

IN THE SUPREME COURT OF FLORIDA

SEAN ALONZO BUSH,

Appellant,

vs.

CASE NO. SC18-227

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR SAINT JOHNS COUNTY

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CITATIONS	iv
SUMMARY OF ARGUMENTS	1
ARGUMENT	
POINT I	5
IN REPLY: THE TRIAL COURT REVERSIBLY ERRED IN FINDING THE EXISTENCE OF DIRECT EVIDENCE OF GUILT SUFFICIENT TO DENY APPELLANT’S MOTION FOR JUDGMENT OF ACQUITTAL UNDER THE CIRCUMSTANTIAL EVIDENCE STANDARD.	
POINT II	6
IN REPLY: HARMFUL ERROR OCCURRED WHEN THE TRIAL COURT DENIED THE DEFENSE RELIEF AFTER AN EXPERT WITNESS TESTIFIED ON SUBJECT MATTER THAT WAS NOT PRODUCED DURING DISCOVERY AND WHICH IMPACTED THE THEORY OF DEFENSE. (restated)	
POINT III	11
IN REPLY: THE TRIAL COURT ERRED IN DENYING APPELLANT’S REQUEST TO INTRODUCE ONE OF NICOLE’S DYING DECLARATIONS.	
POINT IV	13
IN REPLY: THE MOTION TO EXCLUDE LAW ENFORCEMENT OFFICERS’ OPINIONS ON GUILT SHOULD HAVE BEEN GRANTED, AND THE PROPOSED LIMITING INSTRUCTION FOR THOSE OPINIONS SHOULD HAVE BEEN READ.	

POINT V	14
IN REPLY: THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING A MANIPULATED PHOTOGRAPHIC EXHIBIT.	
POINT VI	15
IN REPLY: THE TRIAL COURT ERRED IN DENYING THE SPECIAL REQUESTED JURY INSTRUCTION ON SPOILIATION OF EVIDENCE.	
POINT VII	21
IN REPLY: THE TRIAL COURT ERRED IN SUSTAINING THE STATE’S OBJECTION DURING CLOSING ARGUMENT.	
POINT VIII & IX	22
IN REPLY: THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO ASSURE A RELIABLE VERDICT, THUS VIOLATING THE FEDERAL EIGHTH AMENDMENT AND FLORIDA’S ANALOGOUS COMMON LAW PRINCIPLES. (Restated)	
POINT X	27
IN REPLY: THE DEFENSE OBJECTIONS TO THE PENALTY PHASE CLOSING ARGUMENT SHOULD HAVE BEEN SUSTAINED.	
POINT XI	30
IN REPLY: THE DEFENSE OBJECTIONS TO EMOTIONAL VICTIM IMPACT TESTIMONY SHOULD HAVE BEEN SUSTAINED.	
POINT XII	32
IN REPLY: CUMULATIVE ERROR CALLS FOR REVERSAL OF THE DEATH SENTENCE.	

POINT XIII	33
IN REPLY: FLORIDA’S DEATH PENALTY SCHEME FAILS TO NARROW THE CLASS ELIGIBLE FOR EXECUTION.	
CONCLUSION	34
CERTIFICATE OF SERVICE	35
CERTIFICATE OF FONT	35

TABLE OF CITATIONS

CASES:

<u>Arizona v. Youngblood</u> 488 U.S. 51 (1988).	19
<u>Augustine v. State</u> 143 So. 3 rd 940 (Fla. 4 th DCA 2017).	28
<u>Barth v. State Farm Fire & Gas. Co.</u> 228 Ill. 2d 163, 886 N.E. 2d 976 (Ill. 2008).	17
<u>Benavidez v. City of Gallup</u> 141 N.M. 808, 161 P. 3 rd 853 (N.M. 2007).	16
<u>Blackwell v. State</u> 76 Fla. 124, 79 So. 731 (1918).	24
<u>Chacon v. Philip Morris USA Inc.</u> 254 So. 3 rd 172 (Fla. 3 rd DCA 2018).	17
<u>Cooter & Gell v. Hartmarx Corp.</u> 496 U.S. 384 (1990).	16
<u>Crane v. Kentucky</u> 476 U.S. 693 (1986).	12
<u>D & D Tire v. Ouellette</u> 352 P. 3 rd 32 (Nev. 2015)..	17
<u>Dennis v. State</u> 41 A. 3 rd 391 (Del. 2012).	16
<u>Doxsee v. Doxsee</u> 80 P. 3 rd 225 n.4 (Alaska 2003).	16

<u>Dunlap v. State</u> 360 P. 3 rd 289 (Idaho 2015).....	16
<u>Estelle v. McGuire</u> 502 U.S. 62 (1991).....	24
<u>Ford v. State</u> 802 So. 2d 1121 (Fla. 2001).	27
<u>Gamble v. State</u> 492 So. 2d 1132 (Fla. 5 th DCA 1986).....	11
<u>Gregoire v. City of Oak Harbor</u> 170 Wash. 2d 628, 244 P. 3 rd 924 (Wash. 2010).....	16
<u>Holmes v. South Carolina</u> 567 U.S. 319 (2006).....	12
<u>Hurst v. State</u> 202 So. 3 rd 40 (Fla. 2016).	22, 23
<u>In re Standard Criminal Jury Instructions in Capital Cases</u> 244 So. 3 rd 172 (Fla. 2018).	25
<u>In re: Amendments to the Florida Rules of Criminal Procedure - 2018 Regular-Cycle Report</u> 2018 WL 4868730 (Fla. 2018).	8
<u>Lott v. State</u> 695 So. 2d 1239 (Fla. 1997).	15
<u>McConnell v. Union Carbide Corp.</u> 937 So. 2d 148 (Fla. 4 th DCA 2006).....	18
<u>McDuffie v. State</u> 970 So. 2d 312 (Fla. 2007).	15, 16

<u>Merit Energy Co., LLC v. Horr</u> 366 P. 3 rd 489 (Wyo. 2016).	17
<u>Mikenas v. State</u> 367 So. 2d 606 (Fla. 1978).	27
<u>Miller v. Utah Dep’t. of Transp.</u> 285 P. 3 rd 1208 (Utah 2012).	16
<u>Moore v. State</u> 701 So. 2d 545 (Fla. 1997).	27
<u>Pait v. State</u> 112 So. 2d 380 (Fla. 1959).	24
<u>Payne v. Tennessee</u> 501 U.S. 808 (1991).	30, 31
<u>People v. Perez</u> 670 N.W. 2d 655 (Mich. 2003).	16
<u>People v. Waidla</u> 22 Cal. 4 th 690, 996 P. 2d 46 (Cal. 2000).	17
<u>Reynolds v. State</u> 251 So. 3 rd 811 (Fla.) <i>cert. den.</i> , 139 S. Ct. 27 (2018).	23, 24
<u>RGR, LLC v. Settle</u> 288 Va. 260, 764 S.E. 2d 8 (Va. 2014).	16
<u>Richardson v. State</u> 246 So. 2d 771 (Fla. 1971).	6, 9
<u>Rockmore v. State</u> 140 So. 3 rd 979 (Fla. 2014).	15, 22

<u>Russell v. Stricker</u> 635 N.W. 2d 734 (Neb. 2001).....	16
<u>Sargent v. Shaffer</u> 467 S.W. 3 rd 198 (Ky. 2015).....	17
<u>Seley-Radtke v. Hosmane</u> 450 Md. 468, 149 A. 3 rd 573 (Md. 2016).	17
<u>Sheppard v. State</u> 151 So. 3 rd 1154 (Fla. 2014).	15
<u>State v. Blankenship</u> 542 S.E. 2d 433 (W. Va. 2000).....	16
<u>State v. Bovee</u> 394 P. 3 rd 760 (Hawai'i 2017).....	16
<u>State v. Burbey</u> 243 Ariz. 145 P. 3 rd 145 (Ariz. 2017).	16
<u>State v. Floyd</u> 186 So. 3 rd 1013 (Fla. 2016).	18, 22, 23
<u>State v. Imbruglia</u> 913 A. 2d 1022 and n.3 (R.I. 2007).....	16
<u>State v. Lotches</u> 331 Or. 455, 17 P. 3 rd 1045 (Or. 2000).....	16
<u>State v. Miller</u> 342 Mont. 355, 181 P. 3 rd 625 (Mont. 2008).	17
<u>State v. Perrier</u> 536 S.W. 3 rd 388 (Tenn. 2017).	16
<u>State v. Sartin</u> 200 Wis. 2d 47, 546 N.W. 2d 449 (Wis. 1996).....	17

<u>State v. Schoenrock</u> 899 N.W. 2d 462 (Minn. 2017).....	17
<u>State v. Whistler</u> 851 N.W. 2d 905 (S.D. 2014).	17
<u>Townsend v. People</u> 252 P. 3 rd 108 (Colo. 2011).....	17
<u>Victorino v. State</u> 127 So. 3 rd 478 (Fla. 2013).	30
<u>Wagers v. State</u> 199 So. 3 rd 1116 (Fla. 5 th DCA 2016).	18
<u>Wal-Mart Stores, Inc. v. Wright</u> 774 N.E. 2d 891 (Ind. 2002).	17
<u>Williams v. State</u> 121 So. 3 rd 524 (Fla. 2013).	26
<u>Zant v. Stephens</u> 462 U.S. 862 (1983).	27
 <u>OTHER AUTHORITIES CITED:</u>	
Amendment Eight, United States Constitution.....	22, 24
Section 16(b), Florida Constitution.....	30
R. Regulating Fla. Bar. 4-3.4(e).	28
Rule 3.220(j), Florida Rules of Criminal Procedure	8

SUMMARY OF ARGUMENTS

POINT I: Appellant relies on his initial brief as to this point.

POINT II: The State acknowledges its continuing duty to disclose material changes in its witnesses' expected testimony, but argues that the change in its DNA expert's testimony was not material. It further argues that the defense, at trial, failed to make a requisite showing that the prosecutor was aware of a change in testimony, and argues that defense counsel did not make the resulting procedural prejudice to the defense clear to the trial judge. The record belies all of those assertions. A high level of procedural prejudice stemming from a material change in testimony is clear from the record, and reversal of the conviction and remand for a new trial are warranted.

POINT III: The State concedes that a dying declaration is admissible to prove the *res gestae* surrounding the declarant's impending death. It specifically concedes that a dying declaration is admissible if it relates to *who the actors were* in a suspected murder. What Nicole said to police at the scene was that a man attacked her, and that her children were with their father. Patently the latter portion of the statement conveys an inference *that the assailant was not the children's father*. Exclusion of that latter portion of her statement violated the Appellant's right to put on a defense.

POINTS IV and V: The appellant relies on his initial brief as to these points.

POINT VI: This court should hold that where, as here, an appellate issue turns on a legal question, review of rulings regarding instructions should be without deference.

The State argues that the defense in this case did not prove bad faith by any officer, and that therefore no argument can be made that due process of law was denied by loss of the murder victim's underwear. Appellant has not argued a due process violation; his position is that Florida's discovery rules, including the particularly broad discovery rule that relates to sanctions, warranted an instruction permitting an adverse inference based on loss of the panties. Nothing in Florida law precludes such an instruction in a criminal case, and the court's ruling that such instructions are not permissible in criminal cases was error. The error cannot reasonably be deemed harmless, since the case was defended on the theory that someone else had committed the charged offenses.

POINT VII: Appellant relies on his initial brief as to this point.

POINTS VIII and IX: As this court holds, whether a standard instruction is clear is subject to *de novo* review. There is a reasonable likelihood here that the jury applied an unclear set of penalty-phase instructions in a way that violates Appellant's constitutional rights to due process of law and a reliable outcome.

The jurors heard unexplained references to their upcoming recommendation to the court, both from the judge and from the prosecutor in closing. Their instructions as a whole did not explain that some aspects of their efforts would result in irrevocable findings, and that another would result in a recommendation that could be overridden. The unclear instructions could have resulted in the jurors failing to give their duties appropriate attention.

Nor did the interim instructions clearly bring home to the jurors the full scope of their individual responsibility to weigh mitigation. Further, a standard penalty phase instruction read in this case suggested that mitigation, to be considered as such, must pass a “reasonableness” test. The deliberations in this case - if the jurors followed their instructions to the letter - may well have been affected by that language.

POINT X: The State’s closing argument in the penalty phase invited the jury to consider as a non-statutory aggravator the defendant’s own experience as a crime victim. The State also appealed to anger and resentment against the defense team, and announced the prosecutor’s personal view as to the “right” verdict. Seeking a verdict on bases other than the evidence, as was done in this case, is impermissible; this court should remand for a new penalty phase.

POINT XI: The State is correct to the extent it argues that limited evidence of survivors' grief and suffering is admissible. Appellant's position is that here emotional victim impact evidence became a feature of the penalty phase, when the prosecutor twice asserted that "at the end of the day" the case was about the victim. The State responds that there can be nothing wrong with noting that the victim had family and friends. Appellant maintains his position that the prosecutor's repeated assertion invited the jury to make its ultimate decision based on its reaction to the victim impact testimony, and that the effect was to deny him due process of law.

POINT XII: Appellant maintains his position that the combined effect of problems in the penalty phase warrants relief.

POINT XIII: Appellant relies on his initial brief as to this point.

POINT ONE

IN REPLY: THE TRIAL COURT REVERSIBLY
ERRED IN FINDING THE EXISTENCE OF DIRECT
EVIDENCE OF GUILT SUFFICIENT TO DENY
APPELLANT'S MOTION FOR JUDGMENT OF
ACQUITTAL UNDER THE CIRCUMSTANTIAL
EVIDENCE STANDARD.

The issue raised on this point is squarely before this court for resolution
based on the parties' initial and answer briefs.

POINT TWO

IN REPLY: HARMFUL ERROR OCCURRED WHEN THE TRIAL COURT DENIED THE DEFENSE RELIEF AFTER AN EXPERT WITNESS TESTIFIED ON SUBJECT MATTER THAT WAS NOT PRODUCED DURING DISCOVERY AND WHICH IMPACTED THE THEORY OF DEFENSE. (restated)

The State addresses whether a sufficient Richardson¹ hearing was held at the trial below. Appellant did not, and does not, intend to challenge the sufficiency of the trial court's inquiry.²

To be clear on the merits: defense counsel, at trial, began his opening statement by telling the jury that it would hear that a blue towel found on the threshold of the bathroom within the murder scene had another man's DNA on it, and that it would hear that a laptop computer found hidden under the dresser at the scene had another man's DNA on it. (T 54-55) Crime scene personnel confirmed that the towel was collected from the threshold, and that the laptop was found under the dresser. (T 225, 589) On direct examination of the State's DNA expert,

¹ Richardson v. State, 246 So. 2d 771 (Fla. 1971).

² The undersigned is responsible for the confusion. The heading to the argument made on Point Two in the initial brief does suggest that Appellant will contest the sufficiency of the Richardson inquiry. Through an error, that suggestion was not removed from the heading during editing of the brief. The undersigned did not intend to mislead, and apologizes for the error.

she testified that when she tested the blue towel, she found evidence that yielded a full DNA profile from Nicole, and a partial second DNA profile. That second profile was sufficient to exclude others but not sufficient to include others, and she excluded the defendant as the minor contributor. (T 976-77) Counsel for the State then established that FDLE's policies had changed since 2011, when the items were tested, and asked "if this result had been reported out today, what would you have put on the report?" She responded that today she would report simply that the minor DNA contribution to the towel was "uninterpretable," and that today she would not undertake to exclude or include anyone from that minor contribution. (T 978-79) Defense counsel objected to a discovery violation. (T 979) At sidebar, the judge heard counsel for both parties and asked how the defense was prejudiced. (T 979-80) Defense counsel responded "This is the totality, Judge. This is the heart of the defense." (T 980) The State responded that no real change was made to the expected testimony, in that "[s]he still testified that the defendant was excluded from that profile." (T 981) The State also took the position that "the defense had an opportunity to depose her and ask these types of questions." (T 979) The court found that no discovery violation took place. (T 981)

The DNA expert, Ms. Martin, went on to testify that as to the laptop computer found under the dresser, she again found Nicole's profile and a further

result indicating a minor DNA contributor. (T 982) Again she testified that the minor contributor's profile was sufficient to exclude but not to include other contributors, and again she testified that the defendant was not the contributor. (T 982) "Same objection" was made by the defense, and overruled. (T 983)

On cross-examination, Ms. Martin admitted that if she had testified in this case in 2011, when the testing was done, her testimony would have been that the minor contributions to both the towel and the laptop contained a specific allele which could not have come from Nicole, which came from a male, and which could not have come from any male in the Bush family. (T 993-98)

On this record, the State acknowledges that it has a continuing duty to disclose material changes in its witnesses' expected testimony. (Answer brief at 60-62) This is, of course, true; this court in October of 2018 amended Rule 3.220(j) of the Florida Rules of Criminal Procedure to specifically so provide. *See In re: Amendments to the Florida Rules of Criminal Procedure - 2018 Regular-Cycle Report*, 2018 WL 4868730 (Fla. 2018). The State argues that the defense, at trial, "presented nothing to show that the State was aware of a change in testimony." (Answer brief at 62) As was argued in the initial brief, the prosecutor's questions

themselves³, read with the rest of the Richardson colloquy, establish that he knew he was eliciting testimony that would surprise the defense.

The State argues that the change in testimony was not material, in that the DNA analyst at all times excluded the defendant as the minor contributor to the towel and the laptop. (Answer brief at 61-62) The point the defense has sought to make, here and at trial, is that the defense expected, and led the jury to expect, affirmative proof from the State that another man's DNA appeared on items that must have been handled by the murderer. That expectation was harshly disappointed when the State's DNA analyst testified that she would once have taken that position, but that FDLE's protocols no longer permitted her to make such a leap.

The State further argues that defense counsel did not make the ensuing procedural prejudice to the defense clear to the trial judge. (Answer brief at 64) Counsel's protestation "this is the heart of the defense," combined with the promise he made the jury at the very outset of his opening statement, were sufficient to apprise Judge Maltz what was at stake. The State adds that "[t]he evidence shows that the defense's trial preparation would not have been different since Martin still

³ "Since 2011 have FDLE's policies changed in terms of how it reports out results?" "And if this result had been reported out today, what would you have put on the report?" (T 978)

testified that the defendant was excluded...Appellant's argument now, that had the change ...been revealed before trial the defense could have hired its own analyst to test the DNA, is disingenuous." (Answer brief at 63-64) The record and the briefing belie these assertions: defense counsel immediately objected to the new testimony, and apprised the court that his case was drastically affected. Had the defense learned before trial that Ms. Martin intended to repudiate her report, a rational response certainly would have included getting an outside opinion on just what can and cannot be concluded from the minor DNA contributions on the towel and the laptop. Had that investigation not panned out favorably for the defense, a follow-up rational response might well have included a significant change in counsel's advice regarding the wisdom of proceeding to trial. A high level of procedural prejudice stemming from a material change in testimony is clear from the record, and reversal of the conviction and remand for a new trial are warranted.

POINT THREE

IN REPLY: THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO INTRODUCE ONE OF NICOLE'S DYING DECLARATIONS.

The State concedes that a dying declaration is admissible to prove *the circumstances surrounding the declarant's impending death*. (Answer brief at 65)

The State specifically concedes that a dying declaration is admissible if it relates to *who were the actors* in a suspected murder. (Answer brief at 65) The excluded portion of Nicole's statement related to both; what she said was that a man attacked her, and that her children were with their father. Patently the latter portion of the statement carries the inference *that the assailant was not the children's father*. As Judge Winifred Sharp once wrote for the 5th DCA, "the exclusion of defense counsel's inquiry as to...specifics we think was error. This was similar to serving up spice cake without the spice, or a Bloody Mary without the vodka. It is the specifics, the details, the nitty gritty of life that proves or disproves generalities." Gamble v. State, 492 So. 2d 1132, 1134 (Fla. 5th DCA 1986).

The State urges that any error on this point was harmless "as the excluded evidence came in through other witnesses." (Answer brief at 67) The fact that the children were in Jacksonville that morning may have been proved, but it was not the point the defense was trying to make.

In further support of its harmless error argument, the State posits that defense counsel's ability to argue that another man committed the charged acts was not "inhibited" by the ruling excluding part of Nicole's statement. (Answer brief at 67) As in the usual case, evidence supporting the defense argument might well have helped persuade the jury of its correctness. The error cannot reasonably be deemed harmless, given the defense in this case. *See* Holmes v. South Carolina, 567 U.S. 319 (2006) and Crane v. Kentucky, 476 U.S. 693 (1986), cited in the initial brief at 51-52.

POINT FOUR

IN REPLY: THE MOTION TO EXCLUDE LAW ENFORCEMENT OFFICERS' OPINIONS ON GUILT SHOULD HAVE BEEN GRANTED, AND THE PROPOSED LIMITING INSTRUCTION FOR THOSE OPINIONS SHOULD HAVE BEEN READ.

The Appellant will rely on his initial brief as to this point.

POINT FIVE

IN REPLY: THE TRIAL COURT ABUSED ITS
DISCRETION BY ADMITTING A MANIPULATED
PHOTOGRAPHIC EXHIBIT.

The Appellant will rely on his initial brief as to this point.

POINT SIX

IN REPLY: THE TRIAL COURT ERRED IN DENYING THE SPECIAL REQUESTED JURY INSTRUCTION ON SPOILIATION OF EVIDENCE.

Standard of review. Appellant has argued that this court reviews *de novo* whether a special jury instruction should have been given, citing Rockmore v. State, 140 So. 3rd 979, 983-84 (Fla. 2014). (Initial brief at 61) The State has countered that Florida's trial courts have wide discretion in instructing juries, and that the decision whether to give an instruction is reviewed for abuse of discretion. (Answer brief at 74) Rockmore specifically holds that where it is argued that the trial court *sua sponte* gave an erroneous special instruction, the correctness of that instruction is reviewed *de novo*. Rockmore is one indicator that the Florida courts are moving toward treating appellate issues that arise out of jury instructions as reviewable *de novo* rather than for abuse of discretion.

As background, at one time, this court generally held that rulings on the admissibility of evidence should be reviewed for abuse of discretion. *E.g.*, Lott v. State, 695 So. 2d 1239, 1242 (Fla. 1997). This court in more recent years has held that the courts' discretion in that regard is limited by the rules of evidence and by principles of *stare decisis*. See McDuffie v. State, 970 So. 2d 312, 326 (Fla. 2007). Accord Sheppard v. State, 151 So. 3rd 1154, 1169 (Fla. 2014). Further, this court

now holds that discretion does not extend to evidentiary rulings which are based on an erroneous view of the law. McDuffie at 326, *citing* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

A majority of state supreme courts recognize a similar standard of review for rulings on jury instructions. Fifteen of those courts hold generally that the content of instructions is reviewed *de novo*. State v. Perrier, 536 S.W. 3rd 388, 403 (Tenn. 2017); State v. Burbey, 243 Ariz. 145, 146, 403 P. 3rd 145, 146 (Ariz. 2017); State v. Bovee, 394 P. 3rd 760, 767-68 (Hawai'i 2017); Dunlap v. State, 360 P. 3rd 289, 307 (Idaho 2015); RGR, LLC v. Settle, 288 Va. 260, 275, 764 S.E. 2d 8, 16 (Va. 2014); Miller v. Utah Dep't. of Transp., 285 P. 3rd 1208, 1217 (Utah 2012); Dennis v. State, 41 A. 3rd 391, 393 (Del. 2012); Gregoire v. City of Oak Harbor, 170 Wash. 2d 628, 635, 244 P. 3rd 924, 927 (Wash. 2010); Benavidez v. City of Gallup, 141 N.M. 808, 814, 161 P. 3rd 853, 859 (N.M. 2007); State v. Imbruglia, 913 A. 2d 1022, 1031 and n.3 (R.I. 2007); Doxsee v. Doxsee, 80 P. 3rd 225, 228 n.4 (Alaska 2003); People v. Perez, 670 N.W. 2d 655, 657 (Mich. 2003); Russell v. Stricker, 635 N.W. 2d 734, 738 (Neb. 2001); State v. Blankenship, 542 S.E. 2d 433, 438 (W. Va. 2000); State v. Lotches, 331 Or. 455, 472, 17 P. 3rd 1045, 1057 (Or. 2000).

Eleven additional supreme courts provide the trial courts some measure of discretion in how juries are instructed, but specify that to the extent a question of

law is raised on appeal, review of that legal issue is *de novo*. State v. Schoenrock, 899 N.W. 2d 462, 466 (Minn. 2017); Merit Energy Co., LLC v. Horr, 366 P. 3rd 489, 497 (Wyo. 2016); Seley-Radtke v. Hosmane, 450 Md. 468, 482, 149 A. 3rd 573, 581 (Md. 2016); Sargent v. Shaffer, 467 S.W. 3rd 198, 203-04 (Ky. 2015); D & D Tire v. Ouellette, 352 P. 3rd 32, 37-38 (Nev. 2015); State v. Whistler, 851 N.W. 2d 905, 910 (S.D. 2014); Townsend v. People, 252 P. 3rd 108, 1111 (Colo. 2011); State v. Miller, 342 Mont. 355, 358, 181 P. 3rd 625, 628 (Mont. 2008); Barth v. State Farm Fire & Gas. Co., 228 Ill. 2d 163, 170, 886 N.E. 2d 976, 980 (Ill. 2008); Wal-Mart Stores, Inc. v. Wright, 774 N.E. 2d 891, 893-94 (Ind. 2002); State v. Sartin, 200 Wis. 2d 47, 52-53, 546 N.W. 2d 449, 451 (Wis. 1996). The California Supreme Court holds that “[w]hether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference.” People v. Waidla, 22 Cal. 4th 690, 733, 996 P. 2d 46, 72 (Cal. 2000).

Florida’s Third DCA has recently held that while rulings on jury instructions are reviewed for abuse of discretion, the *de novo* standard instead applies “[w]here ...the analysis turns on a pure question of law.” Chacon v. Philip Morris USA Inc., 254 So. 3rd 172 (Fla. 3rd DCA 2018). The Fifth DCA has noted the Fourth DCA’s comment that “a more accurate statement...may well be that giving or refusing jury

instructions is reviewed under a mixed standard of *de novo* and abuse of discretion.” See Wagers v. State, 199 So. 3rd 1116, 1117 (Fla. 5th DCA 2016), citing McConnell v. Union Carbide Corp., 937 So. 2d 148, 152-53 (Fla. 4th DCA 2006). Those opinions reflect this court’s incremental recognition that many purely legal issues arise in appeals that challenge rulings regarding jury instructions. In Rockmore, this court reviewed *de novo* whether a special instruction, as read, amounted to error. 140 So. 3rd at 983-84. This court has also recently held that whether a standard instruction is clear is a legal question subject to *de novo* review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016). In light of the foregoing, this court should hold that where, as here, an appellate issue turns on a legal question, review of rulings regarding instructions should be without deference.

On the merits, the State contends that Appellant failed to show the requested spoliation instruction was supported by the evidence at trial. In fact, the record shows that first responders saw Nicole alive and partially clothed with a pair of ripped panties around her waist. (T 119, 126, 135) She told those first responders that a man unknown to her had attacked her. (T 121, 138) A law enforcement officer rode with her as she was transported to the hospital. (T 141) With a detective in the vicinity, Nicole died in the hospital and was transported to a medical examiner facility, where other items identified as relevant to any crime to

be charged were collected as evidence for testing. (T 486-88, 444) The ripped panties were not collected from either the hospital or the medical examiner facility; they were never seen again. (See T 480-85) Law enforcement officers were on notice from the very beginning of the case that the issue of the identity of the assailant needed to be addressed. It is reasonable to infer that someone ripped the panties, but the panties were not preserved. It is reasonable to infer that the person who tore the panties is the same person who attacked Nicole, but the panties were not preserved. It is reasonable to infer that the attacker might have left touch DNA in the act of tearing the fabric, but the panties were not preserved. Such transfer DNA might have exonerated Appellant.

The State cites Arizona v. Youngblood, 488 U.S. 51 (1988), arguing that the defense in this case did not prove bad faith by any officer, and that therefore no argument can be made that due process of law was denied by loss of the undergarment. (Answer brief at 74-76) Appellant has not argued a due process violation; his position is, and has been, that he was entitled under Florida's broad discovery rules, including the particularly broad discovery rule that relates to sanctions, to an instruction permitting an adverse inference based on loss of the panties. Nothing in Florida law precludes such an instruction in a criminal case, and the court's ruling that such instructions are not permissible in criminal cases

was error. The error cannot reasonably be deemed harmless, since the primary defense in the case was that someone else had committed the charged offenses.

POINT SEVEN

IN REPLY: THE TRIAL COURT ERRED IN
SUSTAINING THE STATE'S OBJECTION
DURING CLOSING ARGUMENT.

The issue raised on this point is properly before this court for its
consideration based on the initial and answer briefs.

POINTS EIGHT AND NINE

IN REPLY: THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO ASSURE A RELIABLE VERDICT, THUS VIOLATING THE FEDERAL EIGHTH AMENDMENT AND FLORIDA'S ANALOGOUS COMMON LAW PRINCIPLES.
(Restated)

Standard of review. As he did on Point Six as to a guilt-phase issue, Appellant has relied on Rockmore v. State, 140 So. 3rd 979 (Fla. 2014) in seeking review *de novo* of the penalty phase instructions. (Initial brief at 67) The State, again, has argued for an “abuse of discretion” standard of review. (Answer brief at 74) As was argued above on Point Six, this court’s review should be without deference whenever an appellate challenge to the instructions turns on purely legal questions. This court has specifically held that whether a standard instruction is clear is a legal question subject to *de novo* review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

Argument. Appellant has challenged the interim instructions read in this case because they included unexplained references to the jury’s upcoming “recommendation.” The State argues that a capital jury’s verdict is still advisory in 2018, in the sense that the judge can override an ultimate death recommendation, and concludes that the jury for that reason could not have been misled by those unexplained references. It is clear to the bench and bar that since Hurst v. State,

202 So. 3rd 40 (Fla. 2016), was decided,

before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly **find** all the aggravating factors that were proved beyond a reasonable doubt, unanimously **find** that the aggravating factors are sufficient to impose death, unanimously **find** that the aggravating factors outweigh the mitigating circumstances, and unanimously **recommend** a sentence of death. ...Once th[e] critical **findings** are made unanimously by the jury, each juror may then exercise reasoned judgment in his or her vote as to a recommended sentence.

Hurst, 206 So. 3rd at 57-58 (emphasis added, punctuation omitted). The question is whether Appellant's jurors had their shifting role clearly explained to them; the yardstick by which jury instructions are measured is clarity, for jurors must understand fully the law that they are expected to apply fairly. State v. Floyd, *supra*, 186 So. 3rd at 1018. The instructions read in this case did not convey or suggest that the jury's mandatory findings, as distinct from its recommendation, are final and binding. (R 3855-65) The verdict form referred throughout to findings, and did not refer to a recommendation. (R 3871-84) Nor did the instructions explain that the jury's ultimate recommendation could only be overridden in limited circumstances. *Cf. Reynolds v. State*, 251 So. 3rd 811, 828 (Fla.), *cert. den.*, 139 S. Ct. 27 (2018).

The jury heard unexplained references to a recommendation not only from the court, but also from the prosecutor in closing. The record reflects an unacceptable risk that Appellant's jury misunderstood its central role in capital

sentencing, *cf.* Reynolds at 828, and accordingly his rights under the federal Eighth Amendment are implicated. There is a reasonable likelihood, on this record, that the jury applied an unclear instruction in a way that violates a constitutional right. *See* Estelle v. McGuire, 502 U.S. 62, 72 (1991).

Affirming the death sentence on this record would also be inconsistent with this court's common-law jurisprudence. The combined instructions and comment by the prosecutor "might well have sowed in the minds of the jurors seeds of... indifference to duty" which affected the penalty-phase deliberations in a way this court has not permitted. Pait v. State, 112 So. 2d 380, 383 (Fla. 1959). The gravamen of Pait was that the jurors were effectively told "that in some measure they could disregard their own responsibility in the matter." 112 So. at 384, *citing* Blackwell v. State, 76 Fla. 124, 79 So. 731 (1918). In Blackwell, it was suggested to the jury "that they need not be too greatly concerned about the result of their deliberation." 79 So. at 735-36. Here the repeated unexplained references to their work product as a recommendation may have planted the same seeds in the mind of one or more jurors. This court, applying Blackwell and Pait, should remand for a new penalty phase where the jurors can be clearly instructed as to the scope of their responsibilities.

The appellant has also challenged the clarity of the instructions as to the

jurors' individual role in considering mitigation. (Initial brief at 78-80) The State has responded only that "[t]he jury herein was properly instructed with the current instructions approved by this Court." (Answer brief at 83) This is not correct: as noted in the initial brief, in 2018, since the trial of this case, this court amended the interim preliminary instructions to clearly state, for the first time, that "whether a mitigating circumstance has been established is an individual judgment by each juror." (Initial brief at 79) *See In re Standard Criminal Jury Instructions in Capital Cases*, 244 So. 3rd 172, 182 (Fla. 2018). This court at that time also amended the interim final instruction to refer to "mitigating circumstances that you have individually found to exist," *id.* at 191, and amended the standard penalty-phase verdict form to refer to mitigating circumstances found by "[o]ne or more individual jurors." *Id.* at 178. This court in 2018 also clarified the order in which the jurors are to fulfil their penalty-phase obligations. *See id.* at 190-92. Appellant acknowledges that the interim instructions read in this case contained the sentence "[a]ny juror persuaded as to the existence of a mitigating circumstance must consider it in this case." (R 3861) That sentence has been retained and is now to be read earlier in the process, where its implications can be more easily grasped. *Cf.* 244 So. 3rd 172, 191 with *id.* at 190. The changes to the interim instructions support Appellant's position, which is that the interim instructions read in this case did not

clearly bring home to the jurors the full scope of their individual responsibilities.

Appellant has also challenged the clarity of the penalty phase instructions in that, to this day, they suggest that mitigation, to be considered as such, must pass a “reasonableness” test. (Initial brief at 77-78) The State has responded that the jurors must have understood their duties, because they rejected ten of 34 proposed mitigating circumstances. (Answer brief at 83) Appellant does not share the State’s confidence that the jury gave no meaning to the requirement that mitigation must “reasonably...indicate that death is not appropriate.” Jurors are presumed to follow their instructions. *E.g.*, Williams v. State, 121 So. 3rd 524, 534 (Fla. 2013). The deliberations in this case - if the jurors did follow their instructions to the letter - may well have been affected by the quoted language. Remand is appropriate so that a jury can be clearly instructed as to its obligations, both as individuals and as a group.

POINT TEN

IN REPLY: THE DEFENSE OBJECTIONS TO THE PENALTY PHASE CLOSING ARGUMENT SHOULD HAVE BEEN SUSTAINED.

The State defends its argument “you heard...the defendant was attacked as a teenager ...who should know better the pain of being a victim of senseless violence?” (Answer brief at 87-88) It argues that this court has rejected “similar claims” regarding “comments like these,” citing Ford v. State, 802 So. 2d 1121 (Fla. 2001) and Moore v. State, 701 So. 2d 545 (Fla. 1997). (Answer brief at 88) In both Ford and Moore, the prosecutor argued that the defendant’s intact family connections and relatively unscathed early life, offered in mitigation, were in fact not mitigating at all. Here - in contrast - the mitigation which the State argued was aggravating in nature was clearly relevant evidence of dire adversity in childhood and the likely effects of such adversity. As this court explained in Mikenas v. State, 367 So. 2d 606 (Fla. 1978), arguments such as the one challenged here effectively add a non-statutory aggravating factor into the weighing calculus. 367 So. 2d at 609-10. As the appellee acknowledges, to avoid arbitrary decision-making the State must legislatively narrow the class of persons eligible for the death penalty, and Florida has sought to do so by using a finite number of possible aggravating factors. (Answer brief at 95) See Zant v. Stephens, 462 U.S. 862, 876-77 (1983).

As to the further argument “do the hard thing, but the right thing.... [H]ave the courage to [vote for death],” the State argues that the prosecutor “merely asked the jury to follow the law and weigh the evidence.” (Answer brief at 89-90) He did not *merely* do so, but added his view that the morally superior choice was to impose the death penalty. A prosecutor may not argue that a verdict favorable to the defense would be “unjust,” as to do so would give an impermissible personal opinion as to the justness of the cause being argued. Augustine v. State, 143 So. 3rd 940, 941 (Fla. 4th DCA 2017); *see* R. Regulating Fla. Bar. 4-3.4(e).

The State goes on to defend the accusation that the defense was being unfair to the jury. (Answer brief at 84-87) The prosecutor essentially said “the emotional turmoil inherent in this process impacts you, yet you did nothing wrong! Aren’t you *angry* with the defendant for that?” (See answer brief at 85-86) The State now asserts that this argument was “factual” and “based squarely on the evidence,” and that “the State was merely explaining the jurors’ role in weighing the aggravators and mitigators.” (Answer brief at 84, 86) It goes on to set up and knock down some straw men, noting that this is *not* a case where the prosecutor called the defendant “Pinocchio,” or called defense counsel “cowardly” or “despicable.” (Answer brief at 86-87) While it may not have crossed those particular lines, the “not fair to you” argument was an inappropriate and prejudicial appeal to resentment and anger

against the defendant; it acted as a regrettable distraction from the evidence.

The State concludes that the prosecutor's arguments were "hardly egregious [and] not...pervasive.... Accordingly the remarks were proper." (Answer brief at 87)

This is a leap: if the best that can be said for an argument is that was *not egregious*, it does not follow that it was *proper*. Appellant maintains his view that the pointed improper arguments made during the penalty phase adversely affected his rights to due process and to a reliable sentencing outcome.

POINT ELEVEN

IN REPLY: THE DEFENSE OBJECTIONS TO EMOTIONAL VICTIM IMPACT TESTIMONY SHOULD HAVE BEEN SUSTAINED.

Appellant acknowledges that Section 16(b) of the Florida Constitution, cited by him in the initial brief on this point, was amended effective Election Day 2018 so as to remove the requirement that victim's rights must be accommodated in a manner consistent with a criminal defendant's right to due process of law. Appellant maintains his position that his rights to due process and a reliable sentencing outcome were adversely affected in this case by the State's treatment of the victim impact testimony, and that remand for a new sentencing hearing is warranted.

The State is correct to the extent it argues that limited evidence of grief and suffering is admissible pursuant to Payne v. Tennessee, 501 U.S. 808 (1991). (Answer brief at 91) *See* Victorino v. State, 127 So. 3rd 478, 496 (Fla. 2013). This court noted, in denying relief in that case, that "Victorino does not argue that the evidence impermissibly became a feature of the trial but that trial counsel should have objected because such evidence should be per se inadmissible." Id. Here, Appellant's position is that emotional victim impact evidence *did* become a feature of the penalty phase, when the prosecutor asserted - at the beginning and ending of

its closing argument - that “at the end of the day” the case was about the victim.

The State’s response, in this appeal, is that there can be nothing wrong with noting that the victim had family and friends. (Answer brief at 93) Appellant maintains his position that the State’s repeated assertion invited the jury to make its ultimate decision based on its reaction to the victim impact testimony, notwithstanding the results of the weighing process. As noted in the initial brief, what Payne v. Tennessee permits has not been limited by the Supreme Court, and it thus falls to this court to ensure that evidence admitted pursuant to Payne does not result in an unfair proceeding. This court should hold that the State’s calculated presentation of its victim impact case went too far, given the limited guidance Florida’s juries receive regarding such evidence from the standard instructions.

POINT TWELVE

IN REPLY: CUMULATIVE ERROR CALLS FOR REVERSAL OF THE DEATH SENTENCE.

The State dismisses the argument made on this point, asserting that the issues raised on Points Eight through Eleven have no merit whatever, and that zero times any number equals zero. The jurors in this case

- believed the defense had the burden of proving mitigation;
- were not clearly told they must individually weigh mitigation;
- were told the proof offered in mitigation must *reasonably* indicate death is not the appropriate sentence;
- heard argument on the non-statutory aggravator of having survived a rape;
- were urged to base their verdict on their reaction to victim impact evidence;
- were not clearly advised they could exercise mercy;
- were told that sympathy played no part in their deliberations;
- were told death was the “right,” “hard,” “courageous” choice;
- were told the defense was unreasonably manipulating them; and
- heard suggestions that their work product would amount to nothing more than a recommendation.

Based on the foregoing, Appellant maintains his position that the combined effect of problems in the penalty phase warrants relief.

POINT THIRTEEN

IN REPLY: FLORIDA'S DEATH PENALTY SCHEME
FAILS TO NARROW THE CLASS ELIGIBLE FOR
EXECUTION.

The issue raised here is fairly before this court for resolution, and Appellant will accordingly rely on his initial brief as to this point.

CONCLUSION

Appellant has shown that this court should reverse his conviction and sentence, and remand with directions to discharge him from liability, on the ground argued on Point One.

If that relief is not granted, Appellant has shown that this court should reverse his conviction and sentence and remand for a new trial, on the grounds argued on Points Two through Seven.

If that relief is not granted, Appellant has shown that this court should reverse the sentence appealed from, and remand with directions to enter a sentence of life in prison without the possibility of parole, on the ground raised on Point Thirteen.

If that relief is not granted, Appellant has shown on the remaining points that this court should reverse the sentence appealed from and remand for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant Attorney General Doris Meacham, at capappdab@myfloridalegal.com, and mailed to Appellant on this 11th day of December, 2018.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

/s/ Raymond M. Warren
By: RAYMOND M. WARREN

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