

IN THE SUPREME COURT OF FLORIDA

MICHAEL A. GORDON,

Appellant,

v.

CASE NO. SC20-284

L.T. NO. 2015-CF-00476-A

DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

_____ /

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA**

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows:

The record on direct appeal will be referred to as “DR:____” followed by the page number. References to the trial transcripts from the direct appeal will be referred to as “DT:____” followed by the page number.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on this appeal. Argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

Michael Gordon was initially charged by indictment on February 3, 2015. (DR:72-81). A supersedeas indictment was filed on October 11, 2018 charging Gordon with two counts of premeditated/felony murder, burglary of a dwelling with an assault or battery, conspiring to commit robbery with a firearm, robbery with a firearm, grand theft of \$300.00 or more, aggravated fleeing or eluding, three counts of attempted premeditated murder of a law enforcement officer with a firearm, three counts of attempted premeditated murder of a law enforcement officer with a weapon (a motor vehicle), grand theft of a motor vehicle, and a convicted felon in possession of a firearm. (DR:4291-4300). Prior to trial, the court granted an oral motion to sever the “convicted felon” count from the rest of the charges. (DR:4376).

GUILT PHASE

Shortly after 5:30 p.m. on January 15, 2015, Chad O’Brien, a Cash America Pawn manager, and Richie Soto, one of his pawnbrokers, were talking in the Auburndale store’s office when armed men rushed into the store demanding that O’Brien and Soto get down. (DT:3244-48, 3253, 3278-3279, 3282-83, 3820-31). One

gunman pointed a rifle at O'Brien and another pointed a handgun at Soto. (DT:3253-54, 3256, 3263, 3271, 3280-83, 3830-3835). The third robber went straight to a jewelry case and began smashing it with a crowbar when the gunman with the rifle noticed O'Brien's keys and threatened to kill him if he did not unlock the case immediately. (DT:3254-58, 3262-63, 3269, 3270, 3280, 3838-39).

After O'Brien unlocked the jewelry case, the robbers with the rifle and the crowbar began stuffing jewelry into a bag until the robber holding the handgun yelled that they were out of time, and all three bolted from the store. (DT:3256-59, 3265, 3269, 3839-40). They then got into a waiting red SUV that had been parked after dropping them off and fled towards Lake Alfred and Haines City (DT:3274-76). Moments later, Soto called 911 and reported the robbery, which was videotaped by cameras inside and outside the store. (DT:3274-75, 3841-45, 3851-59).

Some of the store's jewelry and jewelry cases, including a ring case that was stolen, contained GPS tracking devices installed by 3SI Security Systems, and the device in the ring case was activated during the robbery. (DT:3285-87, 3787, 3799, 3855-56). Once the device located up to four satellites, it began transmitting a longitude

and latitude location that plotted onto a map. (DT:3799-800; DR:4679). The Polk County Sheriff's Office supervisor dispatch screen and officers' communications devices had access to the tracking system that provided dispatch, supervisors, and detectives the ability to track the device on a computer screen in real time, and law enforcement agencies in the Auburndale area had been trained on the tracking system's operations. (DT:3788-92, 3797). The tracking device initially reported movement heading west on Lynchburg Road in Lake Alfred at over 70 miles per hour at 5:49 p.m., acceleration up to about 92 miles per hour, and termination of movement at 6:02 pm on Old Haines City Lake Alfred Road in Haines City, Florida. (DT:3805-08, 3814; DR:4670-78).

Haines City Police Department officers Jeff Moore, David Smith, and Ronald Adams heard calls come over their radios regarding the SUV fleeing the robbery and being tracked towards Haines City. (DT:2257-58, 2287-89, 2342-44). Officer Moore, in his marked patrol car, began following behind the SUV when shots fired from it struck his vehicle. (DT:2260-61). As they continued eastbound towards Haines City, he continued to come under fire from the SUV and so backed off. (DT:2261). Officer Smith and Detective Adams joined the

pursuit; they also drew repeated fire from the SUV, which struck Smith's police car on the rear passenger side. (DT:2293, 2346-49). The SUV weaved in and out of traffic at a high rate of speed, made a sharp left turn, nearly tipped over, drove down a grass median, up the other side, and pulled into the Chanler Ridge subdivision as Officers Moore, Smith, Adams, and other police vehicles waiting there, pursued it. (DT:2262-64, 2267, 2296, 2351).

Officer Smith entered the subdivision and was directed by Detective Adams to the SUV that was now stuck in a large field at the back of the subdivision on what only appeared to be an exit road. (DT:2298-99). He spotted one suspect, later identified as Devonere McCune, running across the field's high grass. However, when Officer Smith got out his rifle, he lost sight of McCune. (DT:2299, 2301). Officer Smith instead provided armed cover for Polk County Deputy Donald Hermelbracht, who was assisted by Deputy Dennis Russo and Haines City Police Department Officer Sean Mulderrig. Mulderrig, who himself observed another two suspects fleeing, arrested McCune after he was located by Hermelbracht's K-9, Turbo. (DT:2303-04, 2531-34, 2575, 3433, 4216).

One block away, residents of the subdivision, Bree Foster, Caitlyn Campbell, and Ian Lee Wo, spotted a suspicious black male at a property next to the one behind the home where the murder victims, Patricia Moran and Deborah Royal, were later discovered. (DT:2305-06, 2665-68, 2702, 2706-07). He told them he was running from people trying to shoot him and insisted that he lived in the home next to Wo and across the street from Foster and Campbell, which, they knew was false. (DT:2666, 2704). When Foster ran down the block to flag down a police car, the man turned and ran in the direction of 618 Astor Drive. (DT:2669, 2679, 2705). They then called 911 after noticing scattered clothing and finding a rifle in Foster and Campbell's yard. (DT:2671-72, 2706-08, 2713-14). Within minutes of the first arrest, Officer Smith headed to the location with Officer Mulderrig and used his K-9, Roy, to track from the clothing and rifle to 618 Astor Drive. (DT:2306-10, 2579, 2707-08).

Also within minutes of the first arrest, a resident called and reported she heard screaming from her neighbors' residence at 618 Astor Drive. (DT:2536-2537, 2737-39, 4117-18). Numerous law enforcement officers formed a perimeter surrounding the residence. (DT:2542, 4149). Deputies Hermelbracht and Russo ran to 618 Astor

Drive where Turbo cleared the fenced-in backyard so that they and others could search it. (DT: 2537, 2540-41, 3433, 4121, 4132, 4152-53). While searching the backyard, Deputy Russo and Detective Turner shined their weapon-mounted flashlights through a window to light up the interior of the home and spotted a great deal of blood and the motionless bodies of two women. (DT:2542, 3436, 4122, 4132, 4154, 4172). Deputy Russo and Detective Turner yelled out to the surrounding officers and deputies what they saw, and Deputy Freese shouted it out to a supervisor. This was immediately broadcast over the radio. (DT:2543-44; 3437; 4122).

As the deputies were about to enter the residence, a car engine started up in the garage, Gordon burst through the closed garage door, and nearly ran over officers before crashing the car as law enforcement officers opened fire on it. (DT:2543-45, 3437-41, 3466, 4124-27, 4133-34, 4139, 4156-4161, 4168-75). Deputy Jonathan Quintana-Rivera was standing at the end of the driveway when the car burst through the garage door. He ran out of the way to avoid being hit by the car, but it continued in his direction, and he fired at the driver's side twice with his rifle in an attempt to try to stop the

driver. (DT:3514-16). However, before he fired a third round, Officer Nickels popped up into his line of sight. (DT:3518).

Former Haines City Police Department Officer Eric Nickels, armed with a shotgun, was near the curb when he saw the car burst through the garage door. (DT:3480-85). He attempted to move towards the grassy area but fell in the roadway as the car made a hard left-hand turn and headed directly for him. (DT:3485). With the car less than ten feet away from him and fearful it was going to hit him, Officer Nickels shot at its windshield and continued to fire at the vehicle, along with other officers, another five times as it drove past him. (DT:3485-87, 3493).

Deputy Hermelbracht ran with K-9 Turbo to where the car crashed and used Turbo to apprehend Gordon about 20-25 yards away from the crashed vehicle, where Nicholas Harrison, a Haines City police officer, handcuffed Gordon, placed him in a patrol car, and questioned him. (DT:3533, 3563-3566). Post-*Miranda*¹, Gordon informed him that an individual named Tony Wright, a black male in his forties from the Miami area, and two other of Wright's family

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

members were still in the house. (DT:3566-72). Gordon denied that anyone else was in the car with him when he fled the house but stated that three others were in the red SUV with him earlier. (DT:3572-73). The third and fourth passengers in the red SUV, Jovan Lamb and Terrell Williams, were discovered the following morning about 150 yards from the crash of the SUV and arrested. (DT:3741-51, 4279-80).

Meanwhile, Deputy Hermelbracht returned to 618 Astor and assisted the SWAT Team in clearing the residence. (DT:2545-2550, 3441-3445, 4140, 4162-65). According to the entry team, no other suspects were found in the residence. (DT:2552, 3443, 4129, 4164, 4171). Members of the entry team observed, and Crime Scene Investigator Trevor Atkinson saw and photographed, what appeared to be blood located throughout the house: in two bedrooms, the hallway, the family room, the bathroom, and the laundry room; on doorways, floors, carpets, windowsills, walls, the tub, a toilet seat, and two t-shirts found in the washing machine. (DT:2807-2817, 3443-46, 3453-57, 4165). According to Chief Medical Examiner Dr. Stephen Nelson, the location where the two victims were found was an “especially bloody scene.” (DT: 3935, 3995).

Gordon slashed the throats of and repeatedly stabbed 72-year-old Patricia Moran and her 51-year-old daughter, Deborah Royal. (DT:3061-62, 3660-3667, 3942-3952, 3958-59, 3977). A knife handle and several knives were found on the floor in the area where Moran and Royal's bodies were located, including one knife with a broken-off handle that was located under one of their bodies. (DT:2820-33). According to the medical examiners, one who conducted the autopsy on Moran and one who conducted the autopsy on Royal, each woman lived through the entire attack on her and had defensive wounds indicating she attempted to defend herself before she died. (DT:3689-90, 3953, 3963).

Associate Medical Examiner Dr. Vera Volnikh testified that Patricia Moran bled to death from multiple wounds. (DT: 3660-61). In addition to Gordon slashing her throat open nearly eight inches across, she had defensive wounds on her hands, her aorta and both lungs were perforated – her right lung once in front and three times in back and her left lung ten times in back – six of her ribs were fractured, and the tip of her nose was sliced. (DT:3661, 3690, 3696, 5039-40, 5045-46). All told, Moran suffered 57 different injuries, consisting of stabs, incisions, and abrasions in 38 different areas of

her body. (DT:3681-82, 3689-91). Because she bled to death, she took time to die and remained alive for several minutes. (DT:3689-91, 3702-03, 3721-22).

According to Dr. Nelson, almost all of Deborah Royal's wounds were stabs; 54 to her head, neck, chest and back. (DT: 3061-62, 3942-49, 3952). Of the 22 stab wounds to Royal's chest, three penetrated her heart and one penetrated her pulmonary artery, which caused additional internal bleeding and prevented her heart from expanding in its pericardial sac. (DT:3974-75). One of the stab wounds to Royal's chest fractured her sternum between her third and fourth ribs. (DT:3973). Six stab wounds to her liver caused bleeding into the abdomen in addition to the bleeding into the chest cavity. (DT:3972). Nineteen of the stab wounds were to her back; 18 on the left side and one on the right side, six of which penetrated her left lung. (DT:3970-71). She also had a large gaping wound to her neck – over five inches across – that sliced both her carotid artery and jugular veins, cut open her trachea, exposed and sliced completely through her larynx, and continued all the way down to her spine. (DT:3958-59, 3977). She had defensive wounds on her fingers, thumb, palm, forearm, and the back of her hand. (DT:3953, 3979,

3992). Dr. Nelson concluded that it took Gordon “a fair amount of time” to inflict all the wounds and a few minutes for her to die. (DT:3981-83).

After the State rested its case, the defense moved for judgment of acquittal. Of the fourteen counts charged, the court granted the motion as to the count for the attempted murder of Officer Jorge Gill by attempting to run him over with the car stolen from the victims’ garage. (DT:4344-4372). Officer Gill had previously passed away and did not testify. The defendant then called two witnesses in its case: Ian Lee Wo, one of the residents of the subdivision who observed “the suspicious person” nearby the victims’ home and who selected from a photo pack a photo he positively identified as that of the suspicious person, and Sergeant Detective Gustavo Aguirre who presented the photo pack to Wo, Campbell and Foster, and testified Wo and Campbell selected Tony Wright’s photo from the photo pack. (DR:4374-4378, 4391-4394). After closing arguments, the jury was instructed by the court and returned a verdict of guilty as charged as to all remaining counts. (DT:4484-4626, 4871-4874).

SENTENCING PHASE

The State argued that four aggravating factors applied to this case: (1) Gordon's conviction of a prior capital felony or other felony involving the use or threat of violence to a person; (2) the murders were committed while Gordon was engaged in, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempt to commit the armed robbery of the pawn shop or the burglary of murder victims Moran and Royal's home; (3) Gordon murdered both Moran and Royal to avoid or prevent a lawful arrest; and (4) the murders were committed in an especially heinous, atrocious, or cruel manner.

To prove the first aggravator, the State relied upon both the convictions in this case (two first degree murders, five attempted first degree murders of a law enforcement officer, a robbery with a firearm, and a burglary with an assault or battery) and Gordon's multiple convictions of violent felonies committed by him before this case along with testimony about what happened in each of those cases.

The first conviction was the result of Gordon shooting William Hicks in 2004 following an argument between neighborhood children at the home of Quintrilla and Mike McCombs in Lakeland. (DT:4930-

37, 4940-50, 4974-78). Mike McCombs, who was in Winter Haven at the time, called Hicks and asked him go to the McCombs' home until Mike McCombs could get there because McCombs was concerned about some guys escalating an argument involving their children. (DT:4930, 4940-41). Hicks drove over with this nephew but ended up himself arguing with an adult who made a statement to Quintrilla McCombs and the mother of Hicks' children, who was also present. (DT:4941-44). As Hicks returned to his van, Gordon shot Hicks in his leg and foot. (DT:4950, 4960, 4963, 4973). Although Hicks was unable to identify who shot him, Mrs. McCombs witnessed it and identified Gordon in a photo pack as the shooter. (DT:4974-78). As a result, Gordon was convicted of aggravated battery with a firearm. (DT:4929).

Gordon's second conviction was for stabbing Rasmes Simeon in the chest with a sharpened toothbrush when both were detained in the Polk County Jail in 2005. Simeon testified that as he stood by and watched a fight involving other inmates in the jail, he felt something hit him in the chest and then saw blood spurting out from it. (DT:4981-84). Simeon was hospitalized when he lost a lot of blood from the puncture wound, which also punctured a lung. (DT:4981-

84, 5005, 5010). Both Simeon and his cellmate Marlon Burgess, who also witnessed the stabbing, identified Gordon as the person who stabbed Simeon. (DT:5007, 5034-35). Gordon was convicted for aggravated battery for the attack on Simeon. (DT:4979-80).

Finally, in September 2014, four months before committing the acts that resulted in his convictions in this case, Gordon was arrested for committing domestic violence. (DT:5087). After Gordon told his 15- year-old daughter, Mikasia, “Little girl, I’m gonna whoop your ass,” he followed her into the kitchen (DT:5089). Her mother, Shannon Miller, heard a commotion and then Mikasia cry out. Miller, who was on the phone with her sister, told her sister to call the police because Gordon did something to Mikasia. (DT:5079-80). When Miller then went down the hallway to the kitchen and questioned Gordon about it, he “flipped.” (DT:5080). Gordon immediately slapped Miller across the face (DT:5082-83). He said to her something like, “Bitch, this my daughter. Don’t question me about her” or “Bitch, don’t ask me nothing about my daughter.” (DR:5077-99, 5082). He then pulled her five feet into the living room, and in front of her son, got on top of her and “restrained” her with both hands on her neck “like he was trying to choke” her. (DT:5080-85). When the

police arrived, she went outside and asked them to get her children out of the house because Gordon was in there with them, and she did not know what was going on. (DT:5081). This resulted in Gordon being convicted for felony battery and domestic battery by strangulation. (DT:5076).

The State also presented additional testimony of Dr. Volnikh regarding the pain each victim suffered from the injuries Gordon inflicted upon her by repeatedly stabbing and cutting her with a knife while she remained alive, as well as victim impact statements, including photos, from family members Marilee Feiock, Tiffany and Christopher Royal, and close family friends, Lois Ann Apple, Reverend Robert and Linda Vogel, and Justine Clifton. (DT:5038-49, 5055-70, 5104-5127).

Gordon presented the testimony of six expert witnesses, neuropsychologist Dr. Michele Quiroga, neurocognitive imaging specialist Dr. Joseph Chang Sang Wu, neurologist Dr. Mark Rubino, clinical pharmacologist Dr. Daniel Buffington, clinical and forensic psychologist Dr. Jethro Toomer, former prison warden Ronald McAndrew, and Gordon's sister, Theresa Gordon.

Dr. Quiroga testified as follows: She has a Ph.D. in clinical psychology and specializes in neuropsychology. She also has a practice in forensic psychology. (DT:5145-5147). She reviewed records from the following sources: Social Security Administration, Polk County School Board, Peace River Center, Bartow Memorial Hospital, Corizon Health, Lakeland Regional Medical Center, Winter Haven Hospital, Winn-Dixie Pharmacy, and Frostproof Jail Records. (DT:5153-55). She conducted diagnostic interviews with the Defendant and met with him about 7-8 times for a total of 24.5 hours. She administered 22 neuropsychological tests to the Defendant. As part of her work in this case, she also interviewed the following members of the Defendant's family: Mary Gordon, the Defendant's mother; Michael Gordon, Sr., the Defendant's father; Theresa Gordon, the Defendant's sister; Katrina Parker, the Defendant's maternal aunt; Elizabeth Walter, the Defendant's maternal aunt; Demitris Parker, the Defendant's first cousin; and Fleming Sharpshire, the Defendant's first cousin. (DT:5149-5151).

Her forensic work in this case led her to conclude the following matters about the Defendant's early childhood development: As a child he accompanied his mother who worked in farm-producing

fields and he was exposed to pesticides (DT:5389); he was subjected to corporal punishment and verbal abuse at the hands of his alcoholic father (DT:5172-74, 5190); his mother failed to protect him and his sister from the abusive father (DT:5199-5203); he witnessed domestic violence perpetrated by his father (DT:5179); he lacked a positive role model; he grew up in an environment where drugs, guns and violence were present (DT:5204); and the Defendant had a total of six years of school education as he withdrew from school during the seventh grade (DT:5224).

The Defendant's childhood psychopathology and psychiatric history revealed the following: The Defendant began to experience mental health problems at the age of eleven (DT:5203); the Defendant's medical history included a sleep disorder during his childhood and multiple brain injuries(DT:5156); at the age of seven he was hit on the head with a bat; at age twelve he was shot in the head with a BB gun (DT:5187-88); at age eleven, he was diagnosed with Post Traumatic Stress Disorder (DT:5153); and at age eleven he suffered from mood swings and experienced hallucinations and paranoia (DT:5203).

Dr. Quiroga testified that the Defendant began to drink alcohol at ten and began to smoke marijuana at twelve. He also consumed other drugs including Xanax, cocaine and K2 (synthetic cannabinoid). (DT:5190-91). The Defendant was not provided the proper treatment for any of his medical and mental health illnesses.

Dr. Quiroga made the following diagnostic impressions: Multiple Traumatic Brain Injuries; Borderline Intellectual Functioning; Learning Disorder in Reading; Learning Disorder in Written Expression; Learning Disorder in Math; Attention Deficit Hyperactivity Disorder ADHD; Post Traumatic Stress Disorder by History; Schizoaffective Disorder, Depressive Type (delusions or hallucinations and major depressive mood disorder). (DT:5153-54; 5161-62).

Dr. Quiroga testified on cross-examination that the records she reviewed in this case also revealed the following: Around the time of his arrest, he was tested for the presence of various drugs in his body. The results showed that he tested positive for marijuana (DT:5212); between the ages of eleven and twelve he experienced auditory hallucinations; the voices he heard told him to hurt himself and to hurt others (DT:5218); after the Defendant's release from Florida

State Prison in 2014, he was evaluated by Peace River Treatment Center and began to participate in bimonthly counseling sessions and was prescribed medications; he continued to participate in counseling and to take his medications until January of 2015 (DT:5213); when he was interviewed by Peace River Treatment, he informed them that his parents did not have a pattern of making threats, putting him down, or calling him names or humiliating him (DT:5220-21); he stated that he left school when he was in the ninth grade (DT:5223) and that he started drinking alcohol at age 17. (DT:5229).

Dr. Wu testified to the following: he is a Professor at the University of California Irvine; he specializes in Neurocognitive Imaging, such as PET and MRI brain imaging; he had published a dozen articles about the use of PET and MRI scans to analyze and investigate the presence and causes of various neuropsychiatric disorders such as depression, schizophrenia, Alzheimer's, Parkinson's, traumatic brain injury or generalized anxiety disorder. (DT:5270-72).

In this case, he requested that both a PET scan and an MRI scan of Gordon's brain be administered. The MRI scan was not

obtained because the Gordon has metal fragments in his head that appeared to be from an old incident during which he was shot with a BB gun. (DT:5273). Dr. Wu utilized the PET scan data in this case to assess the Defendant's brain functions (DT: 5301). In doing so, he also relied on historical records about the Defendant's background.

Dr. Wu reviewed records that contained interviews of members of the Defendant's family. The records contained information about events that the Defendant had experienced while growing up. Some of the events were described as follows: Gordon was physically abused by his father; when the defendant was between the age of eleven or twelve years he was struck on his head with a brick and was treated at a hospital for his injuries; at the age of 15 Gordon was struck on his head with a gun during a robbery; at the age of 19 Gordon was a passenger of a vehicle that was involved in an accident and he was treated at a hospital for his injuries; he was shot in the back of his head with a BB gun when he was younger; when he was attending school, he was enrolled in special education classes; the Defendant has a history of using illegal drugs; it was reported that the Defendant smoked K2 prior to and around the time of the events of this case. (DT:5303-06.)

Based on his review of the records in this case, Dr. Wu opined that the Gordon's early childhood brain injuries negatively affected his cognitive functions. (DT:5308-10). The brain injuries and his environmental factors caused him to act at times in an aggressive and impulsive way. Dr. Wu also added that the Gordon's CAT scan revealed the presence of frontal lobe atrophy (shrinkage) which most likely caused him to have prolonged cognitive deficits. Such cognitive deficits were likely to have caused Gordon to make poor decisions and increased his impulsivity. (DT:5306-5310, 5320-26). He concluded that Gordon had injuries to the frontal and temporal lobes. (DT:5340).

Dr. Wu admitted on cross-examination that he did not see any medical records or police reports describing the head injuries reported as part of the Gordon's clinical history. (DT:5349-51).

Dr. Mark P. Rubino testified to the following: he is a medical doctor board certified in Neurology. He treats patients who suffer from Alzheimer's disease, Parkinson's disease, dementia and head injuries. (DT:5378-79). He met with Gordon one time. The meeting took place on May 9, 2018 and lasted 2-3 hours. He reviewed records

of Gordon's clinical history² before and after their meeting. He interviewed Gordon and administered a neurological examination to him on which he performed poorly. (DT: 5383-88). He prescribed an MRI of the brain with DTI (Diffused Tensor Imaging) and a PET scan. The MRI with DTI is the preferred tool in cases like this case. The MRI was not administered to Gordon because he has a metal fragment embedded in his scalp. (DT:5391-92). Dr. Rubino concluded that the PET scan showed signs of traumatic brain injuries to Gordon's frontal and temporal lobes, and as a result, the Defendant had cognitive impairments which could have greatly altered his behavior and actions. (DT:5400-10).

Ronald D. McAndrew testified to the following: He worked for the Florida Department of Corrections (DOC) for over 20 years. He worked in various positions within the prison system. He was appointed as a Warden of three different prisons. He is very familiar with the policies and procedures of the DOC. (DT:5458-62).

He testified about the lifestyle for inmates who are serving life sentences and for those who are on death row. He testified that

² The records reviewed by Dr. Rubino were identical to the records reviewed or gathered by other experts in this case.

inmates serving life sentences are permitted to work within the prison system and to contribute to others. In contrast, inmates on death row are kept in closed custody with no interactions with other inmates and cannot work. (DT:5463-70). Upon accepting the work on this case, Mr. McAndrew testified that he examined all the “classification records to include institutional assignments, work history, disciplinary history, medical history and, of course, a personal interview with the offender.” He also reviewed Gordon’s records from the South County Jail, Polk County, including the stabbing incident that led to Gordon’s sentence of ten years in prison. (DT:5470-72). He met with Gordon on January 4, 2019 and went over his disciplinary records with him. He learned from Gordon that he has a good support system: his mom and girlfriend. (DT:5473-74). He spoke to Gordon about whether he has any remorse for his behavior over the years. Gordon said the following:

All the time as I think about my past, know I could have done things better. Relationships as a child, my brother, things I did, that was wrong. I could have been more productive. Feeling about doing my life up better. Want to help other people. Not making excuses all the time. Feel I have had about pain that — oh, not making excuses all the time and to feel about the pain I caused. Want to help now. Not on drugs now. I feel different. Continue a mental health treatment and to take my medications. I have been

through a lot of obstacles, and I can give talks to younger ones about not doing wrong. So easy to get in trouble. Teach others to be positive and helpful. Not hateful person. Want to be a diffuser.

(DT:5477-78). Mr. McAndrew concluded that based on his review of Gordon's records and after comparing him to thousands of other offenders he had dealt with over the years, he believed that if Gordon was sentenced to life he could make a contribution by working 40-50 hours a week. (DT:5479-80).

Dr. Daniel E. Buffington testified to the following: He is on the faculty of the University of South Florida's College of Medicine and the College of Pharmacy. He also has a practice in clinical pharmacology. Pharmacology is the study of substances and their effect on the human body. It also studies the therapeutic and adverse effects of substances on the human body. (DT:5562-63). As part of his work on this case he obtained the following records:

So I received — what I have is multiple pages of records. They included multiple audio interviews with different parties, the court complaint, other court documents, multiple depositions or statements from individuals, police report, other Polk County records, prior records on Mr. Gordon's youth in terms of school records, Winter Haven Hospital records from previous care, interview statements for Mr. Gordon. In addition to that, laboratory reports, medical records from Corizon, Corizon is actually the medical service team that provides care in the corrections

facility. That's the name of the company that's contracted to do that. Photos, discovery records, multiple Polk County Sheriff's Office reports and supplements to their reports.

(DT:5565). During his review of the Gordon's records, Dr. Buffington noted that on May 23, 2014, Gordon was released from the custody of DOC after serving a ten-year sentence. The records revealed that during his stay in prison, Gordon received a variety of medications for his psychiatric and medical disorders. (DT:5567).

Dr. Buffington opined that on January 15, 2015 Gordon was experiencing significant cognitive impairments due to pharmacologic effects and complications associated with neurological brain damage and intermittent treatment for his psychiatric conditions. Additionally, Gordon's use of alcohol and illicit substances adversely contributed to his cognitive functions. (DT:5593-96).

Theresa Yolanda Gordon testified as follows: Gordon is her brother. She is one year older. (DT:5661-62). Their father used to drink alcohol every day. She witnessed her father physically abuse her mother. She witnessed her father hit her brother in the back of the head. He did so often. Her father sexually abused her. The abuse started when she was 4-5 years old. She left the house when she was between eleven and twelve years old. She tried to tell her mother

about her father's sexual abuse. She never reported her father's abuse to the police. (DT:5663-66; 5677-78).

Dr. Jethro Toomer testified as follows: He is a board-certified diplomate of the American Board of Professional Psychology. Until his retirement in 2010, he was a tenured professor and Director Emeritus of the graduate mental health training program at Florida International University. For the last 25 years, he has been engaged in the private practice of clinical and forensic psychology. His area of specialization is the impact of trauma on subsequent fractioning and development. (DT:5697-98).

He looked at documents provided by other experts (Dr. Wu, Dr. Rubino and Dr. Quiroga). He also reviewed some depositions. He interviewed Gordon's sister (Theresa Gordon), Gordon's mother (Christine Jones) and Gordon's aunt (Catherine Parker). He interviewed Gordon for 3-4 hours. Dr. Toomer said that the goal of his evaluation was to determine the role of the trauma and its impact on Gordon's functioning and development. He added that trauma disrupts the individual's normal development. (DT:5698-5702).

Dr. Toomer testified that Gordon's history reflects the manifestation of Toxic Stress Syndrome, a subset of Post Traumatic

Stress Syndrome, due to constant pressure in Gordon's life of stressors/factors such as, deficits in parenting skills, lack of basic needs and adversarial environment which included witnessing violence and being a victim of violence. (DT:5704-5710).

Dr. Toomer concluded that the presence of the stressors in Gordon's life affected his ability to move forward and affected his cognitive thinking, his emotions and his behavior. (DT:5721).

On rebuttal, the State called David Michael Gordon whose testimony was as follows: He is 70 years old and was born in Jamaica. He came to live in the Unites States at the age of 24. He is married to Gordon's mother and has been for approximately 40 years. He and his wife have two children, a daughter and a son (the Appellant). (DT:5818-5824). He worked for IMC-Agrico for over 30 years and retired in 2011. He always provided his family with a place to live. When his daughter (Theresa) was 14 or 15 years old, she went to live with her aunt in Pennsylvania. She came back after one year and then she moved out of the home. (DT: 5824-33).

When his son was nine or ten years old he was placed in a facility in Lakeland called Palmview. He stayed there for three weeks and received counseling. David Gordon's work insurance paid for the

cost of his son's stay at Palmview. He and his wife visited his son during his stay there. When his son was 12 or 13 years old he went to live with his aunt in Pennsylvania. He stayed there for approximately one year. He did not visit when his son was serving his 10-year prison sentence, but his wife did. During that time, he provided his son with money and spoke to him by phone. When his son was released from prison David Gordon picked him up from the bus station in Lakeland. He continued to give his son financial support and gave him a red-colored Jimmy vehicle. (DT:5835-5841).

Mr. Gordon denied hitting his son in the head with a closed fist, spanking his son with a belt on the behind; slapping his son on the face; or hitting his son with a closed fist. (DT:5841-42). Mr. Gordon denied touching his daughter, Theresa, inappropriately. (DT:5845).

After additional argument from the state and defendant, the jury recommended sentencing Gordon to death for the murders of both Moran and Royal. The jury found the following aggravators with regard to both murders: prior capital felony, prior violent felony, the murder was committed during the commission of a burglary, the murder was committed for the purpose of avoiding or preventing lawful arrest, and the murder was especially heinous, atrocious, or

cruel. The jury further found that the aggravating factors were sufficient to warrant a possible sentence of death, one or more individual jurors found that one or more mitigating circumstances was established by the greater weight of the evidence, that the jury unanimously found that the aggravating factors outweighed the mitigating circumstances, and that Gordon should be sentenced to death. (DT:6000-10).

The court found the following aggravating factors existed with regard to each count of murder: prior capital felony, prior violent felony, the murder was committed during the commission of a burglary, the murder was committed for the purpose of avoiding or preventing lawful arrest, and the murder was especially heinous, atrocious, or cruel. The court expressly acknowledged the “doubling doctrine” and stated that as a result of the doctrine, the court excluded any consideration of the homicides in finding that the murder was committed during the commission of a burglary. In addition, the court acknowledged that two of the aggravators, that the murder was committed during the commission of a burglary and that the murder was committed for the purpose of avoiding or preventing lawful arrest, merge with one another as one aggravating

factor. With regard to the weight to be assigned to each aggravator, the court assigned great weight to both the heinous, atrocious, or cruel and prior capital felony or prior violent felony aggravators, and the court assigned moderate weight to the combined committed during the commission of a burglary and for the purpose of avoiding or preventing an arrest aggravators.

The court found Gordon established the following mitigating circumstances and assigned them the following weight: he was under the influence of extreme mental or emotional disturbance (little weight), he suffered from mental illness (little weight), he suffered from Toxic Stress Syndrome (moderate weight), he was not receiving proper treatment (little weight), he was abused and abandoned by his family (little weight), he was smoking K2 or Spice on the date of the murders (little weight).

The court found Gordon failed to establish the following mitigating circumstances he argued applied: his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired, he was an accomplice in the murders and his participation was relatively minor,

and finally, there were other factors in his background or life or the circumstance of the offense that should mitigate his sentence.

Based on the court's review of the evidence, its weighing of the aggravating factors and mitigating circumstances, taking into consideration the jury's sentencing recommendation, and noting that the court would reach the same conclusion even in the absence of the aggravator of avoiding or preventing a lawful arrest, the court sentenced Gordon to death for each murder on February 7, 2020. (DR:6760-90). Gordon filed his notice of appeal on February 24, 2020. (DR:6822-23). This appeal follows.

SUMMARY OF THE ARGUMENT

1. Gordon has not demonstrated that the trial court's conclusion that the State did not exercise a peremptory strike in a racially discriminatory manner was clearly erroneous. The State provided race-neutral reasons for twice challenging the juror (her statement that she was not God when questioned about her feelings about the death penalty and her cousin's 25-year prison sentence).

In addition, Gordon waived his right to challenge on appeal either the use of a second challenge on the potential juror or the explanation as a pretext for racial discrimination because the only objection and argument he made to the trial court – that the State's explanation was not a sufficient race-neutral reason and the juror felt her cousin's sentence was a fair sentence – failed to preserve the record on appeal for a challenge that the explanation was not genuine. Because the explanations are race-neutral, he cannot prevail on this claim. Finally, even if the Court determined he preserved some objection that the explanations are pretextual, he cannot demonstrate the trial court's decision determining otherwise is clearly erroneous.

2. Gordon waived his right to a comparative analysis between the responses of the juror who was struck and the responses of seated jurors. This waiver is a result of his failure to preserve the record on appeal by both failing to identify the race of the seated jurors and failing to compare for the trial court their responses to those of the juror who was struck. Furthermore, he is incorrect that a comparative analysis is constitutionally required as part of appellate review even though raised for the first time on appeal.

3. The Court's prior decision to end proportionality review because it violated the conformity clause of the Florida Constitution does not violate the Eighth Amendment to the United States Constitution. Florida's capital sentencing scheme uses specific aggravators and mitigators to assist jurors and judges to focus on the individual circumstances of each homicide in reaching their decisions and provides for a prompt and automatic appellate review of death sentences when imposed. As a result, Florida's capital sentencing scheme contains sufficient, specific and detailed guidance to prevent vesting unguided sentencing discretion in juries and judges that leads to arbitrary and capricious use of capital punishment in a manner that violates the Eighth Amendment.

Proportionality review was an unnecessary additional safeguard. Furthermore, the changes requiring that a jury unanimously determine beyond a reasonable doubt a defendant's eligibility for a sentence of death and a unanimous jury verdict recommending a sentence of death before a judge may impose a death sentence, provide additional safeguards beyond what is required by the Eighth Amendment.

4. Gordon's death sentence is proper because the totality of the circumstances demonstrate that the highly aggravated circumstances outweigh any mitigating ones. In addition, the death penalty has been imposed in similar cases.

5. The trial court did not abuse its discretion in weighing the mitigating evidence presented. The sentencing order demonstrates that the court considered whether each mitigating circumstance was proven, lists the competent evidence in the record upon which the trial judge based his conclusion, and the weight he provided to the mitigators he concluded were proven.

6. The Eighth Amendment to the United States Constitution does not categorically bar Gordon from execution due to any mental illness from which the evidence demonstrates he suffered. The Court

has repeatedly and correctly rejected the argument that the Eighth Amendment requires that the United States Supreme Court's decisions categorically barring execution of minors and the mentally retarded should be expanded to others who suffer from various forms of mental illness.

7. Sufficient evidence exists of Gordon's premeditated intent to use a motor vehicle to attempt to murder two law enforcement officers. Circumstantial evidence exists that he was aware that the home was surrounded by police, yet he purposefully burst blindly through a garage door and quickly accelerated while attempting to flee the home. Furthermore, the officers Gordon almost struck fired at him while standing directly in front of the car. He not only never attempted to brake, but he accelerated toward the officers, one of whom only avoided being hit or runover by getting out of the way.

8. There is sufficient evidence for a jury to return a lawful verdict finding that Gordon committed both murders. While numerous law enforcement officers from several different agencies were scouring the neighborhood looking for the pawn shop robbers who had escaped from a crashed SUV involved in the robbery – one was apprehended immediately while hiding in high grass close to the

SUV but two others were seen running away together – neighbors of the victims spotted an unknown black male claiming he lived in a home where they knew someone else lived. When one went to inform an officer, he ran away and headed in the direction of the victims' home. Two of the neighbors who spotted the unknown man discovered a rifle and clothing nearby where they spotted the man and reported that to the police, as well.

Shortly after that, a next-door neighbor of the victims called the police to inform them that she heard one of the neighbors screaming. Many of the law enforcement officers in the neighborhood then surrounded the victims' home even as a K-9 tracked from the discovered clothing and rifle to the victims' home.

During a search of the victims' fenced-in backyard, deputies used a flashlight to peek in the windows and spotted the victims' bodies and blood. They immediately broadcasted this information out and it could be heard on the radios of other law enforcement officers who had surrounded the home.

As deputies were preparing a forced entry into the home, Gordon started up a car in the victims' garage and burst through the closed garage door nearly running over officers as he accelerated his

vehicle towards them as they shot at him. He then crashed the vehicle and was immediately apprehended. Post-*Miranda*, Gordon admitted that there were only three others with him in the SUV, although he claimed three other individuals were still in the victims' home.

A SWAT Team entered the home and searched it, but only the victims' bodies were present inside, and the police cordon prevented anyone from successfully attempting to escape. Bloodstained clothing found in the victims' washing machine contained Gordon's DNA.

The following morning, officers who were part of a second cordon of officers surrounding the entire neighborhood, discovered the other two men involved in the pawn shop robbery. Gordon's conviction for both murders is supported by competent evidence in the record.

ARGUMENT

ISSUE I

THE COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION ALLOWING THE STATE'S PEREMPTORY STRIKE OF A MINORITY JUROR.

Gordon asserts that the trial court wrongly ruled that he failed to persuasively demonstrate that the State's explanation for its peremptory challenge of a minority juror was not a pretext for a race-based strike of that juror. However, Gordon waived this claim because he failed to create a record supporting an objection to the explanation as being a pretext for racial discrimination. Moreover, because Gordon cannot demonstrate that the court's ruling is clearly erroneous, he is unable to prevail on any claim of racial discrimination that he could have preserved for appeal.

Race-based peremptory challenges violate a defendant's rights to equal protection and to be tried by an impartial jury under the United States and state constitutions. *Poole v. State*, 151 So. 3d 402, 409 (Fla. 2014). In *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), the Court recognized a three-step guideline for resolving an allegation of discrimination in peremptory challenges: (1) A party objecting to the other side's use of a peremptory challenge on racial grounds

must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike; (2) If these initial requirements are met, then the court must ask the proponent of the strike to explain the reason for the strike. At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation; and (3) If the explanation is facially race-neutral, and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination. *Melbourne*, 679 So. 2d at 764.

In deciding whether the proffered race-neutral reason for the peremptory strike is a pretext, the Court should focus on the genuineness of the explanation, not the reasonableness. *Id.* Reasonableness is one factor to be considered in assessing the genuineness of the explanation. *Id.* at n. 6.

In making a genuineness determination, the Court should consider all relevant circumstances surrounding the strike, which may include, but are not limited to the racial make-up of the venire;

prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment.” *Murray v. State*, 3 So. 3d 1108, 1120 (Fla. 2009).

However, although the trial court has the duty to conduct a genuineness inquiry, as the Court noted in *Melbourne*, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination. More recently, in *Poole*, the Court was focused on the third step in the *Melbourne* process when it explained:

The trial court must make an indication on the record that it not only accepted the race-neutral explanation, but actually engaged in a “genuineness” analysis. *Hayes*, 94 So.3d at 463–64. Although there is no script for the trial judge to recite, to properly comply with Step 3 of *Melbourne*, a trial court must weigh the genuineness of a proffered race-neutral explanation just as it would any other disputed fact. *Id.* at 463. *As the trial court proceeds to evaluate the genuineness of the proffered reason, it can “inquire of the opponent of the strike, who at that point bears the burden of persuasion, to demonstrate why the reason was not genuine.” Id.*

Poole at 409–10 (emphasis added).

During the *voir dire*, the State used a peremptory challenge twice against the same potential juror, Kimberly James. The first time

the court denied the State's challenge but then moments later allowed the State to backstrike her:

THE COURT: All right. Defense, Number 10, James?

MR. BRUNVAND: Accept.

THE COURT: State?

MS. DUCHARME: Strike.

MR. BRUNVAND: We ask for a race neutral reason.

MS. DUCHARME: Your Honor, when I was asking all of the jurors about their opinions on the death penalty, one of the first things that I noted and that Mr. Wallace noted in our notes was that her initial comment was that she was not God, and that gives the State concern as to whether she could really be fair and impartial in giving the State a chance in determining whether the death penalty is appropriate in this case.

THE COURT: Defense, anything at this stage or at this step?

MR. BRUNVAND: Can I have a moment?

THE COURT: Yes.

MR. BRUNVAND: Your Honor, we don't agree that's a sufficient race neutral reason.

THE COURT: Okay. I'll go through the steps. Obviously step number one, looking at the panel as presented, this is a case where the defendant is African-American. Row number one, Juror Number 1 is Mr. Robinson. He appears to be, to the Court, African-American. So far he's still seated on this panel. Ms. James or Mountain-James, she's African-American. So that -- the objection has been made.

Considering the race neutral explanation, the Court obviously must determine whether the neutral explanation is facially valid. Understanding that facially valid, although it is a lower threshold, but it has to be -- the explanation has to be persuasive to the Court. The Court

is not persuaded that the comments taken, all the answers and responses given by Ms. James to the questions both by the State and the defense, I do not find that what she said and the reason articulated by the State is sufficient to allow the cause challenge.

The Court is tasked with determining whether the reason given is genuine and whether it's race neutral regarding excusing the juror, potential juror. So I find that -- I'll deny the challenge at this point. Obviously if there's any other reasons that somebody wants the Court to consider, I will be more than happy to. The burden, obviously, rests on the proponent in this case to strike -- to strike the panel, and, once again, the Court must be satisfied that unless the articulated reason is genuine, the Court should deny the peremptory challenge. So the challenge is denied as to Ms. James.

As to Ms. James, what says the defense?

MR. BRUNVAND: We accept.

THE COURT: As to Epperson, what says the defense?

MR. BRUNVAND: Accept.

THE COURT: State?

MS. DUCHARME: Accept.

THE COURT: As to Kelly, State?

MS. DUCHARME: Accept.

THE COURT: I'm sorry?

MS. DUCHARME: Accept.

THE COURT: Defense?

MR. BRUNVAND: Accept.

THE COURT: As to Mr. Deroxtro, Defense?

MR. BRUNVAND: Accept.

THE COURT: State?

MS. DUCHARME: Accept.

THE COURT: As to Ms. Prevatt, State?

MS. DUCHARME: Accept.

THE COURT: Defense?

MR. BRUNVAND: Accept.

THE COURT: As to Mr. Mackim, State?

MS. DUCHARME: Accept.

THE COURT: I'm sorry. It's the defense's turn. Defense?

MR. BRUNVAND: Strike.

THE COURT: Now it's the State's turn as to Ms. Miller, State?

MS. DUCHARME: Strike.

THE COURT: As to 18, Ms. Beloncik, Defense?

MR. BRUNVAND: Accept.

THE COURT: State?

MS. DUCHARME: Accept.

THE COURT: As to Ms. Laurel, State?

MS. DUCHARME: Accept.

THE COURT: Defense?

MR. BRUNVAND: Accept.

THE COURT: As to Mr. Kirsch, Defense?

MR. BRUNVAND: Accept.

THE COURT: State?

MS. DUCHARME: Accept.

THE COURT: That is 12. The panel is Robinson, Ortega, Paul, Anderson, James, Epperson, Kelly, Deroxtro, Prevatt, Beloncik, Laurel, Kirsch. That's 12. State?

MS. DUCHARME: Judge, we would move to backstrike Kimberly James.

THE COURT: Kimberly James?

MS. DUCHARME: Yes, sir.

THE COURT: Okay. Any additional grounds?

MS. DUCHARME: Yes, sir. She indicated also during my questioning that she has a first cousin that got sentenced to 25 years in prison for a -- sounded like a traveling to meet a minor case, and so we're concerned about her ability to give the State a fair shot or not let that come into play when she's -- if she were selected on this jury.

Judge, I know you made your ruling to the State's argument, but I would make the argument that no other potential juror used that phrase that Ms. James used when talking about the death penalty. She specifically said, "I am not God." And to the State, I mean, that indicates that she's saying to us, "Who am I to judge somebody or be a part of a process that the death would be imposed? That's God's job, not anybody else's."

THE COURT: *What says the defense?*

MR. BRUNVAND: Your Honor, we still object. *I don't believe it's a sufficient race neutral reason. In fact, she indicated I think that this person who she was referencing got 25 years and didn't think it was a problem. Fair sentence I think is what she said. It was a fair sentence.*

THE COURT: I'm just going through my notes to see what notes I have in addition to what's being presented by the State and the defense in support or in opposition of the peremptory challenge, peremptory challenge.

(DT:1791-1797) (emphasis added).

At the time, the court and the parties proceeded discussing the jurors, including several backstrikes, before the judge turned his attention back to the State's backstrike of James:

THE COURT: Having considered the totality of the circumstances, going back to Number 10, and particularly the second reason for the peremptory strike to Ms. James,

I'm going to grant the State's request over the defense's objection to strike Ms. James.

(DT:1800) (emphasis added).

A. Gordon Failed to Preserve Any Claim That the State's Backstrike Should be Prohibited or That Its Explanation for the Backstrike Was Pretextual.

Except for fundamental error, Florida Statute 924.051(3) prohibits a party from appealing a judgment or order of a trial court unless it is alleged and properly preserved. *See also Harrell v. State*, 894 So. 2d 935, 939 (Fla. 2005). "Under the statute, 'preserved' means an issue or legal argument timely raised and ruled on by the trial court, that is 'sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.'" *Id.* at 940 *citing* § 924.051, Fla. Stat. (2000).

Proper preservation has three components: (1) a litigant must make a timely, contemporaneous objection; (2) the party must state a legal ground for that objection; and (3) it must be the specific contention asserted as legal ground for the objection, exception, or motion below. The purpose of this rule is to place the trial judge on notice of a potential error and provide the judge an opportunity to

correct it at an early stage of the proceedings. *Harrell* at 939 citing *Castor v. State*, 365 So. 2d 701, 703 (Fla.1978).

1. Gordon Never Argued the Impropriety of Backstriking a Juror After Denial of a Peremptory Challenge of the Juror.

Gordon complains “there is no rule or recognized procedure that allows a party to exercise two peremptory challenges against the same juror” and quibbles with the accuracy of using the term “backstrike” to describe this challenge. He now argues that by allowing the second challenge to James the court provided to the State “an unwarranted and unauthorized second bite at the same apple.” (Brief at 39). However, no objection or argument was made at trial that it was inappropriate for the State to challenge the same juror twice.

As the Court noted in *Harrell*, the point of the preservation rule is to place the trial judge on notice of a potential error and provide the judge an opportunity to correct it at an early stage of the proceedings. *Harrell* at 939. Had an objection of this nature been raised the second time the State challenged seating James as a juror, the court would have had the opportunity to consider Gordon’s

argument that the attempt was “unwarranted and unauthorized” before allowing the State to strike James from the jury.

Jury selection is not a process by which a defendant can “pocket” a potential error by sitting by idly at the time of jury selection only to spring it on the opposing party for the first time on appeal. *See Floyd v. State*, 569 So. 2d 1225, 1229 (Fla. 1990) (the trial court cannot be faulted for wrongly assuming a fact asserted by the State is true when defense counsel is silent and the assertion remains unchallenged); *Hoskins v. State*, 965 So. 2d 1, 9-11 (Fla. 2007) (failure to name similarly situated jurors and make this argument at trial operated to waive this claim on appeal).

Nor has Gordon cited any authority for his claim that allowing the State a second opportunity to challenge sitting James as a juror is “unwarranted and unauthorized.” If so, Gordon presents no authority suggesting it may be raised for the first time on appeal. Any error Gordon attributes to this complaint is unpreserved and unsupported.

2. Gordon Only Objected to the Racial Neutrality of the State's Explanation.

Gordon now makes a litany of arguments he failed to raise in the court below which he asserts demonstrate that the State's explanation was not genuine: the juror's cousin's charge lacks a meaningful nexus to Gordon's charges, the State's proffered explanation for striking juror James is inconsistent with the purpose stated to the prospective jurors for asking the question, the "I'm not God" remark was taken out of context, and that the court's determination that the initial justification provided was not genuine indicates that the substitute justification was not genuine, either. (Brief at 41-46).

However, none of these arguments were made to the trial court and the only ground stated for the objection was that the explanation provided by the State was "not sufficiently race neutral." To preserve an issue for appeal "it must be presented to the lower court *and the specific legal argument or ground to be argued on appeal must be part of that presentation.*" *Hoskins* at 14. (emphasis supplied) *citing Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005), *cert. denied*, 547 U.S. 1182 (2006) (quoting *Archer v. State*, 613 So. 2d 446, 448 (Fla. 1993)

(emphasis added), *see also Rimmer v. State*, 825 So. 2d 304, 330 (Fla. 2002) (“because appellant raises on appeal an argument that is different than the one argued to the trial court, appellant's claim is not preserved for appellate review.”).

In *State v. Johnson*, 295 So. 3d 710, 714 (Fla. 2020), the Court recently addressed a party’s duty to properly preserve the record for appellate review when claiming on appeal that the trial court wrongly determined that a race-neutral explanation was genuine:

[W]e have never receded from *Floyd*’s preservation requirement. To the contrary, the Court has continually cited *Floyd*, post-*Melbourne*, to explain that the opponent of a preemptory strike must challenge the proffered race-neutral reason and explain the basis for the challenge to preserve a challenge to the trial court’s step 3 ruling for appellate review . . . It is the objecting party’s obligation to place the trial court on notice of the basis for the challenge *and create a record supporting that objection*.

(emphasis added) *citing Dorsey v. State*, 868 So. 2d 1192, 1197 (Fla. 2003) and *Rimmer* at 320-321. The Court explained that this preservation requirement was not only consistent with the basic premise behind preservation of a *Melbourne* claim, but “it also comports with the two legal principles underlying *Melbourne* – that preemptory strikes are presumed to be nondiscriminatory and that the party opposing the strike bears the burden of persuasion

throughout the process.” *Johnson* at 715 *citing Melbourne*, 679 So. 2d at 764.

Moreover, the Court pointed out in footnote 2 that under the federal rule the party opposing the strike must make a *prima facie* showing of purposeful racial discrimination at step 1. Because this is not the case in Florida, the Court explained that “this necessarily means that the opponent must satisfy its ultimate burden of persuasion *prior to the trial court’s genuineness determination in step 3.*” *Johnson* at 716, n 2. (emphasis added).

The trial court expressly provided to Gordon’s counsel the opportunity to present specific arguments concerning the State’s explanation for the challenge prior to the court making its genuineness determination. However, even with the prompting of the court, he failed at that time to raise any of the arguments he now proposes support his claim that the State’s explanation was a pretext for making a race-based strike of James.

As a result, the only argument preserved for appeal is the race neutrality of the explanations for the State’s strike. The Court has previously found that a relative charged with a crime is a race-neutral reason for excusing that juror. *Fotopoulos v. State*, 608 So. 2d 784,

788 (Fla. 1992) *citing Bowden v. State*, 588 So. 2d 225, 229 (Fla. 1991); *see also Hoskins at 9; King v. State*, 89 So. 2d 209, 230 (Fla. 2012).

A. Appellant Has Not Established as Clearly Erroneous the Court's Determination that Gordon Failed to Prove Purposeful Racial Discrimination.

Moreover, even had Gordon preserved for appeal the issue that the State's explanation is a pretext for purposeful racial discrimination, he cannot prevail because he is unable to demonstrate that the court's ruling allowing the strike was clearly erroneous.

As previously noted, when a court is determining whether a party's race-neutral explanation is genuine, it may consider all relevant circumstances surrounding the strike. *Murray* at 1120. However, because the trial court's determination turns primarily on an assessment of credibility, its decision to grant the strike will be affirmed unless it is clearly erroneous. *Id.*

When the State first attempted to strike James, the explanation the State provided was that it was concerned whether James could be fair and impartial in determining whether the death penalty is appropriate based on James' comment that she was not God.

Initially, the court rejected this explanation. However, the court stated that it would consider any other reason brought to the court's attention.

What is likely no more than a minute or two later, the State sought to backstrike James. The court inquired whether the State had additional grounds, and the State then informed the court that James stated she has a first cousin who had been sentenced to 25 years in prison, and this concerned the State about her ability to be fair to the State and not have that affect her as a juror. The State also reasserted its initial explanation regarding James' statement "I'm not God," differentiated this statement from any statement made by any other juror, and argued that the statement indicated James questioned the propriety of being part of a process that could impose a death penalty.

The judge did not immediately rule. Instead, he indicated that he was going to go through his notes to see to what extent they supplemented the arguments presented by the parties regarding the peremptory challenge. Also, the Court should recall that although the court did not mention it at this particular time, at the time of the State's initial challenge the judge had noted that juror Number 1,

who was still seated at the time of the State's backstrike, appeared to the judge to be African-American. After a short discussion about the seating of several other jurors, the court then ruled that having considered the *totality of the circumstances* and particularly the second explanation provided by the State, he was granting the State's peremptory challenge over Gordon's objection.

The opponent of the strike retains the burden of proving purposeful discrimination throughout the entire *Melbourne* process. *See Melbourne* at 764. The trial court ultimately determined that Gordon failed to do so. Gordon must demonstrate on appeal that the court abused its discretion in reaching that decision. *Hoskins at 7 citing Files v. State*, 613 So. 2d 1301, 1304 (Fla. 1992).

As noted previously, Gordon now makes arguments never made to the court at the time it weighed the genuineness determination. However, the only legal ground cited to the trial court by Gordon's objection – twice – is that the explanation provided by the State is not a "sufficient race neutral" one. The only additional comment made by Gordon's counsel during the discussion is that the juror stated that she thought the 25-year sentence imposed was fair. Therefore, the

record argument made before the trial court and Gordon provides to this Court on appeal is little more than a blank slate.

The only record the Court has before it is that the State provided a race-neutral explanation – Gordon’s claim otherwise notwithstanding; at least one other African-American juror was seated on the jury; and the judge spent time reviewing his notes to see if they supplemented the arguments of counsel. When the Court considers this paltry record combined with the presumption on appeal that peremptory challenges are exercised in a nondiscriminatory manner, the Court should conclude that Gordon has not demonstrated that the trial court’s ruling was clearly erroneous.

ISSUE II

GORDON WAIVED HIS RIGHT TO A COMPARATIVE ANALYSIS OF JAMES' RESPONSES TO THOSE OF OTHER JURORS WHEN HE FAILED TO NOTE THE RACE OF THE OTHER JURORS AND ARGUE THAT ALTHOUGH THEY WERE SIMILARLY SITUATED THEY WERE TREATED DIFFERENTLY

Next, Gordon argues that evidence of racial motivation for the strike of James is evident when one examines the responses of seated jurors who he alleges are similarly situated to James. He urges the Court to conduct a comparative analysis of their responses to the questions posed to both James and the seated jurors. However, Gordon has waived this argument, as well.

A. Gordon Waived His Right to a Comparative Analysis of the Jurors' Responses When He Failed to Make this Argument to the Trial Court or Identify the Race of the Seated Jurors.

At the time of his objection, Gordon's trial counsel neither compared James' responses to the responses of any other juror, nor identified the race of any seated juror. (although, as noted earlier during the bench conference, the court mentioned that he believed Juror 1, who was eventually seated as a juror in the case, was African-American). Therefore, the record was not preserved regarding the alleged racially disparate treatment between James and seated

jurors whom Gordon claims provided similar responses as James to the questions posed them. *See Hoskins v. State*, 965 So. 2d 1, 10-11 (Fla. 2007) (claim waived as to similarly situated jurors not mentioned at trial and failure to identify race of a venireperson makes it impossible to determine the question of pretext); *Poole v. State*, 151 So. 3d 402, 414 (Fla. 2014) (argument that two African-Americans were treated differently from white jurors who gave similar responses was waived because it was not raised before the trial court); and *King v. State*, 89 So. 3d 209, 230-231 (Fla. 2012) (since the race of the seated jurors is unclear, racial motivation for striking a juror cannot be shown).

However, Gordon asserts that the Court must conduct a comparative analysis, regardless, because one is “constitutionally required” as a result of the Supreme Court’s opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005). (Brief at 60). However, this is not the Supreme Court’s holding in the case and nowhere in the opinion does the Supreme Court state that a comparative analysis *must* be conducted by state courts or federal courts, initially or on appeal – let alone on appeal when not raised in the court below.

Miller-El, was before the Supreme Court as the result of a petition for habeas relief under 28 U.S.C. § 2253(c). *Id.* at 235-236. The issue before the Supreme Court was whether there was clear and convincing evidence that the state court wrongly found that the prosecutor's race-neutral explanations for its use of peremptory challenges to excuse ten of eleven black venirepersons were a pretext for racial discrimination. The Court held that there was clear and convincing evidence that the state court wrongly determined that two of the prosecutor's strikes were not racially determined and granted relief. *Id.* at 266.

Gordon is correct that the Court in *Miller-El* used a comparative analysis despite one not having been conducted in the state courts, and did so despite the contention in the dissenting opinion that this, along with other matters the majority considered, was not permitted because they are prohibited from considering evidence never presented to the state courts. *Id.* at 274 (Thomas J., dissenting). However, the argument of the dissent, and the majority's rejection of it, must be viewed in both the context in which the case came before the Supreme Court and the precise argument the majority makes in

response to the dissent. This argument, which appears in footnote 2, is what Gordon refers to for support of his argument.

The dissent notes that habeas proceedings prohibit the Court from considering evidence never presented in the state court proceeding and argues that included among the evidence the majority improperly considered is the comparative analysis. *Id.* at 274-279 (Thomas J., dissenting). This rebuke from the dissent resulted in the majority opinion's footnote mentioned above. In response to the dissent's argument, the majority disputes the dissent's claim by stating that the dissent is conflating *evidence*, that is required to first be presented to the state court and *theories about that evidence* which may be based on the record before the Court (and noting that the *voir dire* transcript was in the record before the state court). *Miller El* at 241 n.2. (emphasis added).

The subtle distinction the Court draws between evidence and theories about evidence is significant, particularly when considered in the context of the case being brought before the Court in a habeas proceeding. The proceeding is governed by federal law, and the Court's determination that the comparative analysis is not evidence, but merely a theory about evidence, is its interpretation of that

federal law. This is an important consideration in determining the effect of *Miller-El* on Florida's courts' interpretation of Florida law.

This Court's determination that a comparative analysis must be presented to the trial court or it is waived on appeal is based on its interpretation of Florida Statute § 924.051. Based on that interpretation of Florida law, the Court has determined there is a requirement in that statute that a claim be argued to the trial court to be preserved for appellate review; that is, a party's failure to do so waives its right to make the claim on appeal (with the exception of fundamental errors).

Nonetheless, Gordon urges this Court to follow the lead of the courts of the states of California and Texas, which he notes both require a comparative analysis be conducted on appeal, even when raised for the first time. (Brief at 64). However, their conclusion about how *Miller-El* is to be applied, is far from one of consensus.

Gordon acknowledges that neither the Fifth nor Ninth federal circuits have concluded that state appellate courts must conduct a comparative analysis. Furthermore, while he points to the Fourth and Sixth Circuit Court of Appeals as favoring his argument, neither

support Gordon’s assertion that a comparative analysis is “constitutionally mandated.”

In one case involving direct appeal of a re-sentencing on a capital case cited by Gordon, the Fourth Circuit Court of Appeals stated:

Despite its seminal character, *Miller-El II* created *no new rule of constitutional law* . . . *Miller-El II* itself was a case under AEDPA, so the Court, simply following clearly established federal law as AEDPA requires, could not have crafted a new legal standard.

United States v. Barnette, 644 F.3d 192, 204 (4th Cir. 2011). (emphasis added).

Gordon also cites the federal direct appeal of a criminal conviction in *United States v. Atkins*, 843 F.3d 625 (6th Cir. 2016) as support for use of a comparative analysis for the first time on appeal. However, in contrast to Gordon’s position that *Miller- El requires* a comparative analysis be conducted, even for the first time on appeal, the Sixth Circuit takes a contrasting position.

In *Atkins*, the defendant was convicted under federal law of being a felon in possession of a firearm. Atkins’ counsel raised a *Batson*³ challenge after the government used peremptory strikes on

³ *Batson v. Kentucky*, 476 U.S. 79 (1986).

five prospective jurors, all of whom were black. The court, finding that Atkins had made the *prima facie* showing required under the federal standard, required the government to provide a race-neutral explanation for the strike, which the court then accepted. *Id.* at 628-629.

On direct appeal following his conviction, Atkins argued that the race-neutral reasons for striking the juror were pretextual because the government treated similarly situated white jurors differently. The court noted that although *Miller-El* occurred in the context of a habeas proceeding, it saw no reason it should not apply with equal force in appellate review on a direct appeal from district court.

This said, the court pointed out *that district courts are not required to engage in a comparative analysis. Nor are appellate courts when one is not conducted in the district court.* The court finally noted that the Supreme Court has provided no additional guidance as to when an appellate court should conduct a comparative juror analysis when the parties fail to make one before the district court. *Atkins* at 635. (emphasis added). It concluded that *the court may “elect” to engage in a comparative analysis and added that this position agrees*

with the position of the Ninth Circuit in that “comparative juror analysis [is not] always . . . compelled at the appellate level.” Atkins at 634-637. (emphasis added).

Therefore, at best, there is little consensus about what *Miller-El* requires. About the only thing there appears to be some consensus on is that under federal law a court is not prohibited from conducting a comparative analysis for the first time on appeal, and that it can be a useful tool. However, even a useful tool has limitations and can yield poor results when not used properly.

In *People v. Lenix*, 44 Cal. 4th 602, 621, 187 P.3d 946, 960 (Cal. 2008), the California court noted concerns exist regarding the use of comparative analysis for the first time on appeal. It discussed the Supreme Court’s decision in *Snyder*⁴, stating, “In *Snyder*, the high court recognized the potentially misleading nature of a retrospective comparative juror analysis performed on a cold record.”

The California Court explained further:

[L]ike the *Snyder* court, we are mindful that comparative juror analysis on a cold appellate record has inherent limitations . . . There is more to human communication than mere linguistic content . . . “[T]he manner of the juror

⁴ *Snyder v. Louisiana*, 552 U.S. 472 (2008).

while testifying is oftentimes more indicative of the real character of his opinion than his words.”

People v. Lenix, 187 P.3d 946, 961 (2008).

Given the confusion regarding the requirements of *Miller-El* – its application both to state courts and its use on appeal, particularly when applied for the first time on appeal – and concerns about its effectiveness, this Court should be especially cautious in abandoning its prior positions interpreting Florida Statute 924.051 or creating an exception to them for comparative analysis due to a debatable claim that this is a constitutional requirement of *Miller-El*.

Both Florida statutory law and sound reasoning exist for the Court requiring a party to preserve its objections and arguments by placing the trial court on notice of potential error. By requiring the party to properly preserve error, the trial court learns not only of the potential for error, but precisely what the alleged error is, as well, so that the court can properly weigh its ultimate decision. The mere fact that some state courts conclude a comparative analysis is a requirement does not justify this Court ignoring a Florida statute providing that rights are deemed waived when parties fail to provide notice to the court and preserve the record for appeal.

Finally, even in the event that the Court determined it is required to conduct a comparative analysis for the first time on appeal, one does not help Gordon because (1) the race of the seated jurors remains unknown, and (2) he cannot establish that the trial court was clearly erroneous when it found itself unpersuaded that the State's explanations were a pretext for racial discrimination.

Regarding the second point, James' response about her cousin's conviction does not leave her similarly situated to any of the seated jurors. Gordon attempts to draw a comparison between her cousin's sentence and that of juror Kelly's nephew and juror Stanley's brother. Gordon points out that James stated that she was not particularly close with her cousin and it had no effect on her, while the other sentences involved close family members – the first who was imprisoned for twelve years for vehicular homicide and the other who was in and out over a number of years for drugs.

However, James' cousin's 25-year sentence is unique for its extraordinary length among the sentences discussed. It is over twice as long as that of Kelly's nephew, which is the only other actual length of sentence discussed. When questioned whether he felt it was appropriate he both nodded his head and agreed that it was while

succinctly summing up an easily accepted explanation why he believed the sentence appropriate: “Somebody died.” (DT:1406).

This is not to suggest that James was dishonest in her responses, but that it is perfectly believable for the State to be concerned whether she would be fair to the State. This is especially problematic for the State given that she just learned that her cousin’s sentence in a case in which *nobody died* was twice as long as in a case in which somebody did.

Regarding Gordon’s argument that juror Mamula and James are similarly situated because her comment about not being God is comparable to juror Mamula’s comments about the difficulty of sentencing someone to death, there is a significant difference in agreeing to do something one may find difficult, or even undesirable, to do, and feeling that one has no business doing it.

Gordon argues that the prosecutor twisted James’ response by taking it out of context. He insists that the comment is directly related to the information she knows when watching a news story on being unable to determine if the death penalty is warranted because she is not omniscient. However, the news story only came up in response to the question about when James last thought about the

death penalty. When the prosecutor followed up by asking her what James' "thoughts" were when she saw the story (as opposed to what she knew about the case), her response was:

Well sometimes it's merited and sometimes it's not. There again, I'm not there to look like at evidence to see whether the person should die, you know. I'm not God.

(DT:1498).

It is hardly unreasonable for the prosecutor to have interpreted James' remark as one more akin to her having no business making a decision about imposing the death penalty despite her statement that if the evidence in the case "warrants death, so be it." (DT: 1498).

Considering all the relevant circumstances surrounding the striking of James and given the presumption that the strike was exercised in a nondiscriminatory manner, Gordon cannot establish the trial court was clearly erroneous in ruling that the State's explanation for the strike of James was a pretext for racial discrimination.

ISSUE III

THE COURT PROPERLY DETERMINED THAT COMPARATIVE PROPORTIONALITY REVIEW OF DEATH SENTENCES IS NOT REQUIRED BY THE EIGHTH AMENDMENT.

Next, Gordon asserts that the Court's decision in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) ending comparative proportionality review of death sentences violates the Eighth Amendment to the United States Constitution.

In, *Lawrence*, the Court decided just last year that comparative proportionality review of death sentences violates the conformity clause found in Article I, Section 17 of the Florida Constitution. The Conformity Clause requires that Florida decisions construing the Florida Constitution's prohibitions against cruel or unusual punishment and against cruel and unusual punishment conform with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. In reaching its decision, the Court relied on the Supreme Court's decision in *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), which this Court in *Lawrence* determined held that comparative proportionality review of death sentences is not required by the Eighth Amendment. *Lawrence*

at 3. Gordon contends that the Court misconstrued the Supreme Court's decision in *Pulley v. Harris* and that comparative proportionality review of death sentences remains necessary to avoid rendering Florida's capital sentencing system arbitrary, capricious, and unconstitutional.

In *Pulley v. Harris*, the Supreme Court reviewed a California capital case in which Harris complained that his death sentence violated the Eighth Amendment because the state court did not conduct a proportionality review similar to the nature of the proportionality review conducted by Florida prior to *Lawrence* (as distinguished by the Supreme Court from a "traditional" proportionality review in which a court compares the appropriateness of a sentence for a particular crime by looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions). *Pulley* at 42–43. The Supreme Court summed up the matter as follows:

The issue in this case, therefore, is whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, *requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner.* Harris insists that it does and that this is the invariable rule in every

case. Apparently, the Court of Appeals was of the same view. We do not agree.

Id. at 43–44. (emphasis added). Therefore, to the extent Gordon suggests that this Court wrongly concluded that *Pulley v. Harris* does not require comparative proportionality review of death sentences to comply with the Eighth Amendment or that it only decided the question of whether California’s 1977 capital sentencing scheme provides sufficient safeguards (Brief at 72), the Supreme Court’s own words clearly state otherwise.

Of course, Gordon’s general contention is that this review is a necessary part of maintaining the constitutionality of *Florida’s* capital sentencing scheme. He argues that as a result of the Court abandoning proportionality review, it has “eviscerated” “whatever meaningful safeguards Florida may once have had” against arbitrary and capricious enforcement in capital sentencing. (Brief at 82). However, Gordon’s argument is mere hyperbole.

As the Supreme Court explained in *Pulley v. Harris*, roughly 2/3 of the States redrafted their capital sentencing statutes in an effort to limit jury discretion following its decision in *Furman v. Georgia*, 408 U.S. 238 (1972) because *Furman* concluded that capital

punishment, as then administered under statutes vesting unguided sentencing discretion in juries and trial judges, had become unconstitutionally cruel and unusual punishment. *Pulley v. Harris* at 44. All the States' changes included automatic appeal of death sentences, some included proportionality review, while others did not (although the Court pointed out that Florida and some others perform it despite no legislative requirement). *Id.* However, as the Court noted, "Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable." *Id.* at 44-45.

In his Brief at 70, Gordon's use of the quotation from the Supreme Court's decision in *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976) suggests that the Supreme Court had determined that Florida's capital sentencing scheme was one in which the Supreme court had reached the opposite view – that proportionality review was *not* indispensable. However, in *Pulley v. Harris* the Court discussed its decision in *Proffitt*, and its explanation of that decision dispenses with that notion:

The Florida statute provides for a bifurcated procedure and forecloses the death penalty unless the sentencing authority finds that at least one of eight statutory

aggravating circumstances is present and is not outweighed by any mitigating circumstances. The joint opinion of Justices Stewart, POWELL, and STEVENS observed that the Florida scheme, like its Georgia counterpart, requires the sentencer to focus on the individual circumstances of each homicide and each defendant. *Id.*, 428 U.S., at 251, 96 S.Ct., at 2966. Also, by vesting ultimate sentencing authority in the judge rather than the jury, the statute was expected to yield more consistent sentencing at the trial court level. *Id.*, at 252, 96 S.Ct., at 2966. *Only after concluding that trial judges are given specific and detailed guidance to assist them in deciding whether to impose the death penalty did the opinion observe that death sentences are reviewed to ensure that they are consistent with the sentences imposed in similar cases. Id.*, at 250-251, 96 S.Ct., at 2965-2966.⁸ The concurring opinion filed by three other Justices approved the Florida statute without even mentioning appellate review. *Id.*, at 260-261, 96 S.Ct., at 2970.

. . . [R]eferences to appellate review in *Gregg* and *Proffitt* were focused *not on proportionality review as such, but only on the provision of some sort of prompt and automatic appellate review.*

465 U.S. 37, 46-50 (emphasis added). (footnote omitted).

The Court, having concluded that proportionality review was not the material safeguard to it upholding Florida's capital sentencing scheme in *Proffitt*, the Court then turned its attention to the specifics of the California capital sentencing scheme and pointed out the additional safeguards that make proportionality review unnecessary in California. It identified safeguards that parallel those

that remain part of Florida's capital sentencing scheme post-

Lawrence:

By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute *limits the death sentence to a small sub-class of capital-eligible cases*. The statutory list of relevant factors, applied to defendants within this sub-class, “provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,” *Harris v. Pulley*, 692 F.2d, at 1194, “guarantee[ing] that the jury's discretion will be guided and its consideration deliberate,” *id.*, at 1195. The jury's “discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Gregg*, 428 U.S., at 189, 96 S.Ct., at 2932. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under *Furman* and our subsequent cases.

Pulley at 53.. (emphasis added).

In addition to the California safeguards that are strikingly similar sounding to the Florida aggravators mentioned in *Proffitt* that the Supreme Court focused on above, Florida has additional safeguards imposed since *Proffitt* that further limit the sub-class of capital eligible cases. These include the requirement of jury unanimity in finding beyond a reasonable doubt each aggravating factor that serves as a basis of the defendant's eligibility for a death

sentence and unanimity in a verdict recommending the death penalty. These requirements further limit death sentences to those cases in which a jury can reach unanimous consent. Although these additional safeguards are not required to comply with *Furman* even without the use of proportionality review, contrary to the concerns Gordon raises about a post-*Lawrence* capital sentencing scheme, Florida's now clearly exceeds what the Eighth Amendment requires.

Gordon argues that the introduction of what he terms "aggravator creep" differentiates Florida's capital sentencing scheme from that of the California scheme the Supreme Court found constitutional in *Pulley v. Harris*. However, this argument continues to ignore what the Supreme Court in *Pulley v. Harris* explained were the underlying problems *Furman* stated needed to be addressed. As the Court pointed out, it had explained in *Furman* that the problem which leads to the arbitrary and capricious enforcement of the death penalty is unguided sentencing discretion in juries and judges:

[C]apital punishment, as then administered *under statutes vesting unguided sentencing discretion in juries and trial judges*, had become unconstitutionally cruel and unusual punishment. The death penalty was being imposed so discriminatorily, 408 U.S., at 240, 92 S.Ct., at 2727 (Douglas, J., concurring), so wantonly and freakishly, *id.*, at 306, 92 S.Ct., at 2760 (Stewart, J., concurring), and so

infrequently, *id.*, at 310, 92 S.Ct., at 2762 (WHITE, J., concurring), that any given death sentence was cruel and unusual.

Pulley at 44. (emphasis added).

Furthermore, the Court pointed out that it had addressed in *Gregg*⁵

how these problems can be addressed:

Indeed, in summarizing the components of an adequate capital sentencing scheme, Justices Stewart, POWELL, and STEVENS did not mention comparative review:

“[T]he concerns expressed in *Furman* ... can be met by a carefully drafted statute that ensures that the sentencing authority be given adequate information and guidance. As a general proposition, these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.” *Id.*, at 195, 96 S.Ct., at 2935.

Pulley at 45-46.

Florida has addressed the concerns *Furman* raised in the manner suggested by the Court in *Gregg*. The issue is not one of proportionate review or “aggravator creep,” but rather, providing the appropriate guideline to juries and judges so that arbitrariness is avoided by ensuring that all are focusing on the same lawful

⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

considerations. Because Florida's capital sentencing scheme properly adheres to these principles, Gordon's claim that as a result of this Court's decision in *Lawrence* the sentencing scheme is now arbitrary, capricious, and unconstitutional should be rejected.

ISSUE IV

GORDON’S DEATH SENTENCE IS PROPER BECAUSE THE TOTALITY OF THE CIRCUMSTANCES DEMONSTRATE THAT THE MURDERS INVOLVE HIGHLY AGGRAVATED CIRCUMSTANCES THAT OUTWEIGH ANY MITIGATING CIRCUMSTANCES AND HIS SENTENCE IS PROPORTIONATE TO SENTENCES IN SIMILAR CASES.

Gordon contends that the death sentence is inappropriate in this case because his case is not among the least mitigated first-degree murders. He refers to the Court’s use prior to *Lawrence*⁶ of proportionality review as the appropriate standard that should be applied to this determination. However, as noted above under Issue III, comparative proportionality review is no longer required under Florida law. *Lawrence*, 308 So. 3d at 544. As such, this Court should decline Gordon’s invitation to proceed under the now invalid prior law.

Regardless, even under this Court’s pre-*Lawrence* case law Gordon’s death sentence is clearly proportional. “Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved.” *Palmes v. Wainwright*, 460 So. 2d 362, 364 (Fla. 1984). The Court must

⁶ *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020).

“consider the totality of the circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.” *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1991), *cert. denied*, 498 U.S. 1110 (1991).

In *Francis v. State*, 808 So. 2d 110 (Fla. 2009), two 66-year-old twin sisters who lived together were stabbed to death by a neighbor. One of the sisters received sixteen stab wounds, including one which severed her jugular vein, and two in her back which were three to four inches deep and punctured her lung. She also had one defensive wound just above her wrist. She was conscious for a period from a few seconds to a few minutes. The other was stabbed twenty-three times. The deepest of her wounds reached four to five inches into her liver; her jugular vein was also severed. She had no defensive wounds. Aggravators in *Francis* included (1) the murders were committed in an especially heinous, atrocious , or cruel fashion; (2) the murders were committed in the course of an aggravated battery and robbery and merged with the aggravator that they were committed for pecuniary gain; and (3) the defendant committed a previously violent offense.

The court found the following mitigating factors: (1) the felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (some weight); and (2) the defendant was mentally ill or emotionally disturbed (considerable weight).

In *Aguirre-Jarquin v. State*, 9 So. 3d 593 (Fla. 2009), *receded from on different grounds*, *Hooks v. State*, 286 So. 3d 163 (Fla. 2019), the defendant murdered his two next-door neighbors, a mother and daughter, by stabbing them to death. The daughter was stabbed 129 times. She had severe wounds to her lungs and leg, one of which severed her femoral artery. She also had numerous defensive wounds on her hands and feet that indicated an extremely violent struggle for her life. She was stabbed in the arms, legs, back, hands, feet, and chest. One stab wound to her left lung was considered fatal. There was an extensive amount of evidence in the area of the house where she was found, including a great deal of blood on the floor, walls, and door in the area of her body. The mother, who was confined to a wheelchair and was the second killed, had two stab wounds. The fatal stab wound went directly into her chest and severed her left ventricle, and the other stab wound was to her back. The medical examiner

testified that the stab wound to the heart would have led to an instantaneous drop in her blood pressure, which would have caused her to lose consciousness in no more than twenty seconds.

The court found the heinous, atrocious, or cruel aggravator; cold, calculated, and premeditated aggravator (a third aggravator found by the trial court, the avoid arrest aggravator was never submitted to the jury, but the Court found this to be harmless error because there was not a reasonable possibility that the defendant would have received a life sentence without the court's finding of the aggravator).

In *James v. State*, 695 So. 2d 1229 (Fla. 1997) the defendant rented a room from one of his victims. He returned home after significantly drinking at a party and ingesting multiple hits of LSD to find several of her grandchildren asleep in the living room. Sometime afterward, he strangled to death one of them, an 8-year-old, and then raped her anally and vaginally. He then went to the grandmother's bedroom, intending to rape her, and struck her with a candlestick. This resulted in her screaming, which caused one of the other grandchildren to come to the bedroom where she witnessed him stabbing the grandmother with a small knife. He tied the girl up, went

back and stabbed the grandmother with a butcher knife, then showered where the second grandchild was tied up in the bathroom and fled. Aggravators in James' case included (1) the murder of the grandchild was committed in an especially heinous, atrocious, or cruel fashion; and (2) the defendant committed a previously violent offense (the contemporaneous murders).

The trial court found the following mitigators: (1) James' ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired due to drug and alcohol abuse (significant weight) ; (2) James was under the influence of moderate mental or emotional disturbance at the time of the offense (significant weight); (3) James' past acts of kindness and helpfulness to friends (some weight); (4) his genuine shame and remorse for his offenses (some weight); (5) James' full cooperation with authorities in confessing to the crimes and entering pleas of guilty to the offenses he remembered and "no contest" to those he "truly [did] not remember (substantial weight). (6) James' good conduct while incarcerated (some weight); (7) the trial court finally noted in mitigation that James is capable of offering assistance to

others while in custody and serving as an example to others about the negative consequences of illicit drug use.

In Gordon's case the court found aggravators of (1) the crimes were committed in a heinous, atrocious or cruel manner (great weight); (2) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to another person (great weight); and (3) the capital felony was committed during the commission of a burglary and for the purpose of avoiding or preventing an arrest, which the court treated as a single aggravator (moderate weight). (DR:6787).

The jury unanimously found that one or more jurors found that one or more mitigating circumstances was established by the greater weight of the evidence, the aggravating factors outweigh the mitigating circumstances, and the defendant should be sentenced to death. (DR:6004-05).

The court found the following mitigators: (1) the defendant was under the influence of extreme mental or emotional disturbance (little weight); (2) the defendant suffered from brain damage (little weight); (3) the defendant suffered from Toxic Stress Syndrome (moderate weight); (4) the defendant was not receiving proper treatment (little

weight); (5) the defendant was abused and abandoned by his family (little weight); and (6) the defendant was smoking K2 or Spice on January 15, 2015 (little weight). (DR:6787-6788). The court found that sufficient aggravators were proven to warrant a sentence of death as to each victim and it assigned the sentencing verdict great weight. It added that it would reach the same conclusions even in the absence of the aggravator of avoiding or preventing a lawful arrest. (DR: 6788-89).

The cases cited above are sufficiently similar to the facts of Gordon's case to justify a conclusion that death is a proportional sentence in this multiple stabbing homicide.

ISSUE V

GORDON HAS NOT DEMONSTRATED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN WEIGHING THE MITIGATING EVIDENCE PRESENTED.

Gordon next asserts that the trial court failed to engage in a thorough and comprehensive analysis of the mitigating evidence by treating it superficially and dismissively. The weight a trial court assigns each mitigating circumstance is reviewed on appeal for an abuse of discretion. *Lowe v. State*, 259 So. 3d 23, 61 (Fla. 2018). *see also Covington v. State*, 228 So. 3d 49 (Fla. 2017). Gordon's arguments fail to demonstrate that the court abused its discretion in reaching its conclusions about the mitigation presented.

Gordon initially criticizes the sentencing order as a "far cry from a thorough and comprehensive analysis of the mitigating evidence" (Brief at 94). His criticism appears to be based on the court having "summarized in outline form" the testimony of the defense witnesses and rebuttal witness and providing only a brief summary regarding the judge's conclusions as to each mitigating factor. However, the Court has never required that the sentencing order be a dissertation.

The Court has stated that a proper evaluation (1) must determine if the statutory mitigating circumstance is supported by

the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature; (2) weigh the mitigator against any aggravating circumstances with the relative weight of each determined by the sentencing judge's discretion; and (3) detail in the written sentencing order the results of the weighing process with competent evidence in the record supporting the court's conclusions. *Walker v. State*, 707 So. 2d 300, 319 (Fla. 1997) citing *Ferrell v. State*, 653 So. 2d 367, 371 (Fla. 1995).

All these requirements were met by the court's sentencing order. It succinctly provided for each mitigating factor and whether the trial judge found the factor was proven, the weight he provided to those proven, and the competent evidence in the record upon which he based his conclusion. He then weighed the aggravating circumstances against the mitigating circumstances based on the weights he ascribed to each.

Initially, Gordon contests the trial court's rejection of the "impaired capacity" mitigator. He asserts that because neither the credibility of the mental health experts was questioned by the court nor their testimony that Gordon suffered from long-term mental illness, organic brain damage, low intelligence and learning

disabilities was ever rebutted by another expert, the court entirely rejected the mitigator “without regard to any aspect of Gordon’s preexisting mental condition.” (Brief at 94). However, he conveniently ignores the judge’s explanation as to why he concluded that this factor was not established.

The court explained in the sentencing order that it concluded this circumstance was not established due to Gordon’s own conduct. *See Snelgrove v. State*, 107 So. 3d 242, 259–60 (Fla. 2012), *as revised on denial of reh'g* (Jan. 31, 2013) (factual evidence in the record of defendant’s conduct supports court’s rejection of impaired capacity mitigator even in the face of otherwise unrebutted expert testimony); *Walls v. State*, 641 So. 2d 381, 390–91 (Fla. 1994) (Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking); *Zommer v. State*, 31 So. 3d 733, 750 (Fla. 2010) *quoting Nelson v. State*, 850 So. 2d 514, 531 (Fla. 2003) (quoting trial court's order); (with regard to the impaired capacity mitigator, “[t]his Court has previously upheld rejection of this statutory mitigating factor where a defendant ‘took logical steps to conceal his actions from others.’”); *Hoskins v. State*, 965 So. 2d 1, 18 (Fla. 2007) *quoting*

Nelson, 850 So. 2d at 531 (Evidence of “logical steps” conflicts with expert testimony on this mitigator because the steps constitute “purposeful actions . . . indicative of someone who knew those acts were wrong and who could conform his conduct to the law if he so desired.”) *see also Provenzano v. State*, 497 So. 2d 1177, 1184 (Fla. 1986) (“[S]everal actions taken by Provenzano on the day of the shootout support a finding that he knew his conduct was wrong and that he could conform his conduct to the law if he so desired.”).

In this case, the sentencing order stated:

The Defendant’s role during the robbery, during the escape from the robbery, his brief conversation with the victims’ neighbors and the statement he made upon his arrest lead the Court to conclude that this circumstance was not established.

(DR:6787).

The court could have added, as well, Gordon’s attempt to flee the victims’ home almost immediately after the officers began shining lights in the windows and discovered the victims.

Gordon also decries the fact that the court accorded little weight to the extreme mental or emotional disturbance mitigator (because Gordon voluntarily stopped taking his prescribed medication); the non-statutory mitigators of brain damage (because his mental

illnesses were complicated by his voluntary use of illegal drugs and decision not to adhere to his mental health providers' instructions); not receiving proper treatment (because they were exacerbated by decisions he made himself); and use of K2 or Spice (because it was done by his own volition). However, each of the explanations provided by the court was based on competent evidence in the record and listed in the sentencing order as the basis for the court's conclusion.

Gordon contends that longstanding substance abuse is almost always voluntary. However, the use of K2 or Spice mitigator is not about long-term use, but rather, expressly about specific use of K2 or Spice *on the very day of the murders*.

Gordon also contends that the "any other factors" mitigator was wrongly rejected as unproven because the court found that Gordon was capable of making decisions or choices other than those he made on the date of the murders. However, he cites no authority in support of his claim of error.

Next, Gordon contends that the court erred in finding that the rebuttal evidence "minimized" the evidence presented in support of his claim of "abuse and neglect." He argues that because Gordon's father denied abusing Gordon while Gordon's sister testified that the

father did, and other family members informed Gordon's experts of it, the court cannot split the difference to find it minimized. See e.g. *Craft v. State*, 45 Fla. L. Weekly S293 (Fla. Nov. 19, 2020) ("Because we cannot say on the facts of this case that no reasonable trial court would have failed to assign the childhood-trauma mitigating circumstance more than little weight, we hold that the trial court did not abuse its discretion.").

This ignores the court's ability to determine the credibility of the witnesses' testimony based on competent evidence in the record. The court could certainly reject the accusations that Gordon's father beat his wife or sexually abused Gordon's sister based on his father's denials.

Similarly, the court could conclude that he may have physically disciplined Gordon but never beat him. Gordon argues that this is impossible because the testimony left no room for something in between. However, Gordon's father denied the accusations that he hit Gordon in the head with a closed fist, spanked him with a belt buckle, and slapped him. (DR:5841). The court could find some of the denials credible but not the others. There was nothing inherent

in the testimony that prohibits the court from drawing such a conclusion.

Finally, Gordon contends that the court failed to at all address his low intelligence, which was raised in his sentencing memorandum under the “impaired capacity” statutory mitigator. However, as previously discussed, the court rejected the impaired capacity mitigation claim. It found that Gordon’s conduct contradicted the claim. Because the impaired capacity mitigator is the context in which Gordon raised this specific argument, it was addressed by the court’s finding that impaired capacity was not established and deserved no weight.

Because the trial court properly reviewed and documented his review of each of the mitigators raised by Gordon in his defense, the Court should reject Gordon’s claim that the trial court’s review of the mitigating factors does not violate the Eighth Amendment.

ISSUE VI

GORDON’S MENTAL ILLNESS DOES NOT PLACE HIM IN A CLASS OF PERSONS THE EIGHTH AMENDMENT CATEGORICALLY EXCLUDES FROM EXECUTION.

Gordon next argues that he is categorically excluded from execution due to his mental illness. He acknowledges that this Court has previously rejected this claim, as have courts in other jurisdictions, but explains that he raises the claim anyway to both preserve it and “afford this Court another opportunity to change its mind.” (Brief at 100-101).

In *McCoy v. State*, 132 So. 3d 756, 775 (Fla. 2013), McCoy argued that due to his mental illness he lacked the moral culpability to justify imposing the death penalty and that executing him would be cruel and unusual punishment. He contended that his mental illness placed in a class of persons similar to those under 18 years old and those with mental retardation. The Court had previously rejected this claim multiple times and stated it saw no compelling reason to reconsider its prior decisions:

This Court has consistently rejected this claim. See *Carroll v. State*, 114 So.3d 883, 886–87 (Fla.), *cert. denied*, — U.S. —, 133 S.Ct. 2762, 186 L.Ed.2d 213 (2013) (rejecting claim that mental illness bars execution and citing numerous prior cases); *Simmons v. State*, 105 So.3d 475, 510–11 (Fla.2012) (rejecting claim that persons with

mental illness must be treated similarly to those with mental retardation due to reduced culpability); *Barwick v. State*, 88 So.3d 85, 106 (Fla.2011) (rejecting “the argument that *Roper* extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment”); *Johnston v. State*, 27 So.3d 11, 26 (Fla.2010) (rejecting claim that mentally ill persons are similar to and should be treated the same as juvenile murderers who are exempt from execution); *Lawrence v. State*, 969 So.2d 294, 300 n. 9 (Fla.2007) (rejecting the claim that “the Equal Protection Clause requires this Court to extend *Atkins* to the mentally ill”); *Connor v. State*, 979 So.2d 852, 867 (Fla.2007) (“To the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position.”).

Because McCoy has not presented any compelling reason for this Court to reconsider its established precedent on this issue, we deny this claim.

McCoy at 775.

Gordon presents no new compelling reason for the Court to reconsider its established precedent on this issue.

In support of “affording the Court another opportunity to change its mind,” Gordon argues two Supreme Court opinions that the Court has previously addressed in its prior opinions on this matter – *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005) – and a dissenting opinion from

Kansas state court and a dissenting statement from an unpublished opinion from Texas.

The State sees no point in repeating the same arguments which the Court has consistently and correctly adopted, other than to summarily point out: (1) the Court has correctly limited the application in Florida of both *Atkins* and *Roper* to the specific categories expressed in each of the cases as Gordon cannot cite a single instance in which the Supreme Court has in over a decade sought to extend these holdings beyond the two classes initially recognized; (2) neither the dissenting opinions in *Ex parte Panetti*, 2014 WL 6734357 (Tex. Crim. App. 2014) (unpublished), nor *State v. Kahler*, 410 P.3d 105 (Kan. 2018), affirmed at *Kahler v. State*, ___ U.S. ___, 140 S. Ct. 1021, 1031 (2020) raise any new arguments for this Court to consider; and (3) Gordon's mental illness was raised by his trial counsel and appropriately considered by both the jury and the judge as a mitigating factor, and that doing so provided to him the protection of the Eighth Amendment which he is due. *See Kahler v. State*, 140 S. Ct. at 1031 (sentencing is the appropriate place to consider mitigation of defendant's moral culpability due to his mental illness).

Therefore, the Court should reject Gordon's claim that the Eighth Amendment bars his execution due to his mental illness or brain damage.

ISSUE VII

AS GORDON ACCELERATED THE CAR DIRECTLY TOWARDS DEPUTY QUINTANA-RIVERA AND OFFICER NICKELS, HE WAS AWARE THAT HE WAS LIKELY TO HIT AND KILL THEM.

Finally, Gordon argues that there is insufficient evidence of his premeditated intent to kill either of the law enforcement officers he nearly ran over.

Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. Premeditation may be formed *in a moment* and need only exist for such a time as will allow the accused to be conscious of the nature of the act he is about to commit *and the probable result of that act*. Premeditation can be shown by circumstantial evidence.

Glover v. State, 226 So. 3d 795, 805-606 (Fla. 2017) *citing Morrison v. State*, 818 So. 2d 432, 452 (Fla. 2002) (emphasis added).

In *Bush v. State*, 295 So. 3d 179 (Fla. 2020), the Court abandoned its previous special standard of review for convictions based wholly on circumstantial evidence and adopted one standard to be used in reviewing all cases:

[T]he concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and the judgment.

Bush v. State, 295 So. 3d 179, 200–01 (Fla. 2020), *cert. denied sub nom. Bush v. Florida*, 20-6094, 2021 WL 231589 (U.S. Jan. 25, 2021).

Gordon contends that the circumstantial evidence does not demonstrate that he possessed an intent to kill any officer but only the intent to escape. Of course, the intent to commit one of the acts is not necessarily inconsistent with the intent to commit the other.

Here, resolving in favor of the verdict all reasonable inferences one can draw from the evidence, there is substantial, competent evidence from which a jury could conclude that Gordon was aware that the house was surrounded by police.

Vehicles pursued him into the neighborhood; numerous others waiting at the entrance to the subdivision when he entered it were scouring the neighborhood when he was spotted and one of those neighbors went to notify the police; immediately before he attempted to flee the victims' home, flashlights shining through the backyard window exposed the lifeless bodies of his two victims, and the message about it were shouted out and broadcast over the police radio, which made it likely to be heard over officers' radios in the yard surrounding the house. Therefore, as Gordon started the car, revved the engine, and decided to blindly crash through the garage door, he

must have been aware that doing so likely endangered the lives of the officers surrounding the house.

Furthermore, there is substantial, competent evidence from which a jury could conclude that after Gordon crashed through the garage door, he was aware that the officers were directly before him, because as he rapidly accelerated directly toward them, they fired multiple shots from a rifle and shotgun directly in front of the car, including at least one shotgun blast that struck the windshield. Yet he not only never once braked, he actually accelerated towards them. Therefore, in viewing all the evidence and resolving all inferences from it in favor of the verdict, there is substantial, competent evidence that Gordon was conscious of the nature of the act he was about to commit and that the death of the officers was the probable result of that act. so that the jury's verdict convicting him of attempted murder of both officers should be sustained.

ISSUE VIII

THERE IS SUFFICIENT EVIDENCE THAT DEFENDANT COMMITTED BOTH MURDERS TO SUSTAIN A CONVICTION.

Although Gordon did not raise the sufficiency of the evidence for convictions of either murder, this Court has the duty to address it in reviewing a capital case. *Ferguson v. State*, 417 So. 2d 639, 642 (Fla. 1982). Whether the evidence is sufficient is judged by whether it is competent and substantial. *See Blake v. State*, 972 So. 2d 839, 850 (Fla. 2007). “In determining the sufficiency of the evidence, the question is whether , after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.” *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001); *see also Simpson v. State*, 3 So. 3d 1135, 1147 (Fla. 2009) (applying competent, substantial evidence standard to determine sufficiency of the evidence).

In this case, the State presented evidence of three police officers who pursued into the Chanler Ridge subdivision an SUV fleeing a pawn shop robbery and from which repeated shots were fired at them. After the SUV crashed, it was found abandoned, although one

suspect was quickly apprehended close by. Several officers testified that numerous law enforcement officers from multiple agencies scoured the neighborhood searching for multiple suspects seen on video entering the SUV after the pawn shop robbery. Neighbors of the victims testified that they spotted an unknown person who claimed to live in a home on their block where they knew he did not live. He then fled in the direction of the victims' home when one of the neighbors went to inform the police searching nearby for suspects and then called police upon finding a rifle and loose clothing nearby where they saw the suspicious person. A K-9 officer testified that he and his K-9 tracked from the clothes to the victims' home.

At this same time, the police received a call from the victims' next-door neighbor that when she went to the victims' home, she found the door locked and heard one of the victim's scream "No." Several officers testified that many of the law enforcement officers then in the neighborhood cordoned off the victims' home and a search was made in the backyard of the victims' home. During the search, the lifeless bodies of both victims were spotted through a window using a flashlight.

Almost immediately after spotting the bodies and broadcasting the information over a police radio and before the officers could enter the home, they heard a motor vehicle engine start up in the garage, and a car driven by Gordon burst through a closed garage door. Gordon was shot while trying to run down police surrounding the home as he attempted to flee from it, and he crashed the car. He was immediately apprehended not far from the car. Post-*Miranda* Gordon stated that only him and three others were in the SUV but he claimed the three others were still at the house.

However, nobody was found in the home, other than the two victims, who died as a result of having been repeatedly stabbed and/or cut with knives. Gordon's DNA was discovered on some clothing in the home's washing machine. The final two robbery suspects were found the following morning in a different part of the neighborhood.

The evidence establishes that competent, substantial proof of Gordon's guilt exists and is sufficient to demonstrate that a rational jury could have found him guilty of the crimes charged.

CONCLUSION

Appellee respectfully requests Appellant's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 2021, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Steven L. Bolotin, Assistant Public Defender, Post Office Box 9000-Drawer PD, Bartow, Florida 33831-

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this
brief is 14-point Bookman Old Style, and the word count is 19,441
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