? Is that a fair statement?
>
> A: *You never say "never,"* but it would be very difficult.
>
> Q: So, you are not totally opposed to the death penalty?
>
> A: *No, not really, I guess. If the circumstances were right*.

R2/103-04 (emphasis added). The State then continued to ask leading questions of Lucas until it boxed him into again saying that he would have a problem voting for death. R2/104. Over defense counsel's objection, the court excused Lucas for cause based on his views. R2/217.

Venireman Scofield similarly expressed reluctance to impose death and wavered about his ability to do so but did not want to go so far as saying he could never do it. While the State did not explicitly explain to Scofield that the law would require him to consider death, when it was implied that his views would somehow

detriment the State, he walked back from his initial position of saying he could not vote for death. During questioning by the State, he stated:

> Q: I think when you answered the judge's questions, you said you were opposed to capital punishment. . . . Is it a fair statement, Mr. Scofield, that under no circumstances could you recommend that a man be sentenced to death? Is that a fair statement?
>
> A: At this time, yes, it is.
>
> Q: Okay. If the State was seeking the death penalty in this case, you would have a problem giving the State a fair trial?
>
> A: I don't know.
>
> Q: Well, if I'm seeking the death penalty and you go back in the jury room with the mind set that you're not going to ever, under any circumstances recommend, the death penalty, do you see you would not be giving me a fair shake in this particular case?
>
> A: "Under any circumstances," I think is too strong a term.
>
> Q: So, then there are some circumstances that you think you would be able to vote for the death penalty? I'm not getting into what those circumstances are, but –
>
> A: Yeah.

R2/94-95. When the State pressed further about whether he could think of those circumstances, Scofield said "no," but was clear that this was because he had "never been in that situation". R2/95.

Over trial counsel's objection, the court granted the State's cause challenge. R2/216-17.

The trial court's grant of a cause challenge for Lucas and Scofield is even more striking considering the jury venire was not well-educated about how the penalty phase worked at the time they answered these questions. The State told the jury:

> During the second phase or penalty phase, after hearing further evidence regarding aggravating and mitigating circumstances, that same jury deliberates, and by a majority vote this time, not a unanimous vote as there was in the guilt of innocence phase, but by a majority vote, eight to four, nine to three. Even six to six is a valid vote by a majority vote.
>
> Your job, if you are selected as a juror in this particular case, would be to weigh, to balance the aggravating circumstances against the mitigating circumstances.
>
> [. . .]
>
> It's not just a counting process. You are to give weight, you are to attribute weight to each aggravating circumstance you have found to have existed and found to have been proven beyond a reasonable doubt and to each mitigating circumstance you feel exists in this particular case.

R2/69.

The State then undermined any understanding the jury may have had that there are legal weights and directions applied to the sentencing process, telling the venire: "It's becomes [*sic*] a personal thing what in your mind warrants the death penalty or the

life imprisonment." R2/69.

The State eventually provided a "very brief explanation of how the second phase would work." R2/74. It explained:

> You'll hear the evidence regarding the aggravating and mitigating circumstances and determine if any aggravating circumstances have been proven beyond a reasonable doubt, and you then determine if there's any mitigating circumstances.
>
> You then balance the aggravating circumstances against the mitigating circumstances to come up with your recommendation.

R2/74.

At no point before the start of death-qualifying questioning did the court or either lawyer explain to the jury that the law dictates the sentencing deliberations, and that if they had views for or against the death penalty, they would need to put those feelings aside and follow the law as provided. Nor were any of the jurors who announced opposition to the death penalty directly asked whether they would be able to put their personal views aside.

It was not until after the court and State had finished their questioning that defense counsel finally clarified for the jurors how the penalty phase works. *See* R2/145 (defense counsel explains that the State would present aggravating evidence; the defense would present mitigating evidence; and the jury would decide which is more significant in making its sentencing determination). Yet,

the court failed to take this into consideration when granting the State's cause challenge and did not inquire further of Lucas or Scofield to determine whether he would be able to follow the law.

In comparison, when dealing with a defense cause challenge to strike a juror who was automatically inclined to impose death, the court acknowledged the fact that the jurors did not really understand how the law worked. Venireman Blankenburg announced early on in jury selection that he had already made up his mind without hearing anymore about the case. R2/39. This was because he believed in the automatic imposition of the death penalty once someone has been convicted of murder. The State asked Blankenburg:

> You don't think, Mr. Blankenburg, you could go back into the jury room after hearing all the evidence, every aggravating and mitigating circumstance and base your decision as to whether or not this man should live or die, and base that decision solely on balancing of the aggravating circumstances?

R2/76-77. Blankenburg responded: "I *think* I can, yes." *Id.* (emphasis added). In response to defense questioning, he explained that he has a "high" preference for the death penalty, and that he believes its use puts a stop to a lot of crime. R2/199-200. Yet, when the defense tried to strike Blankenburg for cause based on his views, the trial court denied this request because it found that Blankenburg just did not understand the law at first, and, once educated, Blankenburg showed the ability to follow it. R2/225. The

defense was then forced to use a peremptory strike on him. R2/231.

Several other jurors expressed opposition to the death penalty and responded negatively when asked whether they could vote for death, but, as with Lucas, they were also not properly instructed on the law's mandate and there was no inquiry by the court into whether they could put their personal views aside to follow the law. This included Colleen Barbieri, *see* R2/84-85 (Barbieri was asked to confirm that she opposed the death penalty and would not vote for it under any circumstance but was not instructed on the law or asked whether she could put her views aside to follow the law); Mary McClure, *see* R2/99-100 (McClure was asked five brief questions about how she "[has] a problem with the electric chair" and could not vote for death without any questions about whether she could put her views aside to follow the law); and Altemease Hardy, *see* R2/114-15 (same).

This superficial questioning rendered "*Witherspoon* and its succeeding cases . . . superfluous" because "such general inquiries could [not] detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Morgan*, 504 U.S. at 734-35. The State did not argue, and the trial court did not find, that Lucas' responses met the standard outlined in *Witt*. The trial court failed to confirm the potential jurors' capacity to follow the law, or lack

thereof, before granting the State's cause challenges, and it was especially erroneous to strike Lucas and Scofield when at varying times they both indicated that there were circumstances under which they could vote for death, despite their personal views.

Had appellate counsel raised a *Witherspoon* claim based on these errors, there is a reasonable likelihood the claim would have succeeded. This Court granted relief on a *Witherspoon* claim in similar circumstances in *Chandler v. State*, 442 So. 2d 171 (Fla. 1983). This Court vacated the death sentence because two veniremen had been stricken for cause despite their having "never [come] close to expressing the unyielding conviction and rigidity of opinion regarding the death penalty." 442 So. 2d at 174. In *Chandler*, this Court also did not find it convincing that a juror who wavers about his or her ability to vote for death necessarily shows the inability to serve as an impartial juror. *Id.* at 173 n.3 ("A third prospective juror . . . gave sharply conflicting responses to opposing counsel. Such ambiguity might lead us to conclude that Ms. Thomas had not shown unmistakably her inability to serve as an impartial juror in a capital felony case.").

Because of the failure to adequately determine venireman Lucas' and Scofield's ability to follow the law despite their opposition to the death penalty and the trial court's eventual ruling excusing them for cause, just as in *Witherspoon*, "it is

self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." 391 U.S. at 518. Instead, Long's death sentence was imposed by a jury "uncommonly willing to condemn a man to die." *Id.* at 520. Accordingly, Long's death sentence cannot stand.

VII. LONG'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS TRIED, CONVICTED, AND SENTENCED WHILE INCOMPETENT TO STAND TRIAL.

Decades before Long's trial, the United States Supreme Court established that "the conviction of an accused person while he is legally incompetent violates due process." *Pate v. Robinson*, 383 U.S. 375, 378 (1966); *see also James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992) ("The Fourteenth Amendment prohibits states from denying defendants due process of law by trying them while incompetent."). The standard for determining whether a defendant is incompetent 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." *Duskey v. United States*, 362 U.S. 402, 402 (1960) (alterations in original) (internal quotations omitted). Given the "difficulties of retrospectively determining the petitioner's competency," the remedy for a conviction obtained while the defendant was

incompetent is a new trial once the petitioner is currently found competent. *Id.* at 403.

Long was under the influence of psychiatric medications and could not assist his lawyer with his own defense or have a rational and factual understanding of his trial. His conviction and sentence violate his due process rights. Thirty years after this analysis should have been conducted, this Court should grant a new trial.

At the time of Long's trial, he was taking Sinequan, a tranquilizing antidepressant. *See* Exhibit 2 (medical record from Hillsborough County Jail confirming Long's Sinequan prescription). Media reports during the trial confirmed his sedated demeanor. Dibenzoxepins such as Sinequan are known to frequently cause drowsiness, confusion, disorientation, and hallucinations. They can also cause seizures, which is problematic for Long because he has temporal lobe epilepsy.

Another prisoner on Long's tier at the Hillsborough County Jail was prescribed an antipsychotic. He gave his medicine to Long, so that in addition to Long's prescribed tranquilizer, he was also under the effects of this unauthorized antipsychotic.

This medication affected Long's ability to participate in his trial. As one Orlando Sentinel article reported: "Long also known as 'Bobby Joe,' remained calm as Lazzara read the jurors' unanimous recommendation. . . . Long sat for hours at a time without

commenting on proceedings—often without any movement, staring straight ahead or at his hands clasped in his lap." Pat Lamee, *Jury Recommends Death for Killer of Tampa Woman*, Orlando Sentinel, June 30, 1989. In the same article, trial counsel "acknowledged that [Long] had been sedated during the three-day hearing." *Id.*

Despite the multiple indications that Long was affected by his medication, however, the trial court did not conduct any inquiry into Long's mental state or his ability to assist in his own defense. Long was tried, convicted, and sentenced while incompetent.

First, Long had a procedural due process right to a competency hearing. *See Pate*, 383 U.S. at 377 (recognizing constitutional right to competency hearing). Even if trial counsel failed to request one, the trial court should have ordered one sua sponte based on Long's lethargic behavior in court. The burden was not on Long to bring this to the court's attention because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial." *Id.* at 385. Thus, the trial court was in error for not ensuring that Long's medication did not affect his ability to stand trial.

The Eleventh Circuit has explained that once a petitioner has established that a trial court should have sua sponte held a

competency hearing, the petitioner "has made out a federal constitutional violation." *James*, 957 F.2d at 1571. Such error cannot be harmless because "a finding of incompetency by the state trial court would have precluded a determination of guilt or innocence: the defendant could not have been tried. In other words, the trial of an incompetent defendant is per se prejudicial." *Id.* So, Long was prejudiced here where the trial court failed to order a competency hearing once observing Long's drug-induced lethargy.[10]

For the same reasons as the court should have ordered a *Pate* hearing sua sponte, Long can also show a substantive due process violation of his right not to be tried while incompetent. *James*, 957 F.2d at 1571-72. The standard by which he must make this showing is a preponderance of the evidence. *Id.* at 1571. Long can prove (1) he was prescribed a tranquilizer during the trial; (2) the tranquilizer's known side effects include side effects that affect a person's cognitive abilities, such as confusion, drowsiness, and seizures; (3) he was taking unauthorized

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[10]A claim under *Pate* asserting that the trial court failed to hold a hearing on a defendant's competence before trial is generally raised on direct appeal. To the extent that this claim is defaulted because appellate counsel did not raise this claim, which had a reasonable likelihood of success, appellate counsel was ineffective in their failure to do so. *See James*, 957 F.2d at 1571-72 ("*Pate* claims can and must be raised on direct appeal."); *Evitts v. Lucey*, 469 U.S. 387, 398 (1985) (recognizing right to effective appellate counsel).

antipsychotic medication, which carried not just the known side effects but also those effects for taking medication not properly prescribed by a doctor and tailored to an individual's needs; and (4) he was visibly affected by this medication, as confirmed by media reports. Thus, Long's conviction and sentence violate due process. *Pate*, 383 U.S. at 378. This Court should remand this issue to the circuit court for an evidentiary hearing.

VIII. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE STATE PRESENTED EVIDENCE BEYOND THE SCOPE OF THE ENUMERATED AGGRAVATING FACTORS IN VIOLATION OF LONG'S EIGHTH AMENDMENT PROTECTION AGAINST THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

Appellate counsel failed to raise a claim that the trial court erred in allowing evidence beyond the scope of Florida's enumerated aggravating factors, in violation of Long's Eighth Amendment protection against the arbitrary and capricious imposition of the death penalty. Because there is a reasonable probability that this claim, if raised, would have been meritorious, appellate counsel was ineffective in failing to raise it. *See Evitts v. Lucey*, 469 U.S. 387, 398 (1985) (recognizing right to effective appellate counsel; *Eagle*, 279 F.3d at 943 (citing *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)) ("If [a court] conclude[s] that the omitted claim would have had a reasonable probability of success, then counsel's performance was necessarily prejudicial because it affected the outcome of the appeal.").

The Eighth Amendment prohibition against cruel and unusual punishment precludes the arbitrary and capricious imposition of the death penalty. *Parker v. Dugger*, 498 U.S. 308, 321 (1991). To protect against this, a State's "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). This can be accomplished by either "narrowly defining the offense of first-degree murder" or "provid[ing] for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id.* at 245-46. Either way, the legislature must offer "clear and objective" standards, *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), that provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). Where that narrowing fails to occur—for example, where the jury considers nonstatutory aggravating evidence—the death sentence cannot stand. *See Oyola v. State*, 158 So. 3d 504, 509 (Fla. 2015) (where the sentence considers an invalid nonstatutory aggravating circumstance, the error cannot be harmless and resentencing is required).

Here, the trial court erred in allowing the State to solicit testimony from defense expert Dr. Berland regarding Long’s capacity to know right from wrong, tracking the language of the M’Naghten test for insanity. Trial counsel filed a pretrial motion in limine to preclude any expert testimony about insanity. R2/967. During argument on this motion, trial counsel explained: “[A]ll we’re trying to do is avoid suggesting to the jury that if he can tell right from wrong, then that has no effect on the mitigating factors and, of course, it doesn’t, so that’s essentially our position.” R2/968. The State stipulated to this request, and the court granted the motion. R2/968-69.

However, on cross-examination, the State asked Dr. Berland:

> Q: So then you are not saying that Mr. Long at the time he killed Michelle Denise Simms was suffering an extreme form of psychosis at this particular time, and that he could not distinguish right from wrong?

R2/691.

Trial counsel objected, but the court overruled him. *Id.* The State then repeated: “Was he suffering from a psychosis at the time he committed the crime on Michelle Denise Simms so that he was unable to distinguish right from wrong?” R2/692. Dr. Berland answered: “Essentially you’re asking if he was so overwhelmed or controlled by his psychosis that he couldn’t recognize, essentially

as I think I alluded to earlier, appreciate the criminality, which is similar. Yeah, I think he could." *Id.*

Following Dr. Berland's testimony, trial counsel continued to object to that line of questioning. He argued:

> Judge, during the cross-examination of Dr. Berland, Mr. Benito asked whether Mr. Long was capable of telling the difference between right and wrong, which is the classic *McNaghten* Test, which the Court in its Order in Limine, held to be irrelevant in this proceeding, because it bears on absolutely none of the aggravating circumstances, and is a much higher standard than either of the mitigating circumstances.

R2/712.

Trial counsel then asked where the State intended to go with its own witness, Dr. Sprehe, and to ensure that this irrelevant testimony was not further emphasized. *Id.* The trial court found this line of questioning to be appropriate and allowed the State to pursue it with Dr. Sprehe. *Id.*

The court's ruling violated Long's Eighth Amendment protection against arbitrary and capricious death sentencing. Insanity was not an issue here. The failure to meet the insanity test is not an aggravating factor, and the standard for meeting legal insanity in Florida is not synonymous with any mitigating factors. Once the court opened the jury's decision-making to include factors not enumerated by Florida's capital sentencing statute, the constitutionally mandated narrowing function was no longer in

effect.

Nor can it be argued that this testimony constituted a rebuttal to the mitigation evidence. At no point did any defense witness suggest that Long did not understand right from wrong as he committed his crimes. In fact, Dr. Berland had testified that Long did understand his actions were criminal but was impaired to the point that he could not conform his behavior to the law. R2/692. It was not necessary for the State to find another, less relevant way to solicit this testimony. The trial court had already ruled—and the State conceded—that this is not necessary to the question whether Long was substantially impaired in conforming his behavior to the law or was under extreme emotional distress. Indeed, the very point of those mitigating circumstances is that even if a person fully understands that his behavior is unlawful, because of some mental condition, he is unable to control himself anyway.

The State's questions about Long's understanding of right from wrong at the time of his crime confused the jury as to the relevant question in the statutory mitigating factors, and it introduced irrelevant aggravating evidence. Had appellate counsel raised this error, there is a reasonable probability this claim would have succeeded, and appellate counsel was ineffective for failing to bring this claim.

IX. THE STATE PROVIDED LONG INSUFFICIENT NOTICE AS TO THE EVIDENCE IN AGGRAVATION AGAINST HIM WHEN IT MISLEADINGLY INDICATED IT WOULD PRESENT THE SAME EVIDENCE AS THAT PRESENTED IN THE FIRST PENALTY PHASE, IN VIOLATION OF LONG'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

The State violated Long's Fourteenth Amendment right to due process when it indicated to the trial court and the defense that it would be relying on similar evidence to that presented in the first penalty phase but then presented more extensive and harmful evidence of Long's prior felony conviction.[11]

Due process requires the "the state to allege every essential element when charging a violation of law . . . to provide the accused with notice of the allegations." *M.F. v. State*, 583 So. 2d 1383, 1385-86 (Fla. 1991). While state law at the time did not require the State to provide the defense with notice of the evidence it would present in support of any aggravating factors,[12]

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[11]To the extent that this claim is defaulted because appellate counsel did not raise this claim, which had a reasonable likelihood of success, appellate counsel was ineffective in their failure to do so. *See James*, 957 F.2d at 1571-72 ("*Pate* claims can and must be raised on direct appeal."); *Evitts v. Lucey*, 469 U.S. 387, 398 (1985) (recognizing right to effective appellate counsel).

[12]This, too, is now in question. This Court previously found that after the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), "*Ring* does not require . . . notice of the aggravating factors that the state will present at sentencing." *Kormondy v. State*, 845 So. 2d 41 (Fla. 2003). However, this Court also found that *Ring* did not render Florida's sentencing scheme which allowed a judge, rather than a jury, to make the sentencing decision, a finding that was reversed by the Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). And Florida law

the State here went further than merely not providing Long with such notice. Instead, it led him to believe that its aggravation presentation would match that of the first penalty phase when really it enhanced the evidence in relation to Long's prior felony convictions.

At the first penalty phase, the State called an officer to testify to prior felony conviction in Pinellas County. R1/603-07. The State then entered a certified copy of Long's judgment and sentence from a prior felony conviction in Pasco County. R1/608. The entirety of the evidence presented to the jury on that conviction was: "State's Exhibit Number 11, which is the certified copy of a conviction against Mr. Long which occurred in a Pasco County Court on April 17, 1985." *Id.* The jury then received a copy of the certified judgment with the charges listed. *Id.*

At the resentencing hearing, trial counsel filed a motion in limine to preclude the State from introducing hearsay evidence. R2/980. Trial counsel wanted to exclude hearsay testimony similar to that in the first trial where a detective presented the statement of one of the prior felony victims. R2/982. The trial court declined to rule on the matter until the actual testimony. *Id.* In response, the State argued that this testimony had been

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now requires that the State specify the aggravators it intends to pursue in its notice to seek death. *See* Fla. Stat. § 782.04.

admitted in the first trial. R2/984. It also argued: "Mr. Fraser is on notice, and he can take those steps to provide himself a fair opportunity to rebut the statements at least at this stage." *Id.* While reserving its ruling for later, the court did tell defense counsel that this hearsay evidence may be allowed under the then-recent Florida Supreme Court ruling in *Chandler v. State*, 534 So. 2d 701, 703 (Fla. 1988), which allowed hearsay testimony through a detective testifying at Chandler's resentencing after the defense had had an opportunity to cross-examine those witnesses during the initial guilt phase.

Trial counsel objected again before the State called detectives Terry Rhoads and Charles Troy. R2/952. The trial court overruled his objection. R2/953. Officer Troy then testified extensively about the details of Long's rape conviction in Pasco County. R2/954-59. So, despite the State's repeated indications that it was relying on the same testimony in support of the prior violent felony aggravator that it had used in the first trial, it instead called an additional witness to fill in the specifics of one of Long's prior felony convictions. This graphic testimony was a stark contrast to the prior judgment and sentence read to the first jury. This last-minute switch in strategies amounted to insufficient notice in violation of Long's due process protections. *See, e.g.*, *State v. Coleman*, 188 So. 3d 174, 227 (La. 2016) (change

in expert testimony between first penalty phase and resentencing amounted to insufficient notice where the State had told the defense the expert's testimony would be the same). It was especially prejudicial here, where the trial court relied on the State's argument that it was presenting the same evidence as that admitted at the first trial, so that the defense was sufficiently on notice and the evidence admissible under *Chandler*. In *Chandler*, of course, the original declarants behind the State's hearsay evidence had been presented at the first trial, so there had been a prior opportunity to cross-examine those witnesses. *See Chandler*, 534 So. 2d at 703; *see also supra*, Claim I. As trial counsel here pointed out, he would "never know" whether he could rebut the police officers' testimony "until those women testify." R2/281.

The State's misleading statements regarding the prior felony conviction testimony and drastic change in evidence between Long's initial penalty phase and resentencing hearing amounted to insufficient notice in violation of his due process rights. This Court should vacate his death sentence.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Long respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic service to each party on the attached service list this 20th day of May,2019.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

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